

A COMMUNICATIONS TEACHER LOOKS AT BUSINESS LAW

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Some time ago I was seated in the office of a lawyer whom I had known in law school when he received a phone call. From the one part of the conversation that I could hear it was obvious that a client was calling to ask about a real estate contract which had already been signed. The only course left to the attorney was to point out to his client that the damage was done, that the lawyer should have been consulted before signing the contract not afterwards. My first reaction was, "Now if that individual had had a course in business law he would not find himself in this unfortunate situation." My second, and sobering thought was, "A course in business law would have been so helpful, IF the section of the Statutes of Frauds dealing with the signing of real estate contracts had been remembered. But if that had been forgotten, then, so far as this specific case is concerned, business law might just as well have been dropped and some other course taken while the student was in college." That example brought home to me very forcibly that what a student learns in college is not always significant, but what he retains for use in later life is.

Of course, this is in no sense any disagreement with all of you who point out that the prime function of a course in business law is not the learning of a set of rules by rote to be repeated on quizzes and examinations. None of you feel any more strongly than I that the value of a course in business law is not limited to the mere teaching of something of the rules of law but includes the process of thinking, of analysis and of selection. Most important is that any study of law of any kind should make the student aware that law deals with human relations, not abstract logic, that Aristotelian syllogisms are excellent mental exercises but not always practicable to real-life situations because there are so few absolute major premises to which perfect minor premises can be applied, resulting in an absolute conclusion.

But can any of those other objectives be attained without the use of some "memorized" material—and I put the word "memorized" in quotation marks to indicate that it is something more than parrotlike repetition that is needed? To take an extreme and absurd example (they frequently illustrate the point best), think of how completely impossible it would be to live without some retention of ideas on which we could base our actions. Shaving, cooking breakfast, going to school in the morning to meet classes, all require that we recall previous experiences so that we can repeat those actions. So with thinking. It cannot be done unless there is

some previously ascertained material that we can retain in our minds a sufficient length of time to form a basis for further analysis and thought. While the perfect syllogism may be difficult to find in actual life, the form of working from a basic assumption and proceeding through new evidence to a new conclusion is a valid methodology even though the conclusion must be subjected to certain exceptions and variations because of the nature of man. But clear thinking cannot be done without clearly understood evidence, and this is practically impossible without some mental retention of ideas.

Thus, while it is pointed out again that the prime purpose of a course in business law is not the mere acquisition of a set of legal rules, one of the purposes of such a course IS giving the students an understanding of basic principles of law, and this is a condition precedent to training them to think, to analyze and select a course of action based on their analysis. So it is with the methods by which the mind receives and retains ideas and how that can be utilized in the class room that this paper is primarily concerned.

In discussing how the mind works we are, essentially, dealing with a physiological process. To make certain that the basic principles of communication which will be considered are based on sound physiological bases this section of the paper was prepared in connection with a member of the faculty in the Department of Neurology and Psychiatry of the Tulane University School of Medicine whose special interest is the human brain and how it functions. While certain oversimplification is necessary, this will not obscure the soundness of certain basic principles, nor will the fact that certain exceptions do exist to these over-simplified statements detract, in the slightest, from their basic soundness for general use.

Our first consideration, then, is to examine the manner in which memory works. An analogy which is very useful is that of a wheeled cart traveling over the land. As this vehicle passes over the ground it will leave indentations where the wheels have traveled. These ruts will vary in depth with the weight which is being transported, the number of times the ruts are traversed, or both. Then, with the passage of time and the action of wind and rain, these indentations will gradually disappear. How long that process takes will depend upon how deep they were originally and how severe are the forces seeking to obliterate the tracks. Memory functions in much the same way. Stimuli reach the brain and make an impression which is retained. Other forces immediately go to work to eliminate that impression. To what extent memory will dominate is determined, just as in the case of the wagon rut, by the depth of the impression and the forces of forgetfulness. But man can, to some extent, control this process of memory by increasing the depth of the impression, by seeking to vitiate the forces of forgetfulness, or both.

