Appendix F

A FUNDAMENTAL LAWYERING SKILL

In 1989 the American Bar Association’s Section of Legal Education and Admissions to the Bar created the Task Force on Law Schools and the Profession: Narrowing the Gap. Its purpose was to study and improve the processes by which new members of the profession are prepared for the practice of law. In August 1992, the Task Force issued its final report, *Legal Education and Professional Development—An Educational Continuum.* The report includes a “Statement of Fundamental Skills and Values,” which identifies “Legal Research” as one of the ten fundamental skills that a lawyer should possess. The task force was chaired by former ABA president Robert MacCrate, and its report is commonly referred to as the “MacCrate Report.” Reproduced below is the section of the report that discusses legal research.¹

FUNDAMENTAL LAWYERING SKILLS § 3 LEGAL RESEARCH²

In order to conduct legal research effectively, a lawyer should have a working knowledge of the nature of legal rules and legal institutions, the fundamental tools of legal research, and the process of devising and implementing a coherent and effective research design:

3.1 Knowledge of the Nature of Legal Rules and Institutions. The identification of the issues and sources to be researched in any particular situation requires an understanding of:

(a) The various sources of legal rules and the processes by which these rules are made, including:

   (i) Caselaw. Every lawyer should have a basic familiarity with:
       (A) The organization and structure of the federal and state courts of general jurisdiction; general concepts of jurisdiction and venue; the rudiments of civil and criminal procedure; the historical separation between courts of law and equity and the modern vestiges of this dual court system; (B) The nature of common law decisionmaking by courts and the doctrine of *stare decisis*; (C) The degree of “authoritativeness” of constitutional and common law decisions made by courts at the various levels of the federal and state judicial systems;

   (ii) Statutes. Every lawyer should have a basic familiarity with:
       (A) The legislative processes at the federal, state, and local levels, including the procedures for preparing, introducing, amending, and enacting legislation; (B) The relationship be-


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tween the legislative and judicial branches, including the power of the courts to construe ambiguous statutory language and the power of the courts to strike down unconstitutional statutory provisions;

(iii) Administrative regulations and decisions of administrative agencies. Every lawyer should have a basic familiarity with the rudiments of administrative law, including: (A) The procedures for administrative and executive rulemaking and adjudication; (B) The relationship between the executive and judicial branches, including the power of the courts to construe and pass on the validity and constitutionality of administrative regulations and the actions of administrative agencies;

(iv) Rules of court;

(v) Restatements and similar codifications (covering non-official expositions of legal rules that courts tend to view as authoritative);

(b) Which of the sources of legal rules identified in § 3.1(a) supra tend to provide the controlling principles for resolution of various kinds of issues in various substantive fields;

(c) The variety of legal remedies available in any given situation, including: litigation; legislative remedies (such as drafting and/or lobbying for new legislation; lobbying to defeat pending legislative bills; and lobbying for the repeal or amendment of existing legislation); administrative remedies (such as presenting testimony in support of, or lobbying for, the adoption, repeal, or amendment of administrative regulations; and lobbying of an administrator to resolve an individual case in a particular way); and alternative dispute-resolution mechanisms (formal mechanisms such as arbitration, mediation, and conciliation; and informal mechanisms such as self-help);

3.2 Knowledge of and Ability to Use the Most Fundamental Tools of Legal Research:

(a) With respect to each of the following fundamental tools of legal research, a lawyer should be generally familiar with the nature of the tool, its likely location in a law library, and the ways in which the tool is used:

(i) Primary legal texts (the written or recorded texts of legal rules), including: caselaw reporters, looseleaf services, and other collections of court decisions; codifications of federal, state, and local legislation; collections of administrative regulations and decisions of administrative agencies;

(ii) Secondary legal materials (the variety of aids to researching the primary legal texts), including treatises, digests, annotated versions of statutory compilations, commentaries in looseleaf services, law reviews, and Shepard’s Compilations of citations to cases and statutes;

(iii) Sources of ethical obligations of lawyers, including the standards of professional conduct (the Code of Professional Responsibility and the Model Rules of Professional Conduct), and collections of ethical opinions of the American Bar Association and of state and local bar associations;

