

Designing Formative Assessments of Law Students'

Critical Case Reading and Reasoning Ability for

Doctrinal Classrooms

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This session demonstrates how law student's critical case reading and reasoning ability may be formatively assessed as an integral part of doctrinal instruction. Our approach draws upon empirical test development research that was supported under two successive grants from the Law School Admissions Council, 2003-07. First, using two example items from one of our tests which focused a case in civil procedure, we will briefly illustrate how we drew upon a basic construct of critical case reading skills to generate test items of varying degrees of difficulty, i.e., in terms of their cognitive and contextual demands. Second, we suggest ways that short, similarly constructed sets of test items can be used at several points during a semester to integrate students' learning of doctrinal content with the development of their critical case reading and question-asking skills.

The purpose of our session will be to demonstrate how law student's critical case reading and reasoning ability may be formatively assessed as an integral part of doctrinal instruction. Our approach draws upon empirical test development research that was supported under two successive grants from the Law School Admissions Council (LSAC), from 2003 -2007 (Evensen, Stratman, Oates, & Zappe, 2008). In this research we developed and cross-validated two multiple choice tests, each focusing upon three different but closely related appellate cases, and we field tested both tests with first, second, and third year law students at five different law schools (total n = 307). While the content of each test differs (due to the different sets of legal cases chosen for each), both represent highly similar functional constructions of critical case reading and reasoning skills. In addition, our field tests confirmed some basic theoretical hypotheses about the "gap" between two kinds of abilities: (1) the ability to accurately identify case content and the canonical discourse components of cases (i.e., issue, holding, facts, reasoning, policies, and rules), and (2) the ability to recognize relevant questions about interpretative indeterminacies of case discourse in the context of a simulated advocacy situation. With respect to the latter, significant research in learning theory supports the crucial role that students' question-asking abilities play in the acquisition of expert knowledge and understanding (Graesser, Langston, & Baggett, 1993; Graesser & Olde, 2003; Graesser & Person, 1994; Hacker, Dunlosky, & Graesser, 1998). Our field tests confirmed that students experience considerable difficulty with this skill, and we did not detect any significant improvement in overall test scores either between first and second year students or between first and third year students.

Nevertheless, our experience with this project, including our quantitative item analysis as well as qualitative analyses of concurrent think aloud protocols collected from subsamples of student test-takers, has led us to see considerable potential value in this type of multiple choice testing, specifically as a formative, diagnostic assessment tool in doctrinal classrooms. The goal of our "show and tell" session will be twofold. First, using two example items from one of our tests which focused a case in civil procedure, we will briefly illustrate how we drew upon a basic construct of critical case reading skills to generate test items of varying degrees of difficulty, i.e., in terms of their cognitive and contextual demands. Second, we suggest ways that short, similarly constructed sets of test items can be used at several points during a semester to integrate students' learning of doctrinal content with the development of their critical case reading and question-asking skills. Our argument for this use is that such formative assessments can help make the seemingly invisible process of developing case reading skills more transparent, and developing question-asking strategies in doctrinal areas can put an important part of the case dialogue more under the student's control. Later, during the small group workshop session, we will walk 1st year doctrinal faculty through a step-by-step process for developing their own short multiple-choice items, including criteria for checking the underlying fit between the instructor's conceptual goals and predicting the sorts of interpretative and question-asking mistakes that students are likely to actually make while reading a case.

To support both our "show and tell" presentation and workshop session, we will provide participants with copies of the following: (a) the basic constructs we used to guide the development of our test items; (b) the case which is the focus of our test item demonstration examples; (c) a second, related case for which we will ask participants to generate a test item, i.e., with four incorrect answers and one correct answer; (d) a bibliography of research sources devoted to critical case reading, and (e) the URL that allows other institutions to have access to the research underlying our work.

