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WHAT THIS BOOK IS ABOUT

This book explains four skills that nearly every lawyer uses, nearly every day. You are much more likely to be an effective lawyer if you are good at interviewing clients and witnesses, analyzing facts to develop persuasive theories, counseling clients, and negotiating. Because these four skills cut across every specialty and field in which a lawyer might work, they are at the core of the practice of law.

In addition, this book stresses a number of themes, which can be grouped under the headings of professionalism, working with and for the client, problem-solving, communications skills, and multicultural skills. Professionalism is a group of characteristics that makes lawyering different from and in many ways more difficult than other lines of work. The attorney-client relationship is, obviously, the heart of lawyering. Problem solving is the art of developing a plan to control events, which is what clients hire lawyers to do. Interviewing, counseling, negotiation, and much of the rest of lawyers’ work involves the ability to communicate well orally, and that includes the ability to understand the hidden meanings in what other people say. Multicultural skills add up to the ability to work effectively with people whose cultural norms are different from one’s own. These themes are discussed in Chapters 2 through 6.

Lawyers interview clients and, separately, witnesses. Client interviewing operates on two levels. On one of them, the lawyer finds out what the client knows of the facts. On the other level, the lawyer and client establish and maintain a professional relationship, not just contractually (the client hiring the lawyer) but also personally (developing trust and respect) and strategically (determining the client’s goals and other factors that will influence the lawyer’s work). Client interviewing is covered in Chapter 8.
Interviewing witnesses is a way of ascertaining what people other than the client know about the facts. Witness interviewing poses special ethical problems and requires special skills. It is covered in Chapter 9.

In both kinds of interviewing, lawyers face problems created by the frailties of human perception and memory. These problems are discussed in Chapter 7.

**Persuasive fact analysis** is the critical examination of facts—or what appear to be facts—in pretty much the same way that you have learned to analyze judicial decisions, followed by the development of factual theories through which the client’s cause can be explained to judges, juries, bureaucrats, or the public. Facts can be organized in three different ways: according to the legal elements in a rule of law, by chronology, or in the form of a story. Fact analysis is covered in Chapters 10 through 17.

**Counseling** has two aspects. The first is structuring choices so that a client can select from them and make a decision. That includes identifying options and their advantages and disadvantages, predicting each option’s likelihood of success. The second is explaining these choices to the client in a way that helps the client select from the options you have identified. Counseling is covered in Chapters 18 through 22.

**Negotiating** is the process through which two parties attempt to reach an agreement that reflects their interests, rights, and relative power. Some negotiations are by nature adversarial. Some are by nature a form of collaborative problem solving. And some could be either, depending on how the negotiators approach the problem. Negotiation is covered in Chapters 23 through 28.

**Ethical concerns** are discussed in connection with each of these skills.

Marjorie Shultz and Sheldon Zedeck conducted a research project—which has become known as the “Beyond the LSAT Study”—to develop a law school admissions test that would be more accurate than the LSAT. An admissions test should predict whether an applicant can develop, in law school and through experience, the characteristics that make a lawyer effective. In the first phase of the project, Shultz and Zedeck worked with over 2000 lawyers to learn what those characteristics are, and they identified 26 effectiveness factors. Only a few of them are measured by the LSAT and are taught in law school classroom courses (the kind of courses that teach a part of the law, like Torts, and that use a casebook). The book you are holding in your hands teaches or helps to teach 18 of Shultz and Zedeck’s 26 effectiveness factors, some of which are also taught elsewhere in the law school curriculum:

- Questioning and Interviewing
- Fact Finding
- Building Client Relationships and Providing Advice and Counsel
- Negotiation Skills
- Strategic Planning
- Creativity and Innovation
Practical Judgment
Listening
Influencing and Advocating
Speaking
Integrity and Honesty
Analysis and Reasoning
Developing Relationships
Self-Development
Diligence
Passion and Engagement
Able to See the World Through the Eyes of Others
Problem Solving

The eight remaining factors—which are not significantly addressed in this book—are Writing; Researching the Law; Networking and Business Development; Stress Management; Community Involvement and Service; Organizing and Managing Your Own Work; Organizing and Managing Others (Staff and Colleagues); and Evaluation, Development, and Mentoring of Others.
HOW WE ORGANIZE AND THINK ABOUT FACTS

