Lawyering Skills and the Legal Process

Second edition

Caroline Maughan
University of the West of England

and

Julian Webb
University of Westminster
## Contents

*Preface to the second edition*  
*Table of Statutes*  
*Table of Cases*  

### Introduction  

1  
**Descent into the swamp**  

**Objectives**  
**Supports benchmark statements**  
**A dinosaur snack?**  
Exercise 1.1 Is legal professionalism in crisis?  
Exercise 1.2 Redefining knowledge  
**Where the action isn’t**  
Exercise 1.3 What’s the problem?  
**Where the action is**  
**The skills of lawyering**  
Knowing in action  
Exercise 1.4 When you were a child...  
**The art of lawyering**  
**The values of lawyering**  
Exercise 1.5 High ideals  
Exercise 1.6 Swampy situations?  
**Learning the art of lawyering**  
Exercise 1.7 Crisis? What crisis?  
Exercise 1.8 Concepts  
Exercise 1.9 Review questions  
Exercise 1.10 Learning points  
**Further reading**  

2  
**Learning to live in the swamp**  

**Objectives**  
**Supports benchmark statements**  
**What is reflection?**  
Exercise 2.1 To smoke or not to smoke?
Contents

Exercise 2.2 An unexpected visit 36

Experiential learning and the learning cycle 37

Discrepant reasoning 40
  Exercise 2.3 The discrepant solicitor? 40
  Exercise 2.4 Write all I know about . . . 42
  Distancing and disconnectedness 43
  Summary 44

The learning diary 44
  Exercise 2.5 Re-cycling 44
  Exercise 2.6 More re-cycling 47

Student/teacher roles and relationships 48
  Exercise 2.7 Re-learning 49

What kind of learner am I? 50
  Exercise 2.8 The learning styles questionnaire 50
  Exercise 2.9 Concepts 52
  Exercise 2.10 Review questions 52

Further reading 53

3 Law talk and lay talk: lawyers as communicators 54
  Objectives 54
  Supports benchmark statements 54
  Lawyers need to talk! 55
  Why communication skills matter 56
    Exercise 3.1 What makes a good teacher? 56
    Exercise 3.2 The problems with 'law talk' 57
  How we communicate 59
    Exercise 3.3 Communication models 59
  Barriers and bridges to effective communication 60
    Exercise 3.4 A Martian description 60
    The effect of non-verbal cues 61
    Exercise 3.5 The lights are on . . . 62
    Exercise 3.6 Body talk 62
    Environmental factors 65
    Personal factors 65
    Cultural factors 67
  Inter-cultural factors 71
    Exercise 3.7 Straight to the point or circumlocution? 76
    Exercise 3.8 Concepts 79
    Exercise 3.9 Jury instructions: clarity or confusion? 79
    Exercise 3.10 Testing the evidence or badgering the witness? 80

Further reading 80

4 You'll never work alone: group learning and group skills 81
  Objectives 81
Contents
ix

Supports benchmark statements 81
Stone age instincts 82
  Exercise 4.1 Who am I? 84
Learning in groups: what is it good for? 85
  Exercise 4.2 Groups I have known, groups I would like to know 85
Group theory and research 87
  Higher achievement 88
  More positive relationships 89
  Psychological health 89
  Exercise 4.3 Broken squares 90
Barriers to effective group learning 91
  Exercise 4.4 What am I like in a group? 91
Group dynamics 94
  Exercise 4.5 Fishbowl 94
  Exercise 4.6 What are your preferred team roles? 95
  Exercise 4.7 Roles in my group 95
  Setting ground rules 95
  How groups grow 96
  Exercise 4.8 What’s going wrong? Tackling problems 98
The dynamics of lawyer teamwork 99
  Exercise 4.9 Powerful conspiracies or lost causes? 100
Feedback 103
  Exercise 4.10 Concepts 104
  Exercise 4.11 Tag wrestling 104
  Exercise 4.12 Guilt by association? 105
Reflective exercise: what is your current group skill level? 106
Further reading 106

Interviewing: building the relationship and gaining participation 107
Objectives 107
Supports benchmark statements 107
The functions of the lawyer–client interview 108
  Exercise 5.1 The objectives of interviewing 108
  Exercise 5.2 The other side . . . 109
Assumptions about the relationship 111
  Exercise 5.3 Who’s in charge here? 111
Setting the scene: preparing for the interview 114
  Consider your information needs 114
  Exercise 5.4 You get what you ask for 114
  Planning the physical environment 116
Welcoming: establishing a relationship in the interview 117
  Exercise 5.5 Meet, greet and seat 118
  Note-taking 118
Discussing costs
Territory

