

Wisdom Transfer

Seven ways to accelerate on-the-job learning for lawyers

by Shelley Dunstone

Law firms want their new lawyers to be competent and productive as soon as possible. But learning on the job can be a process of trial-and-error. It can take a long time for new lawyers to gain the skills they need.

It took you a long time to acquire your knowledge and skill. You have a lot of wisdom to impart. The daily interactions that you have with your trainee lawyers provide frequent opportunities for them to learn. But because of the pressures of practice, often these interactions are not as effective as they could be.

Your firm's training capability can become a competitive advantage. The better you get at training, the more readily you will be able to employ juniors. Good training helps you to retain your lawyers and to attract new ones. Young people entering the workforce expect and value good training. Lack of training is one of the main reasons given by newly-qualified lawyers for leaving their job.

This paper offers a framework for improving on-the-job training. These ideas can be applied in one-on-one mentoring, in workgroup discussions, or in your firm's professional development program.

The challenges of on-the-job learning

Unlike a University, a law firm is not primarily a learning institution. The focus is on producing work, and the learning is incidental. The day to day pressures of practice can make it difficult for people to learn in an orderly way, and can even set up barriers to learning. The need to record time spent on tasks can leave little time for thinking. New lawyers know that their performance is being appraised. They are anxious to impress their employers, by appearing efficient, confident and competent. They do not want to reveal their ignorance by asking "stupid" questions or make mistakes. But learning occurs through identifying gaps in knowledge and from making mistakes.

The types of tasks that new lawyers are given to do can appear deceptively simple, compared with the complex legal analysis they have been doing in Law School. They may even feel that what they have learned at University is not applicable in practice. New lawyers sometimes bring a mechanical, rather than analytical, approach to their work, because the legal issues are concealed within the task, not defined in a tutorial problem.

To the untrained eye, a drafting task can look like an exercise in copying. Trainee lawyers rely heavily on precedent documents. Precedents offer the allure of authority. Law graduates are used to solving problems by looking at what has been done in the past. When they are presented with a precedent, they are reluctant to depart from it. They

cling to the structure and the wording; they are not sure what can be changed, or what must be changed. They lack confidence in using their own words, because they are not quite sure what they are trying to achieve. The focus is on producing print on paper rather than on legal analysis, because the problem to be analysed is not clearly defined.

New lawyers learn through imitating experienced lawyers, but sometimes they imitate the wrong things. A lawyer may be successful *despite* their behaviour, not *because* of it. Certain methods of operating suit some people and not others. Or, a key aspect of the expert's performance may be too subtle for a trainee to detect. In his book "How to Win Friends and Influence People"¹, Dale Carnegie tells how early in his career he received a letter with a notation at the bottom "Dictated but not read". He was very impressed by this, "and felt that the writer must be very big and busy and important." He put that same notation on the next letter he wrote, but his correspondent returned the letter to him with a pointed comment about his bad manners. His imitation of success backfired, badly! Similarly, when I started working as a lawyer, I imitated the communication style of my 42-year old male boss. I can see now that this style sat very oddly on a 22-year old female.

As you gain experience, you forget what it is like to be new. Your skills become second-nature. You respond intuitively to familiar problems. This instinctive knowledge is referred to as "tacit knowledge".

Here are some everyday examples of tacit knowledge:

- You can recognise a facial expression as expressing a particular emotion, without being able to say exactly what the signs are.
- You can tell whether a jacket is made of leather or vinyl, as soon as you touch it.
- If (as I do) you eat a lot of bananas, you can quickly recognise one that is ripe but not over-ripe.
- If you park in a particular parking station on a regular basis, you get frustrated with the slow and cautious driver ahead of you who is unfamiliar with the car park. Through familiarity with the car park, you know the speed at which you can turn a corner with safety, and the exact point at which you can see that it is safe for you to turn.

If you were asked to teach any of these skills, you would have to think very carefully about how you do what you do.

As an experienced lawyer, you have reached the stage of "unconscious competence", where you can perform many tasks almost automatically, and you cannot remember what it was like not knowing how to do those things.

But before reaching this stage, you probably went through some other stages - unconscious incompetence (you were unaware of what you didn't know), conscious

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incompetence (you recognised your limitations) and conscious competence (you knew what to do, but needed to spend a lot of time to get it right).