§10.1 FACTS IN THE LAWYERING PROCESS

Throughout the representation of a client, you deal with facts. When a client comes into the office for an interview—regardless of whether she wants to recover for injury in an accident, to defend a claim on a contract, to purchase some real property, or to plan her estate—the client provides you with facts, not a list of legal theories. In preparing a case, you will often devote far more time to fact investigation than to legal research. During most negotiations, lawyers focus as much (if not more) of their attention on the facts of the case as they do on the applicable law. At trial, witnesses testify in regard to the facts as they know them, lawyers address the facts in opening statements and closing arguments, and also argue about the facts in pretrial and trial motions. In every appeal, briefs will be introduced by a “statement of the facts,” and oral arguments will often center on disputes as to findings of fact. And even in the transactional context—the drafting of a will or a contract, for example—you must investigate and assemble facts in a form that represents the client’s “story.”

Unfortunately, we spend very little time in law school addressing issues of how to investigate, organize, and present facts. As Kim Lane Schepple notes, we take
the position that “[l]aw is what needs to be interpreted, but facts are simply true or false. Theories of interpretation are overwhelmingly about how to read legal texts, and the various strategies of interpretation provide orienting rules in understanding these texts. . . . Understanding the facts drops out as an uninteresting or unchallenging or irrelevant part of the process.”¹ Once in practice, lawyers are expected to develop “on the job” the skills for investigating facts, organizing the facts discovered, and designing persuasive factual theories.

This chapter and Chapters 11 through 17 introduce methods for understanding, interpreting, and investigating the facts in a case. These chapters discuss the nature of facts, models for organizing facts, methods for investigating facts, and strategies for responding to the facts presented by your adversary. We will look to research in the areas of cognitive psychology, cultural anthropology, linguistics, literary criticism, and even film theory to explore issues of fact interpretation. This is not a text on evidence law. Throughout your development of a factual theory, you will, of course, have to consider the constraints of evidentiary and other procedural rules of the forum on your final presentation. But putting most procedural issues aside, these chapters will focus on the character and use of facts in the lawyering process.

§10.2 SCHEMAS AND THE PROCESSING OF INFORMATION

A “fact,” the dictionary says, is “what . . . really happened.”² As we all know from common experience, however, that definition is not quite so simple. Two people can see the same event but have two entirely different accounts of “what really happened.” And the same person can witness an occurrence, relate one version of the story on one day but a few weeks later embellish the details of “what really happened,” leave out other details, and give a very different account of the event. Moreover, a person can tell a story of “what really happened” to a group of people, and each member of the group can come away differing in his or her own retelling of the tale.

These different versions of “what really happened,” cognitive scientists tell us, result from the manner in which we process and organize information.³ We are constantly bombarded by stimuli from our environment. Our perception and

recall of these “facts” are filtered and organized through “schemas,” “mental blueprints that we carry around in our heads for quick assessments” of what we think should be happening in a particular situation.4 When we witness an event, we process the “facts” we perceive by using our “schemas.”

When, on Halloween night, for example, a masked and costumed child rings your doorbell with a brown bag in his hand, you assume, based on your prior experiences, that he is trick or treating and that you should place some candy or other goodie in the bag. If you had no experience with Halloween, you might assume that the child is attempting to rob you, has a mental illness and needs shelter for the night, or is soliciting for some exotic religious cult. Our perception of that incident is not merely a passive procedure by which all the data are merely input into our brains. Rather, it is a constructive process in which we filter and organize information according to previously developed cognitive structures.

Schemas serve a number of functions in the perception and recall of information. In regard to perception, they help us give meaning to information we see and hear and direct us to those significant facts to which we should pay attention. They help us keep track of the infinite number of details thrown at us in a given situation. In this way, they “give meaning to [our] every circumstance by reducing the complexity of all that exists. In order that something might be understood, most reality is disregarded.”5 When we go to a restaurant, for example, and a person comes to our table with a pad and pencil, we do not expect that the person is going to ask for an autograph or take dictation, but without giving the situation a second thought, we anticipate that the person will take our order.

In terms of recall, schemas help us draw inferences about what happened in the past. If we cannot remember a particular part or the details of an event, we can reconstruct that portion based on schemas of what we infer should have occurred in that situation. If, for example, an employee had an argument with her boss and cannot remember everything that the boss said to her, she will fill in the details of the conversation based on her schema of the personality of her boss and past experiences with him.