Ignoring, for the moment, controlled stimuli such as might be used in the class room, let us continue to examine the function of the brain under normal conditions. Our next point of attention is how the depth of these memory ruts is determined. There are three factors at work here: 1. The force of the original impact; 2. Repetition of the stimuli; and 3. Associating the new stimuli with some ideas already present in the retention area of the mind. Where the force of the original stimulus is extremely powerful, it remains in one's memory for life. Watching a loved one die, a moment of personal achievement, winning an important game,

a stage success, are examples of events that will never be erased from memory. It need not be a stimulus involving high tension; one of low tension will serve equally well. For some of these examples one is forced to fall back on personal experience, such as a dog seen once, whose ancestry apparently involved a dachshund and some long-eared large-headed dog. The combination of long body, large head and long ears combined to create a dog of such peculiar appearance that the years have not erased it from memory.

Where the original impact of a stimulus is slight, repetition of it may eventually increase the depth of the memory track until it becomes permanent. I doubt if there is any one in this room, over the age of thirty, who followed a certain road or path in his childhood several hundred times but has not travelled that same route for twenty years or more, who could not retrace his early steps, assuming the continued existence of the route. Most of you can close your eyes right now and, in memory, walk to school as you did when you were ten years old, or drive over roads you knew well over twenty years ago but have not seen since. It was the constant repetition that pounded the memory track to the depth of unforgetfulness. What is of great significance here is that the first impression of a low-impact stimulus may make a very slight impression, a second makes a greater impression than the first and each succeeding repetition has a greater impact than the one preceding it. Another factor that should be mentioned here is that five repetitions made one right after the other do not have the same power of increasing the depth of the memory track as five repetitions made with an interval between them. This cannot be too long an interval or the fading of the indentation made by the preceding stimuli will be so great that a new, original impression will be necessary.

Because later stimuli have a greater impact when striking an already existing memory track, the third method of increasing the depth of this rut is significant. In this case, the new stimuli are tied in with previously received stimuli so that the new ideas are made to run in already existing tracks and thus can have some of the impact of later repetitions. The obvious example of how much easier it is to recall a strange face when it can be associated with a well known friend than when the strange face stands without any familiar associations illustrates how this method of increasing the depth of the memory track works.

In addition to increasing the depth of the memory track, the other factor in increasing retention of ideas is the diminution of the forces of forgetfulness. These are tremendously potent forces. They operate, generally, in a curve of decreasing severity, that is, the greatest proportion of material forgotten is lost within a very short time after the stimuli has been received and thereafter forgetting proceeds at a rapidly reduced pace. For example, out of a series of nonsense syllables memorized one day, only about 35% were recalled on the next day, but after six days, around 30% could still be remembered. Naturally, meaningful material has a less severe original drop and takes somewhat longer to reach a plateau where forgetting proceeds at a rather slow pace. But it must be pointed out that for a student starting the study of law, it cannot be assumed that he is receiving meaningful material. While it is not at the level of nonsense syllables, its very strangeness, at least at first, would keep it from being quite as meaningful as, say, a new poem of the romantic school. Without being dogmatic, based on what is known of how the mind

functions, one would be inclined to suggest that six months after the termination of a course in business law, if students would recall 25% of what they learned, it would be an extremely high retention rate, possibly 10% would be closer to reasonable expectations under present conditions.

Probably the immediate reaction to this principle would be, "Well, if our students are going to recall only 10% of what they learn, then instead of trying to teach them 100 facts a semester, we will increase that to 500 facts and they will have more to recall since 10% of 500 is greater than 10% of 100." The only difficulty with that is it does not work that way. One of the factors that increases forgetfulness is projecting too great a mass of ideas to the mind in too short a time. The brain, as in the case of any other part of the body, can get tired from being forced to attempt too much. It apparently takes time to assimilate new ideas and if too many new facts are pushed into the brain at one time, or in too short a time, instead of there being proper assimilation and retention, the brain, like the digestive tract, reacts by regurgitating the material. Thus it is highly probable that the teacher who seeks to present a small amount of material in a given time will actually attain a greater retention level in his students than the teacher who seeks to cover too much ground.

One other factor that causes forgetting is confusion of material. Things that are similar tend to be confused in the mind so that after a passage of time there may be some retention of something, but the similar ideas will be so mixed up in the mind that what retention there is will be entirely erroneous.