When you have reached the stage of unconscious competence, it can become quite frustrating to deal with people at earlier stages of the learning curve. You tend to make too many assumptions about what they know, and may feel it is quicker to do the job yourself.

The experience gap can make communication between experts and novices difficult. If you have recently tried to learn a new skill, you will have some insight into the experience gap. In my mid-forties I decided to learn to sing. This has been an intriguing process. My teacher (an expert) attempts to describe to me (a novice) a process that is automatic for him because of his lifetime of performing. He reflects on what he is doing to produce a good sound. He describes the sensations he feels and the images he finds helpful as he sings. If my sound is not improving, he finds another way to explain it. “Keep your larynx in a speaking position”. “Think of a yawn”. “The sound is coming out of my forehead, not out of my mouth”. “My eye sockets vibrate.” “Send your sound through a coin-sized hole in the wall over here.” “Imagine a set of steps connected by a pipe”. At first, these instructions made no sense to me at all, but gradually the pieces of the puzzle came together. One by one, the various metaphors embedded themselves in my performance, allowing me to concentrate less on producing the sound and more on matters of style. We now share a vocabulary to some extent. I have developed a mental checklist which I can consult when I don’t sound good, and I can ask myself “What am I *not* doing? I self-diagnose and coin my own metaphors, a recent one being “When I sing well, I feel there is a big balloon inside me”.

Similarly, in law, instructions can be ambiguous and mystifying. When drafting a pleading, if we say “Tell the story” we mean “Tell the story in the way that pleadings tell stories”. If we say “Follow the precedent” we mean “Use only the parts of the precedent that are helpful.” You think you have explained yourself clearly until you see the work that the trainee produces. When their work is wrong, do you blame the trainee or your explanation?

Here are seven ways to impart your wisdom and to make your new lawyers productive, sooner:

1. Build on basics
2. Think aloud
3. Ask questions
4. Seek questions
5. Widen the picture
6. Expose the learning
7. Work on strengths

1. Build on basics

We learn a new thing more easily if we can mentally attach it to something else we have learned. To teach a trainee a new task, show them how it relates to what they already know.

Our knowledge is arranged in a mental “structure”. All of our experiences cause the mind to develop “schemata”, which are patterns or conceptual frameworks that help it to sort and make sense of incoming information. The brain sorts information according to the patterns that it knows. Further experience serves to fine-tune the patterns. So, to learn something new, it is helpful to be able to build it on top of existing knowledge.

The new world of business and human problems can be overwhelming for new lawyers. They may be unfamiliar with basic business practices. For example, they may never have operated a cheque account, purchased insurance or mortgaged a property. If a key piece of knowledge is missing, you cannot build upon it. You need to start where they are, not where you would like them to be.

At Law School, students are exposed to some complex legal issues. But sometimes they cannot see how what they have learned is relevant to the tasks they are given in practice. Sometimes they are so accustomed to complexity that they overlook the basics. It can be useful to work through a task from first principles. For example, when teaching students to draft pleadings, I found I needed to remind them about basic causes of action. Before asking them to do any drafting, I asked them to outline the elements of the relevant causes of action, and consider how each might be proved.

After ten years in legal practice, I was asked to teach some classes in Tort, Contract and general consumer law to finance industry employees. Re-reading the basic cases for the first time since Law School, I was surprised at the subtleties that I had forgotten (or had overlooked as a student). This revision gave me a much stronger framework of basics on which to base my practice and my teaching.

If you can link a task to a principle they know, they will understand the task more deeply. Help the trainee to consolidate the basics, and then build upon those. Some people denigrate what is taught at Law School as “just theory”. But theory helps you access what the trainee already knows, so you can link it with the new things that you are going to teach them. It gives you a shared vocabulary and a common starting point for working through a problem.

2. Think aloud

The product of your work is visible, but the thinking process that created it is invisible. To expose your thinking process to the trainee, think aloud in their presence.

We learn to do new things partly by imitating people who are already good at doing those things. But we do not always know exactly what to copy. For example, if you are learning to do weight training in a gym, technique is very important. You can watch others exercising, but it is difficult to learn what to do just by watching. You have to

learn how it *feels* to use a correct technique. Left to your own devices, you grunt and sweat, lift weights that are too heavy or too light, bend too far, pull down too quickly or put strain in the wrong places. You position the seat too high or too low or at the wrong angle. You know it is meant to hurt, but exactly where? Is this good or bad pain? You put yourself at risk of injury or gain little benefit from the exercise. You need a trainer to guide you and to refine your movements.

