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2011

Good Practice Guide (Bachelor of Laws)

Communication (Threshold Learning Outcome 5)

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TECHNOLOGY SYDNEY**

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Introduction

This Good Practice Guide was commissioned by the Law Associate Deans Network to support the implementation of Threshold Learning Outcome 5: Communication and collaboration in its Communication aspect.

The Threshold Learning Outcomes (TLOs) for the Bachelor of Laws were developed in 2010 as part of the Learning and Teaching Academic Standards (LTAS) Project, led by Professors Sally Kift and Mark Israel.¹ TLO 5: Communication and collaboration is one of the six TLOs developed for the Bachelor of Laws. All six TLOs are:

- TLO 1: Knowledge
- TLO 2: Ethics and professional responsibility
- TLO 3: Thinking skills
- TLO 4: Research skills
- TLO 5: Communication and collaboration
- TLO 6: Self-management

The TLOs were developed having reference to national and international statements on the competencies, skills and knowledge that graduates of a degree in law should have, as well as to the emerging descriptors of the Australian Qualifications Framework (AQF) for Bachelors Degrees (Level 7) and Bachelors Honours Degrees (Level 8).²

TLO 5: Communication and collaboration

Graduates of the Bachelor of Laws will be able to:

- (a) communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences, and
- (b) collaborate effectively.

This Good Practice Guide seeks to assist law schools and legal educators in implementing TLO 5 in its Communication aspect by:

- providing a concise summary of existing research and good practice in the area
- synthesising the key considerations to be taken into account in determining how to implement TLO 5: Communication and collaboration, and
- identification of areas in which further work is needed.

¹ Sally Kift, Mark Israel and Rachael Field, *Learning and Teaching Academic Standards Project: Bachelor of Laws Learning & Teaching Academic Standards Statement December 2010*, Australian Learning & Teaching Council (December 2010) <http://www.altc.edu.au/system/files/altc_standards_LAW_110211.pdf>.

² Ibid. See relevantly the Notes on TLO 5 at 20-22 and the sources and relevant equivalent or contributing statements to TLO 5 that are summarised at 46-49.



Authors

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Part 1: Literature review

Written communication

Entry to legal discourse

Dean Bell & Penelope Pether, 'Re/writing Skills Training in Law Schools – Legal Literacy Revisited' (1998) *Legal Education Review* 113

This article proposes an interdisciplinary, theoretically informed approach to literacy and language skills in legal education. The authors explore the legal discourse and the genre of legal writing and note: the importance of surrounding context to the writing ('communication event'); that learning the techniques of legal writing gives entry into the legal discourse community; and, the need for students to be familiar with the meta discourse engaged with in their writing.

Secondary education fails to build expertise in literacy, neglects the rhetorical dimension of expertise, and focuses only on knowledge of content.³ Tertiary studies in law should emphasise the need for knowledge of rhetoric alongside the content dimension. The writing skills needed for law practice and academia require a shift from the 'narrative' mode of everyday thinking to a more abstract, theoretical and analytical mode of thinking.⁴ The workplace and academic contexts have fundamentally different discourses, and whether one can be 'taught' in the other is questioned.

Because becoming expert in the language of a discipline is one and the same thing as acquiring knowledge of its content, *integrated* teaching in writing skills is vital. Attempts to teach writing skills in the de-contextualised environment of a university can lead to alienated and counter-productive educational practices. Teaching legal writing is limited when it is couched in terms of teaching plain language.

The article investigates a model combining the theoretical commitments outlined above with effective teaching of writing strategies within disciplinary modes and genres. It advocates moving from simply describing identified writing qualities to a model that advances to interpretation and ultimately explanation. Emphasis is placed on the process of writing rather than the product and teaching to respond rather than summarise.

Legal writing skills should be identified as part of the overall educational objectives of the law school curriculum. Traditional casebook and textbook genres are problematic in that they present the law as objective, decontextualised and autonomous, and do not give students an appreciation of the dynamic quality of the law. Texts are often obscure about the way in which they assemble, edit and construct 'the law'. Exposure to a wider range of legal documents is required in order to be able to write in different genres and learn the different voices necessary for legal writing. The authors advocate the use of group work in teaching writing skills and asking students to employ these skills. The link between reading skills and writing skills is investigated. The most effective ways to assist those students who enter law school programs with serious writing deficiencies are discussed while noting that language teaching is something from which all students benefit, not just remedial students.

