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## **Legal Research Deficiencies in the Law School Curriculum, Proposed ABA Rule 302, and Solutions**

Kristen Rowlett

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**Legal Research Deficiencies In the Law School Curriculum, Proposed ABA Rule 302,  
and Solutions**

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Submitted to  
Professor Penny A. Hazelton  
to fulfill course requirements for Current Issues in Law Librarianship, LIS 595,  
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Rule 302, and Solutions**

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# Legal Research Deficiencies In the Law School Curriculum, Proposed ABA Rule 302, and Solutions

## Introduction

Why do law school graduates have trouble with legal research? Judges, lawyers, legal educators, and librarians have asked this question since the early years of the American legal system.<sup>1</sup> A legal education is not cheap, yet after three years of school new lawyers may not have gotten their money's worth as they still struggle with the basic elements of research and writing.

Deficiencies in legal research education have been spotted since the beginning of American law schools. Many hurdles contributed to the problems with the current legal research curriculum such as the poor quality of first year law students' writing abilities and the rise of Google-like keyword searching through computer assisted legal research databases such as Westlaw and Lexis.

As research skills of law students and new attorneys continued to cause irritation for clients and legal practitioners, some groups formed in order to solve these problems. Thus, the MacCrate Report, Carnegie Report, AALL Principles and Standards emerged. In 2013, the ABA also proposed a change in their Standards, which would require law schools to update their curriculum by implement in order to give students more practice-oriented experience.

This paper will argue that the ABA's proposed Standards do not fully integrate legal research skills continually throughout a student's legal education. Legal research is not just a course; it is a concept, which must continually be brought to the student's attention throughout all the years of school in order for students to fully become practice-ready legal researchers.

## History

In the early days of law schools, legal research and writing courses were not included in the curriculum as there was very little research to be done.<sup>2</sup>

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<sup>1</sup> See, Mary S. Foote, *The Need for College Instruction in the Use of Law Books*, 10 LAW LIBR. J. 25, 28 (1917).

<sup>2</sup> Robin K. Mills, *Legal Research Instruction in Law Schools, The State of the Art or, Why Law School Graduates Do Not Know How to Find the Law*, 70 LAW LIBR. J. 343, 343-344 (1977).

However, with the rise of the instructional method of case analysis gaining in popularity and growing amount of case reporters and digests, the lack of legal research instruction became more apparent.<sup>3</sup> Particularly, as casebooks were used in class, there was no longer a need for students to find assigned cases themselves.<sup>4</sup>

It is said that as a consequence of the 1906 publication of *Brief Making*, edited by Robert Cooley, early bibliographic courses were added to law schools' curriculum.<sup>5</sup> Assuming these courses followed the text of this book, bibliographic instruction included where and how to find the law, how to use, analyze and evaluate decisions and statutes, and how to prepare trial and appellate briefs.<sup>6</sup>

By the 1920s, almost half of the law schools accredited by the Association of American Law Schools offered legal bibliography instruction.<sup>7</sup> Instructional handbooks such as West Publishing Company's *Brief Making and the Use of Law Books* were already multiple editions into their publishing.<sup>8</sup> However, it was Columbia University Law School Librarian Frederick Hicks who, in his book *Materials and Methods of Legal Research*<sup>9</sup> covering only where and how to find the law, argued that the legal intellectual process of "brief-making" — analysis, logic and construction of arguments— were not appropriate for the first year curriculum.<sup>10</sup>

Hicks' view prevailed, and over the next 25 years, courses in only legal bibliographic research, frequently taught by librarians, became part of the law school curriculum.<sup>11</sup> These courses usually consisted of lecture-based instruction on the use of various legal research tools with accompanying short exercises, conducted in the library.<sup>12</sup>

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<sup>3</sup> *Id.* at 343.

<sup>4</sup> *Id.*

<sup>5</sup> Marjorie D. Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 539 (1972)

<sup>6</sup> *Id.*

<sup>7</sup> Mills, *supra* note 2, at 343.

<sup>8</sup> *Id.*

<sup>9</sup> Frederick Hicks, MATERIALS AND METHODS OF LEGAL RESEARCH (1923). A second revised edition was published in 1933 and a third revised edition in 1942.

<sup>10</sup> Rombauer, *supra* note 5.

<sup>11</sup> Mills, *supra* note 2, at 343.

<sup>12</sup> *Id.*

More significant writing instruction became a staple of first year curriculum in the late 1940s.<sup>13</sup> However, a majority of the substance of these courses focused on basic writing skills rather than legal writing.<sup>14</sup> This was a result of a lingering negative attitude toward basic English grammar instruction that developed in the 1930s.<sup>15</sup> At the same time, law school enrollment experienced a rapid increase as returning World War II veterans started going back to school.<sup>16</sup>

It was during this time that legal educators became concerned with the students' thinking abilities, as well as their writing skills.<sup>17</sup> Educators became skeptical of the case method of instruction and whether this was the best way to teach legal intellectual skills.<sup>18</sup> In order to improve both thinking and writing skills simultaneously, additional instruction, such as appellate moot court exercise, were included in the curriculum.<sup>19</sup>

This style of teaching based on the Hicks approach, called "Legal Methods," caught on quickly.<sup>20</sup> With the combination of instruction in legal research techniques and development in legal theory, first year law students received an introduction to not only research techniques and writing skill, but also case analysis, legal reasoning, and oral advocacy.<sup>21</sup>

Although many law schools found this method of instruction ideal, many problems arose. With the rising number of law students and the more labor-intensive "Legal Methods" course, many schools found they did not have enough staff to fully support this new style of teaching which required a higher degree of individual attention given to each student.<sup>22</sup>

Some schools decided the solution to this problem was to break up first year students into smaller groups for their legal research and writing course.<sup>23</sup> Pioneers in this development, including the University of Chicago and Harvard

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<sup>13</sup> *Id.* at 344.

