

# **Appendix A**

## **Three-Step Teaching System**

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# *Teaching Materials for the Three-Step Teaching System*

## **WHY USE THIS PARTICULAR DESIGN?**

**'I' X 5 = L (for learning)**

- Involvement
- Interaction
- Interest
- Intensity
- Intellectual Challenge



**'I' X 5 = the best potential for learning**

### **INVOLVEMENT:**

Increase involvement by using small break-out groups with focused problem discussion.

### **INTEREST:**

Increase interest by writing relevant present-day factual issues for the session.

### **INTENSITY:**

Increase intensity by limiting fact scenarios to one or two hypothetical fact problems upon which the course content rotates. Require pre-test of materials to encourage careful reading of textual materials

### **INTERACTION:**

Increase interaction by keeping students in small groups with a recorder who will later report to the entire class.

### **INTELLECTUALLY CHALLENGING:**

Intellectually challenge students by moving from the basic issues and topics to the most complex.

## **THE FIRST STEP:**

- The first step is to ask yourself: “What is it that I believe the students should learn during my entire contact time with them from pre-residential, to residential, to post-residential?”
- The next step is to ask, “What kind of big hypothetical problem will interest them that I can create? I need a problem that will incorporate the five “T’s” on which this model is based. What are my learning goals?”

## **MECHANICAL THINKING:**

- Construct a pre-test.
- Select training material on DVD, CD, on-line, and a textbook to provide the information and resources from which the answers to the pre-test questions can be found.
- Deal with class periods of varying length where there is a 2-to-1 ratio of small group interaction to large group sessions.
- Deal with break-out sessions in every session where students are put into groups of 6 to 10 students.
- Create Problem Sets for short lectures and small group discussions held during the Intensive Residential Practicum.

## **CREATIVE THINKING:**

- Will the pre-test questions prepare the students for further study?
- What should be put into the Practicum Exercise Hypothetical problem that will allow me to spin off problems for discussion?
- Create Practicum Exercise Hypothetical
- How should the course be sequenced for the most effective learning?
- Will the Problem Sets stimulate interest and move the students through the course?

