

Foundational Lawyering Skills

Syllabus

Fall 2016

For simplicity, let's call this course FLS.

Each week FLS includes

- a Tuesday one-hour large-group class introducing the week's topic
- and
- a Thursday two-hour small group skills lab in which you will receive assessment and feedback from an instructor.

Learning Objectives

FLS focuses on a cross-cutting theme of practice skills: investigation and analysis of facts. All stages of lawyering — either in the litigation or transactional context — require investigation and analysis of facts.

In client interviews, for example, you must be able to overcome your clients' reticence and to frame questions to elicit clients' stories, listen carefully to their answers, respond in a way that encourages a thorough description of the narrative, and develop legal theories. When you depose an adverse witness, you often must take a different tack and craft questions to break through the witness's hostility with a questioning strategy that can explore and undermine, if possible, your adversary's factual and legal cases. And at trial, you must use differing questioning styles on direct and cross examinations to present persuasively the facts in your case. In a transactional setting, you will collect facts for purposes of informed bargaining.

In all these settings, a number of different skills are brought into play (rapport-building, style of presentation, strategic thinking). But the one cross-cutting skill is the ability to frame and reframe questions of fact.

Most other courses focus primarily on the “persuasive mode” — how to argue law and facts. FLS focuses on the “inquiring mode” — exploring to determine what “really” happened. Unless you learn how to work in the inquiring mode, you will face difficulties in investigating and analyzing facts.

FLS focuses on the following learning outcomes approved by the Law School faculty. (The full outcomes list is on the school’s website.)

Category 5 - Basic legal analysis, fact development and law-finding. Each graduating student must have demonstrated proficiency in the following:

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(b) conducting investigation of facts and constructing a coherent narrative based on that investigation;

(c) identifying legal issues in facts and applying rules and policy to facts;

(d) weighing evidence to reach factual inferences;

(e) constructing arguments and identifying flaws in an argument;

...

(h) presenting analysis orally and arguing orally; . . .

Category 6 - Entry level capabilities: At the level of proficiency required for effectiveness as an entry level lawyer, and in a manner appropriate to a student’s professional goals, each graduating student must have demonstrated proficiency in:

(a) strategic planning: developing a plan to accomplish a goal;

(b) problem solving in light of a client’s objectives: anticipating consequences and assessing risks;

(c) recognizing the most common ethical and professional liability dilemmas and resolving them with high professional standards;

(d) negotiating in both dispute and transactional contexts;

(e) counseling clients;

(f) interviewing;

(g) performing basic trial tasks

Required Text

Krieger & Neumann, *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis* (5th Ed.).

Attendance

The rules of the New York State Court of Appeals, the American Bar Association, and the Law School all require law students to be in good and regular attendance in the courses for which they are registered. In FLS, you may not have more than **six hours** of unexcused absences from class over the course of the semester. If you exceed that, you risk not passing FLS or being administratively withdrawn from FLS — either of which would require retaking the *entire* course.

If you believe you must be absent from class for more than the permitted number of classes, you should contact the Office of Student Affairs as soon as possible. Accommodations will be made for students who must be absent for religious reasons and in cases of truly compelling hardship. Any request for an exception made to the Office of Student Affairs must be accompanied with appropriate documentation. Your instructor will distribute sign-in sheets for each class, which is the dispositive evidence regarding your absence from a given class.

You are responsible for signing in during the class. Falsification of sign-in sheets is a violation of the Code of Academic Conduct.

Grading

You will receive a letter grade for the course, computed as follows:

- 10% based on attendance and engagement in class discussion (including the lecture class and the skills labs).
- 40% based on the quality of your preparation and performance in the skills lab, using the cumulative scores of grading rubrics that are uniformly used by the skills lab instructors. In each week's skills lab, you will receive one of the following grades for your performance that week: Highly Proficient (3 points), Proficient (2 points), Satisfactory (1 point), or Unsatisfactory (0 points).
- 50% based on an exam, which will require you to work out one or more skills problems.

