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## Introduction

This book has a single underlying theme: that being a skilled lawyer means much more than acquiring the capacity to manipulate legal rules. It means having the ability to deal with people and their problems as a competent, ethical and socially responsible lawyer.<sup>1</sup> This in turn requires that skills are developed in a reflective and critical environment, through a combination of what we call ‘skills’ and ‘process’ learning.

The main skills we explore are the classic lawyering or ‘DRAIN’ skills – Drafting (and its underlying writing skills), Research (which we widen into a concept we call problem-solving), Advocacy, Interviewing and Negotiation. You will be expected to develop those skills by practising, by analysing your practice, and then practising some more. At this level we hope you will gain some real insights into the ‘what’ and the ‘how’ of law in action.

The ‘process’ dimension takes us more deeply into the ‘why’ of lawyering. We shall ask you to draw on your experiences of the course and to reflect on our discussions of the practice of law, together with psychological, sociological, linguistic and management research which sheds light on what really happens in the law office and the courtroom. Through this, we hope you will be able to stand back from the skills and think about lawyering as something that is socially and culturally constructed. The lawyer plays an important role as a ‘gatekeeper to legal institutions and facilitator of a wide range of personal and economic transactions’.<sup>2</sup> How we choose to play that role, and with what consequences for ourselves and our clients are two of the most central questions about law in society. It seems extraordinary to us that legal education frequently fails to address either of them in any depth, if at all. We hope that thinking about the lawyer’s role will help you determine how you will deploy the skills at your disposal.

1. Cf. G. S. Laser, ‘Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago–Kent College of Law’ (1993) 68 *Chicago–Kent Law Review* 243. We discuss this notion of lawyering further in Chapter 1.
2. W. Felstiner, R. Abel and A. Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming’ (1981) 15 *Law and Society Review* 631 at 645; also J. McCahery and S. Picciotto, ‘Creative Lawyering and Business Regulation’ in Y. Dezalay and D. Sugarman, *Professional Competition and Professional Power: Lawyers, Accountants and the Social Construction of Markets*, Routledge, London and New York, 1995, p. 238 at pp. 240–1.

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### The aims of this book

These are:

- To encourage you to develop:
  - (1) a range of practical legal skills:
    - client interviewing and counselling;
    - ethical decision-making;
    - writing and drafting;
    - negotiating;
    - case preparation and management;
    - advocacy.
  - (2) a range of general intellectual and interpersonal skills:
    - oral communication;
    - written communication;
    - team working;
    - problem-solving;
    - reflection and conceptualisation;
    - self-assessment;
    - peer evaluation.
- To increase your capacity for independent and reflective learning.
- To encourage a critical awareness of:
  - the impact of legal procedures on the lawyer and other participants in the legal process;
  - the importance of a client-centred approach to legal practice;
  - the ethical responsibilities of lawyers;
  - the value conflicts and uncertainties that arise in legal practice.

### How to use this book

**WARNING:** this book is not just another textbook! You cannot learn skills only by reading; skills development requires doing, and this book is designed to make you do.

Tutors can use it either as a course workbook, or as a flexible resource from which to select and adapt materials. We developed most of its content in the context of an LLB option called ‘Legal Process’ that we launched at the University of the West of England in 1990. This is a skills-based programme constructed around simulated case studies in the civil and criminal law. The materials are team-taught in a series of three-hour workshops, running across a full academic year. Not everything in the book is taught every year. To work through all these materials in this way would certainly take more than one academic year! With some care it is possible to pick and choose materials rather than follow everything to the letter. Many of the exercises can be undertaken by students working outside formal class contact time. The materials can also be adapted for delivery as a single

semester module, or as a series of discrete skills modules (e.g. on interviewing, trial advocacy, etc). Julian has used the interviewing, writing, drafting, negotiation and ethics chapters selectively to deliver a weekly two-hour workshop to second year LLB students at Westminster since 1999. Unlike Legal Process, this is an assessed core module delivered (currently) to in excess of 300 students annually.

Tutors should also note that there is an accompanying website,<sup>3</sup> which replaces the short *Teachers' Guide* that we published to accompany the first edition. The website provides additional guidance for tutors on our experiential method (we also say more about that in the following sections of this introduction); additional guidance and materials for running exercises in this book,<sup>4</sup> and some other exercises and materials we have not included in this volume.