<sup>14</sup> Rombauer, *supra* note 5 at 540.

<sup>15</sup> *Id.*

<sup>16</sup> Mills, *supra* note 2, at 344.

<sup>17</sup> Rombauer, *supra* note 5 at 540.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Mills, *supra* note 2, at 344.

<sup>21</sup> Rombauer, *supra* note 5 at 541.

<sup>22</sup> Mills, *supra* note 2, at 344.

<sup>23</sup> *Id.*

Law School, used graduate instructors hired for one-year appointments to teach these students.<sup>24</sup> With the success of this model of teaching, other law schools followed suit.

Since the 1950s, most legal research and writing programs have remained unchanged. The main variation is in who instructs the course. In the past, law schools have employed 3L's to teach small sections of legal research and writing. Some schools have separate legal research and writing professors who exclusively teach smaller sections of first year students. Consequently, these research and writing professors have become more professionally organized, which may contribute to less research taught. Other schools find their school's law librarians to be better suited in teaching first year legal research and writing.

### **Current courses**

In her 1977 article, Robin Mills predicted that legal research and writing instruction would see significant change.<sup>25</sup> She foresaw this change for multiple reasons. The first was that with the proliferation in the amount and variety of legal resources being produced, legal research would require more sophisticated technique; therefore, the amount of information law students would need to be taught would be much greater. There would also be more ways of getting to the information as documents that were previously hard to find would become more accessible in digital format due to increased access on the Internet. Secondly, with the rise of computer assisted legal research with databases such as Westlaw and LexisNexis, the way research and writing is taught would substantially change. Her conclusion was that legal research instruction was never ideal, and it had an even less chance of success in the future.

Now, after almost 40 years, her predictions were close to the present reality. There is an exponential growth of resources, in both variety and number, and legal research databases have changed the way students conduct research. However, with all this change, the methods used to teach legal research and writing to first year students have remained stagnant. While it is true that there is more of an emphasis on computer-assisted legal research, the structure of legal research and writing courses has remained unchanged.<sup>26</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 347.

<sup>26</sup> See, Steven M. Barkan, *Should Legal Research Be Included on the Bar Exam? An Exploration of the Question*. 99 LAW LIBR. J. 99 403, 404 (2007).

## Structure of the legal research and writing course

These first year research and writing courses are generally created in the hope that students can build upon this training through upper level electives, extracurricular programs, clinical course work, externships, and work experience.<sup>27</sup> However, this idea seems to place the responsibility for teaching legal research in the hands of instructors who may not themselves have mastered efficient research and writing.<sup>28</sup>

The typical legal research and writing course offered to first year law students provides a rigorous introduction to legal reasoning, legal research, and methods of interpreting the law. Using legal research textbooks as a guide, professors demonstrate to students how to conduct basic research, focusing on primary case law and rule application. In addition, students are taught how to synthesize a rule of law from multiple cases, organize and write a legal memo, conduct an oral argument, and cite legal sources using the Bluebook.

## Problems with research courses

It is a widely held view that legal research and writing are two of the most fundamental skills a first year should master.<sup>29</sup> However, the research component of first year courses receives a lot of criticism. This criticism is directed toward the “unnecessary bibliographic detail, lack of educational validity, and the concern that students will mistakenly develop the attitude that all legal problems have ‘one right answer.’”<sup>30</sup> Many factors limit the effectiveness of training first year students in legal research and writing.

First, there is an alarming amount of material thrown at a first year law student in a very short amount of time. There is already very little room on the plate of a 1L. For many, the required substantive law classes may be their first introduction to the Socratic method of teaching. Furthermore, the course load

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<sup>27</sup> Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research-Writing-Analysis-Or More*, 100 DICK. L. REV. 245, 245 (1995).

<sup>28</sup> Donald Dunn, *Why legal research skills declined, or when two rights make a wrong*, 85 LAW LIBR. J. 49, 50 (1993).

<sup>29</sup> Silecchia, *supra* note 27.

<sup>30</sup> Dennis Sears, *The teaching of first-year legal research revisited: a review and synthesis of methodologies*, 19 LEGAL REFERENCE SERVICES Q., 5, 10 (2001).

alone is daunting, especially for students who just finished their undergraduate studies.

On top of all this, students are expected to master the fundamentals of research in their first year. Because of the lack of time, this course, which spans one to two semesters, usually becomes merely an introduction to very basic aspects of legal research. The student finishes this course with “a somewhat kaleidoscopic knowledge of basic research materials and a morbidly hopeful pride in being able to distinguish among them.”<sup>31</sup>

Usually this course is given for less credit than substantive law classes—sometimes only graded on a pass/fail basis.<sup>32</sup> Therefore, it does not carry the same status of other courses in the law school’s curriculum, such as criminal law or torts.<sup>33</sup> Therefore, students feel encouraged to focus more on graded course that affect their GPA and class ranking.