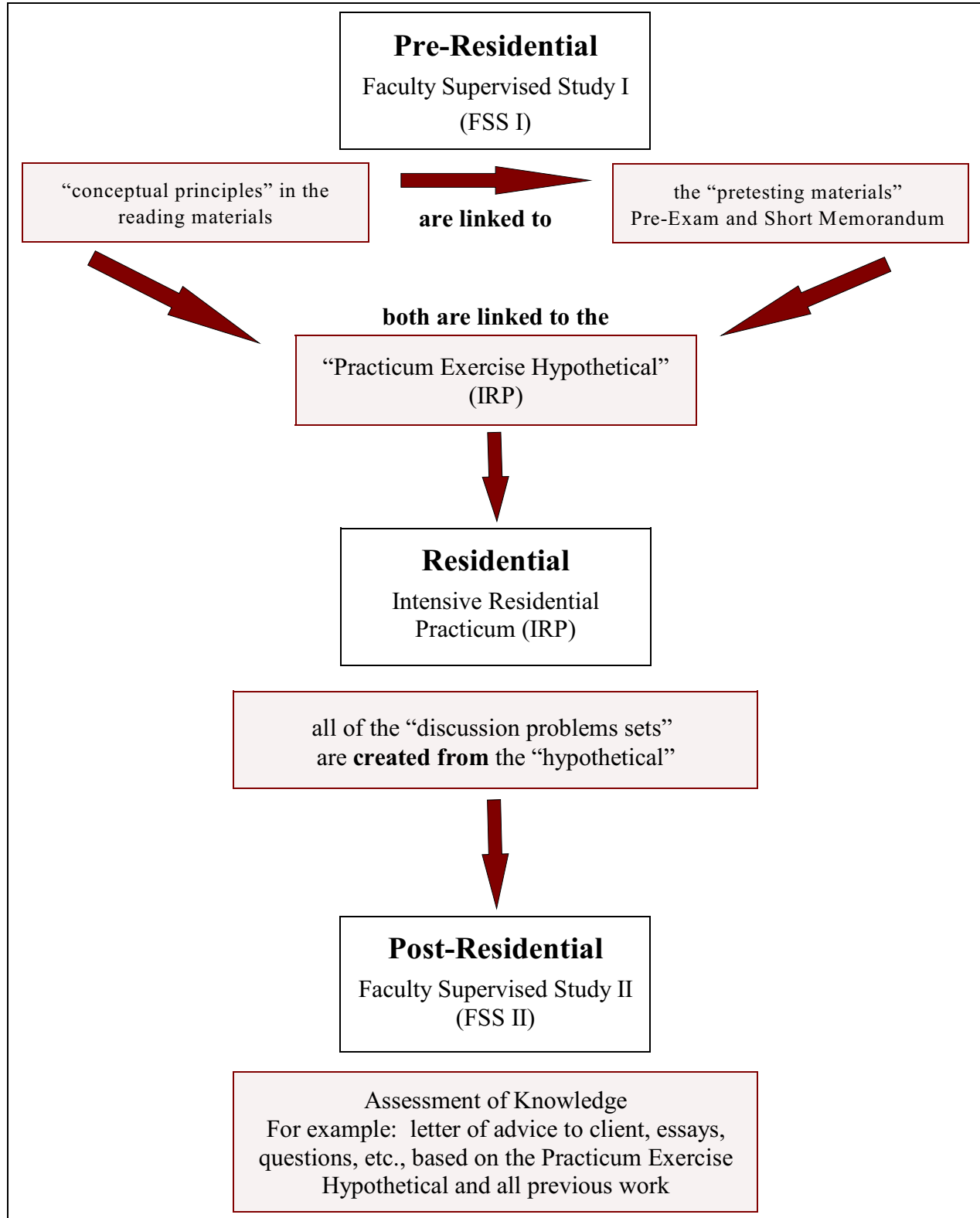
## **ONE APPROACH**

(There are, of course, many ways to approach the creation of materials. This approach worked for the creation of the Civil Procedure Materials)

- One might begin by focusing on the major creative challenge, which is to create a big hypothetical problem. The Practicum Exercise Hypothetical problem, if possible, should incorporate sufficient facts to allow a comprehensive examination of the area and an in-depth examination of sub-topics within the area of study.
- For example, in the Civil Procedure course, an airplane crash in a foreign country was created. This type of fact incident Practicum Exercise Hypothetical provides sufficient factual information and interest for discussion on all of the various civil procedure principles and application of those principles to civil procedure.

## LINKS:

- The links in the learning chain are along these lines:



### **STEP 1:**

- Create the Practicum Exercise Hypothetical on which all problems in the problems sets will be based.

### **STEP 2:**

- Create the series of short pre-residential examination questions based on the textual and supplemental materials you have selected for the class.

### **STEP 3:**

- Assess the time it will take to cover a variety of topics; write the questions for those topics; assess what will occur in all parts of a class session.
  - A–General Discussion –Overview focus
  - B–Break out discussion groups of 4 to 10
  - C–Group Leaders selected for each discussion session
  - D–Reporter selected for each discussion session
  - E–Focused discussion of assigned Problem Sets
  - F–Groups return and report on discussions

### **FINAL PRODUCT:**

- The final product — all materials are linked into comprehensive learning module.  
“I” X 5 = L (for learning)
  - Involvement
  - Interaction
  - Interest
  - Intensity
  - Intellectually Challenge

# PRE-RESIDENTIAL MATERIAL PREPARATION

## FACULTY SUPERVISED STUDY (FSS I) PRE-RESIDENTIAL EXAMINATION QUESTIONS

### ■ THE PRE-RESIDENTIAL EXAMINATION QUESTIONS—DESCRIPTION

*The Pre-Residential Examination questions* are faculty-directed / guided. The questions are derived from the course subject as presented in the Practicum Exercise Hypothetical, the textbook and supplemental materials. Students will be able to find the answers to the examination questions in the textbook you have chosen, the supplemental materials, or electronic legal resources that relate to the course subject.