It must be borne in mind that these principles that have been discussed are not suggestions or personal opinions. They have the same standing as the fact that water is wet, that the earth rotates on its axis every twenty-four hours and in the course of 365 days plus makes a trip around the sun. In short, these are facts of life with which we have to live and unless our teaching is adapted to them, it will be less effective than it should be. We can increase the amount of retention on the part of our students by increasing the depth of the memory track through increasing the impact of original stimuli, by repetition, and through the use of associations. We can cut down the effectiveness of the forces of forgetfulness by the elimination of some mass of material and by the decrease in confusion that may arise in certain similar legal situations. Now, just what techniques can be used to accomplish these results?

In the first place, we can increase the depth of the memory track by use of dramatic material that has a high rate of impact on the mind. Take the much maligned case of *Hamer v. Sidway*: only last year scorn was poked at it in one of the papers presented at our annual meeting. Yet where is a case to equal it in human interest material that will stick in the student's memory and so beautifully illustrate the idea of detriment? This basically excellent factual situation can be made even more significant by the teacher's simple question, "What mistake did the uncle make in his original proposal?" The answer, of course, is that he forgot to add women to the list of things the nephew should ignore. This combination of human interest material plus the battle of the sexes should go a long way to so impressing this case on the memory of the class that it can be used not only to illustrate detriment, but also as a jumping off point for an exposition of promissory

estoppel. It may be a far less dramatic situation than *Hamer v. Sidway*, such as the case of a clerk in a "chick store" who turned off an ordinary garden hose at the nozzle instead of at the faucet, resulting in a burst hose and flooded store. The interesting factual situation will be remembered, and from this the definition of the word "appliance" in an insurance policy which excluded coverage for water damage arising from the use of a domestic appliance. At times it may be the language used by the court in writing the opinion that has the dramatic value which means high impact on the mind. The judge who held that an award for damages to a girl for a scar on her face was justified, but not in a large amount because "females from an early age use make-up on the skin they love to retouch," used a nice turn of phrase that makes his decision easier to remember than one stated in more pedestrian language.

In addition to seeking out cases with dramatic values, the repetition of an idea may be used to increase the depth of the memory track. The most obvious means to this end is the use of more than one case to illustrate a concept. Another method is by repeating the same idea at different stages of the course. No doubt it is superfluous on my part to point out how the concept that law is essentially human relations in action can be emphasized in almost every class meeting. But there are times when the organization of the material in the course prevents what would otherwise be an excellent way to attain repetition and, anticipating the next technique, the use of association. Here we must digress for just a moment to the field of organization, part of communications, to point out a most overlooked principle.

As a general rule, there is no one best way to organize ideas. The proper organization of ideas for purposes of communication is that method which makes the subject matter easier for the audience to grasp and brings it most effectively within the background and experience of the audience. I have an example of that each year in teaching communications in the medical school: the description of a disease that will be given by a doctor without considering the background of his audience. Almost without exception the doctor will start with the cause of the disease (virus, bacteria, or whatever it is), giving the life cycle of the causative agent, and then proceed to the effects of the disease in the patient. This is perfectly all right and proper when talking to other medical men who are trained to think that way. But the layman thinks of disease first as something that makes him sick—the effect on the individual who has it. So to make more effective to the layman the significance of the disease and how to cure or prevent it, it usually is better to start with the effect first, and then proceed to the cause, rather than to rely on the cause-to-effect organization used when communicating with doctors.

Now, applying that same principle to business law, it takes very little study to discover that practically all courses in the subject, as indicated by the texts, are organized as the subject seems most logical to the writer of the text, a lawyer who thinks as a lawyer and in terms of subject matter as he studied it in law school. But this is not necessarily the proper way to present the material to the student who is not going to be a lawyer and is not going to think as a lawyer, but *is* going to be a client. Take our old friend, the Statute of Frauds. Normally this is treated under the subject of contracts. Quite right and proper for the lawyer who is going to think of human relations in terms of contract, tort or crime! But to the layman, say in the case

of the purchase of real property, that means he has to think, as he looks at the property, that a contractual relationship may come into being, then he has to recall that he studied something in business law about contracts and sift through his mind what he studied to come up with the Statute of Frauds in connection with a contract to sell real property. It is not strange that so often he does not. But if instead of teaching the Statute of Frauds as part of contracts, we taught it as part of the subject matter it covered (purchase of real property, purchase of personal property, hiring of employees, payment of certain debts, contractual relationships which require performance for longer than a year, etc.), we could repeat the basic concept of the Statute of Frauds at different times during the course and thus drive this basic idea into the student's mind with far greater effectiveness than by concentrating on it for a day or two and then, for the most part, forgetting its existence.