Listening and questioning
Listening
Exercise 5.6 Is anybody there?
Exercise 5.7 Hyperactive?
Questioning
Exercise 5.8 Me and Mrs Jones
Exercise 5.9 Tell me why
Pulling it all together
Exercise 5.10 The client interview

Advising and counselling
Lawyers as advisers
Exercise 5.11 Toast
Lawyers as counsellors
Exercise 5.12 Home sweet home
Exercise 5.13 Car trouble
Exercise 5.14 Handling emotion
Exercise 5.15 Pressing problems

Parting, and beginning the continuing relationship
Ending
Beginning
Exercise 5.16 Planning your next steps
Participating

Interviewing and empathic lawyering: a (re)vision of practice?
Empathy and participation
Exercise 5.17 Empathic interviewing
Towards a (re)vision of the relationship
Exercise 5.18 Concepts
Exercise 5.19 Blowing the whistle?
Exercise 5.20 Review questions

Learning points
Further reading

6 The 'good lawyer': ethics and values in legal work
Objectives
Supports benchmark statements
Introduction
Exercise 6.1 Tinker, tailor . . .
Exercise 6.2 Does it matter?

The regulation of professional conduct and ethics
The nature of professional regulation
The codes of conduct
Exercise 8.3 Plain reflection 274
Exercise 8.4 Clause analysis 279

Legal language is unduly peculiar 280
Lawyers, not the people, decide what words mean 280
Exercise 8.5 Shovelling excrement 282
Put yourself in her position: deriving meaning from context 283
Exercise 8.6 Natural meanings 283
Exercise 8.7 Caution! Unforeseen hazard ahead! 284
Does it matter what it looks like? Layout and punctuation 286
Isolated sentences 287
Coherence and word order 287
Interceding with the Deity: pleadings 289
Exercise 8.8 Major surgery 290

The illiteracy of the well-educated 292
Defining your drafting principles 293
Exercise 8.9 A general checklist for drafting 293

Putting principles into practice 297
Exercise 8.10 Have a go 297
Defining your approach 297
Aim to be a critical composer, not a complacent copier 298
Exercise 8.11 Concepts 299
Exercise 8.12 Analysis 299
Exercise 8.13 Boilerplate redrafting 299
Exercise 8.14 What is reasonable doubt? 300
Review questions 300

Further reading 301

9 Handling conflict: negotiation 302
Objectives 302
Supports benchmark statements 302
Making decisions and resolving conflict 303
Exercise 9.1 Conflicts of interest 303
How do you deal with conflict? 305
Exercise 9.2 The shark and the turtle 305

The context of legal negotiation 308
Naming, blaming, claiming ... and negotiating 308
Exercise 9.3 Negotiate? What for? 309
The growth of Alternative Dispute Resolution 311
ADR and negotiation 312
What clients want from negotiation 313
What lawyers want from negotiation 314
Mind the gap 315
Learning the art of lawyer negotiation 317
Step 1: Identify the critical issues 318
Exercise 9.4 What is there to negotiate about? 318
Exercise 9.5 Pam and Wilf 323
Step 2: Select a negotiating strategy and style 323
Exercise 9.6 Have your cake and eat it... 327
Exercise 9.7 The Red–Blue exercise 329
Step 3: Sort out your ethics 331
Exercise 9.8 How low can you go? 333
Exercise 9.9 Hidden messages 334
Step 4: Work out your tactics 338
Exercise 9.10 Staying cool, calm and collected 340
Step 5: Keep your act together during the negotiation 341
Step 6: Keep a negotiation journal 343
Planning the negotiation 343
The critical issues and potential outcomes 343
Our strategy and tactics 344
Their strategy and tactics 344
Are lawyers poor negotiators? 344
Negotiation and mediation advocacy 346
Exercise 9.11 Concepts 348
Exercise 9.12 Yet another negotiation 348
Review questions 348
Further reading 349

10 Advocacy: case management and preparation 350
Objectives 350
Supports benchmark statements 350
Advocacy in context 351
The adversarial nature of advocacy 351
Recreating facts in the courtroom 352
Exercise 10.1 Evidential quiz 353
Exercise 10.2 The surgeon’s story 355
A case study: the case of William Gardiner 357
Preparation 361
Developing a working hypothesis 361
Exercise 10.3 Malice aforethought? 362
Exercise 10.4 The money-lender and the merchant’s daughter 366
Exercise 10.5 Gardiner: chronology and issues 367
Exercise 10.6 ‘Elementary, my dear Watson...’ 368
Constructing your theory of the case 368
Exercise 10.7 Making inferences 372
Exercise 10.8 Moriarty’s a murderer 373
Exercise 10.9 Moriarty rides again? 374
Re-examination 429

Conclusion: advocacy, ethics and adversarialism 430
   Exercise 11.17 Concepts 431
   Exercise 11.18 Review questions 432

Further reading 432

Index 433