Additionally, the amount of research material taught in a first year research course is daunting. “Not only are they attempting to provide the students with background in legal analysis, research techniques, citation form and the skills of legal writing, but they are also intended to function as a general instruction to the study of law and serve as an aid to the law school socialization process. This really seems a lot to expect of a course to which only one or two hours a semester are allotted.”<sup>34</sup> To add insult to injury, some authors even argue that more should be taught in a first year course, such as the added emphasis on local court rules.<sup>35</sup>

Print and digital formats of resources also provide different benefits depending on what the researcher values, such as cost, structure and navigability. Additionally, some resources can only be found in print or in digital format. Therefore, students must be taught how to navigate both print and online resources. Then, after this quick instruction, they are expected to be able to do the

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<sup>31</sup> *Teaching of Legal Writing and Research: A Panel*, 52 LAW LIBR. J. 350, 355 (1959).

<sup>32</sup> *See*, Barkan, *supra* note 26, at 404.

<sup>33</sup> *Id.*

<sup>34</sup> Mills, *supra* note 2, at 345.

<sup>35</sup> *See*, David L. Armond and Shawn G. Nevers. *The Practitioners’ Council: Connecting Legal Research Instruction and Current Legal Research Practice*, 103 LAW LIBR. J. 575, 575-603 (2011).

research necessary to write a memorandum of law. Later they are expected to write an appellate brief and give an oral argument.<sup>36</sup>

That being said, these modern courses focus on writing one large memo rather than short “fill-in-the-blank”-type exercises. It may be because instruction is so hurried that the emphasis of these memo-writing assignments mainly requires the student to be able to search for case law. Writing assignments given often deal with a legal question that is backed up simply with a few statutes and cases. Some legal research assignments also can create the belief that a legal question has one right answer.<sup>37</sup>

This “one right answer” approach instills in students the erroneous belief that legal questions are straightforward and easy to solve rather than complicated and multi-layered.<sup>38</sup> While the instructor sees the process of research to be the important takeaway from the exercise, students often direct their focus on the results and answers of these short legal questions.<sup>39</sup> Therefore, students may view legal research in a vacuum, rather than connect the process of legal thinking to their substantive law classes. This mentality often can stay with students as they become new attorneys.<sup>40</sup>

### **Emphasis on writing, not research**

An additional problem is that legal research and writing programs are putting more of an emphasis on the writing part of the curriculum. The result of law schools wanting their students’ writing requirements to be more rigorous was that the time devoted to legal research instruction declined. “Canned exercises, citation assignments, and various types of short papers slowly worked their way into the segment of the curriculum long reserved for the teaching of legal sources and research methodology. Instructors began to be recruited for their writing skills and not their research skills.”<sup>41</sup>

It was wrong to assume that law students could appreciate, let alone master, even the most basic of legal research sources without training.<sup>42</sup> While it

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<sup>36</sup> Mills, *supra* note 2, at 345.

<sup>37</sup> Sears, *supra* note 30, at 14.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Dunn, *supra* note 28, at 56.

<sup>42</sup> *Id.* at 57.

could be true that law schools are graduating a better quality writer, the doubt lies in graduating those who can find the materials on which to base their writing and apply analysis.<sup>43</sup> It is difficult to expect students to appreciate the importance of the Code of Federal Regulations, the Federal Register, and legislative histories when these sources are not part of the curriculum.<sup>44</sup>

## CALR

Another threat to the legal research process emerged with the growth of computer-assisted legal research. We now live in a world where there has been an information explosion, it is now easier than ever to find information, but still difficult to actually understand what the information means. Searching Lexis, Westlaw and Google has become the dominant way to conduct legal research. In a 2012 Legal Technology Survey Report from the ABA, 95.9% of lawyers said they conduct legal research online.<sup>45</sup>

“Google... has taught us that it is no longer necessary to go through the effort of defining our information need. We just put a word or two into the search box and let a search engine disambiguate the query and provide an answer... We have given up the need to think through the reason for our query or to clearly articulate the gap in our information...<sup>46</sup> Students never learn how to think systematically or hierarchically about their research queries.<sup>47</sup>

Chief Justice John Roberts explained the one problem with online research at a speech at Drake University law school:

Blind reliance on research that focuses merely on words, and not on concepts, poses the same hazards that lawyers encounter in the late nineteenth century. Lawyers run the risk that word search will uncover reams of marginally relevant precedent superficially on point, thereby

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<sup>43</sup> *Id.* at 58.

<sup>44</sup> PARTNERSHIP AND SOLUTIONS FOR PREPARING JOB-READY ATTORNEYS, 10, (Thomson/West, white paper July 2008).

<sup>45</sup> Am. Bar Ass’n, 2012 LEGAL TECHNOLOGY SURVEY REPORT, at v-34 (2012).

<sup>46</sup> Mary Ellen Bates, *Is That All? Econtent*, Oct. 2003, at 29, 29, available at <http://www.econtentmag.com/Articles/ArticleReader.aspx?ArticleID=5579&ContentSubtypeID=13>.

<sup>47</sup> Thomas Keefe, *Teaching legal research from the inside out*, 97 LAW LIBR. J. 117, 124 (2005).

distracting them from engaging in critical analysis or structuring of the underlying legal principle.<sup>48</sup>

Students learn about legal encyclopedias, case reporters, treatises and other sources of information but fail to make a connection between the question at hand and a potential resource. Recurring problems students may struggle with include selecting the right source, identifying applicable words or phrases of a query, or analyzing the research problem itself. Instead, students immediately convert a question into a keyword search, even before giving thought to whether the information ought to appear in the database.<sup>49</sup>

Furthermore, full-text searching deprives the researcher of context, which means they can never gain the analytical “thinking like a lawyer” ability. Despite the limitations of CALR, students tend to be overly confident in their ability to search using natural language with electronic databases rather than using an index, for example. A study conducted by Lee Peoples revealed that law students have more confidence in the results of an electronic search than in the results of a digest search, even though they answered more questions correctly when using the print digest.<sup>50</sup>

### **Deficiencies of new attorneys**

National and local professional bar associations and legal writers have been quite vocal concerning law students who are not adequately trained in practical legal skills.<sup>51</sup> This complaint has been around for many years.<sup>52</sup>

Difficulty in finding the law is not a new complaint; almost from the beginning of reporting, lawyers have groaned under the task of ascertaining the law. Lord Coke complained of fifteen volumes of reports; Bacon protested against sixty; early in the nineteenth century Bentham

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<sup>48</sup> *Remarks of the Honorable John G. Roberts, Jr., Chief Justice, Supreme Court of the United States*, 57 DRAKE L. REV. 1, 9 (2008).

