

§ Law in Context

CAROLINE MAUGHAN & JULIAN WEBB

Lawyering Skills and the Legal Process

Second Edition

CAMBRIDGE

Lawyering Skills and the Legal Process

Second edition

Caroline Maughan

University of the West of England

and

Julian Webb

University of Westminster



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge CB2 2RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521619509

© Cambridge University Press 2005

This book is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 1995

This edition published by Cambridge University Press 2005

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this book is available from the British Library

ISBN-13 978-0-521-61950-9 paperback

ISBN-10 0-521-61950-5 paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this book, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Preface to the second edition

This book provides a bridge between academic and practical law. Its purpose is to introduce you to a set of highly transferable oral and written communication, group working, problem-solving and conflict resolution skills, and to develop them in a range of lawyering contexts: client interviewing, drafting, managing cases, legal negotiation and advocacy. The aims of this exercise are not to turn you, the reader, into a ready-formed legal practitioner, but:

- to help you develop a range of skills and attributes that will be useful to you in a variety of occupational settings;
- to enable you to experience and reflect critically on the problems and uncertainties of 'real' law, from the perspective of both lawyers and their clients;
- to enhance your understanding of the interplay between legal knowledge, skills and values in the lawyering process;
- to encourage and empower you to understand your own learning processes and to reflect critically upon them.

It is this dual emphasis on understanding lawyers' skills 'in context' – whereby our understanding is shaped by the contributions of socio-legal research into what lawyers do – and on reflection and critique which we believe distinguishes our 'academic' approach from the more functional emphasis of the vocational courses. At the same time we share with the vocational courses (and any undergraduate skills-based course for that matter) a belief that learning has to be grounded in *doing*. Skills are not acquired passively, but actively by experimentation and practice. Please do not skip the Introduction which follows, where we talk extensively about the learning approach we take and our expectations of you, the reader.

The materials in this book are based on well over a decade of teaching skills to law undergraduates at a number of universities. We have written the book primarily for students in England and Wales on law degree programmes possessing stand-alone skills and clinical modules. We were delighted that the first edition was also used outside this jurisdiction, and on some professional courses where students have been encouraged to think beyond the technical aspects of skills acquisition.

Much has changed in the nine years since we wrote our first Preface. Skill-based learning is far more established in our law schools today than it was in 1995, and the 'employability' of graduates has moved up the political and educational agendas. In terms of scholarship too, the volume of research into the legal profession and practice in the UK has grown significantly. Accordingly, every chapter has

been updated to take account of both new research on lawyers and lawyering, and (where necessary) the extensive changes to both civil and criminal practice since the first edition. In addition to the inevitable updating and polishing, we have made other substantial changes. This edition contains an entirely new chapter (Chapter 4) on working and studying in groups – skills that are increasingly recognised to be of both pedagogic and practical importance. Chapter 6, on the ethical dimension, has been substantially re-written around a single case study, and revised to take account of the development since the mid-1990s of a whole new domestic literature on lawyers' ethics. Chapters 8 (drafting) and 9 (negotiation) have both been revised to take account of changes following the Woolf reforms, and the chapter on advocacy has been expanded into two. The first of these (Chapter 10) is now exclusively on case preparation and management in an adversarial context, and incorporates much of the material on legal problem-solving that appeared in chapter three of the first edition, while the other (Chapter 11) focuses on the courtroom skills of the advocate. Teachers in particular might also like to note that, in addition to our statement of learning objectives, each chapter now commences with a brief statement of the QAA Benchmark Skills that are supported by the materials and exercises in that chapter. We hope you find these helpful in terms of your curriculum design and development. This edition is also supported by a website which contains additional materials that we believe will be useful to both teachers and students – again we say more about this in the Introduction which follows.

Inevitably we have accrued numerous debts and obligations in the process of writing and revising this text. Our greatest debt is to Mike Maughan, who has made an incalculable contribution to our own learning and development over the years. We are particularly grateful to Professor William Twining for his advice and support, and his commitment to bringing the second edition 'home' to the *Law in Context* series. Our thanks are also due to Ron Tocknell for his excellent illustrations, and Moira Bailey for sharing her insights into values-based training, and for being both a 'guinea pig' and friendly critic for much of the new material in Chapters 6, 9 and 11. Thanks, too, to Sue Heenan, Caroline's current teaching partner at UWE. More generally, we would like to acknowledge numerous friends, colleagues and students at UWE, Westminster and elsewhere, who, knowingly or otherwise, have contributed to this book in its various manifestations. Last, but by no means least, we owe a special 'thank you' to Mike and Moira respectively for their love and support during the very protracted gestation of this edition.