(b) With respect to the primary legal texts described in § 3.2(a)(i) supra, a lawyer should be familiar with:
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(i) Specialized techniques for reading or using the text, including:
   (A) Techniques of reading and analyzing court decisions, such as: the analysis of which portions of the decision are holdings and which are dicta; the identification of narrower and broader possible formulations of the holdings of the case; the evaluation of a case's relative precedential value; and the reconciliation of doctrinal inconsistencies between cases;
   (B) Techniques of construing statutes by employing well-accepted rules of statutory construction or by referring to secondary sources (such as legislative history);

(ii) Specialized rules and customs permitting or prohibiting reliance on alternative versions of the primary legal texts (such as unofficial case reporters or unofficial statutory codes);

(c) With respect to the secondary legal materials described in § 3.2(a)(ii) supra, a lawyer should have a general familiarity with the breadth, depth, detail and currency of coverage, the particular perspectives, and the relative strengths and weaknesses that tend to be found in the various kinds of secondary sources so that he or she can make an informed judgment about which source is most suitable for a particular research purpose;

(d) With respect to both the primary legal materials described in § 3.2(a)(i) supra, and the secondary legal materials described in § 3.2(a)(ii) supra, a lawyer should be familiar with alternative forms of accessing the materials, including hard copy, microfiche and other miniaturization services, and computerized services (such as LEXIS and WESTLAW);

3.3 Understanding of the Process of Devising and Implementing a Coherent and Effective Research Design: A lawyer should be familiar with the skills and concepts involved in:
   (a) Formulating the issues for research:
      (i) Determining the full range of legal issues to be researched (see Skill § 2.1 supra);
      (ii) Determining the kinds of answers to the legal issues that are needed for various purposes;
      (iii) Determining the degree of confidence in the answers that is needed for various purposes;
      (iv) Determining the extent of documentation of the answers that is needed for various purposes;
      (v) Conceptualizing the issues to be researched in terms that are conducive to effective legal research (including a consideration of which conceptualizations or verbalizations of issues or rules will make them most accessible to various types of search strategies);

(b) Identifying the full range of search strategies that could be used to research the issues, as well as alternatives to research, such as, in appropriate cases, seeking the information from other people who have expertise regarding the issues to be researched (for example, other attorneys or, in the case of procedural issues, clerks of court);

(c) Evaluating the various search strategies and settling upon a research design, which should take into account:
   (i) The degree of thoroughness of research that would be necessary in order to adequately resolve the legal issues (i.e., in
order to find an answer if there is one to be found, or, in cases where the issue is still open, to determine to a reasonable degree of certainty that it is still unresolved and gather analogous authorities); 

(ii) The degree of thoroughness that is necessary in the light of the uses to which the research will be put (e.g., the greater degree of thoroughness necessary if the information to be researched will be used at trial or at a legislative hearing; the lesser degree of thoroughness necessary if the information will be used in an informal negotiation with opposing counsel or lobbying of an administrator); 

(iii) An estimation of the amount of time that will be necessary to conduct research of the desired degree of thoroughness; 

(iv) An assessment of the feasibility of conducting research of the desired degree of thoroughness, taking into account:

(A) The amount of time available for research in the light of the other tasks to be performed, their relative importance, and their relative urgency;

(B) The extent of the client’s resources that can be allocated to the process of legal research; and

(C) The availability of techniques for reducing the cost of research (such as, for example, using manual research methods to gain basic familiarity with the relevant area before using the more expensive resource of computerized services); 

(v) If there is insufficient time for, or the client lacks adequate resources for, research that is thorough enough to adequately resolve the legal issues, a further assessment of the ways in which the scope of the research can be curtailed with the minimum degree of risk of undermining the accuracy of the research or otherwise impairing the client’s interests; 

(vi) Strategies for double-checking the accuracy of the research, such as using different secondary sources to research the same issue; or, when possible, conferring with practitioners or academics with expertise in the area; 

(d) Implementing the research design, including:

(i) Informing the client of the precise extent to which the scope of the research has been curtailed for the sake of time or conservation of the client’s resources (see § 3.3(c)(v) supra); the reasons for these curtailments; and the possible consequences of deciding not to pursue additional research; 

(ii) Monitoring the results of the research and periodically considering:

(A) Whether the research design should be modified; 

(B) Whether it is appropriate to end the research, because it has fully answered the questions posed; or, even though it has not fully answered the questions posed, further research will not produce additional information; or the information that is likely to be produced is not worth the time and resources that would be expended; 

(iii) Ensuring that any cases that will be relied upon or cited have not been overruled, limited, or called into question; and that any statutes or administrative regulations that will be relied upon or cited have not been repealed or amended and have not been struck down by the courts.