WEEKLY ASSIGNMENTS

ELS = *Essential Lawyering Skills*
(the textbook)

WEEK ONE

Tuesday, August 23

In Class: Introduction to the Course
(Profs. Krieger & Liebman)

Reading Assignment: ELS Chs. 1 & 2 (pp. 3-19) and Ch. 10 (pp. 143-151)

Thursday, August 25

NO SKILLS LAB THIS WEEK

WEEK TWO

Tuesday, August 30

In Class: Marshaling Evidence in Support of Legal Elements
(Prof. Walker)

Reading Assignment: ELS Ch. 11 (pp. 153-161)

Thursday, September 1

In Class: Skills lab – Arguing Motions for Directed Verdict
(Guest Instructors)

Assignment: On TWEN, review the following:

- Law Readings for Week Two
- Chicken Bone Case File
- Evaluation Criteria for Week Two

Prepare a six-minute oral argument for or against a directed verdict by the defendants at the close of the plaintiff's case in chief in the chicken bone case (see p. 38 of the *Chicken Bone Case File*).

WEEK THREE

Tuesday, September 6

In Class: Factual Analysis: Chronology — developing a time line in a case based on existing evidence and identifying gaps and inconsistencies (Prof. Liebmann)

Reading Assignment: Review the *Pena* case file (on TWEN). Read ELS Ch. 12 (pp. 163-172)

Thursday, September 8

In Class: Skills lab – Drafting of Time Lines (Guest Instructors)

Assignment: Based on the *Pena* file, prepare a time line, identifying gaps and inconsistencies. The time lines will be shared and reviewed in class.

WEEK FOUR

Tuesday, September 13

In Class: Factual Analysis: Storytelling (Prof. Theo Liebmann)
This class will provide instruction on developing a story based on existing evidence.

Reading Assignment: Review the *Pena* case file (on TWEN). Read ELS Ch. 13 (pp. 173-192)

Thursday, September 15

In Class: Skills lab – Drafting of Stories (Guest Instructors)

Assignment: Using the timeline crafted for Week Three, draft a story and be prepared to share it and receive feedback about its persuasiveness in class.

WEEK FIVE

Tuesday, September 20

In Class: Sources of Facts — electronic, print, expert, and lay sources of facts with a focus on credibility issues with different sources. (Prof. Krieger)

Reading Assignment: ELS Ch. 16 (pp. 215-229); *Jim Sowell* case and intake memo (on TWEN)

Thursday, September 22

In Class: Skills lab – Fact Investigation Plans (Guest Instructors)

Assignment: Based on the case file provided, prepare a fact investigation plan and then engage in and report on the investigation of the facts, all of which will be reviewed and discussed during class.

WEEK SIX

Tuesday, September 27

In Class: Listening and Responding Skills — techniques for accurate listening and appropriate responses, in the context of a client interview.
(Prof. Bush)

Reading Assignment: Excerpt from Robert A. Baruch Bush, “Mediation Skills and Client-Centered Lawyering: A New View of the Partnership,”
19 CLINICAL L. REV. 429 (2013), pp. 429-490 (on TWEN)

Thursday, September 29

In Class: Skills lab – Listening/Responding Drills
(Guest Instructors)

Assignment: Based on the hypothetical case-scenarios provided, prepare to act as either the client or the lawyer in this interview. During class, student-lawyers will interview student-clients, using the listening and responding skills taught during this week’s lecture.

WEEK SEVEN

Tuesday, October 4

NO SCHOOL – ROSH HASHANAH

Thursday, October 6

NO SKILLS LAB THIS WEEK

WEEK EIGHT

Tuesday, October 11

In Class: Factual Analysis: Direct and Circumstantial Evidence — the two types of evidence and the process of drawing inferences.
(Prof. Walker)

Reading Assignment: ELS Ch. 13, § 2 (pp. 174-175); Ch. 15, § 4 (pp. 208-211); and Ch. 17 (pp. 231-235)

Thursday, October 13

In Class: Skills lab – Closing Arguments
(Guest Instructors)

Assignment: Review the chicken bone case file from Week Two (on TWEN) and prepare a closing argument for one party in the case, which will be presented and evaluated in class.

WEEK NINE

Tuesday, October 18

In Class: Factual Analysis: Cognitive Biases — the role of cognitive biases in lawyers' reasoning about facts and methods for overcoming them. (Prof. Neumann)

Reading Assignment: ELS Ch. 2 (pp. 7–19); Ch. 4 (pp. 33–49); Ch. 7 (pp. 77–93); § 20.3.2 (pp. 262–272); § 21.7 (pp. 288–289) **plus** Readings posted on TWEN (23 pages). Allow plenty of time to read these.

Thursday, October 20

In Class: Skills lab – Cognitive Biases in Client Interview (Guest Instructors)

Assignment: Watch a video of a lawyer's interview of a client and draft a memo identifying the effect of cognitive biases on the lawyer's questioning, which will be reviewed and discussed in class.

