

The Lawyer's Practice

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The Lawyer's Practice

Kris Franklin

The Lawyer's Practice

A Context and Practice Case File

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For Sarah, whose enthusiasm and encouragement knows no bounds; for Lia and Gabriel, to whom patience with parents' work comes less easily and who nonetheless support it with unfailingly good humor. And for Peggy, who never stops teaching.

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Series Editor's Preface

Welcome to a new type of law text. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. **Student learning and preparation for law practice are the guiding ethics of these books.**

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

The problems with traditional law school instruction begin with the textbooks law teachers use. Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, Context and Practice casebooks make it easy for law professors to change.

I welcome reactions, criticisms, and suggestions; my e-mail address is michael.schwartz@washburn.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning. In fact, students, if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Professor Michael Hunter Schwartz, Series Designer and Editor
Co-Director, Institute for Law Teaching and Learning
Associate Dean for Faculty and Academic Development
Washburn University School of Law

Acknowledgments

My profound gratitude to the many colleagues and students who have helped shape my thinking about how to put together materials that will both challenge and teach law students in a realistic way.

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Thank you too to the many co-teachers whose ideas about teaching various concepts contributed concretely to the formation of these materials, and who have helped me refine my thinking about the intricacies of legal practice and student learning. These are too many to mention, but invariably include Anthony G. Amsterdam, Lenni Benson, Peggy Cooper Davis, Linda Feldman, and Aderson Francois.

I am lucky that Carolina Academic Press and Michael Hunter Schwartz and Gerry Hess decided together to build the kind of thoughtful legal educational series in which a theoretically-based practice book (or a practice-based theory book) can find a home. I am especially grateful to Linda Lacy and Tim Colton for their unwavering flexibility and creativity in finding ways to package a somewhat unusual project.

Finally, thanks beyond words to my family. I never cease to be amazed by Sarah Chinn's unwavering love and her passion for ideas, which pushes me always to be as thoughtful as I can just to keep up. I am also grateful to Sarah for incisive editing of this and all of my work, to our children for kibitzing on ideas over dinner, to my sister Kelly who taught me the importance of authors' notes, and to my parents, for everything.

Introduction

What lawyers do

Students come to law school with all sorts of ideas about what they might do when they graduate. Their images of legal work may be drawn from talking to friends and family members, or from portrayals (both positive and negative) of lawyers in the media. The common impression we have of lawyers' work involves activities that seem highly specialized—that is, making arguments in court, drafting wills and contracts, deposing witnesses, and so on. But if you ask many attorneys to describe what they are really doing in their jobs their responses may reveal an objective far broader, and ultimately more compelling, than any list of the individual tasks could possibly encompass. Put simply: lawyers work with their clients to help resolve problems.

Helping clients solve problems, or in many instances, seeking to anticipate and minimize potential problems in the future, is a pretty lofty goal. It carries with it a great deal of responsibility. No matter what kind of work you take on when you leave law school, people will look at you differently. They will expect you to have expertise not only in navigating the legal system, but also in steering others safely through many of the non-legal but related complexities of modern life.

But you will not have to do this work all alone. A hallmark of what has come to be called “client-centered” lawyering is an assumption that clients' problems are best resolved when lawyers work *in tandem* with their clients. As a team, they can consider and address both the legal and non-legal aspects of a particular difficulty or dispute. Accompanying this approach is an implicit notion that clients themselves must ultimately be in control of the legal decisions that will impact their lives. Lawyers should provide information and advice that will assist and support clients in making decisions, but the clients should actually make them.

Of course, some people's expectations of what lawyers can do may not be realistic. And as a new lawyer you will undoubtedly find that you yourself need significant guidance and supervision to hone your skills. Nonetheless, the more you come to think of yourself as a burgeoning *professional*, trained and ready to assist others with their difficulties, the more effective you will be as you begin your legal career.

What this book does

This text is designed to help sharpen your sense of professional identity and responsibility while you practice and learn many of the important skills that lawyers need. To do so,

you will work through many different parts of a fairly representative (fictional) legal case as you represent your client in what we will call the Burnham Heights lawsuit.

Problem-solving competencies

It is certainly true that resolving problems in a legal setting requires undertaking many of the tasks we typically associate with lawyers. Effective legal problem-solving demands that a lawyer competently perform at least the following:

- understand the problem, which in turn involves knowing both the relevant facts and applicable law
- thoroughly research both facts and law
- rigorously analyze facts and applicable laws
- produce well-crafted written work in both formal drafting and informal communication
- develop strong interpersonal skills to work effectively with clients, witnesses, potential parties to a deal, other counsel, judges and supervisors
- think strategically
- pay careful attention to details
- manage time

and perhaps most importantly:

- exercise good judgment, both in the form of reliable legal judgment and garden-variety common sense.