Mackey Plumbing Co. v. Pepper (2002)
Court of Common Pleas of Allegheny County, Pennsylvania

An assumpsit action was heard by a board of arbitrators in Allegheny County. The board's final decision as to the arbitration award to be made was docketed on October 10, 2002. Mackey (the defendant) disagreed with the arbitrator's decision to award Pepper \$2394 in damages for an improperly installed drainage pump in Pepper's home. To proceed with his appeal of this decision, Mackey paid \$162 to the county for his (previous) use of the county arbitrators and timely paid the \$25 filing fee. Mackey also paid \$237 of the \$327 that he owed to Pepper's counsel for accrued record costs, but this payment arrived late, 2 days after the 20 day limit. For this failure to pay all record costs and to do so within the stipulated 20 day limit, the plaintiff (Pepper) moved to quash Mackey's appeal of the arbitrator's award (\$2394 in damages). Act of June 16, 1836, Pa. Law 715, Sec. 27, 5 Pa. S., Sec. 71.

We find for the plaintiff; appeal quashed.
Woodson, Jason.

1. Arbitration and Award

The right to appeal an arbitrator's decision is a substantial right but it is within the court's discretion to decide what reasonable conditions can be imposed upon this right, or when the difference between stated conditions and a defendant's attempted compliance should be considered a mere technicality and disregarded. Defendant's (Mackey's) failure here to pay the complete amount of record costs accrued and to do so on time justifies quashing his appeal and constitutes more than a technicality. P.S. Const. Art. 5, Sec. 9.

2. Arbitration and Award

The right to appeal an adverse decision of an arbitrator is rightfully subject to conditions that all costs be paid within twenty (20) days. Act of June 16, 1836, Pa. Law 715, Sec. 27, 5 Pa. S., Sec. 71.

WOODSON, Judge: (Opinion)

(1) The present motion raises the question of whether nonpayment of record costs, and failure to do so in a timely manner, should disallow the defendant from making an appeal from the arbitrator's decision under Pennsylvania rules. The particular issue in this motion, then, is whether the defendant's appeal should be quashed. The defendant in order to perfect his appeal from the arbitration decision was first required to pay \$327 in record costs to plaintiff's attorney. Defendant had already timely paid \$162 for the assistance of the county arbitrator and the \$25 filing fee, as required. The plaintiff's (Pepper's) attorney concedes that the defendant (Mackey) had faxed him a letter requesting to know the amount that he owed for record costs. The plaintiff's handwritten letter in pencil in response to this request stated the following:

"In response to your request to know the amount of record costs outstanding, please pay \$327 and do so by November 3rd."

Defendant claims this pencil note was extremely difficult to read as the amount of record costs appeared to have been erased and rewritten several times; for this reason, defendant states he thought the correct amount to have been \$237 and not \$327. Defendant claims that his error was an honest one of transposing the numbers "2" and "3." He further claims that he wrote to the plaintiff to obtain clarification but no answer was forthcoming. Defendant claims he would have

telephoned the plaintiff to verify the correct amount owed but did not do so on the assumption the plaintiff would contact him if the payment he eventually sent was insufficient. Defendant claims also to have called the Prothonotary's office to ascertain the exact amount, to have been put on hold, and never to have received a response. The plaintiff, in turn, claims to have made two phone calls to the defendant to inform him of his error, but was unable to reach him. The plaintiff made no other effort to contact the defendant before this motion to quash.

Defendant also claims that he relied upon the plaintiff's notice that payment could be received by November 3rd (also indicated in the pencil note), which is actually beyond (by two days) the twenty day limit allowed by law. Payment should have been received by the plaintiff or Prothonotary by October 31st.

Our inspection of the pencil note suggests it may indeed have been somewhat difficult to decipher (as to the amount owed) yet we cannot see that the defendant nonetheless made a valid or honest attempt to comply. The analysis in *Black and Brown, Inc. v. Home For The Accepted*, 335 Pa.Super. A.2d 722 (1975), in which the shortfall in costs was \$74, requires a "valid attempt to make . . . full payment." We therefore hold that a shortfall in record payment costs of \$90 in the present case cannot be excused as de minimis, nor should this shortfall be excused by the court as a technicality thwarting the Pennsylvania constitutional right of appeal under Article V. Section 9 simply because the defendant erroneously interpreted plaintiff's communication.

We find for the plaintiff; appeal quashed.

