

Chapter 6

GETTING THE MOST OUT OF CLASS

- ✓ Why the case method?
- ✓ Briefing cases.
- ✓ How to participate.

Before turning to an in-depth discussion of how exams work, we want to end this Part by talking a bit about how to go to class. At this point in your educational career, you might think that this is a bit like being offered advice on how to chew gum. But you should resist that impulse: law school classes are different.

We should also warn you that, on this topic—and a few others, such as briefing cases, or outlining for exams—we can get a little preachy. What can we say? We have strong feelings about the right and wrong way to do these things. Or, more accurately, we have strong feelings about *doing* them.

Undoubtedly you'll start law school with the best of intentions: "I'll be a great participant in class; I'll brief all my cases; I'll outline all my classes." (If you don't know what all of this means yet, they're just a way of saying that you are committed to doing your best.) That's the spirit! But here's the thing. Law school is hard work, and most of us get a little lazy at times. Then we run into people who feed our lazier sides by telling us "don't worry about it, there are these great shortcuts."

Shortcuts are things that take you from A (where you are) to B (where you want to go), in a faster or easier fashion, without losing anything important along the way. When it comes to doing well in law school, or on law school exams, or as a practicing lawyer, the shortcuts

people will sell you just aren't real. They are a way for other people to feel good about justifying the work they did not do, by telling you that you don't need to do it either.

You'll have to make your own decisions, but we want to set out our view of how things will go well for you. You are probably spending a lot of money to be in law school. We want you to make the most of it, and get the most out of it. Even if it means doing a bit of extra work. Here, we'll explain how—and explode some of those myths you'll hear.

GO TO CLASS

Perhaps you have heard of “the Phantom.” During the first semester, he never went to class, and never was seen in the library. He just showed up for exams and nailed them. The thought of the Phantom might have you feeling awed and annoyed. Imagine how he makes us feel! We professors like to believe we add some value.

Here's the good news: The Phantom is an urban legend. Throughout law school, but especially in the first year, what happens in class matters a great deal in how one performs on exams.

Students often make an understandable mistake. They segregate their lives. There are classes, and then there is a beast called exams. So, one goes to class every week, hopefully enjoying the school experience, learning what one can. Then, there comes a time when all that has to stop so one can start to prepare to meet the beast.

Although understandable, this approach is wrong. In truth, the road from class to exams is a continuous highway, everything traveling together in a more or less logical order. Classes feed into outlining, and both feed directly into exams. Exams are the logical conclusion to what you have been doing all semester. That is why *how* you go to school matters a lot, both to exams and to what you get out of law school. In this chapter, we offer some suggestions about an approach to class from day one that can translate into better exam results at the end of that highway.

Before we do, though, here's one thought connected to our insistence that exam taking and law practice are related. Think about the Phantom for a moment. Now, suppose you are a client. You've got a legal problem, something that matters a lot to you, like acquiring a

piece of property to build a home, or salvaging the family business, or even a possible prison sentence. You have a choice between two lawyers: one who does all the necessary prep work, even when it is drudgery, and gets to meetings on time, and one who seems quite brilliant, but shows up haphazardly and never quite knows what is going on. Which one are you going to choose? You will want to be the sort of lawyer you'd hire if you needed a lawyer. By the same token, you will want to be the sort of student that will become that lawyer.

Again, we don't mean to sound preachy; we were students, too, and we cut some corners and made mistakes. We confess that there is a bit of “do as we say, not as we do” going on in this chapter. But we were pretty diligent. And most of the people we know who did well in law school were similarly diligent, especially during the 1L year. That is because the 1L year is methodological—learning how to do things—to a greater degree than the following years. Think of all this advice as a chance to learn from our mistakes, and the many we have observed along the way.

PREPARING FOR CLASS: BRIEFING

Class preparation involves reading cases—sometimes several times, especially in the early weeks of your first semester—and “briefing” them. Briefs are just that—brief summaries of the case that will be your guide during class.

When it comes to briefing cases, we can state our position succinctly. *Do it!* There are, and always will be, students who resist this advice. After all, briefing cases is a combination of hard work and tedium, and who wants to sign up for either of those if it's not necessary. But, in our view, it is necessary.