Teachers might also like to note that there are three exercises which require the use of questionnaire materials from outside the book. Exercise 2.8 relies on the learning styles questionnaire which is produced as part of Honey and Mumford's *Manual of Learning Styles*. We have been advised that users of the 1992 edition of the *Manual* can freely copy the questionnaire for training purposes. Later versions require you to purchase a user licence. We find the 1992 version is quite adequate for our purposes. Exercise 4.6 asks students to complete the Belbin questionnaire on team roles which can be found in R. Belbin, *Team Roles at Work* (1993), along with the necessary scoresheet. Exercise 9.2 relies on a questionnaire published in Johnson and Johnson's *Joining Together* (2003), pp. 385–7. The original is rather longer and more detailed than we really need, so we adapt it for our own purposes. There are two other exercises – 4.3 and 4.9 – for which you will need extra materials from Johnson and Johnson, pp. 83–5 and 579–81.

### Structure and rationale

We have deliberately adopted a fairly standardised structure for each chapter, which reflects our overall design of the text as a skills workbook. The format is as follows.

#### **Introductory material**

Each chapter begins with a brief summary of its contents. This is followed by a list of learning objectives and of relevant Law Benchmark Statements. The intention of these features is to maximise the transparency of our objectives, and make clear what tutors and students can expect from each chapter. The Benchmark Statements<sup>5</sup> are an addition since the first edition. These Statements were introduced by the (UK) Quality Assurance Agency to provide a broad specification of

3. At [www.cambridge.org/9780521619509](http://www.cambridge.org/9780521619509).

4. Most materials for the exercises are incorporated into the text, however, in some cases (which we identify in the text) we want students to discover the purpose of the exercise for themselves, or have other reasons for maintaining a greater element of surprise. Providing instructions in the text would give the game away, so we have put all the materials on the website.

5. See [www.qaa.ac.uk/crntwork/benchmark/law.pdf](http://www.qaa.ac.uk/crntwork/benchmark/law.pdf).

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the skills that a law graduate can be expected to acquire in the course of a qualifying law degree. The Benchmarks are designed as outcome statements: that is, as generic behavioural indicators of what a student should be able to do by the end of the degree, and as such they do not add greatly to the more detailed learning objectives we have identified for each chapter. Nevertheless, we have included them here primarily to assist teachers in curriculum planning and design. It will be apparent from the range of Benchmark specifications included that a well-designed lawyers' skills module can help satisfy a significant part of these Benchmark requirements. In each chapter we have only emphasised those Benchmark skills that are a significant feature of that chapter. In so doing we have deliberately not laboured the extent to which some Benchmarks are supported to some degree by every chapter – notably the capacity to reflect on one's own learning (see Key Skill 5: Autonomy and ability to learn) and the ability to work in groups (see Key Skill 7: Other key skills).

#### Information and exercises

The substance of each chapter is organised to achieve three main goals:

1. to enable students to learn experientially from exercises and activities;
2. to provide a necessary minimum of skills and process knowledge;
3. to encourage discussion and reflection.

So far as possible we have structured the materials to encourage you – the students – to think about skills and process issues for yourselves – usually by engaging in an activity and discussion which encourages you to engage with the issues from personal experience. This approach, of course, runs counter to much of the conventional way of learning, not just on law degrees, but on most academic programmes.

To help students (and perhaps tutors too) to adapt to this style of learning, Chapters 1 and 2 set out the learning theories this book is built around. Our experience as teachers tells us that students are much better equipped to learn experientially once they have a basic grasp of how they learn.<sup>6</sup> If you intend to follow our programme, rather than just use this as a secondary resource book, we strongly recommend that these chapters are covered first. Apart from that, we leave issues of coverage to you.

#### Consolidation and further reflection

At the end of every chapter there is a sequence of exercises designed to consolidate learning based on that chapter:

- (a) Concept check: this exercise enables students to assess whether they have understood the information in the chapter.

6. See further C. Maughan and J. Webb, 'Taking Reflection Seriously: How Was It for Us?' in J. Webb and C. Maughan (eds.), *Teaching Lawyers' Skills*, Butterworths, London, 1996.

- (b) Review: this allows students to reflect on and discuss important issues covered in the chapter. Tutors may prefer students to do these exercises after doing some further reading.
- (c) Further skills building exercises, where appropriate.
- (d) Learning points: in Chapters 1, 7, and 9, we have introduced an additional exercise to help students focus on their own needs and abilities in specific skills situations, and to explore how they will adapt certain theoretical constructs for their own use.

### A note on footnotes

We thought long and hard before adopting footnotes. They are unusual in (English) skills books, particularly in the quantity we have. In the end we felt that they were necessary given our intention to put legal skills ‘in context’, and would be less distracting than endnotes or Harvard referencing. We have not distinguished in footnotes between materials tutors might need to follow up more than students, or vice versa. The further reading section at the end of each chapter is designed more with students in mind.