(2) We further regret that defendant relied upon miscalculations of the plaintiff as to the date when record costs were due, but defendant should have known the rules and acted upon them instead. We agree with the analysis in *Meta v. Yellow Cab Company of Philadelphia*, 222 Pa.Super. 469, 294 A. 2d 898 (1972), that "the right of appeal is properly subject to a fixed temporal condition of twenty days," and that here as in that case "it serves a meaningful purpose to know when a matter has finality." We do not see that the defendant made an honest attempt to meet the deadline. We find for the plaintiff; appeal quashed.

TABLE 1: *Test Design, With Sample Question Types*

	Single-Case Items ^a	Cross-Case Items ^b
<p>Determinate Items</p> <p>(Possible answers to these items are <i>declarative statements</i> whose accuracy students must judge.)</p>	<p>Which one of the following statements best summarizes the <i>reasoning</i> in the minority opinion (dissent) in <i>Meta</i>?</p> <p>d) (Incorrect) Citing the <i>Smith</i> case, the minority dissents because it sees no reason to question legislative acts that have remained unchanged for over 100 years.</p> <p>e) (Correct) The minority dissents for the following reasons. It argues that, in order to vacate the statute, the majority should have made (but failed to make) an argument that the record cost statute is unreasonable, and it argues that the defendant had a responsibility to learn the correct amount of costs.</p> <p>(4 items)</p>	<p>Which one of the following statements best summarizes the similarities and differences between the courts' reasoning in <i>Meta</i> and the court's reasoning in <i>Black and Brown</i>?</p> <p>a) (Incorrect) The reasoning used by the two courts is the same: both courts agree that the record cost prepayment requirement serves no real function as a condition of appeal and that record costs in comparison with dollars in controversy make the latter costs <i>de minimis</i>.</p> <p>b) (Correct) The reasoning used by the two courts differs: although both courts refer to the principle of the sufficiency of substantial compliance in their decisions, the <i>Meta</i> court further reasons that the record cost requirement is a matter <i>de minimis</i> because in comparison with the amount of money in controversy in arbitration decisions, record costs are usually quite small. The <i>Black and Brown</i> court does not discuss this disparity in amounts involved.</p> <p>(4 items)</p>
<p>Indeterminate Items</p> <p>(Possible answers to these items are <i>posed as questions</i>. Students must choose the question most relevant to their legal purpose and exigency).</p>	<p>All court opinions are interpretations, and interpretations invite questioning. Assuming that you decide to appeal the <i>Mackey</i> decision to Superior Court, which one of the following questions presented by the <i>Mackey</i> opinion is most relevant to this task?</p> <p>d) (Incorrect) Why does the court rely on its own "inspection" of the pencil note rather than calling for or inviting an expert witness to offer testimony concerning its legibility?</p> <p>e) (Correct) Why does the court note each of Mackey's claims about his attempt to contact the Prothonotary's office yet offer no reasons for concluding that Mackey did not make either an "honest effort" or "a valid attempt to make ... full payment"?</p> <p>(3 items)</p>	<p>Because the <i>Mackey</i> case was decided in a lower level court (Court of Common Pleas), an appellate court judge reviewing <i>Mackey</i> would need to examine decisions in higher appellate courts to learn the applicable law. Given this circumstance, which one of the following questions about the relationship between the <i>Mackey</i> decision and the other two Superior Court decisions (<i>Meta</i> and <i>Black and Brown</i>) is most important for you to think about?</p> <p>a) (Correct) Can the <i>Mackey</i> court, without qualification, conclude from the decisions in either <i>Meta</i> or <i>Black and Brown</i> that record costs must be paid in twenty days?</p> <p>b) (Incorrect) Can the <i>Mackey</i> court properly conclude that "it is within the court's discretion to decide what reasonable conditions can be imposed" upon the right of appeal?</p> <p>(3 items)</p>

^a Question targets only one of the three cases.

^b Question targets two or three of the three cases.

ITEM 3: SINGLE CASE/DETERMINATE

Which one of the following statements best expresses the *legal issue* that the *Mackey* court sees itself as addressing?