We recognize that this might be a monumental task in the early weeks of school, when you are struggling to get a handle on the distinctive language of the law and have yet to obtain the sort of perspective that will later allow you to separate the important from the unimportant. In the beginning, it might take you too much time to put together the sort of complete brief we are about to describe. That's okay. One way to balance between striving for first-rate briefs and keeping your sanity is to set a time limit for each brief. If you are spending hours briefing a single case, that's not an efficient use of

your time. See what you can get together in, say, thirty minutes (not including time spent reading the case). If the brief is incomplete at that point, so be it. You can fill it out later, with the benefit of class discussion.

We do not recommend the collections of ready-made case briefs that are available for purchase. They vary widely in quality, and you should be aware that the person who prepared them could have been working with a different version of the case than you have; cases in casebooks are heavily edited and the authors of casebooks edit them differently. Thus, even if the preparer is terrific, you still might come to class having prepped from a different version of the case than the one that was assigned.

Even if the commercial brief is attuned perfectly to what you have covered, and is well done, it is still a mistake to rely too heavily on it. It's a shortcut that does not take you to your ultimate destination. Students who get seduced by the ease of commercial materials mistakenly suppose that the point of briefing is to collect or have on hand a set of concise case descriptions. If this were all that was going on, however, your professors would just hand out summaries.

It is important that you do the actual work to *prepare* your own summaries. If you were trying to get in better physical condition, it might help to get a book on fitness. But reading the book won't get you fit. Neither will having someone else do your pushups for you. As with physical fitness, so it is with legal reasoning. The value of briefing is in the *doing*, and if you rely solely on commercial outlines, then you aren't doing.

Let's think of this in connection with what lawyers do in their practice. Indeed, this is probably a good place to clear up some confusion you might have about terminology. We suspect you know at this point that, for court proceedings, lawyers prepare and submit to the judge documents called "briefs." And you know that what you are preparing for class are "briefs." But they aren't the same thing. Your class briefs are summaries of cases. Lawyer's briefs are written arguments on behalf of a client that typically cite many cases.

While the two kinds of briefs are quite different, there is a relationship between them. Cases are the building blocks of the common law, and the briefs you prepare for class are *dissections* of those cases so

that you learn the rules and how they work. When lawyers write their “argument briefs” they rely on, and in effect have done, “case briefs” of all the cases they cite. Some lawyers, when they do legal research, will actually prepare short case briefs of each relevant case they find, just like you do for class. Then they use their case briefs to write their argument briefs. In fact, back in the day when law books were expensive such that no one had a full set, and there were no electronic databases, lawyers *had* to prepare these case briefs, just like you will, because that was the only way they’d remember the cases when they got back from the law library. Of course, each practicing lawyer will eventually develop his or her own way to summarize quickly. Things are different now; most lawyers have all the cases at their digital fingertips. But the key point is that lawyers know how to take a case apart and put it back together in a way that is helpful, and that is what you need to learn.

The dissection analogy is, we think, terrifically helpful. Medical students have to learn anatomy. They buy big fat books with lots of pictures of the human body in them, and they memorize, memorize, memorize. Then, they dissect. They learn to take apart the human body and actually gain exposure to those body parts they have memorized. They spend years becoming familiar with those parts by examining them over and over. Now, suppose you are a patient of a doctor and that doctor is going to do something with your body. Would you want a doctor who just learned from those books, and then dug into your body? We’re guessing the answer is no: You would want someone with experience dissecting, and experience practicing with those body parts (under supervision).

Briefing cases is like dissection and supervised practice for medical students. Briefing your cases and then discussing those briefs in class is the chief way you are going to learn how to *do* law. It will also help you learn the substance of the law, of course. But as you now know, the most important thing you are learning in the 1L year is how to take apart and put together legal doctrine and legal arguments as lawyers do. The way you are going to really learn this skill is by dissecting the cases when you write your briefs, not only to learn what the cases say, but to learn how they fit together, so that you can thereafter pick up any case in any area of the law and make the most of it for your client.

A MODEL FOR CASE BRIEFS

When you brief cases you are doing double duty. You are learning the law, but you are also practicing, indirectly, for exams. A good case brief is ultimately an exercise in legal reasoning. Here we're going to describe for you a model for briefing cases. The model is hardly original to us—in fact, it is quite standard. Where we may be able to add some value is in explaining its features.

Facts. As you begin to brief, ask yourself: What is the “story” at the heart of a judicial opinion? What facts are (or are not) provided? Can you summarize them as succinctly (or more succinctly) than the court? Of course, being more concise than the court means omitting stuff you've read. Which facts were key to the ultimate outcome and which turned out not to be germane? You will find that questions like these are exactly what motivate the hypotheticals your professor is going to ask about the case.

