THINKING LIKE A LAWYER: EXPERT-NOVICE DIFFERENCES IN SIMULATED CLIENT INTERVIEWS

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I. ABSTRACT

Background and Objectives: The purpose of this investigation is to examine the thinking processes of “expert” and “novice” lawyers.

Method: In simulated client interviews, “learners” (either expert or novice attorneys) were presented a problem to be solved. The learners were then asked to interview and counsel a “client.” The client interviewed by the learners was an actor, trained to respond to the questions with a specified fact pattern in mind. The interview was videotaped, and after the interview was completed, the learners were asked to review the videotapes. The learners’ explanations of their thought processes were also taped and later reviewed. The following three levels of “expertise” were represented in the investigation: (1) lawyers, who represented the expert level of problem analysis; (2) experienced novices, who represented a point of expertise somewhere between that of the expert lawyer and the novice; and (3) an inexperienced novice, who was hypothesized to represent the true novice. Conclusions: The study’s findings provide evidence of striking tendencies that are in keeping with researchers’ findings in other domains of expertise, supporting a conclusion that legal expertise is developed in a manner more similar than dissimilar to other fields. The study also suggests that further analysis of educational theory in law can be expedited by the findings of researchers in other fields.

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II. INTRODUCTION

"They should have a course to teach you how to learn . . . all they have is courses on what to learn."

David Kocot (college student)¹

"You come in with a skullful of mush, and, if you survive, you leave thinking like a lawyer."

"Professor Kingsfield," The Paper Chase

For educators, the question of how to impart knowledge is the only question worth answering. Educators are fascinated by the process of learning and are intensely interested in making the learning process more efficient for both the educator and the learner. Legal educators are no exception to this rule, as evidenced by their constant search for ways to improve legal education by means of seminars, writings, and task forces that constantly address the learning process. It is clear that legal educators are faced with the task of educating their students in a specific (albeit large and complex) domain. Additionally, legal educators are always faced with the question of what type of education to provide in law school. Should students be taught to "think like lawyers" or should they be taught "the skills of lawyering"? Where does legal education begin with the process of education?

Legal education has changed over the years, reflecting the state of the art of education and psychology and the zeitgeist or thinking of the times. What follows is an exploration of how the current thinking in educational psychology has relevance to legal education today.

III. OVERVIEW OF TRADITIONAL LEGAL EDUCATION

For Socrates, an educator, the question of how to impart knowledge was synonymous with the question, "Can virtue be taught?" For the purposes of this Article, "virtue" is defined as the body of knowledge mastered by and available to the expert in a given field. The question of how

best to teach, i.e., impart knowledge, is still being debated under various guises and has spurred literally thousands of doctoral dissertations dealing with everything from the acquisition of morality\textsuperscript{2} to the acquisition of specific knowledge which becomes, for the educational philosopher, something akin to "virtue."\textsuperscript{3} For educators, how to teach anything is of vital interest, and the more efficient the method of imparting the knowledge, the better the educator can be at the job.

There was a time when "apprenticeships" were a primary schooling mechanism in a variety of fields, including law.\textsuperscript{4} People would "read the law" and work with an experienced lawyer, acquiring lawyering skills in the process. At some point, the apprentice was eligible to sit for the bar exam and, if he or she passed, was admitted as a trained attorney. Formal schooling mechanisms, i.e., the law schools, have taken the place of those apprenticeship programs, and now graduation from an accredited law school is a prerequisite to sit for the bar exam in virtually every state. It then becomes the burden of the formal school mechanisms (the law schools) to provide the training needed for a student to become a lawyer and to make this a cost-efficient process. That is, the law school must focus on imparting the knowledge and skills required by the profession in a manner that attracts students who recognize the school's ability to provide such training. Law professors, like other educators, must take their cue from those who teach others how to teach. Numerous theories of education, of how best to convey knowledge and expertise, exist in the field of education. Which is the "best" method for law schools to embrace?

Up until 1960, law schools offered only one type of legal education, emphasizing the development of analytical skills, the development of legal research skills, and the learning of substantive law.\textsuperscript{5} In order to teach these skills, law schools relied, for the most part, on the Socratic method,\textsuperscript{6} where students are trained to reason via question and answer.

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4. See ABA SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, LEGAL EDUCATION AND THE PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 3 (1992) [hereinafter MCCRATE REPORT].

5. See MCCRATE REPORT, supra note 4, at 233.

6. The Socratic Method, as the method of instruction suggested by Harvard law
debate in the classroom, applying legal statutes and principles where appropriate. This method of instruction insured that law schools became a source of “sorting” students who were good at legal analysis from those who were poor at it without concern as to how these students, once they became lawyers, would acquire skills relevant to providing services to real clients, i.e., expertise, judgment, and problem-solving abilities that go beyond classroom legal analysis. With the development of clinical legal education in the 1960s, that tradition began to change. In 1973, the American Bar Association’s adoption of its Standards for law school approval incorporated core curriculum requirements, professional responsibility requirements and professional skills training. These requirements were later amended to include legal writing.

In recent times, legal educators have attempted to further define precisely what is being and what ought to be conveyed, with the goal of developing educational methods that are more efficient in conveying it. The essence of what legal education is or ought to be, however, remains elusive. In 1942, Karl Llewellyn wrote:

[T]he essence of our craftsmanship lies in skills, and in wisdoms; in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field (sic); in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for regularizing the results, for building into controlled large-scale action such doing of things and such moving of men.

. . . But we do not say this, even to ourselves. . . . [B]ecause we do not say it to ourselves we do not study our own essence as we

professor Langdell was later to be known, was an attempt to remedy the “inadequacies of both the apprenticeship and lecture” models. See Ruta K. Stropus, Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century, 27 LOY. U. CHI. L.J. 449, 452 (1996).

7. For an essay criticing the traditional manner of legal education, see Duncan Kennedy, Legal Education and the Reproduction of Hierarchy, 32 J. LEGAL EDUC. 591 (1982).


9. See McCrate REPORT, supra note 4, at 233.


11. For a critical view of what legal education is, see Duncan Kennedy, Legal Education as Training for Hierarchy, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40, 47 (David Kairys ed., 1982).
need to, we do not train every lawyer in it, we do not have and cannot yet phrase or apply standards of minimum competence in it, we do not require entrants to qualify in it, we learn it, each one of us, only by slow unreckonable accident, happenstance, or inborn artistry. What I do know further is that because we do not say it to ourselves we do not say it to others, and others even when they meet it in one of us, think it not a lawyer’s peculiar craft, learned by lawyering, but think it an accidental human attribute of some particular lawyer.¹²

The “it” that Llewellyn was attempting to pin down is “expertise,” which cognitive psychologists have been attempting to define, study, and make more readily conveyable. Legal educators have, in their own way, been attempting to define the same (e.g., Farmer and Lundberg and their work with client interviewing and counseling). For Gary L. Blasi, a legal educator, “it” is “lawyering” and it involves more than “translation, interpretation, and suppression of narratives”—it also involves “solving (or making worse) problems of clients and others, under conditions of extraordinary complexity and uncertainty, in a virtually infinite range of settings.”¹³

IV. NONTRADITIONAL LEGAL EDUCATION

Experimentation with different vehicles of legal education can also be seen as attempts to further understand legal expertise and its conveyance. The McCrate Report identified fundamental lawyering skills as “essential for competent representation.”¹⁴ The report also identified values, and this combination of skills and values is what contributors to the McCrate Report felt all lawyers need in order to be part of the “learned profession.”¹⁵ The lawyering skills listed include problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work and recognizing and resolving ethical dilemmas. The values listed include providing competent representation, striving to promote justice, fairness, and morality, and striving to improve the profession and professional self-develop-