The third technique, use of associations to give greater impact to an idea, is one that can be used in almost any organization of the subject, but again there are times when abandonment of the traditional organization will give the teacher greater opportunity to more effectively drive home a point. I am certain that every one present does everything possible to associate the principles of business law with the other subjects the student may study during his undergraduate days. Again turn to the example given above, the Statute of Frauds. Not only does the presentation of the different sections of the statute at different times during the course offer an opportunity for repetition, but it also brings in to play the principle of association of ideas. The fact that a contract for the sale of real property must be evidenced in writing, etc., when presented during the discussion of how real property may be acquired, associates the idea of the written memorandum with the action of purchase far more than does presenting that same idea as part of the general idea of contracts. Where the requirement of a writing is part of the act of purchase, there is a far higher probability that it will be remembered by the individual in time to save him trouble than when he has to work his way back through contractual concepts to find it.

Another example of this use of association of ideas is the subject of agency. Normally agency is presented as a single subject, with reference back to it from time to time. But the question that should be asked is, "Does the layman think in terms of agency?" Possibly he does, but more likely he thinks of hiring employees, of sending out salesmen to solicit business, of using deliverymen to deliver products. Again, by presenting the subject of agency, not as a unit by itself, but in terms that the businessman will use in his daily work, you are applying the principle of association of ideas to reinforce the impact of the ideas so they are much better retained.

The other thing that we can do in our teaching, in addition to increasing the depth of the memory track through the use of dramatic material, repetition of ideas and association of ideas, is to decrease those factors within our control that cause forgetfulness. The first of these is to reduce the mass of material that is crammed into a student in the course of a semester or two of business law. I can hear the cry go up now, "But there are some things that a student should know when he enters business; we must teach them!" The answer to that is simple: if you try, he won't know. To ignore this simple fact is, as has been indicated, working on the same

level as refusing to believe that water is wet, that the sun will rise in the East and set in the West and that winter, in those climates that have it, follows autumn. I only have to ask you here, how many of you feel you could take the bar examination in your state tomorrow with any hope of passing it, to illustrate the point. Most of you spent three years in the study of law, yet how much have you forgotten? I have seen texts and course outlines that seek to cover in two semesters almost as much material as it took me three years to cover in law school. That is ignoring this principle of mass of material interfering with retention and causing forgetting. What should be covered in one or two semesters is beyond the scope of this paper. What is well within its purview is to point out that if something is not eliminated from the usual course in business law, there is going to be less retention of its principles on the part of the students than if something is eliminated. What should be eliminated will depend, of course, upon the feelings of the individual teacher and what he considers to be significant.

The other thing that can be done to make retention more meaningful and to cut down on forgetfulness is to eliminate that material within the subjects taught which causes confusion. This may involve the elimination of non-purposeful material or the elimination of confusing material, concentrating on that which is most important and forgetting that which is less important. Let us take an example of each.

We return to the Statute of Frauds again (not that I have anything against it, it just has such excellent illustrations). I have yet to see a textbook that does not include in its presentation of this Statute the exception which applies to the sale of real property where the purchaser, in reliance on an oral contract, has entered into possession and has made substantial improvements. Why teach that? In the first place, it adds confusion to the subject. The main purpose of the Statute is to prevent non-existent contracts from being enforced by requiring evidence of the existence of certain contracts to be in writing. That is the really important thing for the layman to know: get your contracts for the sale of real property in writing! Any exception to that rule will serve to confuse and make it more probable that the basic idea behind the Statute of Frauds will be forgotten. Now this is no suggestion that no exceptions to rules be taught, but in this specific case, what value is the exception? In the first place, who is hurt by not knowing it? Only a wrongdoer. The only one who may find himself impaled on this exception is one who seeks to get out of an oral contract entered into in good faith on the basis of a technical rule of evidence. Frankly, if any of my students have so failed to assimilate the obligations of good citizenship as to try to take advantage of another under those circumstances, he deserves everything he gets. Who is helped by teaching that exception? Only the person who has entered into the oral contract, taken possession of the property, made substantial improvements on the property, and then, reminded of the Statute of Frauds, proceeds to give up everything that he has added to the property, meekly and without seeking legal advice first. Now to assume that the individual involved would be saved from loss if he had been taught the exception is to assume he would first of all have so completely forgotten the course as to ignore the requirement of the writing, and that then, faced with the loss, he would have recalled the statute and the exception. Now to say that this individual is not worth helping is