While teaching in practical legal training courses, I noticed that students will mimic what they perceive as a confident posture at the bar table; an aggressive or authoritative tone of voice; a confrontative or wheedling cross-examination style. In letter-writing, students will automatically adopt the opening paragraph “We refer to previous correspondence herein”, the closing line “If you have any queries regarding this matter, please do not hesitate to contact the writer” and other officious phrases in between. When drafting a pleading, they copy the opening phrase “At all material times”, adhere closely to the format of the precedent and use formulaic phrases as building blocks.

We can copy either a “product” or a “process”. In the examples given above, the product is the document or the tone of voice; the process is the invisible thinking. When trying to copy a product, the learner may not understand what aspect of it is worth copying. For example, an advocacy student perceives the aggressive tone of voice as the thing to imitate. A precedent provides something to copy, but what aspects? They may focus their attention on the “look” and “sound” of the document, rather than how to think about the issues.

Superficial imitation leads to superficial learning. To expose the more subtle aspects to them, you must make your thinking process accessible. Think aloud to help them get inside your head.

In the course of your work, you make all sorts of decisions without being aware of doing so. This is your tacit knowledge in action, according to author Donald Schon. In order to make these decisions, he says, professionals either consciously or unconsciously ask themselves questions about what they are doing²:

“They may ask themselves, for example, “What features do I notice when I recognise this thing? What are the criteria by which I make this judgment? What procedures am I enacting when I perform this skill? How am I framing the problem that I am trying to solve?”

As an experienced practitioner, you have developed a mental checklist of questions to ask yourself, without even realising it. It is like software for your brain, according to cognitive psychologist John Langrehr³:

“When we try to remember how to spell a word, read something with understanding, solve a problem, judge a painting or tie a knot, we each unconsciously use a mental

² Schon (1990) p.50

³ Langrehr p.52

program for thinking about the task at hand...They each consist of a series of short questions that we ask ourselves. These questions might cause us to compare some patterns, notice something, or check the goal, the data given, and any limits restricting the problem...Less able spellers, readers, problem solvers, and so on, have rarely heard the question checklists used by those who excel in these mental tasks. However, by asking better thinkers in any subject, job, sport or hobby to consciously think about their thoughts as they do a physical or mental task, these question checklists can be shared.”

When you ask yourself what these questions are, you are engaging in “metacognition” – thinking about thinking. As Langrehr puts it⁴:

“Metacognition involves the conscious thinking about the series of specific, unconscious thought processes we each use while doing a mental or physical task. This simple, yet powerful tool enables all of us to get inside the minds of good readers, golfers, economists, salespeople, problem-solvers, designers and so on. It allows us to share in the mental checklists of questions they use when they mentally process information in different ways.”

Thinking aloud sounds scarily like talking to yourself, but it is the way to expose your thinking to others. One of the most useful pieces of advice I ever received came to me in this way. A partner I worked with had a habit of thinking aloud when I was present. While reviewing my work, he commented that he tended to start drafting a Statement of Claim not at the beginning but at the end, by listing the legal remedies that the client would be seeking. This was a real “light-bulb moment” of insight for me.

Your expert knowledge consist of much more than laws and case decisions and what precedent to use. Over the years you have built up a repertoire of exemplars, mental templates or models to choose from. These could represent various different ways in which deals can be put together, or ways in which a consent judgment might be framed, or ways in which payments can be made, or ways in which problems can be resolved commercially without resort to legal remedies. You are familiar with a range of strategies to try. You have encountered many personality types and learned to deal with them. You may know how people are typically affected by certain injuries, or how a building is constructed. You have seen recurring patterns of events, of many kinds.

You are able draw on these patterns and adapt them to different situations. The patterns that are so familiar to you are invisible to the beginner. A new lawyer doesn’t have the repertoire that you have. If they don’t know what options are available, they have nothing to select from. By thinking aloud, you expand your trainee’s own mental checklist.

To share your tacit knowledge, try to become aware of your thinking processes as you solve a problem. Voice the questions you are asking yourself. Is the situation similar in some way to something you have seen before? Is something bothering you about it? What unusual things have you noticed about the case? What are the options?

⁴ Langrehr (p.51)

Try to review written work in front of the trainee, rather than simply settling it and sending it back to them. Think aloud as you work through their draft. Let them hear what you are thinking.