Procedural posture. How did the case come to this court and what court is it precisely? This is critically important not only for explaining the context in which rules are made and applied, but also knowing how much authority the case has. Is this a case from a trial court that exemplifies a rule but carries less binding authority? Or is this a U.S. Supreme Court decision that every other court must follow? Did the parties stipulate to certain facts at this stage, or were factual issues contested and resolved by a fact-finder? Is the court declining to decide the merits of an issue because of the procedural posture?

Issue. What is (are) the legal question(s) at the heart of the case? What was it the parties asked the court to resolve? Stating legal issues with precision is surprisingly difficult. Often the best way to do so is by starting with the term “whether.” (For example, in *Baker v. Farmer* from Chapter 4, the issue might be described as “whether an oral agreement can be enforced in court.”) Not only is the professor going to demand this of you in class, but you are going to do it again and again on exams (and as a lawyer). Doing it in your briefs is how you get good at it.

Judgment. Who won? What did they win? A motion to suppress evidence? Damages? An acquittal? This might seem too obvious to

mention, but it is nonetheless critical to understanding the rule. Put it in your brief.

Holding/Rule. What is the legal rule that was relied on to resolve the legal issue? This is ultimately what you came for. And yet it is sometimes remarkably difficult to pry a rule out of a case. It will take a lot of practice before your dissection easily yields precise and accurate statements of rules. Even then, it will become clear enough in class that rules mutate: They are refined from case to case as they are applied to new facts.

Rationale. Here you distill in a sentence or two the reasoning that the court used to get to its rule and its conclusion. This can be tedious, but it is critically important. If a rule seems to defeat its rationale as applied in a next case (or hypothetical), then maybe the rule needs to be refined or revised. A lot of what is going to happen in class is exploring the rationales for rules, and whether those rationales collapse under the pressure of new facts.

Briefing is not an exercise in rote copying from the case. It is a test of comprehension and of method. As you do it, you should be asking yourself lots of questions. For example, what legal issues are raised by the facts? Do you understand why the court framed the issues as it did? If one or another key fact were changed, would that affect your analysis of the issues in the case? Why? Is this a good rule? Do you see some potential for harm in it? Can you think of a better rule? Would that rule accommodate other fact circumstances you can think of? What policy considerations support or cast doubt on the rules?

BE ACTIVE IN CLASS

Both class and briefing require your active participation. The work you do when you brief a case is exactly what you will do as a lawyer, and this is what you will do on your exams. Moreover, each effort at briefing is not only a mini-practice exam, it's an opportunity for feedback. If you brief cases before class, then class will provide an occasion to go over the work you did, and for you to self-grade it.

The same is true of class discussion. The purpose of the Socratic method is to allow everyone in class to participate in the exercise of thinking through the case and its ramifications. Sure, one student (or a

few) and the professor will be doing it aloud. But while they are, you should not only be listening closely and taking notes, you should be playing along in your head. Again, students get confused about this. They think that if they are not on call, their job is just to scribble everything down. But that is wrong. What matters most is participating actively in class even if you are not speaking.

Try to answer a question before the student who is on call does. See if your answer is the same. See how the professor reacts. Does the discussion track what you wrote in your brief? Or is it framed differently, focusing on things you missed or that seemed to you at the time of briefing unimportant or mysterious? The point is not that a good brief will anticipate or track all the issues that get discussed in class—that is asking too much of a brief, and expecting too little of class. Rather, a sign of a good brief is if it flags, perhaps only imprecisely, some of the issues on which class discussion focuses.

The Socratic method centrally is about *dialogue*: actual dialogue between professor and students, as well as metaphoric dialogue between the members of the class and the assigned materials. The learning in a law school class is to be found all around you; it is not just located at the front of the room. Directly and indirectly, you will learn a lot from your classmates. You might think that one of them has asked a silly question, only to be surprised to see the professor take it up in earnest. If so, you will need to rethink why you assumed the question was silly. You might think that another student has answered a question correctly, only to see the professor dismiss it as unsatisfactory. Again, time to review. And, of course, you might disagree with your fellow students about some case, issue, rule, or policy. Depending on how your professor runs the class, you might have an occasion in class to engage with those of your colleagues with whom you disagree, and that is likely to be an illuminating engagement.