wrong; he is. That is not the point. What is significant is that an individual in this situation, who originally forgets and then remembers, or even an individual who does not remember but would not seek legal advice at all, is so rare, proportionately, that to attempt to save him under these unusual circumstances is to do so at the very high risk of not getting over to the majority of the class the idea, "get it in writing." It might even be suggested that had this imaginary individual who remembered the exception before it was too late not been taught the exception originally, he would have had a far greater chance to have recalled the requirement of a writing and probably would not have needed the exception.

In addition to teaching non-purposeful, or less purposeful, exceptions as indicated, there is much similar material that is in the texts that can add to confusion and result in a far less effective teaching result than if the major ideas alone were brought up in class. For example, one of the most important of all subjects, most of us will agree, is that of negotiable instruments. In addition, many texts, and I assume many courses, take up the problem of negotiable bills of lading and negotiable warehouse receipts. It obviously is stupid to even suggest that bills of lading and warehouse receipts are not important, because they are. What is involved is a matter of relative importance. Remember, we are not dealing with the knowledge of the student on the day of the final examination, but with what is retained in his memory after months or years. Which is more important, clarity in knowing something of negotiable instruments, checks, notes, bills of exchange, which are in very common use in business, or endangering the memory track on that subject by discussing things that are so similar in some respects and so different in others? If the bills of lading and warehouse receipts portions of the material were of truly great importance, then one decision should be made. One can only speak from experience. I have been teaching at Tulane for eleven years, not only in the day school but in our night division in which many of the students are businessmen already, with years of experience in their fields and reasonably well settled in the specialized type of work they will do. New Orleans is a port city, as you know. It should be expected that transportation would be important in that city. Yet in eleven years of teaching, three semesters a year, including summer school, including the night students who are actively engaged in business, I cannot recall as many as five questions during the entire eleven years concerning bills of lading and warehouse receipts. Those who deal with these documents have long experience in the field and on-the-job training from others on just how to handle the material. Under these circumstances, I could not possibly feel justified in taking the great risk of muddying up the significant subject of negotiable instruments by the insertion of material on negotiable documents of title, when such an extremely small proportion of the students will ever deal with the latter and all of them will be concerned with the former.

As one who has worked for years on communication, I am only too aware of the difficulties involved. I know too well the strong possibility that some of you will get the idea I am advocating the elimination of negotiable documents of title from our courses, and not teaching exceptions, changing the method of presenting agency and the Statute of Frauds. I have tried to point out I am doing no such thing. What has been the purpose of this paper is to point out certain facts which must be

lived with and which we cannot ignore. We cannot teach everything in two semesters and get the same degree of retention as by teaching a part, but teaching that part with good communication techniques. What part is to be left out, if any, is not up to me to suggest. All the examples I have given are just that, nothing else, merely illustrations of how the basic principles of communication can be used to meet the physiological facts of the brain. The purpose of this paper has been served if you are put on notice of the danger that you run in failing to do as good a job as you can do, by trying to teach too much, by insisting on presenting the material as it makes sense to you rather than in the way it will make sense to your class.

No one is more convinced of the importance of our subject than I am. No one is more pleased than I am (after all I am human) when a student comes back, after years out of school, and tells me how valuable business law was to him. But I never fail to ask myself, "Was that course he had as good as it should have been, or could I have done an even better job by a better application of the principles of good communication?" My answer always is, the course was not good enough, it should have been better. I know I shall never be satisfied: I believe, with Browning, "A man's reach should exceed his grasp, or what's a heaven for?"