The examinations will be graded as: Honors, Good, Satisfactory, or Redo.

### —— EXAMPLE EXCERPT ——

Civil Procedure

Text Book: The Gannon Guide to Civil Procedure.

Other Materials: Federal Rules of Civil Procedure ( found at [www.\\_\\_\\_\\_\\_](http://www.frcp.gov) )

**The FSS I examination questions will be faculty-directed / guided. Instructions will be given to the students prior to the exam that will guide them to areas in the subject matter where they will be able to find answers to these questions.**

1. Assume P wants to bring an action in federal court. Who will draft the summons and complaint? When is an action commenced? Where will a summons be filed? What is the primary purpose of a complaint in federal court?

*Reference: Federal Rules of Civil Procedure 3; Appendix of Forms, Forms 1-18;  
The Gannon Guide to Civil Procedure, Chapters 1, 2, 3, 14.*

2. Assume that P and D are involved in an auto accident. P sues D and in P's complaint makes the following allegation. "D's car was out of control and negligently struck me." The action was begun in state court and removed to federal court. D brings a motion to dismiss. What is most likely the basis of the motion given the sparsity of this hypothetical? On what basis may a defendant remove a case to federal court? Most likely, will B succeed?

*Reference: Federal Rules of Civil Procedure 8(a)(2); Appendix of Forms, Form 9;  
The Gannon Guide to Civil Procedure, Chapters 4, 14 (pp. 250-251), 19.*

3. May a plaintiff make inconsistent pleadings in federal practice? For example, can a plaintiff allege in the alternative that a defendant acted intentionally and negligently?

*Reference: Federal Rules of Civil Procedure 8(e)(2), 11(b);  
The Gannon Guide to Civil Procedure, Chapter 14, pp. 253-256.*



## **FACULTY SUPERVISED STUDY (FSS I) INTERNAL MEMORANDUM**

### **■ ASSESSMENT TOOLS**

The memorandum and the assessment tools are necessary to assure students have predetermined levels of competence before attending the Intensive Residential Practicum (IRP).

After thoroughly studying the Practicum Exercise Hypothetical, students will prepare an *Internal Memorandum* based on the Practicum Exercise Hypothetical. The memo is written to a law firm partner. The Internal Memorandum will be a short document (not to exceed 1,500 words) that should provide a summary of the necessary facts and major issues, show the student's initial research, detail the relevant civil rules and procedures, and set forth the legal concerns regarding the Practicum Exercise Hypothetical.

The Internal Memorandum will be graded as: Honors, Good, Satisfactory, or Redo.

## THE PLANNING GUIDE FOR CREATING PRACTICUM EXERCISE HYPOTHETICAL

### ■ PRACTICUM DEFINITION

**PRACTICUM** \prak-tikem\ n [G. praktikum, fr. LL practicum, neut. of practicus practical] (ca. 1909): a course of study designed esp. for the preparation of teachers [read lawyers] and clinicians that involves the supervised practical application (as in a classroom or clinic) or previously studied theory.

Webster's Ninth New Collegiate Dictionary

The Practicum Exercise Hypothetical is an innovative and creative approach to legal education that allows students to evaluate and apply what they have learned to a real life legal problem. The Practicum Exercise Hypothetical provides students with the opportunity to learn and apply fundamental lawyering skills and explore the boundaries of the law while receiving feedback and evaluation. The Practicum Exercise Hypothetical provides opportunities for students to learn and apply each of the following skills:

1. Problem Solving;
2. Legal Analysis and Reasoning;
3. Legal Research;
4. Factual Investigation;
5. Communication;
6. Counseling;
7. Negotiation;
8. Litigation and Alternative Dispute Resolution Procedures;
9. Organization and Management of Legal Work; and
10. Recognizing and Resolving Ethical Dilemmas.

Each Practicum Exercise Hypothetical is divided into six parts and contains:

- Requirements,
- Learning Objectives & Competencies,
- Directions,
- The Case File–The Study Guide and Check List,
- The Procedural and Factual History, and
- Substantive Information / The Facts– which contain substantive information, statements and documents need for students to carry out the project and achieve the exercise objectives;

■ **TITLE PAGE–DESCRIPTION**

Each Practicum Exercise Hypothetical *Title Page* has a major subject heading followed by a subheading and the case name.