WEEK TEN

Tuesday, October 25

In Class: Questioning in Interviews of Clients & Friendly Witnesses — questioning/listening/responding techniques in the context of client and friendly witness interviews. (Prof. Gundlach)

Reading Assignment: ELS Ch. 8, §§ 8.1-8.3 (pp. 95-116) and Ch. 9 (pp. 123-140).

Thursday, October 27

In Class: Skills lab – Simulated Client & Friendly Witness Interviews (Guest Instructors)

Assignment: Based on the case file provided (on TWEN), prepare a 6-minute portion of an interview of a client or friendly witness. During class, students will perform a portion of a simulated interview and be provided with feedback about the ability to gather facts, listen, and frame questions.

WEEK ELEVEN

Tuesday, November 1

In Class: Questioning in Counseling of Clients in Transactional Settings — the use of questioning/listening/responding techniques in the context of counseling clients in transactional settings.
(Prof. Haber)

Reading Assignment: *Transactional Lawyering Skills (TLS)*, pp. 1-5 (§§ 1.2-1.5) and all of chapter 6, pp. 43-50 (you'll find copies of all these pages on TWEN).

Thursday, November 3

In Class: Skills lab – Counseling Clients in Transactional Settings
(Guest Instructors)

Assignment: Based on the case file provided (on TWEN), prepare questions for a 6-minute portion of a counseling session with a client. During class, students will perform a portion of a counseling session and be provided with feedback about the ability to gather facts, listen, and frame questions in a transactional setting.

WEEK TWELVE

Tuesday, November 8

In Class: Deposition of Adversaries — the use of questioning/listening/responding techniques in depositions.
(Prof. McElroy)

Reading Assignment: Excerpt from Mauet, *PreTrial* (8th Ed.); § 6.9 (pp. 271-311); *Tips for Preparing to Take Your Next (or First) Deposition*; *Demystifying Depositions: Admonitions*; *Demystifying Depositions: The Funnel Technique* (links on TWEN)

Thursday, November 10

In Class: Skills lab – Deposition of Adversaries
(Guest Instructors)

Assignment: Based on the materials provided (on TWEN), prepare questions for a 6-minute portion of a deposition of an adversarial party. During class, students will perform a simulated portion of a deposition and receive evaluation about their ability to gather facts, listen, and frame questions.

WEEK THIRTEEN

Tuesday, November 15

In Class: Information Bargaining in the negotiation process, including techniques to obtain information and to facilitate the process.
(Prof. DiFonzo)

Reading Assignment: ELS, Chaps. 23; 24 (§§24.1-24.2.3), 25 (§§25.4-25.7.1; 25.8); and 28 (only §28.1) (pp. 301-313, 315-319, 333-348, 353, 377-382).

Thursday, November 17

In Class: Skills lab – Information Bargaining Simulation
(Guest Instructors)

Assignment: Using the case file provided, prepare for a 6-min portion of a negotiation to resolve an issue in a transactional context.

WEEK FOURTEEN

Tuesday, November 22

In Class: Direct Examination — the use of narrative and open questions to tell a story.
(Prof. Krieger)

Reading Assignment: ELS, Ch. 15 (pp. 197-213); Excerpt from Carol Caldwell, Harry M. Caldwell, and Timothy Perrin, *The Art and Science of Trial Advocacy* (pp. 182-83,195-202) (on TWEN); Federal Rule of Evidence 401.

Thursday, November 24

NO SKILLS LAB – THANKSGIVING HOLIDAY

WEEK FIFTEEN

Tuesday, November 29

In Class: Cross Examination — how lawyers can use precisely crafted leading questions to draw inferences from established facts.
(Prof. Nevins)

Reading Assignment: ELS, Ch. 17 (pp. 231-35); Excerpt from Carol Caldwell, Harry M. Caldwell, and Timothy Perrin, *The Art and Science of Trial Advocacy* (pp. 285-88; 295-99; 300-05) (on TWEN); Federal Rule of Evidence 401.

Thursday, December 1

In Class: Skills lab – Direct and Cross-Examination Simulations
(Guest Instructors)

Assignment: Using the case file provided, prepare a 6-min portion of a direct or cross-examination of a witness. During class, students will perform a simulated portion of a direct and cross-examination of a witness and receive evaluation about their ability to question and listen to responses during direct examination and to use questioning to draw inferences during cross-examination.