Here's where your brief interacts with class itself. Briefing is not just preparation to sit and listen in class. Think of in-class discussion of cases that you have briefed as roughly akin to middle-school classes in which the teacher reviews the previous night's homework assignment. Ideally, your brief will closely track class discussion. But if not, that's okay. Just make sure that you understand why your "homework" turned out to be not quite right. Perhaps you'll even want to mark up your brief as class discussion proceeds, noting where you missed

a key fact, framed an issue badly, or misunderstood a rule or its implications. The time you take to do this will be well spent.

TECHNOLOGY AND PARTICIPATION

Even into the 1960s, law students (then almost exclusively white and male) were expected to show up to class dressed in suits. Drinking coffee was not an option. Laptops, PowerPoint, and the Internet were, at best, a glimmer in the eye of research scientists or science-fiction writers. Cold-calling was the name of the game. The on-call student was instructed to stand up so that he could receive a merciless interrogation.

Today there are plenty of professors who still cold-call on their students. But otherwise, the world of the law school classroom has changed dramatically, and generally for the better (we think). The classroom of today is enlivened and enriched by a much more diverse student body. Probably you get to roll out of bed and head to class in sweats, with a fancy coffee drink in hand. Most law professors have moved toward less fearsome pedagogic methods. As we explained last chapter, the latter is in our view mostly a positive development; we cold-call but we also work hard not to terrorize, appreciating how difficult it is for anyone to learn while in a panic. Still, we recognize that there is room for—and indeed benefits to students that flow from—a range of teaching methods and styles. You are probably going to be plenty terrified the first time you negotiate a deal on your own, or stand in front of judges, believe us. And you have to make cogent arguments nonetheless.

A less obviously salutary development is the increasing presence—in some instances domination—of technology. Here we have in mind the all-pervasive laptops and tablets. Some professors allow them, others don't. Our view is that, even when their use is allowed, you should think carefully about whether and how you are going to use them. We are big fans of the new technology, but there are some potential downsides that you need to consider.

First, there is the problem of distraction. If you have an electronic device in front of you, that means you probably have access to the Internet, and if you have access to the Internet you have access to

messaging, e-mail, social networking, shopping, gaming, YouTube, and so on. Your intentions might be pure—you might be thinking to yourself that you will only check your messages during a slow moment of class—but you are fighting a losing battle against overwhelming physical and psychological forces. Let's face it, when a notification pops up on your screen, or when a video beckons, you are going to be sucked in. The most enthralling teacher in the world can't compete with the Siren-like powers of electronic media. We say this not because we think law students are immature. We say this because we think law students are human. So are we. As audience members at academic conferences, we try not to turn on our tablets because we know we will soon start answering our e-mail, and that is not the point of attending a conference.

Indeed, on the issue of technology in the classroom, we are unyielding. One of us (Friedman) decrees the “death penalty” for students caught online in class. He tries generally to be mellow about rules and their enforcement, within the demands of the profession itself. But he also tends to wander the room while he teaches, and if he sees the Web or e-mail on a student's screen, fuhgeddaboutit. You can pack up your stuff and leave: The grade is F, thanks. Why is he so hardcore about this? Because it is impossible to participate in the way we described earlier while multitasking. *Impossible*. Yes, we live in a multitasking world. But you cannot seriously engage in a dialogue while you're doing something else. You just can't. If you don't do well in your 1L year and wonder what happened, the first question you should ask yourself is if you were active in class in the way we described, or were instead attending to e-stuff.

We also feel obliged to let you in on a secret, one that you probably know already, at some level. To the extent you use class time for e-mail or entertainment, you are not actually sparing yourself the effort required for thinking and learning. You are merely time shifting, like when you “DVR” a television program. Instead of doing the work in class, you are now going to have to do it after class, most likely in those hyper-hectic weeks leading up to exams. If you think about it, this makes no sense. You are postponing hard work from a less stressful time to a more stressful one. Oh and, by the way, you are helping yourself to a pretty lame form of downtime. Do you really want to spend your scarce “me-time” budget in class? Surely you can think of better places and better ways to amuse yourself.

Second, even when they are not causing distraction, electronics invite a form of classroom participation that is inimical to learning what you need to learn to do well on your exams. When students have laptops in front of them, they tend to fall into the mode of writing down everything that happens in class. You are training to be a lawyer, not a stenographer. Typing out, more or less verbatim, the words coming out of your professor's mouth, is not going to do you a lot of good. What class time adds to your legal education is not primarily information — although certainly some will be imparted. Rather, as we have explained repeatedly, you are being taught how to spot, frame, and think through issues. To get a feel for those skills requires you to listen and think simultaneously, not merely to record. As we have said, even when you are not on-call or speaking, you need to be an active, engaged, self-conscious participant who pays attention to the interactions between your professors and your fellow students. Why is the professor pushing so hard on that question? Why was she not satisfied with the answer given? On what grounds is she defending or criticizing the decisions we are reading? What's the point of her asking that weird hypothetical?