³ C Geisler, *Academic Literacy and the Nature of Expertise: Reading, Writing and Knowing in Academic Philosophy* (Lawrence Erlbaum Associates Inc, 1994) ch 3.

⁴ P Meyer, "'Fingers Pointing at the Moon": New Perspectives on Teaching Legal Writing and Analysis' (1993) 25 *Connecticut Law Review* 777, 779.



Integrated approaches

Cecilia Jacobs, 'On Being an Insider on the Outside: New Spaces for Integrating Academic Literacies' (2005) 10 (4) *Teaching in Higher Education* 475

Add on generic approaches to remedial literacy decontextualise language and academic literacy but, paradoxically, discipline academics don't have a sufficiently explicit knowledge of language or literacy to effectively teach in this area. In this study, literacy academics were teamed with discipline academics in a university wide study aimed at transgressing discipline boundaries to integrate language and discipline content. Jacobs notes that learning takes place within communities of practice⁵ and that specific discourses are utilised within those communities of practice. Discourse is defined as 'a socially accepted association among ways of using language, of thinking, feeling, believing, valuing, and of acting that can be used to identify oneself as a member of a socially meaningful group.'⁶ Discourse therefore needs to be taught by discipline academics that can model the discourse. However, two challenges arise for discipline academics: 'knowing when and how to scaffold students' learning within the discourse; and 'bringing their tacit knowledge and understanding . . . into the realm of overt and explicit teaching'.⁷ Because literacy academics work with marginalised students who have failed to master mainstream discourses they are able to identify where teaching assumes understanding. Also, as literacy academics are outside the discipline discourse they are also able to offer critical insight not available within the discipline.

Tonya Kowalski, 'Toward a Pedagogy for Teaching Legal Writing in Law School Clinics' (2010) 17 *Clinical Law Review* 285⁸

Many law school clinic students are unable to put into practice the writing skills they learned in first year legal writing classes. The author suggests that the 'transfer of learning' phenomenon, in which the mind does not recognise applications for previous learning in new situations due to the change in context, may be the cause. Not only do students often overlook applications for knowledge obtained in previous situations, they also sometimes appear to regress when asked to change contexts. The schema theory of cognitive psychology states that when human beings learn, they encode their knowledge according to the context in which they obtained it.

The article proposes that students be taught to recognise that existing skills can apply in a new situation, to recall those skills, and then judge how to use them appropriately for the change in circumstances. A writing program at the advanced level should discuss how to generalise and then adapt relevant analytical skills for the many other kinds of work product encountered in practice, such as status memos, demand letters, trial motions, and so on. The article addresses this problem in detail and proposes methods for use beyond specialised writing clinics and into traditional live client clinics.

⁵ See Etienne Wenger, *Communities of Practice* (Cambridge 1998).

⁶ J. P Gee, *Social Linguistics and Literacies: Ideology in Discourses* (Falmer 1990) 143, quoted in Cecilia Jacobs, 'On Being an Insider on the Outside: New Spaces for Integrating Academic Literacies' (2005) *Teaching in Higher Education* 10 (4) 477.

⁷ Jacobs *ibid*, 484.

⁸ See also Sarah O'Rourke Schrup, 'The Clinical Divide: Overcoming Barriers to Collaboration between Clinics and Legal Writing Programs' (2007-2008) 14 *Clinical Law Review*, 301 which presents the argument for combining clinical training with legal research and writing learning and the obstacles that currently keep these disciplines divided.



Applying journalism pedagogy

Natalie Markman, 'Bringing Journalism Pedagogy into the Legal Writing Class' (1993) 43 *Journal of Legal Education* 551⁹

Markman proposes that legal writing subjects should be viewed as a crucial component of law school education and suggests combining the first year legal writing subjects with a substantive program and that advanced writing subjects be offered to student in their final years. The author argues that borrowing techniques from journalism programs may provide workable classroom techniques to legal writing teachers. Both the journalist and the legal writer must summarise, distinguish, and use authoritative support, as well as use clear language and effective organisation of ideas. Both disciplines also encourage students to hone their analytical skills and the expressive components of their writing.

Markman suggests a process-oriented method of teaching with: less emphasis on formal structure and more emphasis on revision and the writer's active role in making sense of the information gathered; using writing to develop ideas, to focus analysis, and to eventually communicate effectively. Prewriting should encompass more than just identifying the issue, rather, it should encompass the articulation of the purpose of the writing and the audience, and the context within which the writing will occur. Only after such articulation can effective planning and research begin. Assignments should allow for revision, interchange and rethinking.