This text allows you to practice each of these competencies in structured but realistic ways. The exercises in the book progress in a manner typical of an unfolding civil case. You may not be assigned to handle all parts of the case, but in each phase of the Burnham Heights case you will be working on, you will do almost exactly what an experienced lawyer would do next to prepare for trial or settlement. What that means for you is that rather than focusing on each of the various skills on our problem-solving list independently, you can practice and reflect on them in context and begin to understand how they fit together.

Exercises that build on one another can change the way you learn

Aside from being somewhat more authentic, the implications of this integrated-exercise design may not be obvious at first. Yet as your class moves forward you are likely to find that the interrelatedness of each aspect of your case file profoundly affects the way that you work, and the way that you learn.

First, having a connection to your client, and a conscientious sense of accountability for the decisions you make as you work on his or her¹ case, will undoubtedly add context, realism, and depth to your learning. Moreover, from the very beginning stages of learning

1. To avoid using awkward language to refer generically to either lawyers or clients, this text hereafter makes the somewhat arbitrary choice to use male pronouns for clients and female pronouns for attorneys.

about the problem all the way through to negotiating a possible resolution, the work that you do will build on the choices you have made in earlier stages. In other words, exactly as is true in real life, your own handling of the case both legally and interpersonally may profoundly influence the options available in subsequent stages.

Necessarily, then, the ideas, materials, and characters you will work with in the Burnham Heights case are rich and quite complex. There are a lot of ways to handle them. Just as it is true that good lawyers might approach the same set of facts or tactical decisions differently, a series of simulated learning experiences that can feel genuinely lifelike requires that there be any number of smart ways to approach different parts of the problem. Hopefully, this intricate correlation between your efforts and the substance of your developing case will help make this case feel more like *yours*, which may in turn create incentive to thoughtfully consider every decision that you make in every aspect of your case. This is an important part of learning to be a professional.

Developing critical reflection skills

Rather than being daunted by the density of the Burnham Heights scenario, you can see it as both a challenge and an opportunity. Every student tackling these exercises will work hard, but each person will probably go about the work somewhat differently. Variations in technique or methodology do not necessarily mean that one way is correct and others are wrong. Far more often, differences in approaches simply exemplify the axiom familiar to nearly all legal training: rarely in law will there be only one possible answer to any question.

Just because it is frequently true that there are many possible choices at any given point, however, does not mean that all solutions are equally insightful or equally successful. Some decisions may be reasonable with limited information, but nonetheless do not turn out well, while other choices are simply poor ones. As you work through the exercises in this book you'll have an opportunity that is not actually available to practicing lawyers. You can see what happens if other students/lawyers choose different forks in the road, and your instructor can help you find ways to change or correct any genuine mistakes that you make.

You will quickly see that lawyers should strive to be self-critical. We are not trying to be pessimistic about how we perform our duties, but rather to continually evaluate our own work so that we are always improving. Competent representation of our clients is, of course, a baseline requirement, and successful outcomes are always our goals. But you can come to truly stand out in our profession if you are not willing to settle on mere proficiency, but rather, adopt the legal equivalent of a "continuous quality improvement" plan. Even if your efforts succeeded in a particular project, you should carefully analyze each aspect of your work: your conversations with clients and others, your communication of the arguments you craft, your strategic determinations. Ask yourself about each and every choice, no matter how small or seemingly insignificant: "What other ways were there to do this?" and "Should I have tried them?"

Over time, this questioning attitude will ensure not only that you learn the basics of your craft from the outset, but also that you remain critically engaged with your work and that you never stop growing professionally. The exercises in this book will provide opportunities to begin practicing all of the skills and activities on our list of problem-solving competencies and, even more profoundly, can help you develop the critical and reflective eye of the most expert attorneys.

How you will use this material

The Burnham Heights case involves a family's civil suit against its local school district because of what the family charges are inadequate accommodations for their two disabled children, each of whom has several distinct claims. The litigation will focus primarily on a legal issue that you may not yet have encountered in law school, but will also include tort material commonly covered during the first year. The case will be filed in federal district court, but requires application of both state and federal substantive law as well as the federal procedural rules.²

Why litigation?

The Burnham Heights case takes place amid active civil litigation. Each side will work toward preparing for trial while seeking, perhaps preferring, a negotiated settlement.

However it is important to keep in mind that an enormous amount of legal work—in fact, the sum total of many successful practices—is transactional. That means that it takes place outside of any lawsuit and seeks to accomplish the client's goals while minimizing the risks of future litigation. Learning about how law operates in litigation is the norm in most law schools and has been for many, many years. It's a fair question to ask whether working in a litigation context is good preparation for the many future lawyers who will instead find themselves in a transactional practice. After all, there are many differences both obvious and subtle between the two settings. As but one example, litigation and transactional clients may have significantly different views toward other parties (adversaries or potential partners/beneficiaries?).