There's a related point to be made here about the problem of in-class stenography. The thought that one's principal task is to record information provided by the professor presupposes that legal education involves a one-way transmission process: Professor speaks, students absorb. Perhaps you will encounter some law professors who teach this way. But we hope that it is clear by now this is not the point of the Socratic method. Rather, we are trying to teach you by example the judgment needed to tell good arguments from bad ones, the skill of practicing lawyers and expert exam takers.

Now, we make one concession to technology. What technology can offer is the ability to organize and synthesize in just the way we say you will have to for your outline. There is something elegant about having all your materials in bits and bytes so you can cut and paste, and so you can quickly consult your case and your brief and maybe even last week's notes. We can see the advantages.

Still, we really do suggest you give the issue thought. We hope you don't think we are Luddites. Just like you, we live much of our lives on computers and dealing with technology. But we can't walk into the classroom and type and teach at the same time. And you can't type

frantically and learn. Try some experiments. Trade off with a buddy on ‘typing duty’. See which way you learn best. Organize in groups to do this.

But whatever you do, be present in class. You are probably paying insanely good money for this, and the classroom give-and-take is what is at the heart of what you are paying for. You aren’t going to get the judgment to think like a lawyer in any other way.

GUNNERS

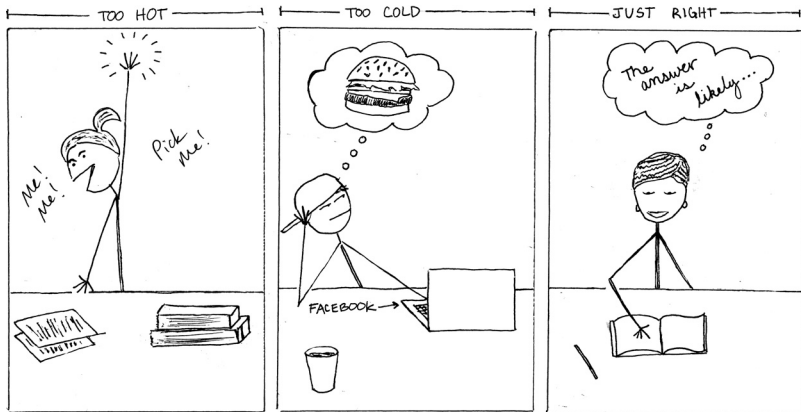
Those of your classmates with their hands in the air all the time have traditionally been called “gunners” and most of you do your best to avoid this label, even at the cost of not putting your arm in the air when you have a question, or something to contribute. We should say up front that we intensely dislike the tendency of law students to divide the world into regular students and gunners. (Yes, folks, it’s time to move past high school.) Class is not a game in which a small group performs and everyone else tunes out, or makes fun of those who raise their hands and speak.

One of our overarching themes is that law school actually has a lot to do with law practice. Nowhere is this truer than when it comes to class participation. You should relish the opportunity to participate, either when you are called on or when you volunteer, because that is what you are going to be doing as a lawyer. If you are thinking that the “public speaking” aspect of law is only for courtroom litigators, you are wrong. Whether they are doing deals, arbitrating disputes, or persuading regulators, all lawyers spend a good chunk of their time talking about the law. And guess what? Senior lawyers and clients notice useful contributions to conversations. If you expect them to throw good work your way, you are going to have to show them that your head is in the game, and that you have valuable things to say. Now is the time to begin to get the hang of it. Of course that doesn’t mean you need to or should raise your hand every time a professor directs a question to the class. Pick your spots. But to give up this opportunity is to squander your tuition dollars.

The classroom is an intellectual community. Everyone is in it together. If you are the person who doesn’t participate, you are

free-riding. If you are someone who can't stop interjecting, you are crowding out your colleagues. If you lean to the quiet side, force yourself to do your part, put your hand in the air a bit more often. And if you are the one sitting in the front row with your hand up all the time, here's a suggestion: Your classmates probably don't want to hear from you *that* much. The key here is the happy medium, with everyone playing a part.