(Excerpts that follow are taken from the Civil Procedure Practicum Hypothetical Sample)

—— **EXAMPLE EXCERPT** ——

**CIVIL PROCEDURE**

**AIR CRAFT ACCIDENT LITIGATION**

**Oliver Frederick, et al. v. Alliance ChartAir Airlines Inc.,  
EuroAir International, et al.**

## ■ TABLE OF CONTENTS–DESCRIPTION

The *Table of Contents* refers to the pagination in the upper-right hand corner of each page. Each document has its own page number on the bottom of the page and has a document reference to assist the participants in paper management.

## —— EXAMPLE EXCERPT ——

### Aircraft Accident Litigation - Page 1

#### TABLE OF CONTENTS

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## ■ REQUIREMENTS–DESCRIPTION

The *Requirements* section refers to the student’s requirements for the entire course. The students must satisfactorily complete all the requirements for the:

- Pre-Residential – Faculty Supervised Study I (FSS I),
- Residential – Intensive Residential Practicum (IRP), and
- Post-Residential– Faculty Supervised Study II (FSS II).

The *Requirements* section will remain identical for each course.

## —— EXAMPLE EXCERPT ——

**In order to meet the requirements of this course, the students must satisfactorily complete all requirements set out in A, B and C below.**

### CIVIL PROCEDURE

#### **A. Pre-Residential – Faculty Supervised Study I (FSS I).**

1. Take and successfully complete the pre-residential examination questions.
  - The course text book and the Federal Rules of Civil Procedure may be used to complete the answers in the pre-residential examination.

#### **Instructions for the Pre-Residential Examination**

- Your name, address, date, course name and course date should appear at the top, left-hand corner of each page submitted.
- The completed pre-residential examination must be received **before** the Intensive Residential Practicum (IRP) begins in London.
- You may send the pre-residential examination via email, fax, or regular mail to the attention of:

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## ■ LEARNING OBJECTIVES & COMPETENCIES–DESCRIPTION

The *Learning Objectives & Competencies* are divided into two parts.

- **Part I** contains the Substantive Topics to be covered during the course.
- **Part II** explains how the learning objectives and competencies of the course will be achieved.

The contents of **Part II** is consistent in all courses with modification to meet particular course objectives.

## —— EXAMPLE EXCERPT ——

### LEARNING OBJECTIVES & COMPETENCIES

**Part I** contains a list of substantive topics to be covered during the course.

**Part II** explains how the learning objectives and competencies of the course will be achieved

#### **PART I SUBSTANTIVE TOPICS**

- Subject Matter Jurisdiction
  - Power of court to hear dispute
- Personal Jurisdiction
  - Power of court over a particular individual
- Venue
  - What is the most appropriate venue under federal venue provisions?
- Inconvenient Forum
  - Is there a better, or more convenient forum?

-----

#### **PART II LEARNING OBJECTIVES AND DEMONSTRATION OF COMPETENCIES**

Students will demonstrate a competent understanding of the substantive areas of Civil Procedure in the following ways, by:

- A. Satisfactorily completing Faculty Supervised Study I (FSS I) that will occur prior to the Intensive Residential Practicum (IRP). Achieved by:
  - ▶ Completing a preliminary examination.
  - ▶ Completing a preliminary memorandum setting out the issues in this matter.
- B. Satisfactorily completing Intensive Residential Practicum (IRP).
- C. Satisfactorily completing Letter of Advice to client concerning the facts of the Practicum Exercise Hypothetical. The Letter of Advice shall be based on:
  - ▶ Work conducted at the Intensive Residential Practicum (IRP).
  - ▶ Other Faculty Supervised Study II (FSS II).
  - ▶ Course text book.
  - ▶ Federal Rules of Civil Procedure.
  - ▶ Other relevant legal research.