- a) The court must determine whether it is within its discretion to decide when the difference between stated requirements for making an appeal from arbitration and a defendant's partial compliance with those requirements can be disregarded as a mere technicality.
- b) The court must decide, with reference to Pennsylvania rules, what reasonable conditions a court may impose upon the right of appeal from arbitration.
- c) ***The court must decide whether, under Pennsylvania rules, a defendant's nonpayment of record costs, coupled with an attempt to pay them two days late, should prevent a defendant from making an appeal from an adverse arbitration decision .
- d) The court must decide whether, under Pennsylvania rules, defendants who find themselves in the following factual situation be allowed to appeal an adverse arbitration decision:
 - Received an unclear communication from the plaintiff concerning the amount owed and the due-date for paying record costs; and
 - Tried but failed to reach the Prothonotary's office to learn the exact amount of record costs owed; and
 - Paid \$237 of the \$327 due for record costs two days late; and
 - Met all other procedural and monetary requirements for appeal.
- e) The court must decide whether a defendant's partial payment of record costs should be considered more or less important than payment of other costs, such as fees for the arbitrators and security for the original amount in controversy.

ITEM 3: SINGLE CASE/DETERMINATE

JUSTIFICATIONS

- a) **INCORRECT.** This answer is wrong because the court does not see this question as an issue. On the contrary, the court expressly assumes that it does possess the discretion alluded to in the question as indicated in the first head note: “The right to appeal an arbitrator’s decision is a substantial right but it is within the Court’s discretion to decide what reasonable conditions can be imposed on this right, or when the difference between stated conditions and a defendant’s attempted compliance should be considered a mere technicality and disregarded.”
- b) **INCORRECT.** This answer is wrong because it captures only part of the issue that the court sees itself addressing and at too general a level. It does not reference what particular “conditions” on the right of appeal from arbitration are in question, i.e., the requirement to pay opposing counsel’s costs of record within 20 days.
- c) **CORRECT.** This answer is the best because it closely paraphrases the court’s (Judge Woodson’s) own language: “The present motion raises the question of whether nonpayment of record costs, and failure to do so in a timely manner, should disallow the defendant from making an appeal from the arbitrator’s decision under Pennsylvania rules.”
- d) **INCORRECT.** Although this answer does accurately indicate key facts under scrutiny in the case in the third bullet, the other facts are not ones focused in the court’s own statement of the issue. Thus, this statement is overly detailed.
- e) **INCORRECT.** This answer is erroneous because the court never explicitly raises or addresses this question about the relative importance of paying record costs compared to other procedural costs or requirements.

ITEM 8: SINGLE CASE/INDETERMINATE

All opinions are interpretations, and interpretations invite questioning. Assuming that you decide to appeal the *Mackey* decision to Superior Court, which one of the following questions presented by the *Mackey* opinion is most relevant to this task?

- a) Why does the court state that the issue in the case is whether an appeal may be quashed for "nonpayment" when the facts show that Mackey partially paid the amount owed, albeit two days late?
- b) Why does the *Mackey* court opine that Mackey's shortfall in payment constitutes "more than a technicality" even though the shortfall amounted to only a small fraction of the arbitrator's award of damages?
- c) Why does the court rely on its own "inspection" of the pencil note rather than calling for or inviting an expert witness to offer testimony concerning its legibility?
- d) Why does the *Mackey* court go into great detail about the confusion surrounding the communication between the plaintiff and the defendant, yet hold Mackey culpable for not acting within the parameters set out by the statute?
- e) ***Why does the court note each of Mackey's claims about his attempt to contact the Prothonotary's office, yet not explain how it weighed each of these claims when concluding that Mackey made neither an "honest effort" nor "a valid attempt to make . . . full payment"?