Finally, to anyone reading this book: we welcome your feedback and evaluation. Whether teacher, student or practitioner, we would be pleased to hear about your experiences in using this book, and any suggestions you have for ways in which we could improve it.

Caroline Maughan
Julian Webb
August 2004

Table of Statutes

Statutes

- Access to Justice Act 1999, 154, 172
- Bail Act 1976, 412
- Children Act 1989, 191
- Civil Evidence Act 1968
 - s.3(1), 419
- Consumer Protection Act 1987
 - s.21, 206, 207
- Courts Act 2003, 356
- Courts and Legal Services Act 1990, 186
 - s.4, 165
 - s.27(2A)(a), 172
 - s.27(2A)(b), 165
 - s.28(2A)(b), 165
 - s.111, 165
 - s.112, 165
- Criminal Evidence Act 1898
 - s.1, 386
 - s.1(f), 386, 427
- Criminal Justice Act 2003, 356, 412
 - s.51, 388, 395
 - s.53, 395
- Criminal Justice and Public Order Act 1994
 - s.48(1), 311
- Criminal Law Act 1967
 - s.6(1), 382
- Criminal Procedure Act 1865
 - s.3, 419
- Official Secrets Act 1911
 - s.2(1), 288
- Official Secrets Act 1989, 289
- Police and Criminal Evidence Act 1984
 - s.79, 416
 - Code of Practice C (revised), 120
- Proceeds of Crime Act 2002
 - ss. 327–333, 189

Road Traffic Act 1991

s.3, 335

Social Security Contributions and

Benefits Act 1992

s.134, 264

Solicitors Act 1974

s.37A, 164

Terrorism Act 2000

ss. 18–21, 189

Unfair Contract Terms Act 1977

s.2 67

Youth and Criminal Justice Act 1999

s.41, 387

Statutory Instruments

Civil Procedure Rules 1998, 181,

267, 289

r. 1.1, 175, 289

r. 1.1(1), 181

r. 1.1(2), 181, 182

r. 1.3, 181, 182

r. 1.4, 356

r. 1.4(1), 313

r. 1.4(2), 181, 182, 313

r. 16.4, 289, 290

r. 22, 185

r. 24.5, 313

Practice Direction 5, para. 2, 289

Practice Direction 16, para. 3, 289

Practice Direction 29, para. 3.5, 182

Practice Direction 52, 369

Practice Direction 54, 369

Income Support (General) Regulations

1987, 265

reg. 45, 264, 265

reg. 51, 264, 265

Land Registration Rules 1925

r. 312, 219

r. 313, 219

Litter (Northern Ireland) Order 1994, 282, 283

Sch. 1, 257–262

Unfair Terms in Consumer Contracts Regulations 1999

reg. 6(2), 268

Foreign Legislation

Legal Profession Regulation 2002 (Victoria)

s.142A, 193

European Convention on Human Rights

Art. 6, 387

Table of Cases

Cases

- A firm of solicitors, *Re* [1992] 1 All ER 364, 165
- B and Russell McVeagh McKenzie Bartleet & Co v Auckland District Law Society and Judd [2003] UKPC 38, 192
- Barclays Bank plc v Eustice [1995] 4 All ER 511, 193
- British American Tobacco Australia Ltd v Cowell [2002] VSCA 197, 193
- British American Tobacco Ltd v USA [2004] EWCA Civ 1064, 192
- Davy v Leeds Corporation [1964] 3 All ER 390, 301
- Donoghue v Stevenson [1932] AC 562, 402
- Dunnett v Railtrack [2002] EWCA Civ 302; [2002] 2 All ER 850, 183
- Furman v Georgia (1972) 408 US 238, 409, 410
- Giannerelli v Wraith (1988) 165 CLR 543, 184
- Griffiths v Dawson [1993] FL 315, 169
- Halsey v Milton Keynes NHS Trust and Steel v Joy & Halliday [2004] EWCA Civ 576, 183
- Langley v North West Water Authority [1991] 1 WLR 697, 183
- Loch Shipping v Richards Butler [2002] EWCA Civ 1280, 197
- Maltez v Lewis, *The Times*, 28 April 1999, 182
- McCabe v British American Tobacco Australia Ltd [2002] VSC 73, 194
- Medcalf v Weatherill [2002] UKHL 27, [2002] 3 WLR 172, 165, 183, 184
- Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd [1982] 3 WLR 1636 (CA), 211
- Morrison v Jenkins (1949) 80 CLR 626, 374
- Myers v Elman [1940] AC 282, 165, 168
- P v P [2003] EWHC (Fam) 2260, 189
- Pennzoil v Texaco, 65
- Practice Direction (Criminal Proceedings: Consolidation) [2002] 1 WLR 2870, 369
- Prince Jefri Bolkiah v KPMG [1999] 2 AC 222, 197
- Prince v Samo (1838) 7 A&E 627, 430
- R v A [2001] UKHL 25, [2001] 12 AC 45, 387
- R v Bentley *The Times*, 31 July 1998, 356