## ■ DIRECTIONS–DESCRIPTION

The *Directions* are important. They permit the exercises to be used at any time and in any jurisdiction. The exercises have been tested and the dates needed to make each exercise work determined through experimentation. The dates were adjusted to make the exercises work within a limited period of time, to fit the objectives of The Legal Practicum and the needs of law school semester scheduling.

The National Institute for Trial Advocacy model of indicating years by Year -1, Year -2 or Year +1, Year +2 to indicate previous or future years is very helpful but does not work when the dates are days, weeks or months in the past or future and participants need to refer to actual days and dates. The instructions direct how to insert appropriate dates and the exercises provide clear signals in bold print when dates are to be inserted. They also describe how and where to insert locations and ages of people appearing in the exercise. In each of the exercises the places where locations or ages are to be inserted are also indicated with simple signals set out in bold print with an appropriate line for that purpose.

With one brief five to ten minute introduction, participants are able to make the appropriate insertions at the indicated places within a few minutes without errors. Once the participant masters the instructions they do not have to be referred to again and the instructor can simply indicate the starting date for that exercise and the jurisdictional locations.

## — EXAMPLE EXCERPT —

### VERY IMPORTANT

#### DIRECTIONS FOR DETERMINING DATES, AGES, LOCATIONS AND APPLICABLE LAW

In order to keep this exercise current and workable for any time and place, dates, ages, locations, and statutes MUST be inserted where indicated by a blank line and a bold instruction in parentheses.

### DATES

Use a current calendar. Dates are to be calculated from the date the exercise is assigned.

Should an event occur on a holiday, the holiday should be ignored unless specifically indicated by the exercise or the instructor.

Dates are NOT an issue in an exercise unless specifically indicated by the instructor.

The following formula will permit correct dates to be inserted where necessary.

- \* All dates following the assignment of the exercise are indicated by a “plus” (+) sign, followed by the number of days, weeks, months, or years to be counted:

## ■ CASE FILE / STUDY GUIDE AND CHECK LIST–DESCRIPTION

The *Case File* is the introduction to the substantive information. It begins with the *Study Guide and Check List*.

The *Study Guide and Check List* are designed to focus the students' work. The guide should encourage students to make independent determinations as to the value of pursuing an area. It should provide thought and stimulate independent thinking.

## —— EXAMPLE EXCERPT ——

### STUDY GUIDE AND CHECK LIST

- a. Sources of law governing Federal Civil Procedure
    - Case Law
    - Statutes
      - Elements of Claims
      - Civil practice and procedure
      - Rules of civil procedure
        - Sets out how a civil case will be conducted
        - Sets out time lines for motions, conferences, discovery, and trial
  - b. Sources of Law
    - Case Law
    - Statutes
      - Time limitations on claims
      - Negligence theories
    - Rules of Evidence
      - Admissibility of potential evidence, testimony, and exhibits
      - Relevancy of potential evidence, testimony, and exhibits
      - Objections to potential evidence, testimony, and exhibits
    - Local Rules
      - Federal
      - Special procedure requirements
      - Timing of motions—local permeatations
      - Discovery options and limitations—local perspective
      - Pre-trial responsibilities
    - Other Sources
      - Treatises/hornbooks/textbooks
      - Practice guides/CLE materials
      - Digests and annotations
      - Looseleaf services
-



## ■ SUBSTANTIVE INFORMATION / THE FACTS—DESCRIPTION

Each Practicum Exercise Hypothetical contains the appropriate *Substantive Information*. These are statements and documents for participants to carry out the project and achieve the exercise objectives and competencies. The substantive information materials should appear as realistic as possible and may be used in most jurisdictions. Some of the materials may require minor adjustments to fit particular jurisdictional requirements. Include such things as:

- Plaintiff, Witness, or Defendant Fact Summaries
- Financial Statements
- Correspondence
- Exhibits
- Letters, FAX or Memos
- Summons
- Complaints
- Answers
- Newspaper accounts

## —— EXAMPLE EXCERPTS ——

ASSUME THE DAYS AND DATES IN THIS EXERCISE ARE ACCURATE

### AIRCRAFT ACCIDENT LITIGATION

OLIVER FREDERICK, ET AL.

v.