<sup>49</sup> Genie Tyburski, *It's the Source That Matters*, at <http://www.virtualchase.com/howto/sources.html> (revised Oct. 17, 2003).

<sup>50</sup> Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What Is the Modern Legal Researcher To Do?*, 97 LAW LIBR J. 661, 676 (2005).

<sup>51</sup> Marguerite L. Butler, *Rule 11-Sanctions and a Lawyer's Failure to Conduct Competent Legal Research*, 29 CAP. UL REV. 681, 685 (2001).

<sup>52</sup> See, e.g., Blair Kauffman, *Information Literacy in Law: Starting Points for Improving Legal Research Competencies*, 38 INT'L J. LEGAL INFO. 339, 342-43 (2010).

referred to the reports as ‘a mass, the contents of which defy the industry of an ordinary lifetime to master.’ Judge Dillon said: ‘ In 1881 the judicial reports of England numbered 2,944 volumes, and in this country, 3,000, and they are increasing at the rate of over one hundred volumes a year.’<sup>53</sup>

Ian Gallacher conducted a 2006 survey of 740 students who were about to enter law school and found that over 81% were either somewhat confident or very confident of their legal research abilities.<sup>54</sup> However student responses to basic research questions strongly suggested a much lower level of competence.<sup>55</sup>

According to a 2013 study conducted by the ALL-SIS Task Force on Identifying Skills and Knowledge for Legal Practice, the average attorney spends about a quarter of her time on legal research.<sup>56</sup> Moreover, almost half of attorneys use print-based resources frequently during their practice.<sup>57</sup> In light of these statistics, the incentive to master legal research skills while in law school is great. Proficient research abilities are important to learn early in law school because these skills will pay off when the student practices law.

### **Consequences of poor research**

Attorneys who fail to conduct appropriate legal research can suffer a heavy consequence including financial penalty, professional embarrassment, and even disbarment.<sup>58</sup> Federal Rule 11 authorizes federal judges to sanction attorneys who do not conduct legal research in accord with professional standards.<sup>59</sup> State

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<sup>53</sup> Foote, *supra* note 1, at 27.

<sup>54</sup> 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, 178 (2007-2008).

<sup>55</sup> Patrick Meyer, *Law Firm Legal Research Requirements of New Attorneys*, 101 LAW LIBR. J. 297, 300 (2009).

<sup>56</sup> See, ALL-SIS Task Force on Identifying Skills and Knowledge for Legal Practice, *A Study of Attorneys’ Legal Research Practices and Opinions of New Associates’ Research Skills*, 8 (2013).

<sup>57</sup> *Id* at 30.

<sup>58</sup> See, Butler, *supra* note 51, citing *People v. Yaokum*, 552 P. 2d 291 (Colo. 1976); *Nebraska State Bar Ass’n v. Holscher*, 230 N. W. 2d 75 (Neb. 1975), etc.

<sup>59</sup> Butler, *supra* note 51, at 686.

courts also have the authority to sanction lawyers by statute or court rule.<sup>60</sup>  
Requires “reasonable” research.<sup>61</sup>

Cases that have interpreted this Rule 11 certification are instructive in assisting legal research professionals to identify common research problems and to tailor legal research training to address them.<sup>62</sup> It is also important to impress upon the legal research student that competence in legal research is as important to professional development as is the substantive course work that will eventually be tested on the bar.<sup>63</sup>

Federal Rule of Civil Procedure 11 was enacted by Congress in 1938 in order to deter lawyers from filing lawsuits lacking in factual or legal bases, reduce abuses in the litigation process that have the potential for harming the interest of the opponent, to prevent litigants from wasting court resources in pursuing frivolous claims, and to compensate defendants for legal fees that they should not have been forced to incur.”<sup>64</sup>

However, very few Rule 11 cases were litigated between its enactment and amendments in 1983.<sup>65</sup> The 1983 amendment changed to require the court to impose penalties for failure to conduct competent legal research and changed the standard for assessing penalties from a subjective good faith standard to an objective reasonable attorney standard, requiring the attorney to conduct research as a reasonable lawyer would under similar circumstances.<sup>66</sup> Since this amendment, and subsequent 1993 amendment, there has been a rise in Rule 11 litigation and sanction.

“The harsh results that came with the mandatory assessment of sanctions that were required by the 1983 version of Rule 11 clearly identified the deficient research culture at the bar and the litigation that resulted from the 1983 amendments revealed common legal research problems.<sup>67</sup> These problems include: (1) the attorney ignores an unbroken line of contrary authority; (2) the attorney fails to offer even remote analogies; (3) the attorney cites no cases, or

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<sup>60</sup> *Id.* at 681.

<sup>61</sup> *Id.* at 697.

<sup>62</sup> *Id.* at 683.

<sup>63</sup> *Id.* at 684.

<sup>64</sup> *Id.* at 687-88.

<sup>65</sup> *Id.* at 688.