¹³ Blasi, supra note 8, at 317.
¹⁴ McCrate Report, supra note 4, at 135.
¹⁵ See id. at 136.
ment. Other legal educators define, as central to lawyering, skills in "oral communication," "written communication," and instilling in others confidence in the lawyer, as well as "ability in legal analysis and legal reasoning," and skills in "drafting legal documents and 'ability to diagnose and plan solutions for legal problems.'"17

One way that law schools have been attempting to provide students education, i.e., to convey legal expertise, through non-traditional academic experience is through the clinical practice experience.18 One rationale for such experience is that students benefit by having experienced instructors model lawyering skills and by being allowed to practice these skills in a monitored situation where the students can be observed and tested.19 Another rationale is that "textbook" problems are generally highly structured and only relevant information is provided in the description, while real-life problems come to the problem solver with both relevant and irrelevant information available. Thus, part of the problem solver's task is to recognize what is relevant and to apply the relevant, learned problem solving skills appropriately.20 In clinical education "the dominant notion"21 of what problem solving is, is that "problem solving involves perceiving that the world we would like varies from the world as it is and trying to move the world in the desired direction."22 Thus, when students graduate from law school and have had a clinical experience, they enter the field as attorneys who have had experience and instruction in areas not specifically taught in the classroom. The enrollment in post law

16. See id. at 138-141.
17. See Blasi, supra note 8, at 326.
18. Recently the issue of whether or not clinical education should be the place where legal skills are taught has been debated. It is strongly felt by advocates of clinical instruction that the clinical programs have become too "skill-teaching" oriented, and, as a result, that they have drifted away from the main goals of clinical education. A discussion of this issue is not the main topic of this article, but it is an issue of great concern and importance. For a good summary of what the issues are, see Symposium on Clinical Education: Panel Discussion, 36 CATH. U. L. REV. 337 (1987).
school courses such as “Bridging the Gap” programs, designed to teach law school graduates how to be lawyers, speaks volumes as to the need for such instruction.  

The model of teaching via practical experience is also found in medical fields and human service fields, among others. In the medical field, Barrows and Tamblyn have been vocal proponents of the problem-based approach to conveyance of knowledge, whereby students receive a problem first and then develop the knowledge necessary to solve the problem, rather than being given a large body of knowledge first from which to select the appropriate bits to be applied to a problem that is later encountered. Developing the knowledge to solve the problem involves much more than simply finding an answer to a question:

The student does not listen, observe, write, and memorize; instead, he is asked to perform, think, get involved, commit himself, and learn by trial and error. He is asked to learn both cognitive reasoning skills and psychomotor skills of interview and examination, and to identify learning needs made apparent by his work with a problem.

The “teacher’s” role in this process is that of a guide or facilitator. He or she must understand the process of clinical reasoning in order to stimulate students to think for themselves, asking the right questions at the right times to aid the development of the “clinical reasoning process.” Barrows and Tamblyn claim that without this type of learning, medical students often complete their training and pass all their knowledge-based exams without knowing how to practice medicine effectively, a complaint analogous to that of law students who need a “Bridging the Gap” course after the Bar Exam.

23. See MCCRATE REPORT, supra note 4, at 286.
25. Id. at 83.
26. See id. The clinical reasoning process, for Barrows and Tamblyn, consists of five behaviors: information perception and interpretation; hypothesis generation; inquir-y strategy and clinical skills (where the clinician asks “search questions,” or questions designed to provide information in support of or to disconfirm the hypothesis, and “scan questions,” or questions to provide new cues as to the adequacy of the hypothesis set); problem formulation (the leading hypothesis emerges and the patient’s problem is conceptualized); and making diagnostic and/or therapeutic decisions.
V. EXPERTS AND NOVICES

The practical experience model of education may be further understood by studying cognitive psychology’s information processing model, which has been used to study “expertise” in general. When compared to the decision theory model, “rather than focusing on optimal methods of making individual decisions, cognitive science conceives problem-solving as a process that entails a sequence of decisions and actions, no single one of which is likely to be determinative.” 27 Blasi feels that “the core activities of lawyers entail problem-solving and the making of decisions,” and that, of the available models of problem solving and decision making, “the cognitive paradigm is more broadly applicable and of greater potential value in understanding a wider spectrum of lawyering expertise.” 28

Up to the 1950s, “intelligence” was seen as a global thing; you either had “it” or you didn’t. Education models during those days were developed around this global view of intelligence. With the development of computers and the field of artificial intelligence, the view that intelligence is an “all or nothing” proposition began to change. 29

In trying to program computers, cognitive psychologists made discoveries which led to the development of new theories of intelligence. 30 Rather than a global ability, the current view of intelligence consists of the idea of the presence of “cluster areas” of skill in the brain. Intelligence is “expertise” in some cluster area(s). Accordingly, cognitive psychology has focused on the study of intelligence as clusters of accumulated knowledge and their organizational systems in an attempt to understand how expertise is developed and how it might be imparted to and fostered in the novice.

Chi, Glaser, and Rees suggest that “the analysis of expertise in semantically rich knowledge domains is quite relevant to understanding the nature of intelligence.” 31 In their article, Chi, Glaser, and Rees point to

27. Blasi, supra note 8, at 331.
28. Blasi, supra note 8, at 318.
30. See ALLEN NEWELL & HERBERT A. SIMON, HUMAN PROBLEM SOLVING (1972), cited in MCCRATE REPORT, supra note 4, at 328.
31. M. Chi et al., Expertise in Problem Solving, in ADVANCES IN THE PSYCHOL-
the increasing emphasis on the structure of knowledge as a significant influence on intelligence and high-level cognitive performance: "The study of expertise forces us to focus on a new dimension of difference between more and less intelligent individuals—the dimension of knowledge—because expertise is, by definition, the possession of a large body of knowledge and procedural skill." To be an expert in a field, it is not enough to possess a large body of factual information; an organizational system with structure and procedural knowledge is necessary to apply the relevant factual information to the problem to be solved. Problem solving involves recognizing a pattern ("schema") from the flood of "facts" given in the problem and applying the appropriate problem-solving strategy once the pattern is recognized.

In examining abilities/clusters, cognitive psychologists have looked at the concept of expert and novice information processing and problem solution, comparing and contrasting these groups' performance in a variety of domains and analyzing qualitative as well as quantitative differences in their performance. The research in this area has found that experts and novices differ in a number of ways. In a study of radiologists, cognitive psychologists explored the diagnostic reasoning of experts and novices. They found that the experts looked at the x-ray material (the "facts" in this type of problem) and quickly extracted only relevant aspects, leading to the correct diagnosis. The true novices (who did have a great deal of schooling nonetheless) also frequently made the correct diagnosis, often in spite of attributing weight to irrelevant facts or even mistakenly "remembering" information. The somewhat experienced novice (i.e., more expertise than a novice but not an expert yet) seemed, on face value, to fare the "worst" as mistaken diagnoses were somewhat more frequent. These experienced novices seemed to become confused by the great amount of information available to them, leading to the quip that "a little knowledge is, indeed, a dangerous thing." Their mistakes came from remembering rare, complicating events that were suggested by the data, or by giving weight to "facts" that should have been discounted. Interestingly, the true experts saw the mistakes of the experienced novice


32. See id. at 127.


34. See A.M. Lesgold et al., The Acquisition of Perceptual Diagnostic Skill in Radiology, in LEARNING AND DEV. CTR., UNIV. OF PITTSBURGH, TECHNICAL REPORT NO. PDS-1 (September 1991).
as signifying that the novice was learning the material that was needed to become a true expert.\textsuperscript{35} Experts accepted this temporary increase in errors as an essential step in the process of becoming a true expert. The medical profession and the human service fields have valued the development of procedural knowledge through practical experience obtained in an internship or clinical placement. To these fields, an essential part of training (imparting expertise) comes from developing the organizational component of knowledge, and attention is specifically given to its development, as for example, in the exercises of "diagnose and defend" and "grand rounds".