In a formal training program, you could create opportunities to hear experts to think aloud. For example, you could have someone interview the expert to draw out their thinking, in front of an audience of trainees.

3. Ask questions

An experienced lawyer can easily assume too much about what the trainee knows. To give the right help, you need to know how they are thinking. You can find this out by asking questions.

We learn more effectively when we are engaged in finding the answer, than when someone gives us the answer. Questions provide a catalyst to make us think.

Your training tools including both “telling” and “asking”. But we tend to tell more than we ask. For example, we say “Here’s what I need you to do.” And the trainee nods wisely and goes off to attempt the task. How do you know you have told them what they need to know? You need to find out what they know and how they are thinking.

A general question like “How are you getting on?” will only elicit the answer “Fine”, because no one wants to appear to be struggling. You need to be more specific with your questions.

Ask questions that take effort to answer, that require them to think, and that help you to get inside their head. You are looking for clues as to the extent of their knowledge and the quality of their thinking.

Using questions, you can find out what they know, identify gaps in their knowledge, find out where they are “stuck”, uncover misconceptions and test their analysis.

Questions direct the trainee’s attention to matters that they might not otherwise notice or consider. When you call attention to an aspect of importance, you are expanding their mental checklist. Then they are more likely to think about that aspect in future matters of the same type, and also perhaps in other types of matters.

Here are some examples of questions that will get your trainee to think:

- What if the defendant doesn’t pay?
- What could go wrong here?
- If you were in the client’s position, what would you be worrying about?
- What sort of evidence do you think we will need to get to prove this allegation?
- What questions should we be asking this client?
- What sort of witness will we need to look for?

- What are the key events, do you think?
- What are the various possible outcomes?
- What are the alternatives here?
- If you had no one to help you, what would you do next?

Questions of this sort open a dialogue that leads to better and faster learning. It provides opportunities for misconceptions to be dispelled, and to make sure that they understand the task before they attempt it. It is more effective to give them the task in person than in a memo, so that there will be this opportunity for clarification.

You could also give them the questions in advance, and ask them to think about these and come back with their answers. This would provide a basis for more in-depth discussion.

Questions can also be incorporated into preparatory work that allows you to test their thinking and understanding. If they immediately try to prepare a document from a precedent, their thinking is hidden in the draft. How could you test their thinking? Instead of giving them a precedent document, you could ask them to select a precedent and then explain why they chose that one. Or, before going to a precedent, you could ask them to set out in their own words what they think the basic terms of an agreement should be. You can then see if they understand the basics of what they are doing.

Questions can also provide a framework to help the trainee critique their own work. If you can specify the objectives that the work needs to achieve, they can start to measure their work against those standards, and this, too, will provide a basis for discussion.

4. Seek questions

Trainees can be reluctant to ask questions that expose ignorance or lack of understanding. But better questions lead to faster learning. Insist that your trainees ask probing questions, and always answer with patience.

Getting your trainees to ask questions encourages them to take responsibility for their own learning. It puts the onus on them to identify what they need to know. And answering their questions makes you reflect on how you do what you do.

Because of their limited mental checklists, the kinds of questions that trainees ask are usually not very probing, for example, “Have you got a precedent that I can use?” “Should I start a new paragraph here?” “Is this all right?” To ask more searching questions can feel “risky”.

The ability to ask good questions is a crucial skill for lawyers. I have noticed that top lawyers often ask naïve questions. They make no assumptions. If there is any uncertainty, they will ask clarifying questions. They have learned that it is acceptable not to know everything, nor is it possible to do so. It can actually be dangerous to assume that you understand something, and it is often best to test that understanding through questions. To obtain the information they need, lawyers need accurate and incisive questioning skills.

If a trainee asks a vague question, respond with “Ask a better question.” By encouraging them to be more specific in their questions, you are helping them to become better lawyers.

Assess your trainees on the quality of their questions. Foster a sense of curiosity. Their willingness to ask questions indicates their state of readiness to learn. The quality of their questions reveals the depth of their thinking. Create an atmosphere in which questioning is encouraged. To say “Feel free to ask any questions” is not enough. You have to insist that they ask questions, and then respond encouragingly when they do.

5. Widen the picture

Learning on the job can be a fragmented experience. Show your trainees how what they have learned in one context can be applied in another.