<sup>66</sup> *Id.* at 688-90.

<sup>67</sup> *Id.* at 704.

only a single, wholly inapposite authority, in support of his “argument”; and (4) the attorney fails to argue for the modification, extension or reversal of existing law.<sup>68</sup>

With the rise of sanctions placed upon attorneys as punishment for poor legal research, many groups of legal scholars came together to try to find the root of the problem.

### **MacCrate Report**

In 1992, the American Bar Association Section on Legal Education and Admission to the Bar published a report evaluating the legal education system.<sup>69</sup> Relying on statistical data, this task force’s mission was to “look at public and professional expectations of what lawyers are and ought to be, and what skills and values they need to fulfill those expectations, and how they got about acquiring those skills and values during and after law school.”

Duncan Alford provided a concise and accurate summary of what the MacCrate Report said and did:

The MacCrate Report emphasized the need, identified by practitioners, for additional skills training in law school and explored the role law schools should play in producing practitioners. The report identified ten “fundamental lawyering skills.” Among them were legal research and factual investigation. The report noted that legal research is “in essence a process of problem solving...” The MacCrate Report also recommended that skills faculty should be permanent, full-time teachers within the legal academy.<sup>70</sup>

One thing the report did not do was attack the dominant law school teaching methodology. However, it did encourage law schools to “actively provide courses what would teach fundamental skills and values to those students

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<sup>68</sup> *Id.* at 705.

<sup>69</sup> AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (Robert MacCrate ed., 1992) [hereinafter MacCrate Report].

<sup>70</sup> Duncan Alford, *The development of the Skills Curriculum in Law Schools: Lessons for Directors of Academic Law Libraries*, 28 LEGAL REFERENCE SERVICES Q. 301, 305 (2009).

noting that “the ability to do legal research is one of the skills that any competent legal practitioner must possess.”<sup>71</sup>

The report was significant because it discussed expanding legal research instruction beyond bibliographic instruction into a more process-oriented model in which students are taught to resolve real-world problems using comprehensive legal research skills, such as the development of research plans and the analysis of legal information.<sup>72</sup> The report also catalyzed an enormous change in legal writing and clinical courses, which are considered the courses in which the most fundamental lawyering skills are taught.<sup>73</sup>

The MacCrate report describes legal research as, among other things, including a familiarity with, and relationship between the following: case law; statutes; administrative regulations and decisions; rules of court; restatements’ and secondary legal materials such as treatises, digests, annotated code compilations, and loose-leaf services.<sup>74</sup>

Fundamental lawyering skills listed in the report included: (1) “problem solving,” (2) “legal analysis and reasoning,” and (3) “legal research.”<sup>75</sup> Specifically, the report analyzed the concepts embedded within research skills. Important concepts included: knowledge of the nature of legal rules and institutions; knowledge of and ability to use the most fundamental tools of legal research; understanding of the process of devising and implementing a coherent and effective research design.<sup>76</sup>

Regarding secondary legal materials, the ABA determined that “a lawyer should have a general familiarity with the breadth, depth, detail, and currency of coverage... and the relative strengths and weaknesses... so that he or she can make an informed judgment about which source is most suitable for a particular research purpose.”<sup>77</sup> The report also recognized the need for new practitioners to be able to form a proper research plan, including the effective formulation of

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<sup>71</sup> MacCrate, *supra* note 64, at 163.

<sup>72</sup> *Id.* at 148-50.

<sup>73</sup> Barbara Bintliff, *Legal Research MacCrate’s “Fundamental Lawyering Skill” Missing in Action*, 28 LEGAL REFERENCE SERVICES Q. 1, 1 (2009).

<sup>74</sup> MacCrate, *supra* note 64, at 157-59.

<sup>75</sup> *Id.* at 138.

<sup>76</sup> *Id.* at 157-62.

<sup>77</sup> *Id.* at 160.

issues, identification of an appropriate research strategy, and the ability to implement that plan.<sup>78</sup>

The MacCrate report presented a useful start, but still merely pointed to gaps without providing means to bridge those gaps between the reality of and the aspirations for law student legal research proficiency. By merely providing a framework rather than the mechanism to remedy these deficits in law student instruction, schools still did not have a concrete method to follow.

### **Carnegie Report**

Another influential study highlighting failures of the legal education system occurred in 2007. This report, frequently called the Carnegie Report, advocated a fundamental change to legal education in which the case-dialogue method would be balanced by practical and ethical instruction with the goal of teaching law students how to be lawyers.<sup>79</sup>

Unlike the MacCrate Report, the Carnegie Report did not pay separate attention to legal research or legal research instruction. Instead, the Carnegie model emphasized a holistic approach to legal education that should apprentice law students into the community of legal practice. The authors of this report envisioned a legal pedagogy that combines conceptual knowledge, skill and moral discernment to ensure law students develop the capacity of judgment guided by professional responsibility.<sup>80</sup>

Within its recommendations, the Carnegie Report describes a “shadow” structure used to complement the traditional law school pedagogy.<sup>81</sup> “Shadow” pedagogy includes clinical or practice experience of lawyering, or the contextualization of the classroom’s legal analysis and doctrine.<sup>82</sup> The Carnegie Foundation’s philosophy was that the teaching of analytical skills and knowledge

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<sup>78</sup> *Id.* at 160-63.

<sup>79</sup> William M. Sullivan, *Align Preparation and Assessment With Practice: A New Direction for the Bar Examination*, 85 N.Y. ST. B.J. 41, 56-59 (2013).