It is more effective to have a greater number of smaller writing assignments than one large project, so students can see writing as a process rather than a finished product. Ongoing teaching of analysis and expression should replace after-the-fact evaluation and consistent and immediate interaction should be in place through in-class writing and feedback. Also suggests use of product-based techniques such as keeping in sight the ultimate goal of writing and the notion of audience used in journalism as this brings a context to the writing process.

Interaction between students and teachers

Elizabeth Fajans and Mary Falk, 'Comments Worth Making: Supervision Scholarly Writing in Law School' (1996) 46 *Journal of Legal Education*, 342

This article gives an overview of the writing process, and then examines the student's and teacher's roles at each stage of this process, with suggestions of improvement for both parties. Institutional and curriculum changes are suggested that, the authors argue, may make scholarly writing more successful and practical.

New forms of written communication

Kristen Konrad Robbins-Tiscione, 'From Snail Mail to Email: The Traditional Legal Memorandum in the Twenty-first Century' (2008) 58 *Journal of Legal Education* 33

This article argues that traditional content of legal writing subjects, such as legal memoranda, are not of practical benefit to law students and should be replaced with other more technologically advanced and contemporary forms of legal writing.

⁹ See also Abigail Salisbury, 'Skills without Stigma: Using the JURIST Method to Teach Legal Research and Writing' (2009-2010) 59 *Journal of Legal Education*, 173 proposing that legal writing teachers implement the legal research and writing model pioneered by JURIST, which teaches practical research and writing skills by having students write and edit for the online news and commentary service.



An overview of practice in Australian law schools

Samantha Hardy, 'Improving Law Students' Written Skills' (2005) unpublished paper for University of Tasmania EDGE program

This report establishes a context for the importance of teaching written communication skills in Australian law schools, surveys relevant literature and programs and makes recommendations for a comprehensive integrated program for the UTAS Law School. The following findings from the report highlight best practice approaches to teaching legal writing skills.

- **Writing and legal analysis are inseparable.**¹⁰ Citing Greenshaw,¹¹ Hardy notes that in the law, 'content and skill in composition interact, and ... legal writing is more than the expression of legal ideas in words ... law is the ongoing, persuasive use of legal language to resolve problem situations'. She states that 'The process of writing is itself an important means of analysis' and quotes Squires¹² who writes that 'Writing forces students to refine their thinking, to formalize (thus clarify) their ideas, to make their arguments precise, and to check their logical reasoning'. And, Hardy quotes Burke who says that 'legal writing is itself a form of legal reasoning.'¹³ Hence, a failure to write well may be evidence of a failure of necessary reasoning.¹⁴ It may also be evidence of a student's failure to understand how the various roles that they occupy shape their writing.¹⁵
- **Who should teach writing programs? Pedagogical awareness and institutional factors.** Hardy notes that Boyer recommends a model where full-time law faculty staff teach legal writing.¹⁶ This model is however dependent upon the pedagogy of the law teacher. Academics may not have a clear understanding of the pedagogy relating to generic attributes and may as a result categorise communication skills as separate from disciplinary knowledge¹⁷. Hardy quotes Kissam who argues that law schools as institutions may promote 'instrumentalist habits of reading and writing.'¹⁸ Further, according to Kissam:

The most fundamental principle states that legal research, legal thought and writing, should be integrated exercises in order that students experience and understand the vital, often tacit interconnections between effective research, the analysis of problems which shifts as research and writing progresses, and the rethinking and rewriting of texts that so often informs effective research and analysis. These integrated exercises, moreover, should be continued and intensified throughout the three-year curriculum to

¹⁰ Citing N L Shultz, 'How Do Lawyers Really Think?' (1992) 47 *Journal of Legal Education* 57, 57. See also Bryan A Garner, *Legal Writing in Plain English, A Text With Exercises* (University of Chicago Press, 2001), xiii.

¹¹ L H Greenshaw, 'To Say What the Law Is: Learning the Practice of Legal Rhetoric' (1995) 29 *Valparaiso University Law Review* 861, 866.

¹² L B Squires, 'A Writing Specialist in the Legal Research and Writing Curriculum' (1979-1980) 44 *Albany Law Review* 412, 418.

¹³ B R Burke, 'Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context' (1991) 52 *Montana Law Review* 373, 397.

¹⁴ Citing Burke *ibid*, 403 and Greenshaw above n 11, 861.

¹⁵ Citing N Feigenson, 'Legal Writing Texts Today' (1991) 41 *Legal Education Review* 503, 506.