But there are good reasons for the litigation focus beyond routine adherence to tradition. First, though the emphasis might be different in every practice setting, the list of central problem-solving tasks and skills are probably quite similar. So for the purpose of developing general legal competencies, it may not matter that much in which setting you rehearse. More importantly, virtually all legal work operates in the shadow of litigation. Consequently, even full-time transactional lawyers must fully understand problems from a litigation perspective so that they can work proactively to prevent their clients from ending up in a lawsuit, or at least try to situate them as favorably as possible should one arise.

Finally, there is the fact that litigation is a signature province of attorneys. For many (though not all) problems, understanding actual or potential court cases is the greatest difference between what lawyers can offer and the contributions that experts from other fields may make. For foundational learning, therefore, it makes sense that law students become comfortable with the intricacies of working on ongoing legal proceedings even though they will disperse into any number of disparate disciplines after law school.

What to expect as you begin work on the Burnham Heights case

Most of the stages of the Burnham Heights scenario correspond to the natural evolution of similar cases in real life, but occasionally you will find that we have had to stretch

2. Burnham Heights is a fictional city set in the state of Maryland. Your instructor may decide, however, that it would be helpful for you to work in the jurisdiction of your particular law school. If that is the case, please assume that all references to "Maryland" in the materials refer actually to your own state, and assume that the complaint was filed in the appropriate federal court for your district.

slightly beyond the boundaries of common procedures to make your coursework more practical. For example, there are times when both sides may be working on the same sorts of tasks simultaneously, when in actual practice it would be more common for them to work sequentially, with one party responding to the other.³ Moreover, some of the included cases are real ones, but have been lightly edited for use in our case file. Please view these sorts of deviations as convenient accommodations.

These materials are suitable either for a first-year legal practice/lawyering course integrating written and analytical work with an introduction to core clinical training, or for an upper level course subsequent to basic instruction in legal writing and thinking. Depending on the needs of your particular class you will probably omit some of the exercises in this book, and may emphasize research and writing particularly heavily, or only as needed to support the focus on other parts of the case. Your professor will brief you about any developments you may need to be aware of.

Your role in these exercises

You will be assigned to represent either the plaintiff family or the defendant school district in this educational access/tort case. It should not matter all that much which side you work on. The materials have been crafted to present comparable challenges to both sides, and both sides hold positions that are sympathetic, though probably not unassailable.

In the beginning stages of the case you will work to gather as many facts as you can, and to research the law pertaining to the case. As you move along you will oversee discovery and motion practice while you prepare to counsel your client about his or her best options given your analysis of the case so far. You will find that this requires an understanding not only of your case as a whole, but also of your client goals and desires. Finally, while you move ahead in preparing for trial, you will also try to settle the case out of court. Crafting an individually-tailored resolution will commonly result in better circumstances for your client, and may be preferable to seeking a judicial resolution even one were to turn out favorably.

Plan of this text

This book is divided into four main parts and one supplementary section. Each of the four parts corresponds to a distinctive phase in the pre-trial/pre-negotiation preparation of the case, while the supplemental “coda” section jumps forward somewhat to an appeal of one unresolved legal point. As you go along, it will help to pause frequently and reflect on where you are in the case. In that way you can begin to see how the various steps and exercises you have completed relate to one and construct your case as a whole.

Within each section are several chapters pertaining to smaller pieces of the larger undertaking. Chapters are further divided into Exercises, each of which completes one significant task necessary to accomplishing the larger goals of that phase of the Exercise.

3. This case file also divides into discrete tasks many of the planning and preparation steps that senior attorneys might perform simultaneously. Their experience allows them to move through their groundwork quickly and efficiently. But to ensure that you will have a chance to practice and comprehend each component part of the exercises in this case file, each of those steps is treated here as a distinct assignment. Your class may opt to address each assignment separately, or may choose to combine some of the exercises into larger projects.

As you begin each Exercise you'll find a list of the problem-solving competencies that it emphasizes. This list is intended to guide your thinking in what kinds of intellectual work are required to complete the assignment, but it is certainly not meant to be exhaustive. In fact, there could be significant disagreement about what should be on the list, and it would not be overstating the case to contend that every item on our list of competencies is needed for every assignment. Nevertheless, the competencies listed in each Exercise are the ones most lawyers would agree are especially central. As you begin each step in the case note how many of the competencies required for the task might not have been ones that you would immediately have expected to be called upon. Lawyering work is intensive, thoughtful and interrelated, far more so than many beginning lawyers realize.

Each Exercise begins by assigning a specific task for you to complete. Some of these will be written, others done orally. You may find yourself working individually or in teams. If the latter, you will gain experience that is uniquely valuable in today's frequently-collaborative legal practice environments. You can also add "effective teamwork" to the important professional competencies that you are developing.