There are several types of schemas. “Script” schemas concern events, such as a baseball game, a doctor’s visit, or the administering of the LSAT exam, in which a particular sequence of causally related events is expected to occur. When we go to a restaurant, for example, we expect to be seated, to be given a menu, to have our order taken, and to be served. “Role” schemas relate to occupations, social roles, or social groups. Each of us, for instance, has a schema about doctors, lawyers, sanitary workers, New Yorkers, Texans, stock brokers, landlords, and tenants. Finally, “person” schemas concern different personality types. Our inference about how Homer Simpson will react during church services is quite different from the response we would expect from Ned Flanders.

Obviously, we all do not have the same schemas. Some develop from the region or culture in which we live. Others evolve from the ethnic, racial, religious, or social group to which we belong. And still others depend on our individual prior

4. Sherwin, supra note 3, at 700. The cognitive structures we refer to as “schemas” have also been termed “frames,” “scripts,” and “stock stories.”
5. Lopez, supra note 3, at 19.
experiences and observations about the way situations occur and persons behave. Whatever their source, one individual’s schemas may be very different from another’s and, as a result, their versions of “what really happened” in a particular circumstance may vary broadly.

In the context of representation of a client, the concept of schemas is very important to fact analysis. The information your client reports to you is based upon her perception of the events—based on her own schemas. The same, of course, is true of your adversary’s version. This does not mean that one side is necessarily lying and the other is telling the truth. Rather, it is the result of the fact that we all perceive and organize information based on individual schemas. As Kim Lane Scheppele observes in the context of trial decision-making:

Judges and jurors are not witnesses to the events at issue; they are witnesses to stories about the events. And when litigants come to court with different stories, some are accepted and become “the facts of the case” and others are rejected and cast aside. Some of what is cast aside may indeed be false (and some of what is accepted may be too). But some of the rejected stories may be accurate versions of events that grow from experiences different from the experiences of those who are doing the choosing.6

The findings of fact of “what really happened” in a case can, therefore, hinge to a certain degree on the schemas of the different witnesses and those of the fact-finder. Even given the same legal standards, it is possible in a given case that the decision might differ depending on the different schemas of the witnesses presented and the particular judges or jurors.

In the transactional context, too—negotiating a contract, for example—“what is really happening” can vary depending on the schemas of the parties. In a negotiation between a manufacturer and a distributor for the sale of goods, for example, the perception of events by parties who have had a longstanding, amicable relationship may be very different from those of parties who have had no previous dealings and who feel that they have been burned in recent, similar transactions.

§10.3 DIFFERENT MODES OF THINKING ABOUT FACTS

Another helpful contribution of psychologists to lawyers’ understanding of the fact-finding process is the notion that people have two very different modes of thinking about facts. As James White describes,

We all know how to talk about war and can carry on the arguments for and against a particular one, balancing costs and benefits, rights and wrongs. But when the story of a single wartime death is told—how it happens and what it means to the victim, to his family, to the killer—it fills the mind, and who can then go on to justify a war with words and reasons? You have perhaps seen conversations come

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to an end at such a point, one side consumed by the story, the other resisting it as irrelevant or emotional, neither satisfied with his response.7

Jerome Bruner contends that people use these two modes of thought—paradigmatic and narrative—in ordering their experience.8 Fact-finders—judges, jurors, agency officials—are not first-hand observers of the events at issue. They must reconstruct reality—“what really happened”—based on the testimony of witnesses and arguments presented by the lawyers. Based on these presentations, they come to their own conclusions about what really happened. The distinction between paradigmatic and narrative thought is helpful in understanding how fact-finders engage in this reconstruction process.

The paradigmatic mode of thought “attempts to fulfill the ideal of a formal, mathematical system of description and explanation.”9 This type of thought is the domain of mathematics, logic, and science, in which abstract principles guide the search for truth. Using this mode of thought, we approach a problem as if it is a mathematical proof: given certain general propositions, if the requisite facts exist, then a particular conclusion is required. Treating issues like algebra problems, we search for the “truth” in a given situation.

Legal argument is primarily framed in terms of paradigmatic thinking. Statutes, case law, or administrative regulations provide an organizing structure for finding the “truth” in a given case. They set forth the necessary elements for a claim or defense, and the lawyers prove their claims by presenting facts in support of the required elements. In a jury trial, jurors are given instructions as to these elements and are directed to structure their decision-making according to those instructions. Appellate judges use this same rational approach to justify their decisions. They identify the legal elements applicable to the case, review the trial court record to marshal the facts establishing each of the elements, and then determine whether the relevant legal standards have been met. The general rules and principles derived in the context of the facts of that particular appeal are later applied by decision-makers in subsequent cases.