¹⁶ A Boyer, 'Legal Writing Programs Reviewed: Merits, Flaws, Costs and Essentials' (1985) 62 *Chicago-Kent Law Review* 23, 26.

¹⁷ Citing S C Barrie, 'Academics' Understanding of Generic Graduate Attributes: A Framework for Assuring Quality' (Paper presented at the Australian Universities Quality Forum, 2004).

¹⁸ P C Kissam, *The Discipline of Law Schools: The Making of Modern Lawyers*, (Carolina Academic Press, 2003), 7.



take advantage of the increasing knowledge and confidence of students in applying legal techniques.¹⁹

- *Features of good writing programs identified by Hardy.* Hardy refers to the American Bar Association Sourcebook on legal writing programs, which suggests that good writing instruction:
 - views writing as a recursive rather than linear process
 - views writing as an activity that involves the non-rational as well as the rational faculties
 - emphasises that writing is a way of learning and not just a communication skill
 - incorporates that premise that writing is a discipline's creative activity that can be analysed and described
 - is conducted by those who can think like a lawyers and think like a writer.²⁰

Hardy also quotes McCrehand Parker, who says that

writing assignments that require students to consider complex facts and competing social policies expose students to the kinds of rhetorical choices lawyers must make – and the consequences of those choices – in constructing arguments on behalf of clients, developing and expressing legal analysis of social issues, and establishing their own voices as professionals.²¹

- *Structural issues.* Teachers need to be competent and motivated. The program needs to be: well structured; fit within the characteristics of the school; be integrated within the curriculum; and, accord with the institutional objectives.²² Sufficient resources must be allocated; credit must be given for students' work; sufficient instruction must be available; and, a consistent approach is necessary.²³

¹⁹ Ibid, 140 (Hardy has omitted footnotes).

²⁰ Kissam above n 18, 9-11.

²¹ C McCrehan Parker, 'Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It' (1997) 76 *Nebraska Law Review* 561, 567-8.

²² Boyer, above n 16, 25-6.

²³ G D Gopen, 'The State of Legal Writing: *Res Ipsa Loquitur*' (1987) 86 *Michigan Law Review* 333, 358.



Books

J K Aitken & Peter J Butt, *Piesse: The Elements of Drafting* (Lawbook Co, 10th Ed, 2004)

Explores the history of the use of legal English and offers advice on techniques of drafting with an emphasis on plain language and the rules of interpretation.

Michele Asprey, *Plain Language for Lawyers* (The Federation Press, 4th ed, 2010)

Aims to illustrate 'how important it is for lawyers to write so they can be easily understood' and also for writers to 'learn to see your writing as others see it'. Explains the main elements of plain language together with sections on interpretation, e-mail and document design.

Peter Butt, *Modern Legal Drafting, A Guide to Using Clearer Language* (Cambridge, 2nd ed, 2006)

A practical guide to the technique of drafting.

Martin Cutts, *Oxford Guide to Plain English* (Oxford, 2nd ed, 2004)

An excellent, concise pocket book of 21 essential guidelines for clear writing.

Bryan A Garner, *Legal Writing in Plain English, A Text With Exercises* (University of Chicago Press, 2001)

More advanced than Painter (below), this text explores the principles that apply to all legal writing and also those applicable to specific forms. Includes basic intermediate and advanced exercises. Inspirational.

Justin Gleeson & Ruth Higgins (eds), *Rediscovering Rhetoric, Law Language and the Practice of Persuasion* (The Federation Press, 2008)

Presents a thesis that the methods of rhetoric for 'inducing justified true belief' are 'necessary skills in responsibly performing important roles.'²⁴ Contains chapters on classical rhetoric and explores effective rhetorical practices and the role of rhetoric in politics and speech writing.

Rupert Haigh, *Legal English* (Cavendish Publishing, 2004).

Offers practical instruction on writing, structure and grammar using legal English and several chapters on drafting contracts.

Neil James, *Writing at Work* (Allen & Unwin, 2007)

This book provides a practical guide for writing clearly. Offers advice on reader focused writing, getting started, structure, expression and editing.

Ross Hyams, Susan Campbell & Adrian Evans, *Practical Legal Skills* (Oxford, 3rd ed, 2007)

Chapter 4 offers practical instruction and exercises on writing and drafting.

Mark P Painter, *The Legal Writer, 40 Rules for the Art of Legal Writing* (Cincinnati, 3rd ed, 2005)

This foundation text on plain legal language is both entertaining and readable. Written by a US Judge.