When you provide feedback on a trainee’s work, the feedback is situation-specific. They now know what to do the next time they have the same problem. But what if the next problem is a bit different? Does the same advice apply? And are there other, different situations, in which the same advice would be helpful?

You may be able to expand the point you are making into a general principle. Of course there will always be exceptions, but you can articulate a principle that is “mainly true”. Perhaps you have frequently observed a particular pattern of events. If so, it is useful to say so. For example, you might say “I have found that if you say that sort of thing in a letter it can inflame the situation.”

Tell stories of your experiences, both good and bad. Don’t always cast yourself as the hero. Admit to your mistakes. Make it clear that everyone makes mistakes, and that there is no shame in making some. Infuse the story with details such as how you were feeling and the effect that certain experiences had on you. Try to extract a lesson from the story that will help the trainee in the future. Showing your vulnerability helps to build trust with the learner. They may then be more willing to admit to mistakes, and learn from them, instead of covering them up.

6. Expose the learning

Encourage trainees to reflect on their performance and to identify what they have learned. Help them to expand their definition of “learning”.

We can learn a lot from experience. But sometimes we do not recognise exactly what we have learned. What is your concept of “learning”? Does it relate mainly to legal principles and rules of procedure? We learn much more than this every day in practice.

Make it a habit to ask your trainees what they have learned from doing their work. Develop some good questions to get them to reflect on their performance. Encourage them to debrief their experiences. For example, “What did you learn:

- about dealing with the police?”
- about human nature?”
- about advocacy?”
- about how to negotiate?”
- about yourself?”

Ask them what they would do differently next time. Encourage them to ask themselves the same kinds of questions when you are not there.

Encourage them to share with you their “light-bulb moments” – the big insights that suddenly came to them. Listen carefully to their description of what they learned. This will put you more in touch with the beginner’s mind, and what knowledge they were lacking. Others might also lack that knowledge. This type of dialogue helps to narrow the experience gap.

7. Work on strengths

There are many different models of success. Help new lawyers to recognise their strengths, be themselves, and develop a style that suits their personality.

We learn by imitating successful people. Trainee lawyers want to look and sound like lawyers so that they will feel like lawyers, to blend in so no one will know they are new, and impress the bosses and the clients. This is understandable. But excessive imitation is not healthy. There must be some scope for individuality.

The law exerts a powerful influence of conformity. Yet, we all have different personalities and unique strengths. If a lawyer tries to operate in a way that is inconsistent with their self-image, they will feel increasingly uncomfortable and may end up leaving the law.

A particular way of behaving might suit you but not others. A trainee does not have to be just like you in order to be successful. Your wisdom includes knowledge of how others operate. You could encourage your trainees to observe others and reflect on differences in approach.

Early in my career, I worked with a partner who was a very successful litigator, but his approach was often to escalate an argument. Every time I followed his advice, I would end up in a highly combative situation that made me feel very uncomfortable and out of my depth. Gradually I learned that this was only one way of doing things, and began to take my own advice, instead of asking him what to do.

Show that there are numerous ways to do things. Outline alternatives whenever you can. Give reasons for the decisions that you make.

Individual style is particularly relevant when it comes to business development. Clients like to deal with people who are authentic and approachable. Phony behaviour is not engaging.

There is no one single way to build a client base. There is no one single way to behave at a networking function. One person might revel in the prospect of inviting a client out for a drink. Another will dread it. As a young female lawyer, I felt quite uncomfortable that male clients would get the “wrong idea” about meeting me for a drink! This concern probably presented a barrier to gaining business, rather than facilitating it. Taking clients out drinking was the model of business development that I had seen, but clearly it was just one way to do it, not the only way.

There are numerous ways of achieving the same objective – more business. There is no single formula that is guaranteed to be successful. Give the person plenty of choices. Find ways that suit their person’s personality, accepting that they may need to step slightly outside of their comfort zone.

Summary

Firms that are good at transferring wisdom will enjoy a competitive advantage. Their trainees will be more productive, sooner. These firms will gain the reputation of being good employers and will therefore attract good graduates.

On-the-job learning occurs through interaction between expert and trainee. To accelerate the learning, create more opportunities for interaction, and strive to make each interaction more valuable through a better quality of dialogue.

This paper has focused on the task of training new graduates, but these ideas can be taken further, to identify and share more advanced professional skills and knowledge for the benefit of the firm as a whole.

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