ITEM 8: SINGLE CASE/INDETERMINATE

JUSTIFICATIONS

- a) INCORRECT. This question is one whose resolution would be of no help to an advocate for Mackey. After all, the court could justify its use of the term “non-payment” by simply noting what the facts make clear: no payment was received by the deadline. Further, the court could bolster this justification by noting that it clearly acknowledged that Mackey did make a late payment.
- b) INCORRECT. This question identifies an interesting rhetorical inconsistency in the opinion. However, this question is not a good one for an advocate in this situation to pursue, because asking why the *Mackey* court characterized Mackey’s shortfall as “more than a technicality” will not provide the advocate with any legal basis for appeal. Raising this question has no legal basis because the statute being applied says nothing about any “technicalities” that would forgive failure to pay. Further, the controlling precedent of *Black and Brown* does not decide or even discuss standards for deciding when failure to pay is (or is not) “a mere technicality.” Thus, premising an appeal of *Mackey* on the fact that the *Mackey* court gave no reason for this specific conclusion would have no basis in law.
- c) INCORRECT. This question is one which may on the surface appear to be of some help to an advocate representing Mackey, but it might only be worth pursuing if Mackey had sought to introduce expert evidence about the pencil note and the motion to do so was rejected by Common Pleas Court. It does not appear as though Mackey ever tried to introduce such evidence, else the court may have may indicated how it responded to such a motion when it offered its appraisal of the pencil note itself.
- d) INCORRECT. Like question (b), this question identifies an interesting rhetorical aspect of the opinion. However, this question is not a legally relevant one to ask because the statute being applied does not reference any exceptions for compliance involving miscommunication between plaintiffs and defendants. Moreover, the statute directs defendants to communicate with the Prothonotary’s office about the amount of record costs owed, not with plaintiffs.
- e) CORRECT. This question is one whose consideration may help an advocate for Mackey. At least, the question frames a potential jurisprudential problem with the *Mackey* opinion, one that could be used to ground a claim that the court did not apply the law. Specifically, the criticism implied in question (e) is legally relevant given the holding and caveat expressed by the court in *Black and Brown*. The *Mackey* court does not dispute Mackey’s claims about contacting the Prothonotary’s office but it also does not appear to examine these claims in light of the complete language of the *Black and Brown* holding and its caveat.

Black and Brown, Inc. v. Home For the Accepted, Inc. (1975)
Superior Court of Pennsylvania

In an assumpsit action, Home For the Accepted, Inc. (the appellant) lost a decision before a board of arbitrators. The appellant tried to appeal, but despite compliance with other requirements, the appellant made no effort to pay accrued costs to the appellee (Black and Brown, Inc.) prior to the expiration of the 20 day appeal period. Based on this failure to tender costs, the appellee then moved to quash Home's appeal. The Court of Common Pleas of Philadelphia County, at No. 507 September Term, 1971, Trial Division, Law, Victor J. Di Nulile, J. granted the appellee's motion and ordered Home's appeal quashed. Home now appeals this motion to this Court.

The Superior Court, No. 844 October Term, 1974, Van der Voort, J. held that nonpayment of costs warranted dismissal of the appeal. Affirmed.

[1] Arbitration

Requirement that record costs be paid during appeal period is mandatory, but a valid attempt to make such timely and full payment, coupled with substantial though incomplete compliance with the requirement, should not result in harsh finality of an order quashing an appeal from arbitration; rather, the courts should examine the appellant's attempts at compliance in order to determine whether an honest effort has been made to meet the requirements of the statute; overruling *Meta v. Yellow Cab Company of Philadelphia*, 294 A.2d 903. % P.S. 71.

[2] Arbitration

Nonpayment of costs warranted dismissal of appeal from award of arbitration, where no timely attempt to tender costs was made by appellant despite express notice of the requirement that this be done. 5 P.S. 71.

Before WATKINS, President Judge, and JACOBS, HOFFMAN, CERCONE, PRICE, VAN der VOORT and SPAETH, JJ.

VAN der VOORT, Judge (opinion).

This appeal again raises the issue of whether the nonpayment of costs, in an appeal from an award of arbitration, should support a dismissal of the appeal. Our review requires a re-examination of the holding in *Meta v. Yellow Cab Company of Philadelphia*, 222 Pa.Super. 469, 294 A. 2d 898 (1972).

The record in the present case shows that on September 9th, 1971, a Complaint in Assumpsit was filed by appellee (Black and Brown, Inc.) against appellant (Home for the Accepted, Inc.) in the Court of Common Pleas. Appellee had previously filed a mechanic's lien for alleged non-payment on cabinets and appliances furnished to the appellant. The assumpsit action was heard by a Board of Arbitrators and on December 3, 1973 an award was filed in favor of the appellee for \$2,475 plus interest. The award was docketed on December 28, 1973.