<sup>80</sup> William M. Sullivan, et al., *Educating Lawyers: Preparation for the Profession of Law*, 12 (2007). [hereinafter CARNEGIE REPORT]

<sup>81</sup> Barbara Glesner Fines, *Out of the Shadows: What Legal Research Instruction Reveals About Incorporating Skills throughout the Curriculum*, 2013 J. DISP. RESOL. 159, 160 (2013).

<sup>82</sup> *Id.*

is enhanced by placing analysis and doctrine in the context of real-world application.<sup>83</sup>

### **AALL Research Principles and Standards**

In July 2013, the Executive Board of the American Association of Law Libraries approved the Research Principles and Standards, which set out to define modern standards for a research competent law student.<sup>84</sup> These standards highly value information literacy within legal research instruction and seek to have librarians incorporate them into many aspects of library instruction and curriculum design.

The research standards comprise five principles: (1) knowing the legal system and legal information sources, (2) gathering information through effective and efficient research strategies, (3) critically evaluating information, (4) applying information effectively to resolve a specific issue or need, and (5) distinguishing between ethical and unethical uses of information and understanding the legal issues related to discovery, use or application of information.

Each research principle and standard includes a list of skills that legal professionals should possess to be considered literate in legal information and legal research. These principles and standards mirror many of the fundamental skills set forth in the MacCrate Report, such as requiring law students to understand state and federal judicial systems and differentiate between primary and secondary sources. They also incorporate some of the more analytical skills included in the MacCrate Report, such as recognizing that an information-literate student can develop a research plan and analyze legal issues and sources.

### **ABA's Proposed Rule 302 and 303**

At its meeting held on August 8-9, 2013, the American Bar Association's Council of the Section of Legal Education and Admissions to the Bar approved for Notice and Comment proposed revisions to some of its *Standards and Rules of Procedure for Approval of Law Schools*. One of the major proposed changes

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<sup>83</sup> *Id.*

<sup>84</sup> AM. ASS'N OF LAW LIBRARIES, PRINCIPLES AND STANDARDS FOR LEGAL RESEARCH COMPETENCY (approved July 11, 2013) [hereinafter RESEARCH PRINCIPLES AND STANDARDS], available at <http://www.aallnet.org/Documents/Leadership-Governance/Policies/policy-legalrescompetency.pdf>.

occurs with Standard 302, which is originally titled “Curriculum” but would be split into two and called “Standard 302 [Learning Outcomes]” and “Standard 303 [Curriculum].” Proposed Standard 302 and 303 are new Standards that outline the minimum learning outcomes that must be established by a law school.<sup>85</sup>

Splitting the current accreditation Standard 302 into two separate standards allows for more specificity as to what is required of a law school’s curriculum. “Legal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context” remain integral to current standard 302(a) and to the learning outcome in the proposed standard 302.<sup>86</sup> The current Standard does not prescribe any credit hour requirements for specific areas.

Proposed Standard 303 includes a requirement of two credit hours in professional responsibility and a new requirement of six credits of instruction in experiential courses. Proposed Standard 303(b) is a revision of current Standard 302(b), which requires law schools to provide “substantial opportunities” real-life practice experiences.

Already the proposed changes have received criticism. During the notice and comment period one professor stated that these new standards should only be passed as a temporary stopgap to put schools on notice of forthcoming requirements. A specific complaint is that the proposed standard of learning outcomes should be more complete and stringent.<sup>87</sup>

“Nearly all lawyers negotiate and counsel clients, but proposed Standard 302 wouldn’t require that every student learn how to negotiate and counsel. Nearly all lawyers draft documents creating rights and obligations—contracts, stipulations of settlement, court orders, judgments, ordinances, etc.— but proposed Standard 302 wouldn’t require that every student learn those skills either... A graduate who hasn’t learned these skills isn’t an educated lawyer.”<sup>88</sup>

An additional aspect to the complaint that the ABA’s proposed standards still would not create a practice-ready law graduate is the ability to conduct legal research. Although not specifically mentioned in the above complaint, legal

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<sup>85</sup> *See*, Appendix

<sup>86</sup> *Id.*

<sup>87</sup> Comment from Richard K. Neumann, Jr., Professor, Maurice A. Dean School of Law at Hofstra University, (January 31, 2014), available at <http://www.alwd.org/wp-content/uploads/2014/02/Chapter-3-Neumann.pdf>.

<sup>88</sup> *Id.*

research is the backbone of the important skills a student must exercise in real practice, such as how to get exhibits admitted into evidence and drafting pleadings or motions.

The complaints are not new. What is new is the seriousness of the attention given to the importance of legal research abilities. These proposed standards mention that legal research is fundamental aspect of the law school curriculum, but the new standards do mandate instruction for each student. If these new standards reach approval, law schools may be required to restructure or add more courses. Even if these proposals are rejected, the ABA's increased focus on practice-ready law students emphasizes the ongoing concerns of the quality of law graduates' practical skills. At the base of these practical skills is legal research.

### **What is legal research?**

None of these reports and standards specifies how to implement their findings into classroom instruction. Although each lists the important skills a law student should acquire, without a method of implementation, professors may not know how to effectively teach these skills to students.