- R v Collins [1973] CB 100, 402
R v Derby Magistrates Court, ex parte B [1995] 4 All ER 526, 186
R v Law Society, ex parte Singh & Choudry (a firm) *The Times*, 1 April 1994, 165
R v Paris [1994] Crim LR 361, 120
R v Prefas and Price [1988] 86 Cr App R 111, 419
Rhesa Shipping Co SA v Edmunds [1985] 2 All ER 712, 355
Ridehalgh v Horsefield [1994] Ch 205, 166
Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616, 268
SITA v Watson Wyatt; Maxwell Bentley [2002] All ER (D) 189, 183
Skjevesland v Geveran Trading Co Ltd [2002] EWCA Civ 1567, [2003] 1 WLR 912, 165, 182, 183
Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale NV [1966] 2 All ER 61, 268
Three Rivers District Council v Governor and Company of the Bank of England (No. 10) [2004] EWCA Civ 218, 191
USA v Philip Morris Inc and British American Tobacco (Investments) Inc [2004] EWCA Civ 330, 193
Vernon v Bosley (No. 2) [1997] 3 WLR 683, 191
Voelker v Combined Insurance Co of America (1954) 73 So 2d 403, 374
Wagon Mound, The [1961] 1 All ER 404, 402
Woolmington v DPP [1935] 1 AC 462, 355

Lawyering Skills and the Legal Process – 2nd Edition:

Statutes

Bail Act 1976

Children Act 1989

Social Security Contributions and Benefits Act 1992, Section 134

Solicitors Act 1974, Section 37A

Statutory instruments

Civil Procedure Rules 1998

1.1(2)

1.4(2)

16.4

Part 22

Personal Injury Protocol 8.96

Income Support (General) Regulations 1987

Regulation 45

Regulation 51

Law Society Guide

16.02

21.01

Chapter 16

Litter (Northern Ireland) Order 1994

PACE Code of Practice C Para 10.4

Practice Direction

1.3

Part 29

Practice Rule

15

16D

Solicitors' Practice Rules 1990

Rule 1

Rule 15

Cases

British American Tobacco Ltd v USA 7.182

Furman v Georgia 12.71

Giannerelli v Wraith 7.151

Griffiths v Dawson 7.78

Halsey v Milton Keynes NHS Trust and Steel v Joy & Halliday 7.140

McCabe v. British American Tobacco Australia Ltd 7.199

Medcalf v Weatherill 7.152

Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd 8.15

Pennzoil v Texaco 4.27

R v Collins, The Wagon Mound, Donoghue v Stevenson 12.29

R v Law Society ex parte Singh and Choudry (a firm) 7.54

Three Rivers District Council v The Governor and Company of the Bank of England
7.178

USA v Philip Morris Inc and British American Tobacco (Investments) Inc 7.187

Contents

<i>Preface to the second edition</i>	<i>page</i> xvii
<i>Table of Statutes</i>	xix
<i>Table of Cases</i>	xxi
Introduction	1
1 Descent into the swamp	11
Objectives	11
Supports benchmark statements	11
A dinosaur snack?	12
Exercise 1.1 Is legal professionalism in crisis?	13
Exercise 1.2 Redefining knowledge	19
Where the action isn't	20
Exercise 1.3 What's the problem?	20
Where the action is	21
The skills of lawyering	24
Knowing in action	25
Exercise 1.4 When you were a child . . .	25
The art of lawyering	26
The values of lawyering	27
Exercise 1.5 High ideals	27
Exercise 1.6 Swampy situations?	28
Learning the art of lawyering	29
Exercise 1.7 Crisis? What crisis?	29
Exercise 1.8 Concepts	32
Exercise 1.9 Review questions	33
Exercise 1.10 Learning points	33
Further reading	33
2 Learning to live in the swamp	34
Objectives	34
Supports benchmark statements	34
What is reflection?	35
Exercise 2.1 To smoke or not to smoke?	36