The parties agreed that on December 10th, 1973, appellant's trial counsel inquired of, and was informed by, counsel for the appellee, that actual accrued costs amounted to \$102. Appellant's trial counsel notified his client of the costs and the necessity for payment of the costs if an appeal was to be taken. Appellant disregarded this notice and dismissed its trial counsel without notice to appellee. Appellant did not inform new counsel of its prior notice as to costs. An appeal from the arbitrator's award was made on January 10th, 1974. But despite compliance with other requirements for making an appeal, appellant made no effort to pay accrued costs to the appellee prior to the expiration of the appeal period.

On February 15, 1974, appellee filed a Motion to Quash the appeal based on the failure of appellant to tender costs. On March 14, 1974, appellant's counsel offered appellee's counsel a check for \$102, but such offer was refused. On March 22, 1974, the lower court granted appellee's Motion and ordered the appeal quashed. This present appeal by appellant followed.

Now the appellant maintains that the action of the lower court was erroneous in light of the holding of Meta v. Yellow Cab Co. of Philadelphia. In that case, the defendant's attorney paid to the plaintiff's attorney only \$10 for record costs associated with the arbitration proceedings, rather than the actual amount due, \$17.75. Judge Packel, in the majority opinion, joined by then President Judge Wright, and Judges Spaulding and Cercone, held essentially that the ". . . 20 day time limit and the furnishing of security are properly jurisdictional requirements, but the requirement for the payment of costs is directory rather than mandatory" (underline added). In a Dissenting Opinion, Judge Hoffman, joined by President Judge Watkins and Judge Jacobs, argued essentially that the requirement was mandatory that costs be timely paid to perfect the appeal, and that the Court should not disregard the clear legislative command by holding otherwise.

The lower court in the present case distinguished Meta from the facts of this case since there was no attempt by the appellant in this case to pay any costs during the appeal period. In our review of the instant appeal we find significant the fact that no timely attempt to tender costs was made by the appellant (Home for the Accepted, Inc.), despite express notice of the requirement that this be done.

Our recognition in this regard leads us to conclude that the holding in Meta must be overruled insofar as it declares that the statutory requirement of the payment of costs in this type of appeal is directory rather than mandatory. We simply cannot condone a complete refusal and failure to pay the record costs in an appeal from arbitration.

To be sure, both the majority and the minority views in Meta recognized the harshness of denying a party the right of appeal when he mistakenly paid \$10 in record costs, rather than the actual record costs of \$17.75. The majority pointed out that in other cases, our Court has followed a principle of the sufficiency of substantial compliance. We now adopt that rationale and hold that the requirement that record costs be paid during the appeal period is mandatory -- but with the caveat that a valid attempt to make such a timely and full payment, coupled with substantial though incomplete compliance with the requirement should not result in the harsh finality of an order quashing an appeal from arbitration. Rather, our courts should examine the appellant's attempts at compliance in order to determine whether an honest effort has been made to meet the requirements of the statute. Our overruling of the holding of Meta applies also to its progeny, e.g., Holmes v. Broodno, 222 Pa.Super. 478, 294 A.2d 903 (1972).

Lastly, returning to the facts of this case, we find no attempt at substantial compliance by appellant, but rather a situation where no semblance of compliance exists. The lower court, in view of this record, was correct in quashing the appeal.

Affirmed.

Summary References

Evensen, D., Stratman, J., Oates, L. & Zappe, S. (2008). Developing an assessment of first-year law students' critical case reading and reasoning ability: Phase 2. Law School Admission Council (LSAC) Research Report Series. Newton, PA: Law School Admission Council.

Graesser, A., Langston, M., & Baggett, W. (1993). Exploring information about concepts by asking questions. In G. V. Nakamura, R. M. Taraban, & D. Medin (Eds.), *The psychology of learning and motivation: Vol. 29. Categorization by humans and machines* (p. 411–436). Orlando, FL: Academic Press.

Graesser, A., & Olde, B. (2003). How does one know whether a person understands a device? The quality of the questions a person asks when the device breaks down. *Journal of Educational Psychology, 95*, 524–536.

Graesser, A., & Person, N. (1994). Question asking during tutoring. *American Educational Research Journal, 31*, 104–137.

Hacker, D., Dunlosky, J., & Graesser, A. (Eds.) (1998). *Metacognition in educational theory and practice*. Mahwah, NJ: Lawrence Erlbaum Associates, Inc.