Schoenfeld,\textsuperscript{36} in a study of expert and novice performance in another domain, found that the performance of experts was qualitatively different from that of novices. Experts apply problem solving strategies that, even if they are known to the novice, are not applied by the novice. Schoenfeld has also found evidence that expert problem solvers are better at problem solving than novices, even outside of their domain of expertise. This suggests that some mental capacity\textsuperscript{37} is developed as expertise is being developed. Experts are also more likely to conduct an "executive review" of the process they are engaged in, especially when the process gets bogged down, and they also redirect themselves if necessary. In general, the research comparing experts' and novices' performance has found that experts have an overall organized cataloging system for their knowledge as well as a large body of factual knowledge available.\textsuperscript{38} This system both drives their thinking in gathering information and organizes and makes sense of the feedback they get about this information. Experts further define and enlarge their organizational system by the processes of accretion, structuring and tuning, whereby information is entered, classified, and stored. Already stored information is further evaluated in light


\textsuperscript{37} To cognitive psychologists, what is being developed is the ability to manage one's intellectual resources.

\textsuperscript{38} See Blasi, \textit{supra} note 8, at 335.
of new information, and revisions in theories, modifications of stored information, and development of new hypotheses are made accordingly. Stored information affects the information gathering, evaluation, and storage processes of even more information, so that the “cluster” grows in depth, complexity, and sheer volume. Thus, the “expert” becomes ever more “expert,” or the intelligent person becomes ever more intelligent. New factual information coming into the system may affect (if only ever so slightly) already stored facts that may, in turn, require adjustment in the organization and storage of known material. The expert is able to accommodate this intake and reorganization with little effort or disruption. The expert is able to recognize the implications of new discoveries in the field on already known material and is able to appreciate its impact. The novice has a much more difficult time of things: any new discovery may be taken in as a fact in isolation with little or no appreciation for the impact on already known facts. For the novice to acknowledge the implications of new material on old material, a great deal of effort is required, and a careful “thinking through” must occur. It is thought that expertise means a very complex knowledge structure that fits together in multiple ways.

Envision, if you will, a mental filing cabinet with many files (organizers) filled with facts. The files are cross referenced in various ways, so that pulling one file means that several other files will need to be pulled, each of which, in turn, will necessitate the pulling of several more files, until, eventually, the multi-drawer mental filing cabinet is emptied. For the novice, this quickly becomes a confusing mess of “loose facts” or facts not tied to any organization, and the novice will experience difficulty in reorganizing those facts into their proper files. For the expert, this is not the case: the expert can quickly refile the loose facts, which are never seen as “loose,” but as related, organizationally, into a cohesive whole. For the expert, if new facts come in that necessitate reorganizing the entire filing system, it is relatively easily accomplished. Expertise affords flexibility in mental resources.

Recall, if you will, the level of concentration necessary for the novice driver of a manual shift car. All mental resources are focused on

39. Among cognitive psychologists, this is referred to as “spreading activation.” This occurs where the activation of a bit of knowledge in the brain activates other, related knowledge, which in turn activates still more knowledge, and so on, until a large body of knowledge is activated, or made readily accessible to the conscious mind.
applying the clutch, shifting gears in a specific pattern at specific times, steering the car, applying the gas or brakes, etc. Now imagine the novice’s reaction when the gear pattern is shifted from a standard 3 speed “H” to a less common pattern, such as is found in an 18 wheeler (a truck) with 13 gears. For an expert driver, the new gear pattern would be quickly assimilated, with little or no loss of functioning in regard to steering the vehicle. The expert may well be able to carry on a conversation with a passenger in the vehicle and tune the radio in addition to driving. The novice, on the other hand, may have difficulty even keeping the vehicle on the road, as his mental resources are all concentrated on the task of shifting gears properly.

VI. THE CONCEPT OF EXPERTISE IN EDUCATION

For educators, the model of “intelligence” as domains of expertise would suggest that education should center around imparting expertise to the student. Recalling that expertise requires both “facts” or bits of knowledge and an organizational system, the imparting of expertise would require transfer of both to the non-expert (novice or student). In law school, students begin the process of developing their organizational system and factual knowledge base. The traditional law school experience, however, is not focused towards helping the law student develop the organizational system necessary to perform like an expert. Law school curriculum is meant to develop inductive and deductive reasoning skills, which are admittedly necessary to the development of the organizational or “filing” system, but the development of expertise is left to the student, without guidance and specific instruction. In the words of cognitive psychologists, accretion (the addition of new knowledge to existing memory schemas) is accomplished in traditional legal instruction as is the provision of some basic schemas or “patterns” (e.g., the elements comprising a contract, which every first-year must memorize). However, structuring

40. “Structuring” is defined as “the formation of new conceptual structures, of new conceptualizations” where “the existing schemas will no longer suffice” and “new schemas must be formed.” D.E. Rumelhart, Notes on a Schema for Stories, in REPRESENTATION AND UNDERSTANDING 82 (D.G. Bobrow & A.M. Collins eds., 1975). Structuring is considered “probably the most important of the modes” of learning, and is essential for creativity and expansion of the field of knowledge; hence, it is essential in developing true expertise. See Donald A. Norman, Categorization of Action Slips, 88 PSYCHOL. REV. 208 (1981).
and tuning\textsuperscript{41} are not specifically taught. A possible exception takes place in clinical instruction programs.

The clinical experience is like the internship of the medical field — poorly understood in relative terms, and not clearly defined as to just what knowledge is imparted. Part of the difficulty in defining what is imparted is due to limited knowledge of how expertise in any field is developed. The clinical experience is under scrutiny in all fields and has met with criticism concerning its structure.\textsuperscript{42} Interestingly, the medical and human service fields have not questioned the value of the clinical experience itself, only its structure. This is not the case in the legal field. The value of the clinical experience has been questioned, and debate occurs over whether or not anything is imparted which cannot be taught just as well in the classroom. One interesting question to entertain, then, is: "Is anything special imparted to the law student in the clinical experience, and if so, what is it?" Given what is known from other fields' studies of the development of expertise, it would be expected that something special is, indeed, imparted, and one answer to the "what is it?" question may be that, in the clinical experience, supervising attorneys may help students to organize and cluster information and set up the mental files (schemas) in a particular area of law. Recalling the findings of Schoenfeld in other domains of expertise, the "essence" of this experience may then be extracted and applied to other areas of law, enabling the development of expertise more quickly and efficiently than where such experience is not available. The idea that the essence of expertise is learned is the rationale behind the internship requirement in medical and human service fields (albeit, not stated quite as succinctly).

Since the process of developing expertise is not well-understood and since there are no studies that specifically explore the similarities between the development of legal expertise and the development of expertise in other fields, the first question to be asked is: "Is legal expertise similar to or vastly different than other expertise?" Legal education has been seen as somewhat "different" than other fields of expertise: the medical and

\textsuperscript{41} "Tuning" is defined as "the fine adjustment of knowledge to a task," where "the proper schemas exist and appropriate knowledge is within them," but are "inefficient for the purpose," such that the knowledge must be "adjusted to the task." Rumelhart, supra note 40. This, too, is considered essential for true expertise. See \textit{See id.; see also} Norman, supra note 40.