Bobette Wolski, *Skills Ethics and Values for Legal Practice*, (Law Book Co, 2nd ed, 2009)

²⁴ JT Gleeson and RA Higgins in Justin Gleeson et al (eds), *Rediscovering Rhetoric, Law Language and the Practice of Persuasion* (The Federation Press, 2008), xviii.



Chapter 6 provides a useful summary of plain language and different forms of legal writing.

Websites

Clarity International

<<http://www.clarity-international.net/index.html>>

Clarity International is an organisation of lawyers and others who advocate using plain language in place of legalese. Members receive a biannual journal. Free copies of past issues the journal are available from the website, which also offers a comprehensive reading list <<http://www.clarity-international.net/reading.html>> .

Plain Language Association International

<<http://plainlanguagenetwork.org/>>

The Plain Language Association International website provides free plain-language articles, writing tutorials, and web links. The resources list <<http://plainlanguagenetwork.org/Resources/books.html>> includes many free downloads.

Spoken communication skills

General communication skills: listening and speaking

Robert Bolton, *People Skills: How to Assert Yourself, Listen to Others and Resolve Conflict* (Preston, 1986)

Written in an engaging, personal style this book describes the 12 most common communication barriers, and explains how to acquire the ability to listen, be assertive, resolve conflicts, and solve problems.

Matthew McKay, Martha Davis & Patrick Fanning, *Messages* (New Harbinger, 3rd ed, 2009)

A comprehensive, practical and well-written guide to communication techniques with relevant examples and exercises.

Confidence

Adrienne Hancock and Matthew Stone, 'Public Speaking Attitudes: Does Curriculum Make a Difference' (2010) 24(3) *Journal of Voice* 302

General public speaking skills may be applied to several scenarios within the legal graduate's prospective career. Yet public speaking or performance anxiety is noted to be the most common form of social phobia, with prevalence rates varying from 14 to 48 per cent.²⁵ The most common technique for treating social phobias is based upon exposure therapy.

Adrienne Hancock et al²⁶ found that students' confidence in public speaking was equally increased through specific training of either the mechanical aspects of speech or training in communication theory and public speaking.

Mike Allen & John Bourhis, 'The Relationship of Communication Apprehension to Communication Behaviour: A Meta-analysis' (1996) 44(2)

²⁵ For an overview of research surrounding prevalence rates see the introduction of Adrienne Hancock and Matthew Stone, 'Public Speaking Attitudes: Does Curriculum Make a Difference' (2010) 24(3) *Journal of Voice* 302.

²⁶ Ibid.



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By reviewing over 30 studies (with over 3700 participants), the authors showed that as communication apprehension increased, both the quality and quantity of communication behaviour diminished. The correlation was higher between higher communication apprehension and lower quality of communication, and less so, though still significant, between higher communication apprehension and lower quantity communication behaviour.

It was noted that while communication apprehension treatment may lower feelings of communication apprehension, there is little evidence that this will also lead to an increase in the quality and quantity of the person's communication behaviour.

David Garner, 'Socratic Misogyny? Analysing Feminist Criticisms of Socratic Teaching in Legal Education' (2000) 2000(4) *Brigham Young University Law Review* 1597²⁷

This article presents evidence from numerous studies that suggest female law students feel a higher level of communication anxiety than males, particularly in relation to the Socratic method of teaching, and certain causes that may lead to this outcome. The article then outlines certain improvements to the Socratic method such as teachers taking an ethics-of-care approach, by giving positive reinforcement to students wherever possible, telling students when their answers are good, and referring to student's comments in a commending way in later discussions. This approach would also include asking students again for their comments later in the discussion if they were initially less than responsive to questions, giving them time to regain composure and focus on the issues, refraining from interrupting students, and then, after discussion, telling the students what type of answers were being sought by the questions and why.

The author argues that the Socratic method should one of a number of teaching methods and should only be implemented when the point to be made is a significant one, which calls for the cooperative effort required to understand the issue more completely.

Empathic approaches to communication

Hugh Brayne, 'Counselling Skills for the Lawyer: Can Lawyers Learn Anything from Counsellors' (1998) 32(2) *The Law Teacher* 137

A client-centred orientation of the lawyer-client relationship requires lawyers with well-developed one-on-one interpersonal skills.²⁸ Brayne has analysed this relationship with regard to the interpersonal skills required within a counselling-styled relationship.²⁹

Learning via modelling

Luc De Grez, Martin Valcke, and Irene Roozen, 'The Impact of an Innovative Instructional Intervention on the Acquisition of Oral Presentation Skills in Higher Education' (2009) 53 *Computers & Education* 112

Luc De Grez et al reviewed the literature relating to the attention processing and

²⁷ See also Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 (4) *Journal of Legal Education* 25 for a discussion of the negative effects of the Socratic method.