ALLIANCE CHARTAIR, INC.,  
EUROAIR INTERNATIONAL, ET. AL.

### PROCEDURAL AND FACTUAL HISTORY

**THE FOLLOWING FACTS ARE AGREED TO BY THE PARTIES AND MUST BE ACCEPTED BY THEM. THESE FACTS MAY BE CONSIDERED AS AGREED EVIDENCE AND MAY BE USED IN PLEADINGS, PRE-TRIAL AND TRIAL**

A Charter airlines has crashed in Thunder Bay, Ontario, Canada. It was returning to Minneapolis, Minnesota, from a Medical Legal conference in Boston. The flight to Boston originated in Minneapolis. Minneapolis was host to a pre-conference seminar sponsored by a group of lawyers and doctors. The Minneapolis conference was by invitation only. People traveled from all over the country to attend this specialized meeting. Following the conference the charter plane left for Boston. After the Boston conference was over the plane was on its way to Minneapolis to permit people to get flights to their home destination. On the way back the plane stopped in Toronto to drop off passengers. The plane made an unscheduled stop in Thunder Bay, Canada. After a short stop, the flight resumed. The plane crashed shortly after takeoff in Canada.

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## WITNESS STATEMENT

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Witness: Gayle Marshall

Taken By: National Transportation Safety Board Investigator, Shelley Schwartz

Dated: May 11, \_\_\_\_\_ (Year -1)

RE: Crash of Alliance ChartAir Flight #1326, Date May 9, \_\_\_\_\_ (Year -1), Thunder Bay, (YPT)  
Canada, Registration # N377AC

---

I am an aircraft maintenance engineer licensed by the government of Canada with endorsements for specialities as a mechanic and maintenance and electrical engineer. At 3:00 p.m. on May, 9 \_\_\_\_\_ (Year -1), I was advised by administrators at Thunder Bay airport that a charter aircraft belonging to Alliance ChartAir had experienced some problems and had asked for a licensed mechanic to see if there were any problems. I arrived at the airport at approximately 4:30 p.m. and spoke to the senior pilot, Jean-Marie Ferrari, and she said there had been some problems with the air pressure system in the passenger compartment of the plane and asked me if I could do a mechanical check to see if there were any problems that would prevent the flight from proceeding to Minneapolis/St. Paul International Airport. . . .

-----

**Alliance ChartAir, Inc.  
Flying Horse Airport  
Eden Valley, Midstate**

## FACSIMILE

**DATE:** May 13, \_\_\_\_\_ (Year -1)

**TO:** Brian Bottle of Baxter, Bemis, Brown and Bottle  
875 Summit Avenue  
Midstate

**FROM:** Rose Boyd, CEO  
Alliance ChartAir, Inc.

As you may know a tragic accident occurred on May 9, \_\_\_\_\_ (Year -1) involving one of our planes. Twenty-nine persons lost their lives in this accident. Our in-house legal staff is not equipped to handle this matter. After consulting with our parent company, EuroAir, I have agreed to retain you and your firm once again as our attorneys.

I will be consulting with a number of firms to determine whom we should retain. We are, of course concerned with attorney fees, but we are naturally concerned with the potential cost to the company.

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## **METROPOLITAN NEWS**

L. Marie, Publisher–John Oliver, Editor

### **What's Inside:**

**Monkey Learns How To Program Computer! Technology Section**

**Norwegian Americans Set Record For Eating Foul Tasting Fish at Lutefisk Festival, Entertainment Section**

Date: May 13, \_\_\_\_\_(Year -1)

### **DISAGREEMENT BETWEEN SISTERS MAY HAVE CAUSED CRASH!**

A disagreement between sisters may have caused the crash of Alliance flight 207 in Thunder Bay. Although the cause is technically still unknown at this time, a National Transportation Safety Board preliminary report sites witnesses that overheard an extended argument between sisters Dr. Rosalind Schwartz, the leader of the tour group and the pilot, Jean-Marie Ferrari. . . .