	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

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
 5 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	119
Territory	119
Listening and questioning	121
Listening	121
Exercise 5.6 Is anybody there?	121
Exercise 5.7 Hyperactive?	122
Questioning	123
Exercise 5.8 Me and Mrs Jones	124
Exercise 5.9 Tell me why	127
Pulling it all together	127
Exercise 5.10 The client interview	128
Advising and counselling	128
Lawyers as advisers	128
Exercise 5.11 Toast	128
Lawyers as counsellors	132
Exercise 5.12 Home sweet home	134
Exercise 5.13 Car trouble	135
Exercise 5.14 Handling emotion	137
Exercise 5.15 Pressing problems	138
Parting, and beginning the continuing relationship	139
Ending	139
Beginning	140
Exercise 5.16 Planning your next steps	140
Participating	141
Interviewing and empathic lawyering: a (re)vision of practice?	143
Empathy and participation	143
Exercise 5.17 Empathic interviewing	144
Towards a (re)vision of the relationship	145
Exercise 5.18 Concepts	147
Exercise 5.19 Blowing the whistle?	148
Exercise 5.20 Review questions	150
Learning points	151
Further reading	151
6 The 'good lawyer': ethics and values in legal work	152
Objectives	152
Supports benchmark statements	152
Introduction	153
Exercise 6.1 Tinker, tailor . . .	155
Exercise 6.2 Does it matter?	158
The regulation of professional conduct and ethics	161
The nature of professional regulation	162
The codes of conduct	163

Disciplining lawyers	164
Exploring professional conduct and ethics	166
Using the ethics case study	166
Trouble on the High Street – Part 1	167
Exercise 6.3 Jason arrives	167
Exercise 6.4 Bayview Developments	170
Exercise 6.5 The litigant in person	175
Trouble on the High Street – Part 2	177
Exercise 6.6 Jason and KB Construction	177
Exercise 6.7 To lie or not to lie	179
Exercise 6.8 In whose best interests?	188
Exercise 6.9 Whose secret is it anyway?	190
Trouble on the High Street – Part 3	195
Exercise 6.10 Bayview strikes again	195
Should we rethink legal ethics?	198
Ethics and problem-solving	198
Exercise 6.11 My station and its duties	199
Exercise 6.12 Concepts	203
Exercise 6.13 Review questions	203
Further reading	204
7 Clarifying language: making sense of writing	205
Objectives	205
Supports benchmark statements	205
Why it is important to write well	206
Exercise 7.1 What, when and why?	206
Exercise 7.2 Which is dense? The reader or the text?	207
Exercise 7.3 Lord Lucid	211
Learning from your writing experience	212
Exercise 7.4 Do you suffer from verbal diarrhoea?	213
Know exactly what you want to say	214
Exercise 7.5 The brick exercise	214
Differences between the spoken and the written language	214
Planning	215
Exercise 7.6 Plain thinking	216
Exercise 7.7 Who is my reader?	216
Exercise 7.8 Golden bull	219
Summary	220
Selecting appropriate language	220
Exercise 7.9 Who speaks good English? It is I!	220
Select an appropriate variety of English	221
Select an appropriate register	223
Exercise 7.10 Le mot juste	224

	Select an appropriate level of formality	224
	Select gender-neutral language	225
	Summary	226
	Say exactly what you mean to say	226
	Exercise 7.11 Grasping grammar	226
	Getting the fundamentals right	227
	Exercise 7.12 Bad grammar	227
	Exercise 7.13 Some people just don't know when to stop	231
	Exercise 7.14 Whose who?	234
	Use correct spelling	235
	Summary	236
	Moving towards artistry	236
	Vocabulary	236
	New use or misuse?	238
	Sentence length and complexity	241
	Exercise 7.15 Sense and nonsense	243
	Paragraphing	243
	Exercise 7.16 Link-hunting	244
	Exercise 7.17 Take out the rubbish	246
	Self-edit your writing	248
	Exercise 7.18 Self-editing	248
	Writing letters	248
	Writing to clients: client care	248
	Writing to other people	249
	Exercise 7.19 Joyless in the Maldini	249
	Good writing makes sense	250
	Exercise 7.20 Concepts	251
	Exercise 7.21 More rubbish	251
	Exercise 7.22 Blowing the whistle? Part II	253
	Review question	253
	Learning points	254
	Further reading	254
	Self-editing checklist for writing	254
8	Manipulating language: drafting legal documents	256
	Objectives	256
	Supports benchmark statements	256
	Legal documents are precision instruments	257
	Exercise 8.1 Runaway trolleys	257
	Legal documents and the three Cs	259
	Exercise 8.2 Unravelling the regs	264
	Legal language is powerful stuff	266
	Legal language is not plain language	274