Finally, be strategic. When you get yourself out of law school you will want a job. Maybe a clerkship. You are going to need reference letters. Who is going to write them? The professor at the front of the room calling on you, that's who. We tell our students that sitting quietly in class all semester and then getting an A on the exam — assuming an A is what they get — is not going to make for strong references. It is just human nature: Professors really get behind students who take the endeavor seriously. One can over-participate as well as under-participate, to be sure. (We get annoyed at people with their hand up constantly, too.) What we are looking for are smart, engaged, mature people with good judgment. So are employers. Now is the time to work on being that sort of person.



“PSYCHING” THE PROF

The first-year law school curriculum is fairly standardized. Some schools include a course on legal methods, or legislation and

regulation; others don't. Some have spring electives; others don't. But pretty much everywhere, you are going to be taking classes in Civil Procedure, Contracts, Criminal Law, Property, and Torts. And yet if you happen to talk about one of these core courses to a friend in another section at your school, or at another school, you will likely discover that he or she is learning it differently than you are. The syllabus for your Torts class includes week after week on negligence and strict liability, and only a week at the very end of class on intentional torts. Your friend's Tort class starts with a month on intentional torts. Your Civil Procedure class is all about pleading, discovery, joinder, and motion practice, with passing mention of personal and subject-matter jurisdiction. Your friend's is the opposite. That there is such variation is neither surprising nor a cause for concern. Each of these subjects is too complex to cover in its entirety in a single course, and different choices can reasonably be made about what will constitute representative and pedagogically useful materials. (Remember, the method you are learning is as important as the substance.)

You can help yourself, though, by thinking about why your professor has chosen to present the subject of a particular class in the way in which she has presented it. It will pay to make an effort to get inside the head of your professor—to get a sense of how he thinks about the subject.

Different professors come to their courses with different training, different interests, and different aspirations. Some will want only to teach particular doctrines or rules as discrete, self-contained units. Others will have a broad “take” on the subject, a view of how all of its parts fit together as pieces in an intricate puzzle (e.g., Criminal Law is best understood as a scheme for deterring antisocial conduct, not as punishing culpable wrongdoing). Others will emphasize a special set of tools to be used in analyzing problems within the field (e.g., to understand Contracts, one must understand and apply principles of microeconomics). Others will highlight recurring themes (e.g., Torts teaches us first and foremost about the open-endedness and malleability of legal rules).

For each of your classes you should work to get a sense of where your professor is coming from. We recommend this in part because knowing the law requires recognizing forests as well as trees: Arguments about particular issues or doctrines in criminal law connect to

larger views about what criminal law is, and what it is for. We also recommend it because it will probably give you some guidance on how to focus your efforts at studying. If you hear from your Constitutional Law professor regular expressions of concern about judicial subjectivity and the value of interpretive approaches that (arguably) constrain discretion, such as textualism or originalism, then you probably can expect to get a set of questions that invite you to discuss the role of discretion in courts' constitutional decisions, and perhaps the legitimacy of the institution of judicial review. Likewise, if you have a Contracts professor who is fond of pointing out ways in which doctrine does or does not permit the allocation of scarce resources to the user who most highly values them, you can expect that you might be asked to argue for or against the application of a given rule on the ground of efficiency.

We are not advocating that you try to mimic or parrot your professor on her exam. She might be unimpressed to see a version of her own thoughts being thrown back at her. Rather, we mean that you ought to engage issues and questions that your professor explicitly or implicitly highlighted during the semester as central to the subject. To do so is to demonstrate that you have a sense of the forest as well as the trees. That sort of showing might earn you some exam points in its own right. It might also give the professor some confidence that you have a handle on the subject, which in turn might get you the benefit of the doubt when she is trying to determine how to score particular parts of your answers.

OH, AND HAVE FUN

1Ls often view the classroom experience with stress and terror. 3Ls sometimes harbor a sense of monotony and boredom. Both extremes are a mistake. Be engaged. Make your professors and your classmates help you. Interact with the material; don't expect it to just happen to you. Prepare for class, milk class for all you can, reflect after class on how you can do better. Experience tells us you are going to be sitting in our office in fifteen years reminiscing about how great that classroom experience was. Why wait? Enjoy it now.

The Bottom Line

- ✓ Be “present” in class.
- ✓ Brief cases.
- ✓ Look and listen for the right things in class; don’t transcribe.
- ✓ Be thoughtful about technology (maybe even skip it).
- ✓ Try to adopt the perspective of the professor: What’s his or her take on the subject?