-----

#### **FOLLOW UP REPORT TO N.T.S.B. PRELIMINARY REPORT BY SHELLEY SCHWARTZ**

**TO:** Ralston Jorgensen

**FROM:** National Transportation Safety Board Investigator, Shelley Schwartz

**RE:** Incident occurred re: crash of Alliance ChartAir Flight #1326, Date May 9, \_\_\_\_\_  
(Year -1), Thunder Bay, (YPT) Canada

**DATE:** May 11, \_\_\_\_\_ (Year -1)

At the request of Canadian authorities I arrived on the scene shortly after the crash of the above described aircraft and as a result of that prepared my initial preliminary report. In that regard I have spoken to and taken statements from the following:

Gayle Marshall, aircraft maintenance engineer, AME, licensed by the government of Canada  
Earnest "Buddy" Bainbridge, ramp service attendant, Thunder Bay Airport  
Jolynn Janosich, ramp service attendant, Thunder Bay Airport  
Norma Benson, witness  
Jack Benson, witness  
Daniel Lyon, witness  
Sarah Peters, witness

There were no other witnesses to the crash or to conversations. All airplane cleaners and fuelers reported having no conversations with pilot, crew or passengers and that the cleaning and fueling were not out of the ordinary.

## ■ PROBLEM SETS–DESCRIPTION

*Problem Sets* will be used for each of the Intensive Residential Practicum teaching modules to stimulate interest and move the students through the Intensive Residential Practicum. *Problem Sets* are designed as an assessment of:

- general discussion and lectures
- small group discussions
- small group reports to entire class

When you review the sample Problem Sets, you will see that there are more problems sets than can be discussed by all of the small groups in the breakout sessions given the time allotted.

The Problem Sets are designed to cover all of the major issues raised by the Practicum Exercise Hypothetical. When there are a number of Problem Sets, you will see on the Teaching Schedule that each small group is assigned a starting point and will be asked to discuss and resolve as many of the problems as possible within the time allotted.

For example, if there are eight problems, group A starts at #1, group B starts at #3, Group C starts at #5 and Group D at #8. This assignment order assures that all problems will be discussed by at least two groups in the break out groups. The small groups will report back to the entire class in the order they were assigned the problems. The reports will be recorded and provided to the students. Therefore all students will have available the collective knowledge of on all of the problem sets.

The order in which the problems are assigned to the small groups should be rotated. The rotation will assure that the group sequence will change in the report back sessions.

See Teaching Schedule and Problem Sets.

# EXAMPLE EXCERPT

## CIVIL PROCEDURE PROBLEM SETS TABLE OF CONTENTS TO SESSIONS

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Problem 1     [Forum Selection—Rule 8 FRCP—Whether to File the Case in State or Federal Court] .....	2
Problem 2     [Subject Matter Jurisdiction of Federal Court] .....	5
Problem 3     [Tactical and Legal Considerations in re Joinder of Claims] .....	7
Problem 4     [Joinder of Parties—Selecting the Defendants: Tactical Advantages and Disadvantages, if any] .....	10
Problem 5     [Simple Drafting Problem—The Technical Requirements of Drafting a Complaint in Federal Court] .....	12
Problem 6     [Drafting Your Claim and Requesting Damages] .....	14
Problem 7     [Traditional Bases of Jurisdiction; Service of Process] .....	16

### PROBLEM SET #1

The Civil Procedure Practicum Exercise – Alliance ChartAir Airlines, Inc.,  
forms the basis for all of these discussion problems.  
Strategy and Tactics—Drafting Complaints, Joinder of Parties and Claims

### SESSION 1

- Group A: Begin with Problem 1 and work on as many problems as you can during the hour.  
Group B: Begin with Problem 2 and work on as many problems as you can during the hour.  
Group C: Begin with Problem 4 and work on as many problems as you can during the hour.  
Group D: Begin with Problem 6 and work on as many problems as you can during the hour.

#### Problem 1

*[Forum selection—Rule 8 FRCP—Whether to File The Case in State or Federal Court.]*

Assume that several family members of the passengers who perished in the airplane crash have contacted you regarding possible representation. You are considering taking the case but are not sure about where to file the action—state or federal court.