Mary Foote, in her 1917 article, noted that “while the chemist trains quite diligently with chemicals, and while players must be taught football, and doctors spend years in practice as interns, law is ‘practically the only science which gives to its novice no training in the use of the tools which must furnish him his living’”<sup>89</sup>

While she was arguing for a separate legal research course in the law school curriculum, her point still rings true today. State bars are making the same complaint today. The president of the Rhode Island bar wrote

...imagine if we trained doctors solely in classrooms and only for three years, with no patient contact, and had them, almost exclusively, read nothing but medical case studies. Then, without ever having been required to see a patient, give an injection, or work in a hospital or doctor's office, they are awarded their M.D. if they pass an exam, they receive their license to practice medicine, and are unleashed on the public. The license would allow them to practice medicine in any field without any further

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<sup>89</sup> Meyer, *supra* note 55, at 298, citing Mary S. Foote, *The Need for College Instruction in the Use of Law Books*, 10 LAW LIBR. J. 25, 28 (1917). Foote was arguing for a separate legal research course to be added to the law school curriculum.

training. Heart surgery? No problem— you are a doctor, you have your license... Well, isn't that how law schools train lawyers?... [T]hey are no more prepared to represent a client than a doctor with a similar lack of training would be prepared to treat a sick patient.<sup>90</sup>

More time is needed in most first-year curricula to teach legal research, but this extra time can rarely be achieved without sacrifices elsewhere. It is unrealistic to require more credit hours of research instruction during the first year of law school when students already complain about the stress of being a 1L.<sup>91</sup>

Legal research is more than a course, it's a concept.<sup>92</sup> The initial step in re-visioning legal research is to clearly articulate what legal research actually is, as well as the skills that it requires. Only then can legal research be integrated into all aspects of the law school curriculum.

Legal research is problem solving at the most basic level. It requires “creativity, confidence, flexibility, and reflection,” and a mastery of discrete skills.<sup>93</sup> Students miss opportunity to gain creativity and flexibility in their research skills when the legal research and writing course functions in a closed universe. The research aspect of a legal research and writing course usually revolves around the narrowly defined fact pattern of the legal memo assignment.

### **Solutions – Boulder Report**

In June 2009, a panel of legal research professionals gathered at the Conference on Legal Information: Scholarship and Teaching in Boulder, Colorado. This group developed the Boulder Statement on Legal Research Education, which reflects the consensus of the conference participants on the theoretical foundation of a signature pedagogy for legal research education.<sup>94</sup>

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<sup>90</sup> Michael R. McElroy, *First Thing We Do, Let's Kill All the Law Schools*, 61 R. I. BAR J. 3, 3 (2012).

<sup>91</sup> Dunn, *supra* note 28, at 63.

<sup>92</sup> *Id.* at 49.

<sup>93</sup> *Id.* at 33.

<sup>94</sup> CONFERENCE ON LEGAL INFORMATION: SCHOLARSHIP AND TEACHING, THE BOULDER STATEMENTS ON LEGAL RESEARCH EDUCATION 249 (2013) (hereinafter BOULDER STATEMENTS).

According to the Boulder Statement, graduating ethical and competent legal professionals is an explicit priority.<sup>95</sup> “Legal research education can be reconceptualized and restructured so that it supports an integrated curriculum and reinforces the connection between law school and the legal profession.”<sup>96</sup>

The best way to create competent researchers is to have these research skills “woven throughout the law school curriculum through practice-oriented courses and substantive law courses to create a holistic form of teaching.” For decades, librarians and teachers of legal research have argued that “research is what connects the legal professional to the required knowledge and the way research is done profoundly affects how one understand the substantive law.”<sup>97</sup>

Integration requires weaving skills such as legal reasoning, writing, and research throughout the curriculum.<sup>98</sup> There are four main ways these skills can be woven into the entire law school curriculum: (1) increased integration of research in the first year research and writing course; (2) integration of doctrine into legal research classes; (3) integration of legal research into doctrinal courses; (4) increased upper-level specialized research courses.

### **Increased integration of research in the first year research and writing course**

As many first-year legal research and writing courses focus more on writing, students are merely introduced to legal research.<sup>99</sup> One reason may be that first-year writing courses occur in a closed universe. The course usually focuses on purposely-selected problems that are easy to grasp.<sup>100</sup> To create competent researchers in this first year of school, students must be able to interact with the range of material necessary to facilitate a deep understanding of the research process.<sup>101</sup> Additionally, the research skills introduced in a first-year research and writing course tend to focus more on finding rather than thinking practically about the information.<sup>102</sup>

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<sup>95</sup> *Id.* at 1.

<sup>96</sup> *Id.* at 4.

<sup>97</sup> *Id.* at 9.

<sup>98</sup> *Id.* at 10.

<sup>99</sup> *Id.* at 13.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

One remedy to increase integration of research into this first-year course is to bring assignments out of a closed universe. Instruction should not only include controlled research assignments but also assignments that more closely resemble what students will see in practice.<sup>103</sup> These assignments can also be linked to doctrinal courses, such as criminal law, torts, or contracts.<sup>104</sup>

This style of teaching would require more work from the research and writing professors and, potentially, cooperation from the administration. However, the concerns about law students receiving experimental learning opportunities shows a need for realistic research instruction. By requiring students to engage with real-life problems and to develop and implement efficient research plans, a law school potentially is providing, as the ABA states, “substantial opportunity” to get real-life practice experience.<sup>105</sup>

### **Integration of doctrine into legal research classes**

As 1L’s are just learning how to become literate in the substance of the law, legal research must be deeply integrated into the first-year curriculum in more courses than just a first-year writing course. “Integrating material covered in one class into another skills-based course allows students to connect their doctrinal classes to their skills courses in a way that enhances both.”<sup>106</sup> They learn to recognize that legal education is not a series of unconnected courses, but a process of learning to reason analytically.<sup>107</sup>

Integrating material from substantive law courses would allow students the chance to learn research as well as provide an understanding of the connection between doctrine and practical skills.<sup>108</sup> Integration of doctrinal material only requires legal research faculty to build their courses with knowledge of the other required 1L courses.<sup>109</sup> If instructors can integrate cases that students are discussing in doctrinal courses, instructors have the chance to highlight these cases in a different way. For example, instructors can introduce students to navigating the procedural history of an important Supreme Court ruling. This

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> American Bar Association, Proposed Standards for Approval of Law Schools and Interpretations Standard 302(b) (Proposed July 2013).