### How to learn from this book

We base our learning methodology on the experiential learning cycle devised by David Kolb and the methods of reflective practice developed by Donald Schön (see Chapter 2). Learning is based around a large number of practical exercises. By doing these exercises students observe and analyse their own behaviour, thoughts and feelings and those of their fellow students. This process of reflection enables them to identify what worked well, what did not, and why. They can then experiment with new forms of behaviour at the next opportunity.

This methodology will be unfamiliar to some law teachers,<sup>7</sup> and probably to many law students. It may therefore involve you in a re-appraisal of your attitudes to learning and your perceptions of tutor and student roles in the learning process. We therefore think it will be helpful if we address a number of issues involved in this type of learning.

Do I have to join in?

#### To students:

Yes, this is essential! Because you are ‘learning by doing’, you will take a much more active role in class than you may be used to. You will participate actively

7. Some accessible discussion of learning methodologies can be found in the following collections: K. Raaheim, J. Wankowski and J. Radford, *Helping Students to Learn*, SRHE/Open University Press, Milton Keynes, 1991; N. Gold, K. Mackie and W. Twining (eds.), *Learning Lawyers’ Skills*, Butterworths, London, 1988; M. Le Brun and R. Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law*, Law Book Co, Sydney, 1995; J. Webb and C. Maughan (eds.), *Teaching Lawyers’ Skills*, Butterworths, London, 1996; H. Brayne, N. Duncan and R. Grimes, *Clinical Legal Education: Active Learning in your Law School*, Blackstone Press, London, 1998; R. Burrige, K. Hinett, A. Paliwala and T. Varnava, *Effective Learning and Teaching in Law*, Kogan Page, London, 2002.

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in the practical exercises, often by role playing. You will give and receive feedback both on your own performances and the performances of other members of the class. Your tutor may video exercises to help you review your performance.

Active learning also means taking responsibility for your learning. This book and your tutor provide much of the learning content, but you are in charge of the process. This means you will analyse your behaviour, thoughts and feelings, experiment actively to change your behaviour, and challenge your personal values and attitudes. We strongly advise that you record your learning process in your own personal learning diary, which (we suggest) need not be read by your tutor unless you think that would help you to learn.

### **To tutors:**

If you are new to skills teaching, the process will be as much a challenge for you as it is for the students. Active learning for students does not mean that teachers can become passive! Preparing, structuring and running skills workshops can be exhausting. At times we ask you to role play, so you will have to learn the role and then act it out. While groups are doing practical exercises, you will probably want to circulate and listen in, to check that your students have got the hang of what they are supposed to be doing. You will also want to note down points to raise in the feedback sessions. You will find you spend a great deal of time summarising on boards, flipcharts and overhead transparencies, sticking flipchart pages on walls, or providing the materials for your groups to do all these things. And don't forget the video! This is an incomparable part of feedback. When we first set up the course we used to spend probably too much time trying to review videos in class. We still use them for demonstration purposes, but have found that it is far more effective to let the students take the videos of their performance away with them for either individual or small group analysis.

Keeping to time can be a major problem. It is important to devote plenty of time to feedback, so as to enable students to reflect on and conceptualise their experiences in the workshops. You may set aside what you think is sufficient time, but find you exceed it, because you do not want to cut off valuable feedback. This still happens to us. We have yet to find any easy solution which does not involve us imposing a strict, and sometimes quite arbitrary, time limit.

Will my tutor tell me everything?

No, definitely not!

### **To students:**

Taking more control over your learning means that your relationship with your tutor may be different from the one you are used to. Your tutor's job is to set up conditions and situations in which you can experiment and improve your skills.

Your tutor will want to become redundant as soon as possible, by enabling you to evaluate for yourselves the success or otherwise of your performance.

You will spend a good deal of your time working in groups. This method of working may be new to you. It involves a number of skills. You will have to work out how to allocate responsibility for tasks within the group, and find ways of handling any problems which arise between members of your team. Group work is dealt with in detail in Chapter 4.

### To tutors:

We can all find it difficult to break long-established habits of didacticism. However, telling students how to perform the skill will not enable them to learn it. Similarly, feedback should not consist of the tutor telling the student how they should have performed. To develop the skill of critical self-assessment, students need to evaluate their own performance before anyone else does it for them. After all, they are the people who are going to have to deal with the problem next time, not you.

How do I reflect on and evaluate my experiences?