\textsuperscript{42} In the medical field, for example, the tradition has been for interns to be on call for 36-hour shifts, off for 36 hours, and then back on for 36 hours, leading to charges of diminished capability to learn, increased risk to patients, etc.
human service fields, among others, have long seen the need for internship programs to help the student develop "procedural knowledge" or the structuring and tuning modes of learning, while the legal field has focused on the Socratic method as the major vehicle of developing expertise. The major purpose of the present study is to compare "legal expertise" to expertise in other fields (as described in the cognitive psychology literature).

The present investigation aims to explore the hypothesis that the student in the clinical program, as a result of his or her experiences, begins developing the "mental file" that the experienced attorney has available to himself or herself. If this is true, students with clinical experience will, during an interview situation, be able to more closely mimic the experienced attorney, while students with no practical experience will be expected to resemble the expert to a lesser degree. The inexperienced student should display inductive and deductive reasoning in the client interview and counseling situation, and mastery of the substantive area as a result of the training received in law school; however, it will be the student with clinical experience who, like the experienced attorney, will show the development of a "schema" — a structured and organized outline that both drives the kinds of questions asked and helps him or her develop the legal theory to be utilized to serve the client. Some evidence of the "executive review" should also be discernible.

VI. METHODOLOGY

The method utilized is modelled heavily after that used by cognitive psychologists studying the development of expertise in the medical field as well as in chess and physics. The "learner" (either expert or novice) receives a problem to be solved, arrives at the solution and then is "debriefed" by going back over the solution and the problem, recreating the problem solution steps aloud for the experimenter. The format is exactly what was used in the present study: the "learners" (subjects) were presented a problem (client with a legal need) and solved the problem (counseled the client). The learners were given 50 minutes for initial interview and counseling, which was videotaped, then asked to review the videotape, elaborating their thinking processes and hypotheses. That portion, too, was videotaped. The learners' thinking processes while reaching their solutions were thus investigated and their problem solving evaluated.
VII. Subjects\textsuperscript{43}

Three levels of "expertise" were represented in the investigation: lawyers, who represented the expert level of problem analysis; experienced novices, who represented some point of expertise hypothesized to fall between the expert lawyers and novices; and an inexperienced novice who was hypothesized to represent the true novice.

A. Lawyers

Four "expert" attorneys participated, drawn from the "pool" of attorneys known to practice Immigration Law in the Boston metropolitan area.

Expert One had been practicing law for fifteen years, thirteen of which had been devoted to immigration law. He estimated having handled approximately one thousand immigration problems. His formal legal education included one immigration law course. He was a clinical instructor in immigration law for three years, supervising approximately seventy-five students.

Expert Two had been practicing law for twenty years, fourteen of which had been devoted to immigration law. He estimated having handled approximately fifteen hundred immigration problems. His formal education had never included an immigration law course. He had taught several continuing education courses. Although he had never taught in the classroom, he reported having supervised about six students.

Expert Three had been an attorney for three years and had been practicing immigration law throughout those three years. She reported handling about one hundred immigration problems. Her formal education included an immigration law course. She had been a clinical instructor for the past one and one-half years, having supervised approximately fifty students.

Expert Four had been an attorney for eight years, five of which had been devoted to immigration law. She reported handling about five hundred cases. Her formal education did not include an immigration law course. She had taught several courses at the undergraduate level. She had also been a clinical instructor, having supervised about thirty-two students doing clinical work in immigration law.

\textsuperscript{43} The following descriptions are written to portray the subjects as they were at the time of investigation.
B. Experienced Novices

Two "experienced novice" attorneys participated, drawn from the "pool" of Harvard University Law School students who had participated in the school's Immigration Law class and its clinical component.

Experienced Novice One reported having worked as a law clerk for a private commercial firm during two summers. She was exposed to immigration law as a student in two immigration courses, one of which included a clinical component for approximately four months. She had never taught or supervised students. As a student, she had handled approximately seven immigration-related problems.

Experienced Novice Two had worked as a social worker for two years before attending law school. During her law school experience, she reported working on several non-immigration matters. She had also taught during the past three years (non-law courses). She also had, for the past three years, supervised non-law students, and had continued to work in the field of social work and participate in a clinical experience (Legal Aid). As part of her legal education, she had taken two formal immigration courses. She had never handled any immigration-related matter.

C. Inexperienced Novice

An "inexperienced novice" attorney participated, drawn from Harvard University Law School students who had participated in the school's Immigration Law class, but not the clinical component. The inexperienced attorney reported having spent one summer working as a law clerk with a private firm. She had never taught or supervised students. She had also never handled any immigration-related matter. Her legal education included one immigration law course.

VIII. CLIENT

The "client" interviewed by the learners (attorneys), both expert and novice, actually was an actor, trained to respond to the attorneys' questions with a specified fact pattern in mind. A training program for the actor included the instruction to respond to the questions so that information had to be elicited by the attorney, rather than having it be freely "volunteered" by the "client." In other words, the attorneys determined the course of the interview and what facts emerged by his or her line of
questioning. The use of simulated clients has been recommended by several investigators, including Farmer, primarily because of ethical considerations. Here, while the ethical considerations are important, the control factor is equally weighed: where there are no "real life" consequences for a client, the experimenter is able to control variables, such as the "facts" inherent in the case, and the behavior of the "client." The following "fact pattern" provided the basis for the "client's" story:

Luis Montoya Hernandez was born July 9, 1965, in San Salvador, El Salvador. He has two brothers, Juan Montoya Hernandez (DOB 11/20/63) and Carlos Montoya Hernandez (DOB 11/2/60). Luis had a sister, Juanita Montoya Hernandez (DOB 9/11/67), who died during childhood of severe blood loss as a result of an accident, her parents having refused to allow a blood transfusion based on their religious beliefs. His parents are Carlos Montoya (DOB 6/25/25) and Juanita Hernandez (DOB 8/35). Both of his parents were born in San Lorenzo, Departamento San Vicente. Carlos Montoya died in June 1980 after suffering a massive heart attack. Carlos and Juanita left San Lorenzo in 1958 after they got married. For Juanita, it had been her first marriage. Carlos had previously lived with his common-law wife, Rose Aguilar, and in this marriage he had four children: Ileanexis, Marines, Jaime and Delfin. Luis doesn't know where his half brothers and sisters presently reside or their DOB's. Luis is now residing in Boston with his "wife" Maria and two children.

In 1958, Carlos and Juanita left San Vicente in search of a better job, and to move away from Rosa Aguilar, who was very upset that Carlos had left her and their children. Prior to moving to San Salvador, Carlos had been a "capataz" on a farm. In 1975, after Juanita died, Carlos and his family moved back to San Vicente. Although Carlos and his family were doing well in San Salvador, things were not as good as Carlos had dreamed. By the time the family moved back to San Lorenzo, all of the boys had attended Escuela Elementary; however, Luis' older brothers had left school at 10 and 12 years of age to take jobs with their father as day laborers in construction. At the time they moved back to San Lorenzo, Luis was ten years old. He never attended school again.

After returning to San Lorenzo, Luis, his brothers, and his father worked on a farm between 1975-79, while Luis' mother remained at home where she did some paid "washing" of uniforms brought to her by members of the local National Guard. After 1979, however, she refused to do any more of this work, complaining that she had noticed blood on the uniforms, and that, in good conscience, as a Jehovah's Witness, she had to stop doing the work.
After his father died in 1980, Luis, at the age of fifteen, got a job working for an American from Boston, Massachusetts, who was an expert tile maker. His name was Rod Johnson. As part of his new job, Luis learned to make a variety of tiles, used primarily to replace antique tiles in "rehab" projects or in construction of "Spanish"-style buildings. Rod Johnson's tile-making business was unique, as the tiles were of a "custom Victorian" which required the use of a unique tube lining process in their construction. Rod had received training in this technique in England and Japan, and, within his unique designs, he combined aspects of ceramics from the two disparate countries. Most of his tiles were sold to upper class clientele from San Salvador, interested in historical restorations and handcrafted designs. Rod grew very fond of Luis, as Luis showed a lot of artistic talent and learned tile making very quickly. Luis presently works for Rod in Boston.