<sup>106</sup> BOULDER STATEMENTS, *supra* note 89, at 10.

<sup>107</sup> *Id.* at 15.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 16.

provides the student with more exposure to these cases and allows them to understand cases as not just standing for one concept or separate from real world issues.

### **Integrating legal research into doctrinal courses**

More difficult is the integration of legal research skills into doctrinal courses. However, there are many benefits to providing multiple ways for students to engage with the material they are attempting to learn.<sup>110</sup> For example, a typical first-year student can come to understand a case as representing only one concept. Integration of legal research can provide students with a broader understanding of the history and social context of a case.<sup>111</sup> The Boulder Statements provide a way to implement research into doctrinal courses:

One short and simple way to integrate legal research is to require students to provide a short case update on one or more of the cases they are studying. The process of researching provides an opportunity for students to actively engage with the case in a different and more focused manner than merely reading it. The assignment moves students from a passive reader to active engagement with the material and doctrine being examined. By requiring students to grapple with how other courts define, describe and apply the case, this simple research task creates the opportunity for students to reflect not only on the doctrine and the evolution of the doctrine, but on the process of using case law to learn the law. Moreover, reviewing students' assignments provides the professor with insight into whether or not students understand the doctrine the case was designed to highlight.<sup>112</sup>

### **Upper level skills courses**

Looking beyond the first year, there are other ways to integrate research instruction into 2L and 3L curriculum. One method many law schools choose is to provide specialized or advanced legal research courses, which may count for upper-level writing requirements.<sup>113</sup> Specialized research courses can include subject-focused research courses, such as a course on legal research in business

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<sup>110</sup> *Id.* at 17.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 20.

<sup>113</sup> Fines, *supra* note 76, at 17.

law, and seminar courses where students are required to conduct intensive research and writing.<sup>114</sup> These specialized courses provide a more fertile ground for integrated research instruction as advanced research courses can suffer from a lack of context.<sup>115</sup>

Creating and implementing a curriculum with integrated legal research would not be an easy task. For a skill to be integrated into the curriculum in a way that will substantially affect graduate competencies, the skill must be important enough in the hierarchy of the faculty and curriculum to justify the costs of curricular change.<sup>116</sup> Time, cost and faculty willingness to cooperate will present many hurdles. However, dedicated attention to implementation of research through the above-listed areas of the law school curriculum has the potential to increase researching ability and practice-readiness in law students.

## Conclusion

For decades now, a recurring complaint in the legal world is that recent law school graduates lack practical skills, particularly legal research abilities. Deficiencies in this skill are based in part on the structure of the legal research and writing course. With the tremendous amount of material a first-year student must learn, it is important for law school curriculum to highlight the importance of this skill and to implement legal research into multiple writing and substantive law courses.

Law schools can implement legal research instruction in four ways: (1) increased integration of research in the first year research and writing course; (2) integration of doctrine into legal research classes; (3) integration of legal research into doctrinal courses; (4) increased upper-level specialized research courses. As discussed, each of these options provides students exposure realistic and hands-on legal research as well as a greater understanding of the context of legal doctrine. Furthermore, implementation of these practices would further a shared mission of the MacCrate Report, Carnegie Report, AALL's principles and standards, the ABA's proposed accreditation requirements, and the Boulder Statements: law school curriculum must change in order to create ethical and competent, practice-ready lawyers.

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 2-3.

## APPENDIX

### **Current Standard 302**

#### **Standard 302 CURRICULUM<sup>117</sup>**

- (a) A law school shall require that each student receive substantial instruction in:
- (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
  - (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
  - (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
  - (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
  - (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.
- (b) A law school shall offer substantial opportunities for:
- (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;
  - (2) student participation in pro bono activities; and
  - (3) small group work through seminars, directed research, small classes, or collaborative work.

#### **Proposed Standard 302. LEARNING OUTCOMES<sup>118</sup>**

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

- (a) Knowledge and understanding of substantive and procedural law;

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<sup>117</sup> American Bar Association, Standards for Approval of Law Schools and Interpretations Standard 302 (2013).

<sup>118</sup> American Bar Association, Proposed Standards for Approval of Law Schools and Interpretations Standard 302 (Proposed July 2013).

- (b) Legal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.

**Proposed Standard 303. CURRICULUM<sup>119</sup>**

- (a) The law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:
  - (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members;
  - (2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and
  - (3) one or more experiential course(s) totaling at least six credit hours. An experiential course or courses must be: (i) simulation course(s); or (ii) clinical course(s); or (iii) field placement(s). To satisfy this requirement, a course must be primarily experiential in nature and must:
    - (i) integrate doctrine, theory, skills, and legal ethics and engage students in performance of one or more of the professional skills identified in Standard 302;
    - (ii) develop the concepts underlying the professional skills being taught;
    - (iii) provide multiple opportunities for performance; and
    - (iv) provide opportunities for self-evaluation.
- (b) A law school shall provide substantial opportunities to students for:
  - (1) faculty supervised clinical courses or field placement(s); and
  - (2) student participation in pro bono legal services or law-related public service activities.

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<sup>119</sup> American Bar Association, Proposed Standards for Approval of Law Schools and Interpretations Standard 303 (Proposed July 2013).