But thinking is not limited to this paradigmatic mode. While paradigmatic thinking addresses primarily the rational part of ourselves, narrative thinking attempts to speak not only to our rational side, but also to the “emotional,

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irrational, mystical, needing, loving, [and] hating” parts of ourselves.\textsuperscript{10} It does this by structuring facts in the context of stories. Unlike paradigmatic thinking, which applies general principles to the facts to ascertain the “truth” in a situation, narrative thinking places the facts in the context of a particular story to provide “meaning” for that situation.

A story presents the facts as a causal chain of events describing the development of a situation, its climax, and eventually its outcome. It does not, however, merely relate a sequence of events. By focusing on specific details and ignoring others, by highlighting certain tensions between the characters and the circumstances in which they find themselves, by arranging events in a certain order, or by using particular language or symbols, a story attempts to endow the facts with a given meaning. “A circumstance that [might] resist[] reduction into some authoritative and unambiguous proposition [in a paradigmatic formula] may be persuasively expressed in all its complexity in a well-told story.”\textsuperscript{11}

Psychologists tell us that narrative thinking pervades our whole life. Like schemas, stories serve a “screening function.” When we witness an event, they help us organize the large amounts of information we perceive. We filter out details that we consider extraneous and include others that we consider essential.

Narrative . . . differs from purely logical [thinking] in that it takes for granted that the puzzling problems with which it deals do not have a single “right” solution—one and only one answer that is logically permissible. It takes for granted, too, that a set of contested events can be organized into alternative narratives and that a choice between them may depend upon perspective, circumstances, interpretive frameworks.\textsuperscript{12}

When we are involved in or witness an automobile accident, for example, we focus on certain aspects of the event and the parties and ignore others, structuring a story for ourselves of “what is really happening.” Likewise, when we later recall the accident, our recollection is in story form, attempting to give meaning to the myriad facts which we previously observed. Then, when we recount the accident to someone else, we tell it in story form, emphasizing those features that we consider important to the listener but ignoring others that we view as irrelevant. And finally, a listener hearing the story reconstructs it according to the listener’s own point of view. At any of these stages—perception, recall, recounting, or listening—different participants or observers may develop radically different stories, depending upon their vantage points, personal interests, emotional states, or individual schemas. Each of those persons may experience a situation differently and give it different meaning.

Besides their screening function, stories provide a means for understanding the “Troubles” that people encounter in their lives. When people strive to attain certain goals, they sometimes face unexpected dangers and obstacles along the way. Stories help the participants in these events and onlookers to create meaning from these situations. Depending on the spin we give the facts, the version of the

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\textsuperscript{10} Lopez, supra note 3, at 34–35.
\textsuperscript{11} Id. at 29.
\textsuperscript{12} Amsterdam & Bruner, supra note 8, at 141.
\end{flushleft}
story can range from comedic to tragic. “It is through narratives that we come to see people [coping with their Troubles] as heroes, villains, tricksters, stooges (and so forth) and that we come to see situations as victories, humiliations, career opportunities, tests of character, menaces to dignity (and so forth).”\(^{13}\)

This distinction between paradigmatic and narrative thinking has much significance for lawyers’ representation of clients. The legal process entails both modes of thought. Obviously, much legal work requires paradigmatic thinking. Lawyers, judges, and jurors all are constrained somewhat by the requirements of established legal doctrine and attempt to fit the facts presented into the applicable legal formulas. Often, we hear judges and jurors complain that they had no option in a case other than to render a particular decision because of the “requirements of the law.” They feel that their decisions are compelled by the legal requirements.

But since all legal problems are at base human problems, and narrative thinking is part of our nature, storytelling is also an essential part of legal decision-making. The primary sources of facts are witnesses who observed or participated in certain events. They engaged in narrative thinking during their observations of the relevant events to give those circumstances meaning, concentrating only on the information they considered significant and filtering out the rest. And, at trial, despite the admonition “to tell the whole truth,” as witnesses they recount these stories, again focusing on those details they now consider important and downplaying others. Even when documentary or other recorded evidence is offered, it is presented in the context of an overall story.