In 1982, San Vicente became a center of fighting between the Salvadoran Army and the Guerrillas. Rod's factory was burned several times until he found it necessary to leave El Salvador. Between 1980 and 1982, Luis was "recruited" several times by the military. However, Rod, who had become very influential, had intervened on Luis' behalf and was able to acquire "dispensations" for him. After Rod left in 1982, Luis began to feel more vulnerable to "recruiters." Part of his insecurity was due to the several contacts he had with the armed forces. In addition, his brother Carlos had left El Salvador in June 1979, running away from guerrillas, and his brother Juan had left for the United States in March 1980 for the same reasons. Since coming to the United States, Carlos has married a United States citizen, Mary Holmers, and has himself become a United States citizen (1984). He presently resides in Denver, Colorado. On the other hand, Juan became a permanent resident in 1989 after applying under the amnesty program. He is presently filing a petition for his undocumented wife. Since both brothers had left, Luis stayed as long as he could in El Salvador to take care of his mother.

Luis' "wife," Maria, born January 2, 1967, has been a lawful permanent resident (LPR) of the United States since January, 1987. After acquiring a visa to visit her mother, shortly after beginning to live with Luis as his "wife," Maria had left El Salvador in March, 1982. Luis remained in El Salvador until February, 1983, when he became concerned about his safety. He went to the American Embassy in El Salvador and requested a visa to visit friends in Boston, Massachusetts. He was afraid to tell the officials that he feared for his life, in the belief that the U.S. government would begin an investigation into his story and inadvertently
tip off the very people he feared as to his whereabouts and allegations. He had heard from people "on the streets" that if he told the officials that he had a "wife" in Boston, he would be denied a visa to visit, especially since he owned no property in El Salvador and had no money in the bank there. His visa was denied. He entered the United States on March 1983 through El Paso, Texas, after paying a "coyote" $1000.

Maria had acquired her permanent residency under a second preference petition filed on her behalf by her legal permanent resident mother, Teresa, in January, 1985, after her mother learned that she could file for her daughter without becoming a U.S. citizen. At the time of the petition filed on her behalf, Maria was living in the U.S. with Luis and two children: Fernando, born 12/8/83, and Hilda, born 10/13/85, a brittle diabetic under close medical supervision. Maria and Luis considered getting married after Hilda was born. Teresa asked them not to get married, however, since she had been advised by counsel that, as a permanent resident, she could only file a petition for Maria if Maria was not married. Teresa advised Maria to remain unmarried until her petition was approved.

Luis, a devout Jehovah's Witness who is prohibited by religion from serving in the armed forces and from killing, is very fearful of returning to El Salvador, even for a brief period, as he has been questioned by the armed forces in El Salvador as a potential recruit. In fact, shortly before leaving, they advised him to prepare for his induction into the army. Ironically, the men of his village were primarily rebels, who had of late been pressuring him to join their faction. The army does not recognize the conscientious objector status of Jehovah's Witnesses. Six armed men dressed in civilian clothes had come to Luis' home for the first time in February of 1982 at nine o'clock at night. They identified themselves as members of El Salvador's armed forces. They had a list of names, including Luis' and Maria's, and told them that they needed to report for duty in April of 1982. Maria was by then in the U.S. with her mother. Luis did not report. In June, three of the six men in civilian dress, again armed, came to Luis' house at one o'clock in the morning. They confronted Luis about the fact that neither he nor Maria had reported as ordered. Luis told them that his religious beliefs prohibited him from serving in a military organization. The men told him that his continued failure to report for duty would be interpreted as a sign that he favored the rebel forces. At that point, they asked about Maria's whereabouts, and Luis, afraid to say that Maria was in the U.S., lied and said he did not know where she was. The men said that they knew where she was—with the rebel forces. The men "arrested" Luis and took him to a building.
While being detained, he was tied up, given very little water and no food, and constantly threatened. Finally, after seven days, he promised to join the force and was released in order to gather his belongings, after which he was supposed to report for induction. Instead, he went into hiding, moving from friend’s house to friend’s house or into the woods, until he learned in December of 1982 that armed men dressed in civilian clothing had been seen burning the house that he had lived in and roughly questioning his mother, relatives and neighbors. Since leaving El Salvador, Luis has been “home” once, in 1985. He returned on that occasion after learning that his mother was dying. He returned to the U.S. and was miraculously able to fool the immigration service by using the passport of his brother, who is a U.S. citizen.

Luis has learned “on the street” that if he and Maria marry now, Maria can file a petition on his behalf and he can work legally. He has been working as a tile maker since he came to the United States. He has always worked for the same company, and Rod is satisfied with his performance, but has lately found it increasingly difficult to retain Luis because he does not possess a “green card.” A company attorney conveyed to Rod his belief that, under the new immigration laws, the company was in a position to be heavily fined. Rod has offered Luis any assistance he can give him, since Luis’ skills are unique. Furthermore, Rod has heard rumors about an amendment in Congress that would, he thinks, make it easier for Luis to stay in the U.S. because of his skill.

Maria is now employed as an outreach worker for a non-profit agency serving the Hispanic community. While her job does not pay quite enough to fully support the family, it does provide benefits that cover the large medical costs of managing the youngest child’s diabetes, and that will cover the costs of Maria’s current pregnancy.

IX. ANALYSIS

“Points” were awarded for each “fact” uncovered by the interviewer’s questions. The fact pattern contains a number of “red herrings”, i.e., facts that suggest a legal remedy to the client’s problem that would not be fruitful. While “points” were awarded for uncovering these facts, they could be seen as weighing far less than the facts that are relevant to the optimal legal remedy available to the client under the fact pattern. It was expected that the experts and, to a lesser degree, the experienced novices, would spend much less time than inexperienced novices following up unfruitful leads because they would recognize them as such.
early in the process, thus probably uncovering fewer of the irrelevant facts.

The hypothetical developed allowed for 135 "facts" (or points) about the fictional Luis Montoya Hernandez, his family and biography. These "facts" represented known bits of information, regardless of importance in either determining the advice given to the client or the likely outcome of the case. The "facts" were embedded in the biography of the fictional client, to be revealed to the interviewing attorney in response to questions asked. The actor portraying the fictional character was instructed to respond to questions asked, "volunteering" essentially no information. In addition, each attorney was expected to identify the appropriate legal remedy available to the client.

X. RESULTS AND DISCUSSION

It was not expected that any attorney would elicit all 135 facts during the allowed 50 minute interview, and none did. A rather narrow range was observed; one attorney uncovered 27 facts (the fewest number) and one uncovered 66 (the highest number). Sometimes interviewers, both the experienced and novice, asked very open-ended questions which, when responded to in an appropriate fashion, revealed numerous facts. For example, one interviewer asked, "Were you ever personally in danger by the political situation in El Salvador?" Obviously, an affirmative answer would always spur follow up questions, while a negative answer would not necessarily do so. An expert might use different wording, with open-ended questions allowing the most latitude to uncover facts (e.g., "Tell me why you do not want to go back to El Salvador.") Because the fact pattern had included some descriptions of encounters with people in El Salvador, along with speculations about which political faction was involved, the purpose of the encounters and the client's reactions to the encounters, the simulated client tended to "volunteer" many facts in rapid succession, while a more focused, close-ended question, such as "How many men came to your house?" did not produce such a deluge of facts.