The nuances of expertise in legal representation involve a lifetime of study. Each Exercise provides short commentary giving context for the assigned task, but whole volumes have been written about each one of the items on our list of problem-solving competencies. Many of those resources will be helpful guides as you plan each phase of your work. The material contained in this volume is not intended to be encyclopedic, but rather to get you started in thinking through the decisions you will have to make in order to be effective in your work. For more specific guidance you are encouraged to consult other assigned or optional readings.

Finally, each of the Exercises ends with a series of questions. The Practice Questions are intended to guide you in your thinking as you work through or complete the assigned tasks in your specific case. The Ethical Considerations raise ethical or moral questions about the work at hand. There may be specific canons of professional responsibility that govern some of the points raised. Even where such rules exist, though, you will often find that they do not provide exact directions about how you must conduct your work, and that no set of ethical guidelines can dictate precisely how you should conduct yourself as a principled advocate for your client. Many of those harder questions will be ones that only you can fully settle for yourself. The Reflecting on Your Work questions are intended for use after you have completed each assignment and are ready to learn from it as a broader example of lawyering work. Because they raise points to consider as you evaluate your performance, however, they may also be useful to keep in mind as you plan and go about the project. All three categories of questions are included when they are useful, but some categories are occasionally omitted if they would not add meaningfully to your experience in that particular Exercise.

Caring for your work

As in real life, the Burnham Heights case unfolds gradually. In the beginning, your case file will be comparatively sparse. As you work through the different phases of the materials, though, you will accumulate a wealth of documents and information. Some of this information will come from your own work product—*e.g.* from your notes from client conferences or from your legal research. Some will be given to you in the form of documents prepared by your adversaries or other lawyers working in your law firm. Your professor will make sure that you have the materials that you need when they are required for your particular course.

You should treat all of your materials for this course with the same meticulousness that you will give these documents in practice. Develop an organized system for keeping your files so that your papers will remain neat and accessible. You will find that you need to review your documents regularly, and you will work most efficiently if you can easily locate everything you are looking for when you need it.

You must also ensure that you protect your case files carefully. Personal information about your clients is confidential. Until your instructor tells you to share particular information or parts of your files, you must protect your client's privacy by not revealing information about your client's case to anyone, including your classmates. Moreover, attorneys' work products are privileged, so you should not share drafts of your work with others until you are encouraged to do so.

Learning from your efforts

Research into experiential learning suggests that the most effective methods incorporate three phases: 1) investigation and planning; then 2) performance; followed by 3) critical examination.

You should adhere to this plan/do/critique model for every new step you take in your work on the Burnham Heights case. Regardless of whether you are working on a writing project, researching, or preparing to interact in some way with your client or opposing counsel, following these steps will help you get the most out of each exercise, and will establish a core methodology that will serve you well throughout your professional life.

This approach means that whether you are working alone, working with a partner, or modeling part of the exercise in a classroom setting, you will start by planning your work carefully. To do so, you will undoubtedly have to learn more about what is expected for each of the tasks you undertake. That is, you will have to develop a working understanding of what it means, for example, to draft a well-written brief or to conduct a particularly effective intake interview with a new client.

Next, you will have to formulate a plan to accomplish each task in consideration of the unique facts of your own case (keeping in mind that even though all students may be working on the Burnham Heights scenario, subtle differences among your clients or the ways that you have conducted your cases will mean that your classmates' cases are probably not precisely the same as your own). When your plans are comprehensive and carefully considered, you will be ready to carry them out to the best of your ability.

Finally, you should carefully evaluate your plans and your execution of them. Each of the steps you undertake in working on your client's problem is complicated. At this early stage in your career you are not expected to fully master the myriad skills you are learning. Rather than striving for perfect performance, it will help if you view your work in the Burnham Heights case simply as an opportunity for you to work toward developing expertise, and a foundation for your own critical analysis. Keep in mind, too, that *critique* does not mean quite the same thing as *criticism*. It can be as valuable to identify and analyze what went well in your efforts as it is to focus on what might have been improved. Either way, you will be learning to evaluate your professional work, and to identify the strongest approaches to any given legal task. Identifying and articulating your successes will help you repeat them.

Your critical efforts may be assisted by getting written, oral or other forms of commentary from your teacher, fellow students, or your client or opposing counsel. Outside feedback

on your work is invaluable, so be sure to approach it with openness and an interest in learning as much as you can, rather than in defending your particular decisions.

Enjoy yourself

One of the hallmarks of successful people in any profession is *passion* for their work. If you undertake the Burnham Heights projects with enthusiasm and a spirit of curiosity, you are not only likely to learn more and get more out of your experiences, but will probably also have more fun. Taking delight in your work serves your clients well, gives even routine tasks meaning, and will ensure that your legal career can remain profoundly rewarding.