As the witnesses tell their stories, fact-finders (judges, jurors, administrative officials) construct their own story about “what really happened.” Cognitive scientists tell us, for example, that jurors do not merely tape record the testimony in their heads throughout the trial in order to plug it into legal formulas at the conclusion of the trial or hearing. Rather, they impose a narrative story organization on the evidence as it is presented. They attempt to find their own meaning from the differing, and perhaps inconsistent, stories they hear from the witnesses, focusing on certain aspects of the evidence, ignoring others. They strive to provide meaning to the Trouble that is the focus of the case. When they ultimately make their decision, they try to determine not only whether a specific event occurred, but also whether it could have occurred in the context of the story they have developed in their minds. As the Supreme Court has observed,

Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman’s motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. A

\(^{13}\) Id. at 46.
syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.\textsuperscript{14}

For a lawyer, the concept of narrative thinking “means that, within certain limits, disputants have some escape from . . . the reality of the dispute.”\textsuperscript{15} In other words, the decision in a case may result as much (or more) from the nature of the stories presented by the parties as it does from the “truth” or “falsity” of a story. An experienced lawyer knows that sometimes it is easier to “prove” something through persuasion than to know whether it is true.

Indeed, one study of responses to storytelling starkly confirms this point. In this study, 85 college students were each asked to compose stories about themselves or what they had done and to tell their stories to the remaining students. Half were directed to tell false stories. The other half were instructed to tell true stories. The audience members were then told to record their evaluations of the truth or falsity of each story told. The results of this study showed that the assessments of the truth of the different stories were not related to the actual truth or falsity of the story. Instead, the researchers found that the believability of stories was correlated with the storyteller’s ability to craft a well-structured story.\textsuperscript{16} Accordingly, even if you present a wealth of evidence in support of your case, you may not convince the decision-maker if you fail to present a believable story. Conversely, even if you have only limited evidence, you might succeed if you can construct a persuasive story.

You need, therefore, to understand how narratives are constructed. As lawyers tell stories—to adversaries, judges, jurors, or agency officials—these audiences develop their own story of “what really happened” based on their own schemas and notions of what is supposed to happen in certain situations. Accordingly, in constructing a story—to present in a negotiation or at trial—you need to be aware of what makes a story meaningful for your audience so that you can attempt to influence the listener’s reconstruction of the story.

Our job then as lawyers is not only to assemble the relevant legal doctrine in support of our clients’ cases but also to construct the facts in the case in terms of the audience’s narrative thinking. We will not gain an understanding of that thinking by browsing in law libraries. Rather, we will discover it by watching television shows, films, and YouTube videos; listening to podcasts and popular music; reading blogs and mainstream publications, such as \textit{Us Weekly} and \textit{USA Today}; online social networking; and paying close attention to the “stock stories” reflected in our daily conversations and banter. “As in politics and advertising, effective lawyering requires a familiarity and facility with commonly shared

\textsuperscript{14} \textit{Old Chief v. United States}, 519 U.S. 172, 187, 189 (1997); see also \textit{Wiggins v. Smith}, 539 U.S. 510, 537 (2003) (holding that a defense attorney provided constitutionally ineffective representation to his client in the sentencing phase of a death penalty case because he showed only one mitigating factor—the fact that the defendant had no prior convictions—and failed to present the defendant’s “powerful mitigating narrative” of an “excruciating life history”).

\textsuperscript{15} Bennett & Feldman, supra note 3, at 33. See also Amsterdam & Bruner, supra note 8, at 111; Janet Malcolm, \textit{The Crime of Sheila McGough} 26 (1999) (“all attorneys know . . . truth is a nuisance in trial work. The truth is messy, incoherent, aimless, boring, absurd. The truth does not make a good story; that’s why we have art.”). Obviously, these insights raise some important ethical issues. See infra §13.8.

\textsuperscript{16} Bennett & Feldman, supra note 3, at 69–83.
meaning-making tools as well as commonly shared meanings. In short, lawyers must know what’s in our popular culture toolkits.”

While many lawyers have the intuitive ability to identify the appropriate “narrative frame” for a given case, others of us were not born with that facility and must learn the craft of narrative design.

Chapters 11, 12, and 13 explain how lawyers can use these insights from cognitive psychology—schemas, paradigmatic thinking, and narrative thinking—to organize facts persuasively through three different methods of organizing the facts: the legal elements model (Chapter 11), the chronological model (Chapter 12), and the story model (Chapter 13). Each model addresses different approaches people use in processing facts and can help you test the persuasiveness of facts you unearth in investigating a case. Chapter 14 explains how to select the model best suited for presentation to a given audience.