The sheer number of facts elicited had little to do with whether or not an appropriate remedy was uncovered for the clients; the attorney uncovering 27 facts correctly identified the appropriate remedy(s) and counseled the client.

That the expert and novices did not significantly differ in this simple, quantitative measure of "success" should not be taken as an anomaly, as other researchers of "expertise" have found similar patterns. For exam-
ple, Chi, Glaser and Reese 44 found that expert physicists and novice physicists did not differ in performance when sorting problems according to solution data. If one thinks of a legal problem as analogous to a physics problem (i.e., identifying the physics principles to be applied for problem solving is analogous to determining the appropriate legal remedy available to the client), it comes as no surprise that the expert and novice attorneys here were able to discuss appropriate remedies with the client.

How, then, did the experts differ from the novices? While the scope of this study is rather small and hence does not allow for elaborate, definitive analysis, some striking tendencies did emerge that are in keeping with other researchers' findings in other domains of expertise.

Recall that other researchers investigating expert/novice differences in other domains of expertise have found that novices tend to have difficulty sorting irrelevant information from relevant information. This was true in the present case to some extent, as the inexperienced novice obtained such information as the client's mother's and father's names and their birth dates. In the debriefing interview, one of the expert attorneys indicated that he might obtain some of this type of information further along in the process, but that he saw a need to determine a probable course of relief for the client and to begin the process necessary to obtain that relief, and that such information was not germane for the first interview.

Another difference that was striking was the "level of confidence" exhibited by the three levels of experts. The expert attorneys all ended the interview with the outline of a plan to obtain relief, including alternative plans in the event that "Plan A" did not meet with success. In the words of one expert, "I wanted to let the client know that I could handle this." The experienced novices also outlined plans to obtain relief and alternative plans, cautioning the client that they needed to check with the supervising attorney to ensure that no errors or omissions had been made. The inexperienced novice did not end the interview with such an outline, indicating to the client that there was a need to confer with a supervising attorney. The inexperienced novice asked the client "Is there anything you want to ask me?" The client said "I don't know what to do next." The novice followed this statement up with instructions to bring a copy of Maria's petition for permanent residency and a statement from the employer, but she did not respond to the obvious statement by the client that he did not feel reassured, and that he did not know where things

44. See Chi, supra note 31.
were going or what to expect. Thus, there is some evidence that attorneys who have dealt with clients have learned that the client wants to hear that their problem (for which they came seeking advice) can be dealt with appropriately, and that there is something to be done to bring about relief. When one considers that people seeking legal advice are usually upset in some way, it becomes clear that leaving the client with a plan of action can be very reassuring and may be a factor that the client utilizes when choosing an attorney for representation.45 This provision of a plan of action to the client, by the way, was also true of the novice who had clinical experience in another field of law, suggesting that, as Schoenfeld predicted, some essence is extractible and makes for better problem solving even in domains outside of the area of expertise.

In outlining the plan of action for the client, the experts displayed amazing agreement with each other and with the experimenter in regard to the hierarchical ordering of remedies available to the client (see Appendix for analysis of the legal remedies and the “solution” to the client’s problem). The experienced students also displayed a very similar hierarchical ordering, but, like novices in other domains, got some of the details wrong. For example, they recognized that the preference system represented the most likely obtainable remedy, but thought that it would be more readily obtainable through the client’s brother rather than through Maria, as they counseled the client that application should be made through the brother, a U.S. citizen.

A very striking difference between the experts and novices was the speed at which the experts reached the hierarchical ordering of the obtainable remedies and were ready to counsel the client. Within five minutes of the interview’s start, the experts were clearly focusing on the client’s relationship with Maria (“establishing a bona fide,” in one expert’s words) and bringing up the question of marriage to Maria. While this may seem to be uncomfortably swift to some, the fact that it was displayed by all the experts points to it being a significant finding, the meaning of which is certainly worthy of further study. It also made the experts’ “clusters” readily discernible, as the client’s responses to questions “ruled in” or “ruled out” various remedies. For example, to the experts, the fact that the client was from El Salvador made the probability

45. It is known that clients often “attorney shop” by having an initial interview with more than one attorney. Initial interviews are often less costly than later hours for which the attorney’s usual billable rate is charged. Initial interviews with some firms or attorneys in private practice are even free.
of an asylum petition very unlikely to succeed, as the political situation is such that the requisite "proof" of reasonable fear of persecution is very rare. Questions pertaining to the relatively rare circumstances where such "proof" is discernible came in quick succession, and when the "key" answers did not fit the pattern, the questioning was abandoned quickly. The novices tended to go (nearly) through the entire litany of questions around the clusters, even if some key elements were not answered in the desired direction.

Probably the most striking difference between the experts and novices had to do with the amount of "enriched knowledge" applied to the finding of a solution. As indicated above, the experts tended to "weight" factors involved in the legal remedies according to information that they had about the courts, world affairs and recent court decisions — i.e., they displayed evidence of tuning and structuring. For example, in determining whether or not an asylum petition should be pursued, the experts used the knowledge that a reasonable fear of persecution must be established. To determine this, one novice asked a series of questions as follows:

[Was]ever you personally in danger by the political situation in El Salvador? . . . who were these people? . . . did you hear anything else from them . . . can you think of any other instances where you were in personal danger by the political situation?

The experts did not tend to pursue this line of questioning as extensively as the novice. While the experts devoted only a small amount of the time following this line of reasoning, and then only as a fallback position (or a second remedy to be pursued in the event that the remedy of choice did not go as anticipated), the novices devoted a large portion of their time to the development and assessment of this particular theory. For example, one expert's complete line of questioning regarding persecution consisted solely of several questions dealing with the client's religion (Jehovah's Witness), and then only after the client had indicated his desire not to return to his native El Salvador. This expert indicated that his knowledge of a superior court's decision, in which the court granted asylum to a petitioner who was a Jehovah's Witness because the religious beliefs of the petitioner contributed to greater risk of persecution in El Salvador, influenced his decision to pursue this line of questioning. His "cluster" of information about El Salvador and asylum petitions incorporated this knowledge and "reorganized" his usual pattern of thinking about asylum petitions, and his problem solving was adjusted accordingly. He asked:
"Tell me a little of why you don't want to go back... what religion are you... how long have you been a Jehovah's Witness... is your family (Jehovah's Witnesses)... can you prove this with documentation... even in El Salvador, they sometimes give a membership card to Jehovah's Witnesses, do you have one... are you a practicing Jehovah's Witness... are you known in Jehovah's Witness's circles to be a good Jehovah's Witness... Are there people here who can write letters here... are there people you know in El Salvador who can write that you were a Jehovah's Witness there?"

This expert's reasoning and line of questioning was hypothesized to be (and later verified by his own admission to be) influenced by the fact that, in immigration law, few petitions for political asylum have been granted to Salvadorans, especially where the petition rests on fear of persecution because of political activity. Furthermore, recent decisions by higher courts have seemed to suggest the possibility that a claim for political asylum based on refusal to serve in the armed forces because of religious convictions may be considered to be legitimate. While political asylum petitions are supposed to center around the reasonable fear of persecution, the practice of immigration law subtly shades the experts' expectations and they respond by amending the focus of the petition (evidence of structuring and tuning). The experts did not "waste time" by pursuing lines of questioning that seemed to have little likelihood of success, especially where it appeared that other remedies to the problem in question existed.