²⁸ See for example Bobette Wolski, *Skills, Ethics and Values for Legal Practice* (Lawbook Co, 2nd ed, 2009) ch 3.

²⁹ Both Wolski and Brayne (above) base their approach in the work of Gerard Egan, in particular as cited in Wolski (ibid).



psychosocial dynamics underpinning the pedagogical method and, noting that the literature on best practice models for teaching communication skills is scant,³⁰ critically observed that ‘available studies especially concentrate on the question ‘what to teach?’ and not on the issue ‘how to teach?’.’³¹ The authors’ utilise social cognitive theory, which explains that complex human behaviour such as oral presentation skills, is learned by observation through modelling.³² Hence, observation plays a key role in the development of students’ expectations about their oral presentation skills. The literature reviewed describes four sub processes of observation. Based on these processes the authors designed a multimedia presentation that included videotaped behaviour models. The instruction program was learned paced and opportunities for practice and feedback followed. Practice, performance and feedback are an important part of sequential skill acquisition. Learning begins with observation and then enters a social guided stage, then a self-controlled stage and finally a completely self-regulated stage.³³

The goal of the program was to enable students to be self-monitoring. Self-monitoring is defined as ‘when someone compares his presentation with a standard’ and is distinguished from metacognitive control where ‘the same person continuously screens the personal behaviour’ and in this way interferes with performance.³⁴ Further, monitoring has to be accurate, that is ‘calibrated’ in order to be effective.³⁵ Motivation is also identified as important. The study emphasised the value of oral presentation skills for future professional life and stressed the mastery goal orientation. Negative outcomes associated with performance avoidance were noted along with mixed findings for performance approach goals.³⁶ The study found that performance significantly improved and that professional feedback rather than feedback from peers or self were the most effective.³⁷

Books

Gerard Egan, *The Skilled Helper: A Problem-Management Approach to Helping* (6th ed, 1998)

Outlines a successful problem-management approach to effective helping focusing upon collaboration. Maybe be useful in formulating teaching materials on communicating with clients.

Justin Gleeson & Ruth Higgins (eds), *Rediscovering Rhetoric, Law Language and the Practice of Persuasion* (The Federation Press, 2008)

Described under books in part A, Written Communication, above.

Ross Hyams, Susan Campbell & Adrian Evans, *Practical Legal Skills* (Oxford, 3rd ed, 2007)

Includes chapters dealing with interviewing, advising, negotiation and mediation,

³⁰ The scantness of academic literature on teaching strategies was noted by Luc De Grez, Martin Valcke and Irene Roozen, ‘The Impact of an Innovative Instructional Intervention on the Acquisition of Oral Presentation Skills in Higher Education’ (2009) 53 *Computers & Education* 112; and B Andeweg and J de Jong, ‘“May I have your attention”: Exordial Techniques in Informative Oral Presentations’ (1998) 73(3) *Technical Communications Quarterly* 271.

³¹ De Grez, Valcke and Roozen, above n 30.

³² Ibid 113.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid 114.

³⁶ Ibid.

³⁷ Ibid 188.



and advocacy.

Stephen E Lucas, *The Art of Public Speaking* (McGraw-Hill 10th ed, 2008)

This widely used communications text explains classical and contemporary theory and explores practical applications.

McCroskey, J, *An Introduction to Rhetorical Communication* (1982)

Offers students a step-by-step guide for planning presentations incorporating the principles of both rhetoric and a social sciences approach to communication.

Nicola Rolls & Peter Wignell, *Communicating at University: Skills for Success* (Charles Darwin University Press, 2007)

Provides a foundation for communication skills in the context of both academic and professional work.

Jane Summers & Brett Smith, *Communication Skills Handbook* (John Wiley & Sons, 2006)

A widely recommended text that aims to assist students to effectively prepare and present written and verbal material.

Bobette Wolski, *Skills, Ethics and Values for Legal Practice* (Lawbook Co, 2nd ed, 2009)

Chapter 3 includes public speaking exercises, speaking and listening exercises and describes the skills learning process as: preparing for the opportunity to practice; gaining feedback and reflecting; and further opportunity for practice. Sets out skilled helper model provided by Egan (described above). Identifies that lawyers need people skills as well as problem solving skills. Refers to Bolton (described above under 'General communication skills') and sets out listening skills. Provides a useful list of resources.