Through feedback and your learning diary.

### 1 Feedback

We think feedback has two functions: (a) it should encourage the performer to reflect on their performance; (b) it should support that reflection and reinforce good practice.

- (a) We suggest the following feedback sequence should always be used:
- (i) Start with the student who has performed the exercise. So, for example, in a practice client interview, the 'lawyer' feeds back first.
  - (ii) The 'client' responds with views on her feelings and perception on the process.
  - (iii) Anyone else actively involved in the exercise.
  - (iv) Observers (the student's group or the whole class).
  - (v) The tutor.

If you are to encourage reflection you need to start by questioning the performer on their behaviour, and their thoughts and feelings about the performance. We start feedback by using a very general, open, question to get a response from the performer. We then use the performer's responses to focus on specifics. By your questioning you should try to get the performer to recognise their own strengths and weaknesses, without you telling them. Don't give them advice at this stage. For example:

OBSERVER: How do you think the interview went?

LAWYER: OK. I didn't do as well as I hoped: he seemed a rather difficult client.

OBSERVER: What made him 'difficult'? Was there anything in particular which gave you that feeling?

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LAWYER: I don't think I established a rapport with him.

OBSERVER: So what could you have done to improve rapport?

LAWYER: Perhaps if I'd made fewer notes, and looked at him more, responded a little more openly, that would have helped.

- (b) If you are going to give advice then address specific aspects of performance rather than just giving a general 'I think Jo could have summarised the facts better'. What aspects of recapping could be improved upon, and how? Be prepared to share experiences in this kind of feedback.<sup>8</sup>

Remember, whether you are asking questions, or giving advice, or reflecting on your performance: feedback needs to be focused, constructive and honest. Performers and observers should try and avoid feedback that sinks to the level of banality. Observers should not offer destructive or 'negative' feedback. It can damage a performer's confidence, and encourages them to be defensive, rather than open, about their practice.

### 2 The learning diary or portfolio log

The UWE course uses learning diaries or 'journals' as the primary means of recording reflection. The Westminster variant adopts portfolio-based assessment.<sup>9</sup>

#### *To students:*

You should make an entry in your learning diary or log after you have had a few hours to think about your behaviour, thoughts and feelings during the exercise and the feedback session immediately afterwards. Wherever possible, however, you should make contemporaneous notes about your performance, your feelings and the feedback you gave and received. Use these to help construct your learning diary or log entries. Try and avoid writing up entries purely from memory – it can be misleading.

#### *To tutors:*

If you adopt our original methodology learning diaries play an important part. We recognise that there is a long-standing debate over whether tutors should even review, never mind assess, student diaries. For what it is worth, our position is that review is useful, but should be a consensual aspect of the course rather than a formal requirement.<sup>10</sup> The student diaries are personal and may include much confidential material. We suggest you don't include them in your assessment of students for that reason. There is also a problem of determining what you would be assessing: the student's performance, their reflection and evaluation of it, or their ability to write an experiential learning diary?

8. Good practice in giving feedback is set out in Chapter 4, at p. 103.

9. See also J. Webb, 'Portfolio-based learning and assessment in law' at [www.ukcle.ac.uk/resources/portfolios.html](http://www.ukcle.ac.uk/resources/portfolios.html).

10. These issues are less significant with the model developed at Westminster. Log sheets are assessed as part of the portfolio.



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You may also find it useful to keep a diary to record your own learning, particularly if you are not experienced skills tutors. We have found it both a salutary experience, and a hard discipline to maintain.

Will I enjoy it?

We certainly hope so. Here are some comments from two LLB students at the end of the first term's work:

- (1) I love the style of teaching that has been adopted. As well as allowing you to meet new people I feel that group work enables you to learn more. It allows you to talk about your ideas with other members of the class and also hear their ideas, some of which you may not have thought of. The relaxed and friendly atmosphere makes you want to listen and understand. Even though I am aware of the importance of the theory we are being taught . . . It is beneficial to put this theory into practice through doing role plays and writing letters . . . I have gained detailed knowledge of the learning process and self assessment. Previously I never really thought about how I acted in a particular situation and whether my performance would affect future conduct.
- (2) . . . the three hours do fly past. It has become a real motivator for me. I struggled last year with my subjects and was nervous about my final year. This teaching format has taught me more about my ability to cope, and me as a person, and has given me more confidence.

Our own experience is that learning skills can be stressful, frustrating, infuriating . . . and more fun than you ever thought studying could be – but only if you are prepared to get involved and make it work!



Figure 1.1.1. Law graduation – The Descent into the swamp