The experts were not misled by the deliberate red herrings implanted in the hypothetical. The novices, on the other hand, were led astray to some degree, and generally spent more time asking questions about or listening to reports of fear of confrontation by men who had come to the client's home at night. One expert, in a very revealing moment of candor, indicated that his business, as he saw it, was to determine a remedy that would result in the client's desired outcome (obtaining legal working papers and status); this was his "business," rather than being the client's "social worker," listening to past incidents that had little likelihood of success in remedy, or processing the client's experience in an admittedly difficult social/political environment (El Salvador). This pattern appears analogous to other researchers' findings in other fields. For example, novice physicists were led astray by the surface features of problems presented when they sorted physics problems, while the expert physicists were not, and sorted the problems according to principles of physics...
necessary for correct problem solution.\textsuperscript{46}

There were striking similarities in the approach of the expert attorneys to the interview. All the experts devoted the first minutes of the interview to asking a basic set of questions from which they were able to "diagnose" the case (within five minutes, as noted above). This set of questions did not vary appreciably from expert to expert. For example, all the expert attorneys asked the client how they entered the country, whether or not they had relatives in the U.S., whether or not the client had been detained by the Immigration and Naturalization Service, and whether or not the client was presently employed. Based on the responses to these questions, the experts were able to conclude that in this particular case the best option for the client was to marry his (by then) U.S. citizen girlfriend and then have her file a petition on his behalf. Having reached this conclusion, the experts then devoted the next minutes of the interview to developing "the fallback" position of political asylum. The novice attorneys followed a similar pattern in their interviews. However, they spent more time in the initial stage of the interview and were distracted by the "red herrings." The novices also considered the issue of political asylum to be of more importance than the experts. The novice attorneys admitted that once they began asking questions about persecution in El Salvador, they framed their questions in such a way that the elicited answers began to form the basis of the affidavit to be submitted in support of the application for asylum. One of the novice attorneys admitted that once she found out the client was from El Salvador, she recalled her experience as a clinical student with the cases on which she had worked.

From all of these observations we can see that, as predicted, the expert attorneys had an organizational system with structure and procedural knowledge that allowed them to apply the relevant factual information to the problem to be solved. They recognized several "schemas" from which they were able to determine several possible solutions to the immigration problem presented by the client and then they applied the appropriate problem solving strategy. The experts looked at the facts (analogous to the "x-rays" in the study of radiologists) and quickly extracted only relevant aspects, leading to the correct diagnosis. The novices that had in some way applied their schooling to real life situations

through the clinical program also made the correct diagnosis, although they felt the need to confer with an experienced attorney to confirm their diagnosis.

Because the present investigation uncovers striking similarities to other researchers' findings regarding developing expertise in other fields, the conclusion that legal expertise is developed in a manner more similar than dissimilar to other fields appears appropriate. In some ways, this is reassuring. A finding that legal expertise development is vastly different would be truly disconcerting. It is also exciting, as it suggests that further study of educational theory in law can be expedited by the findings of researchers in other fields, whose contributions have improved education in those fields. Persons interested in conveying lawyering skills need not take on the task alone.

Obviously, there is a need for further study of the hypotheses presented in this Article. It is readily acknowledged that the sample of attorneys, including experts, experienced novices and inexperienced novices, was very small and perhaps not representative of the population at large. However, the similarities in the findings between the present investigation and the numerous investigations of experts and novices in other domains is encouraging and suggestive. Certainly, replication studies should be undertaken. Studying larger groups would allow investigation of between-group differences and within-group similarities suggested in the findings here, but in need of further exploration.

The present Article should be seen as a first step in the investigation process and, because of its narrow scope, it is meant primarily to spawn questions. In that endeavor, it appears to have made a contribution.

47. See Chi, supra note 31.
XI. APPENDIX

The hypothetical presents several legal questions that the interviewing attorney must address in order to properly counsel the client.\textsuperscript{48} The initial concern in determining the proper advice to the client is the client's desire to get a work permit and his strong stance against returning to El Salvador for fear of losing his life or being persecuted.\textsuperscript{49}

Luis' initial concern relates to the fact that his employer is becoming worried about Luis' status and is afraid that the company may be fined. The company's concern stems from the 1986 passage of the Immigration Reform and Control Act (IRCA), which makes it illegal for all employers to knowingly hire, recruit, or refer for a fee unauthorized aliens, or to continue to employ aliens who they know have become unauthorized to work.\textsuperscript{50} The act also provides for civil and/or criminal fines for violations of the act. The requirements of IRCA do not apply, however, to persons employed before November 7, 1986, the date of the enactment of IRCA.\textsuperscript{51} Therefore, if Luis' concern is limited to "getting" a work permit, Luis should be informed that neither he nor his employer needs to worry since he was hired before the statutory date.

During the interview, it should become obvious to the attorney that this client has several options that may allow him to acquire permanent residency in the U.S. The attorney should pursue these alternatives with the client, assuming, of course, that the client wants the alternatives pursued.

The fact that the client comes to the attorney just for a work permit should signal to the attorney that either this client is not well informed about immigration laws or, if he is well informed, that there may well be a reason why he is not interested in becoming a permanent resident. It is

\textsuperscript{48} The hypothetical reflects the state of immigration law as of the Spring of 1991. The participants based their interviews on the law as it was then. It is acknowledged that in some instances, because of changes in the law, the interpretation or citation of a particular section of the Immigration Code may not reflect these changes. The author decided to report the findings of the study without modification in order to focus upon the lawyers' thinking, rather than upon facts of law. The reader, if interested, is advised to research present law.

\textsuperscript{49} For a list of aliens who qualify for employment authorization, see 8 C.F.R. § 274a.12 (1996).

\textsuperscript{50} See 8 U.S.C. § 1324a (1994); see also 8 C.F.R. § 274a (1996).

\textsuperscript{51} See 8 C.F.R. § 274a.7 (1996), also known as the "grandfather clause."
not uncommon for clients like Luis to have relied on information "heard" in the streets, which is, more often than not, inaccurate. There is a good example of this in the hypothetical. If Luis is asked why he has not married Maria, he will respond that his understanding is that if he marries her, she will lose her status as a permanent resident of the U.S. because she came to the U.S. as a result of a petition by her mother under the second preference, that is, the "unmarried" daughter of a permanent resident alien. Luis got this information from the "streets" and, of course, it is not accurate, since the marital status of Maria is only relevant for the initial petition by her mother. Once Maria was admitted to the U.S., she was free to get married.\textsuperscript{52}

It is also not uncommon for clients with Luis' background to be aware of the possibilities of acquiring, through marriage, the status of permanent resident, but not wanting to follow that alternative for personal reasons. In short, this area is ripe for exploration by the attorney.

The strongest alternative for Luis to acquire permanent residency will be through marriage to Maria, who became a permanent resident in January, 1987. The Immigration and Naturalization Act (I.N.A.) provides for a limited number of visas to be allocated worldwide under what is known as "the preference system," which consists of six categories.\textsuperscript{53} The second preference category includes the spouses or unmarried sons/daughters of lawful permanent residents (LPR).\textsuperscript{54} LPR status is granted to persons who, under the act, meet certain qualifications, and it is a status which can eventually lead to citizenship.\textsuperscript{55} A permanent resident has many of the rights of a U.S. citizen, except the right to vote and to hold office in some states (among other exceptions). Whereas citizenship is difficult to lose, permanent residency is a "defeasible" status.\textsuperscript{56} An LPR could lose his status by leaving the country for more than a year\textsuperscript{57} or by being convicted of certain crimes.\textsuperscript{58}

Permanent residents (LPR's) can apply for permanent residency for their husbands, wives, and unmarried children. The process of applying is relatively simple\textsuperscript{59} and consists of the submission of several immigration

\textsuperscript{59} See 8 C.F.R. § 204.1 (1996).
forms, completion of a medical examination, and proof that a marriage is bona fide (e.g., affidavits from friends attesting to the validity of the marriage, marriage certificate, legal documents naming both parties, birth certificates of children naming both parties as parents). In the present hypothetical, some difficulties may arise in gathering documents since the client is not officially married. Additionally, the client in the hypothetical faces several problems of which he should be made aware. The biggest problem is his inability to "adjust" his status. Adjusting status is the process by which an alien files for a change of status from "illegal" or non-immigrant to permanent resident. The process of "adjusting" status would allow Luis to remain in the U.S. and legally work while the Immigration Service processes his application. Otherwise, the INA will require Luis, as a result of IRCA, to travel to El Salvador for his final interview.