Websites

UNSW Academic Skills Resources: Discussion skills for seminars and tutorials
<<http://www.lc.unsw.edu.au/onlib/disc.html>>



Part 2: Summary of key points

Communication skills generally

Although law teachers implicitly understand that law is vitally concerned with language and persuasion, they expect that literacy training should take place in secondary school. Law teachers are not usually trained to teach writing or oral communication skills. And, as much of their knowledge is implicit they are unable to overtly communicate their knowledge of legal discourse to students.³⁸ Being marked on communication skills is not the same as teaching how to communicate.

Literacy academics have a key role to play in helping discipline academics to make their tacit knowledge of legal discourse explicit and thereby capable of being taught overtly as well as being taught by modelling.³⁹ Interdisciplinary training will enhance consistency between different law teachers. Law teachers need to be willing to devote time to teaching communication skills.

An integrated understanding of the discourse of law as a discipline is required. Law teachers need to conceptualise literacy and communication as a discipline skill that is integrated within the legal construct of applied legal knowledge and human interaction rather than separate styles or methods.⁴⁰ Teaching written communication and oral communication is not sufficient. Neither is teaching plain legal language on its own. A rich context for communicating with clients and other stakeholders is required, along with an understanding of persuasion.

Rather than focusing on what to teach, for example letter writing, negotiation or advocacy, teachers should first start with basic communication theory and the development of interpersonal skills. The importance of these in the context of legal practice should be established so that students are motivated to develop these skills personally. With this framework in place, relevant theory and techniques can be introduced and the role of ethical persuasion in the pursuit of truth established. This learning applies equally to written and oral communication and with this learning in place, students will understand the importance of different genres and be able to choose the means or form of communication that suits the context and audience.

Written communication

The importance of writing programs in law schools is demonstrated by the literature. Instruction should be based on the non-linear process adopted by successful writers that focus on understanding the issues to be discussed, effective communication of that understanding to the reader, and persuading the reader to respond.⁴¹ Writing instruction needs to be embedded within classes with discipline content. Separating

³⁸ Jacobs, above n6.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ P Nightingale, 'Understanding Processes and Problems in Student Writing' (1988) 13 *Studies in Higher Education* 263, 267-8; L Flower, *Problem-Solving Strategies for Writing* (Orlando, Florida: Harcourt Brace Jovanovich, 3rd ed, 1989), 30; P Elbow, 'Teaching Thinking by Teaching Writing' (1983) 15 *Change* 37; J Emig, 'Writing as a Mode of Learning' (1977) 28 *College Composition and Communication* 122; L Odell, 'Teaching Writing by Teaching the Process of Discovery: An Interdisciplinary Enterprise', in LW Gregg and ER Steinberg (eds) *Cognitive Processes in Writing* (Lawrence Erlbaum Associates, 1980) 139, 143 cited in Annette Hasche, 'Teaching Writing In Law: A Model to Improve Student Learning' (1992) 3 *Legal Education Review*, 267.



writing from knowledge removes context and devalues writing. Instruction should begin early in the degree program and be followed up by advanced classes later in the degree.

An understanding of how students learn literacy skills is required including the role of appropriate instruction, practice and expert feedback. Literacy is an incremental skill built over time. Assessment should allow for pre-writing, writing and revision as a means of practising, gaining feedback and improving skills over time. Students will then learn to develop active revision skills and undertake effective editing. An awareness that student learning becomes deeper with effective writing programs⁴² indicates the integrated nature of discipline knowledge and literacy.

Graduates have difficulty transferring skills from university to the workplace because they experience a change in context, and as such are unable to translate what they have learned in legal writing programs into practical ability in the workforce. Methods to help students transfer skills from one context to another are required.

As law school curriculums focus upon appellate law where the client is largely absent, little or no context is gained for the students to grasp the importance of client centred communication. Similarly, if the context for writing is the delivery of information little attention will be given to the development of themes, argument and persuasion. Language should instead be conceptualised as a means of persuasion rather than as a technical tool for conveying information. Rather than reducing case analysis to the identification of ratio and obiter the role of persuasion in judgements and in this regard, their similarity with speeches could be considered and in this way connect oral and written communication via an overarching understanding of rhetoric.

Both the importance of plain language and its limitations need to be acknowledged. The conventions of language, the process of writing and importance of critical thinking need to be embedded within instruction on writing.