Given that many of the passengers are from different states, what considerations will you make in deciding where to bring the action? Might you conduct a jury study before deciding? Review the decisions of the highest court of the state in which you are considering bringing the case? Examine its long-arm statute? Statute of limitations?

#### Focus of discussion:

This is the first small group problem on this topic for these students. The Group Leader should select a *reporter* for each session. The *reporter* should be rotated throughout the sessions so that everyone has a chance to be a *reporter*. The reporter is responsible for quickly summarizing the group discussion regarding the problems it worked on when we all reconvene as a group.

Group leader: Quickly have each student introduce himself or herself and provide some background in handling claims.

**Specific discussion topics could include:**

- A. What is the general theory upon which the American Court System is based? How does this theory affect lawyering in a civil case?
- B. Does a state court in the United States have subject matter jurisdiction to hear the disputes in an airplane crash that occurred outside its borders, where the parties are citizens of the United States?
- C. Should the plaintiffs' lawyers hire a jury consultant to conduct a jury study before deciding to initiate a lawsuit? Would it be advisable to conduct a trial before a mock jury when preparing to handle the case?
- D. What relevance, if any, does the geographic location of the witnesses have to do with a decision as to where to file the action, i.e., in what state and in what court system?
- E. Should the lawyers representing the plaintiffs consider bringing the action in Canada?

**Notes about the law:**

- 1. Most state courts are courts of general jurisdiction and have the power to hear almost any claim.
- 2. The American courts are generally viewed as having been created to provide a decision "by an agent of state power, [of] a controversy existing between two individuals (or the State and an individual), by rational (not merely personal) considerations, purporting to rest on justice and law (i.e. the community's general sense of order)."<sup>1</sup>

Courts apply two types of law—*substantive* and *procedural*. Courses such as Torts and Contracts deal with the substantive rights and duties that regulate the everyday relationships among individuals and between individuals and institutions. The substantive law also defines the standard of liability in a particular case. Civil Procedure, by contrast, explores the procedures used by the courts to resolve the disputes that are brought before them.

This course deals with the procedural questions presented in *civil* suits not *criminal* suits. The principal difference is that civil suits generally are initiated and litigated by private parties attempting to vindicate their legal rights vis-a-vis other private parties. Criminal suits are instituted and prosecuted by the government in an effort to punish those individuals whose conduct has violated the community's moral judgments as expressed in its penal law. Government involvement, however, is not always an indicator of a criminal suit since the government is a party to civil suits, and can be either a plaintiff or a defendant.

The most distinctive element of the American legal system is its adherence to the *adversary* process. The central feature of this system is the responsibility placed on the parties for beginning the suit, for shaping the issues, and for producing evidence. A court takes almost no active part in these facets of the process; it does not do its own investigating, it rarely even asks a question. *Id.* By contrast, the judicial systems in civil law countries employ the *inquisitorial system*. Under the inquisitorial model, the court conducts an active and independent inquiry into the merits of each case, which may include having the judge question and examine witnesses, as well as specifically ordering certain fact-finding.

Reliance upon the adversary system is justified by the following: (1) A truer decision is reached as the result of a contest directed by interested parties. (2) The parties, who after all are the ones principally interested in the controversy's resolution, should bear the major burden of the time and energy required. (3) Although impartial investigation may be better when no final decision need be reached, setting up sides makes easier the type of yes-or-no decision that is thought to be necessary in a lawsuit. (4) Since resort to law has replaced the resort to force that characterized primitive ages, the atavistic instinct to do battle

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<sup>1</sup>Wigmore, *The Judicial Function*, in *Science of Legal Method* xxvi, xxviii (1917).

is better satisfied by means of settling disputes that is very much in the hands of the parties. See Cound, Friedenthal, Miller & Sexton, *Civil Procedure*, 8<sup>th</sup> Edition 2001, p.3.

3. A federal and state court will apply its procedural rules to the dispute. However, there will be a struggle over whether Canadian or American substantive law will apply. See e.g., *Pipe Aircraft v. Reyno*, 454 U.S. 235 (1981). This is a choice of law issue.