In order to adjust, the INS regulations provide that the following requirements must be met:

1. The alien must have been inspected upon entry;
2. The alien must be at the time of application in legal status (except for husbands and wives of U.S.A. citizens);
3. The alien must not have worked in the United States illegally; (except for husband/wife of U.S.A. citizens)
4. A visa must be available immediately.

It can readily be seen that this client fails several of the tests: Luis entered the country illegally and therefore was never inspected; he is presently in the U.S. in an undocumented status, and he has also been working in the U.S. illegally. Finally, under the present numerical allocations for the second preference, this client will have to wait anywhere from eighteen months to twenty-four months before he will be called for an interview without the possibility of a work permit.

A possible solution to this problem might be for Luis to marry and remain in his present status until his wife applies to become a U.S. citizen. Quick calculations show that it may be two to three years before this client would be able to benefit from his wife's citizenship, and, once again, he would be unable to work legally for most of the time spent waiting. A note of caution should be given to the client to the effect that, under present regulations, if he is placed in deportation proceedings, marriage will not help him since the regulations provide that anyone

61. See id.
marrying for residency while in deportation proceedings must leave the
country for two years before an application can be filed on his behalf.\textsuperscript{62}

The lawyer interviewing Luis should inquire into the possibility of
Maria not only marrying Luis but also becoming a citizen of the U.S. and
then filing for Luis under a category excluded from the quota system, i.e.,
immediate relative of a U.S. citizen. "Immediate relative" includes
spouse, unmarried children under the age of 21, and parents of U.S. citi-
zens. The advantage of applying under this category is that Luis should
be able to acquire permanent residency at an earlier date than those con-
sidered under the preference system. Additionally, applicants under this
category are allowed to work legally in the U.S.

The attorney interviewing Luis will probably inquire as to the status
of Maria, as well as how and when she acquired the status. The attorney
will immediately find that Maria has been an LPR since 1987 and will
not qualify for citizenship until January of 1992. At that time she will
have to apply for citizenship, and the process of acquiring her citizenship
could take anywhere from six months to a year. Although this alternative
may appear at first glance to provide a shorter waiting period for Luis at
the present time, in the long run it does not appear to solve the major
concerns of Luis since he will, on the basis of having entered the country
illegally, still not be able to "adjust" his status and will have to go to El
Salvador for the final interview. It remains that, for the reasons stated
previously, Luis should really have no problems continuing his work
without a permit.

It is important to determine what kind of relationship Luis has with
Maria and whether or not marriage is, in fact, a feasible alternative. After
discussing the possibility of marriage with Luis, the interviewer should
advise him to marry Maria and have her file a petition on his behalf
under the second preference, provided, of course, that Luis is open to the
suggestion. As soon as Maria becomes eligible, she should apply for
citizenship and, at that point, amend her petition to one of immediate
relative.

On this issue, one last caution should be given Luis. If he does not
marry Maria and gets placed in deportation proceedings, he will, under
the Marriage Fraud Act of 1976, be subject to a two-year foreign residen-
cy requirement if he gets married after such proceedings.\textsuperscript{63} Luis will be
required to wait for two years in a foreign country before his wife can

\textsuperscript{62} See infra note 64.
file papers for him. In Luis's case, if Maria does not become a U.S. citizen, and the allocation of visas for the second preference remains the same, it could take Luis up to four years to become an LPR.\textsuperscript{64} Finally, Luis should be warned that, if at the time he is granted LPR status, he has been married for less than two years, his LPR status will be considered "conditional" and he will have to file a petition for removal of the condition during the ninety-day period preceding the second anniversary of the grant of the conditional status.\textsuperscript{65} Failure to file this petition will result in loss of his LPR status. Separation or divorce during this "conditional" period will create a presumption that the marriage was fraudulent.

Another alternative available in the hypothetical is the possibility of applying for political asylum.\textsuperscript{66} Since this client has not been "caught," he will be filing "affirmatively," which will give him a longer legal process if he is denied. Under this solution, the client will be able to acquire a work permit. Although it looks like a good case exists for asylum, it is a well-known fact that applicants from El Salvador have a very difficult time succeeding in this process. It is a good bet that the client will be denied and will engage in a long legal battle. Also, the client must again be warned that denial at the initial stages will place the client in deportation proceedings, making it difficult, at that stage, to have his wife file a relative petition under the previously described Marriage Fraud Act. The lawyer may consider looking at the possibility of filing the asylum petition at the same time he is pursuing the marriage options. Since Luis cannot "adjust" and will be required to return to EL Salvador for his final interview, a "solid," strong, well-documented asylum petition may help him convince the INS to allow him to complete his final interview in a country other than El Salvador.

Since Luis is from El Salvador, the attorney may consider suggesting that Luis file for Temporary Protected Status (TPS). In October 1990, Congress passed, and later the President signed into law, the Immigration Act of 1990 which, among other things, provides temporary protected

\textsuperscript{64} At the time the hypothetical was developed, Congress was still in the process of considering amendment of the Marriage Fraud Act. Just a few days before we began the interviews, the President signed into law an amendment to the Marriage Fraud Act which provides that the 2-year foreign residency requirement does not apply if the alien establishes to the satisfaction of the Attorney General, by clear and convincing evidence, that the marriage was entered into in good faith. \textit{See} 8 U.S.C. § 1255(e)(3) (1994).


status (protection from deportation) and work authorization for aliens in the United States. Congress has specifically designated El Salvador as a target country for an initial period between the effective date of the Act and June 30, 1992. In order to qualify for this program, Luis needs to complete his application by June 30, 1991. This act only protects Salvadorans from deportation for a period of eighteen months, after which time the INS could begin proceedings against them. However, this act may well give Luis legal status while he waits for the petition to be completed.

Another possible solution exists, in the form of the remedy of Suspension of Deportation. For this remedy, the applicant must show that he has been in this country continuously for more than seven years (if convicted of a crime, ten years), must show that he is not deportable under one of the grounds listed in the INA, must be in deportation proceedings, and must show the he will suffer “extreme hardship” if deported. Favorable factors include the ages of his children, length of time in this country, family ties in the U.S., employment record, and (while not particularly helpful for this particular client) educational background. Because Luis is not currently in deportation proceedings, this remedy does not offer a solution to him at this time. However, Luis needs to know that this remedy is available to him in the event any of the other remedies fail and he is placed in deportation proceedings. That would be easily remedied. The circumstances identified in the hypothetical appear very favorable for this remedy.

Finally, the interview should reveal that Luis has acquired a special skill that may allow his employer to file for Luis under the sixth preference, or what is known as “Labor Certification.” Luis appears to meet all the requirements of the statute and has an employer who is willing to assist. However, this remedy is not easy to get and requires a long period of waiting and, at times, is very expensive. This is probably the “least likely to help Luis” alternative. Of course, in real life, the lawyer may very well find a client who would be unwilling to marry his “common law” wife or girlfriend, who is not willing to risk filing for asylum out of fear for the safety of his family back home, or simply is not willing to accept the travel restrictions to his country imposed by asylum status. In that case, Labor Certification may be the only feasible remedy, and the lawyer should therefore consider it.