Spoken communication

Once students have an understanding of interpersonal skills and rhetoric they will then have a context for an appreciation of a range of communication styles; for example, assertive, attentive, integrative, conciliatory, or problem-solving styles.

An understanding of how students learn communication skills is required. The role of appropriate instruction, practice and expert feedback need to be understood. And that communication is an incremental skill built over time. The literature identifies this as an area that requires further research.

The difficulties that students from minorities and shy students experience developing communication skills need to be acknowledged and remedial measures incorporated into the curriculum. The use of the Socratic method on its own to 'teach' oral communications skills should be questioned. Given that law academics are not usually trained in speech therapy mechanics and techniques,⁴³ teaching a communication-theory oriented subject in law schools is more appropriate. Subjects teaching these skills should be located early in law school programs so that students are able to improve their confidence and performance and build on this incrementally over time.

⁴² Hasche, above n 41.

⁴³ See Hancock et al above n 255.



There appear to have been no empirical studies done to support the use of Brayne's counselling model for the lawyer-client relationship. However, studies from other 'skilled helper' disciplines (such as medicine) have shown that specific training in interpersonal communications produces significant improvements in numerous aspects of the relationship.⁴⁴ Of particular relevance to the lawyer-client relationship is the improved ability of doctors to impart detailed medical knowledge,⁴⁵ which is analogous to the lawyers' delivery of 'bad news'.⁴⁶ Including interpersonal skills training within law school communication skills training will balance the focus on adversarial communications techniques, which are the focus of mooted programs.

Conclusion

The teaching and learning strategies that are appropriate for each subject will depend upon the institution, available funding, a given cohort's size, and the competence of teachers. Notwithstanding these variables, the need for training in the fundamental principles of communication theory and for practice, revision and reflection, are consistent. Making explicit law teachers' implicit knowledge of communication skills and the availability of theoretical models to assist in this process are necessary for an integrated approach to communication skills training within substantial law subjects.

⁴⁴ See for example Jo Brown, 'Transferring Clinical Communication Skills From the Classroom to the Clinical Environment: Perceptions of a Group of Medical Students in the United Kingdom' (2010) 85(6) *Academic Medicine* 1052.

⁴⁵ A Wolf et al, 'Improving Communication Skills – A Randomised Controlled Behaviorally Orientated Intervention Study for Residents in Internal Medicine' (1998) 60 *Psychosomatic Medicine* 268.

⁴⁶ Anthony Black et al, 'Efficacy of Communication Skills Training for Giving Bad News and Discussing Transitions to Palliative Care' (2007) 167 *Archives of Internal Medicine* 453.



Part 3: Further work

Interdisciplinary partnerships

Working with literacy academics in partnership with law academics to make explicit tacit discipline knowledge and develop an understanding of legal discourse that can be understood by students could be further explored.

The skilled helper model

Data from the field of medical education on doctor-patient-relationships and teaching health professionals' interpersonal skills such as listening empathy could be incorporated with the 'skilled helper' model that Wolski uses to describe the client interview. Testing the 'skilled helper'/ client centred interview empirically including testing the value of specific communication skills training such as empathy⁴⁷ could be investigated.

Lifelong learning and engagement with the profession

The importance of continuing education in writing after law school, the need for appropriate feedback in the workplace and the negative effect of technology on spelling, grammar and organisation need to be addressed⁴⁸ and the role of law schools identified and delineated in this regard.

Rhetoric

The study of rhetoric may assist students to enter the legal discourse. How to successfully incorporate an analysis of rhetoric into general program design and also within communication skills training could be further investigated.

The Socratic method and its effect on shy or marginalised students

Further research on the possible negative effects of the Socratic method is required along with alternatives for teaching and practising oral communication skills within a classroom environment.

Texts on general communication skills, confidence and spoken communication for lawyers

While there are texts devoted to client interviewing, negotiation and, advocacy for lawyers there does not appear to be any texts that are devoted specifically to lawyers' general communication skills, confidence and spoken communication skills. Given that an awareness of general communication skills, confidence and spoken communication skills are of paramount importance to the work of lawyers, this is an area that requires further research and writing.

⁴⁷ For an anecdotal analysis as to the benefits see Hugh Brayne, 'Counselling Skills for the Lawyer: Can lawyers learn anything from Counsellors?' (1998) 32(2) *The Law Teacher* 137 which notes the author's own personal improvement (via independent analysis of his interviews) before and after training.

⁴⁸ Susan Kosse and David ButleRitchie, 'How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study' (2003) 53 *Journal of Legal Education* 80.





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