

EMERSON’S

“WHAT TO WRITE”

ON

PERFORMANCE TESTS

FOR THE CALIFORNIA STATE BAR EXAM

- What does client want (including options)?
- What requirements must be satisfied to achieve client goals?
- Do we have the facts needed?

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ALL PERFORMANCE TESTS ARE ABOUT THE LAWYERING PROCESS

The lawyering process is about how to use the

LEGAL MODEL

at the appropriate place in the

TIME LINE

to prepare the document asked for in the

TASK MEMO

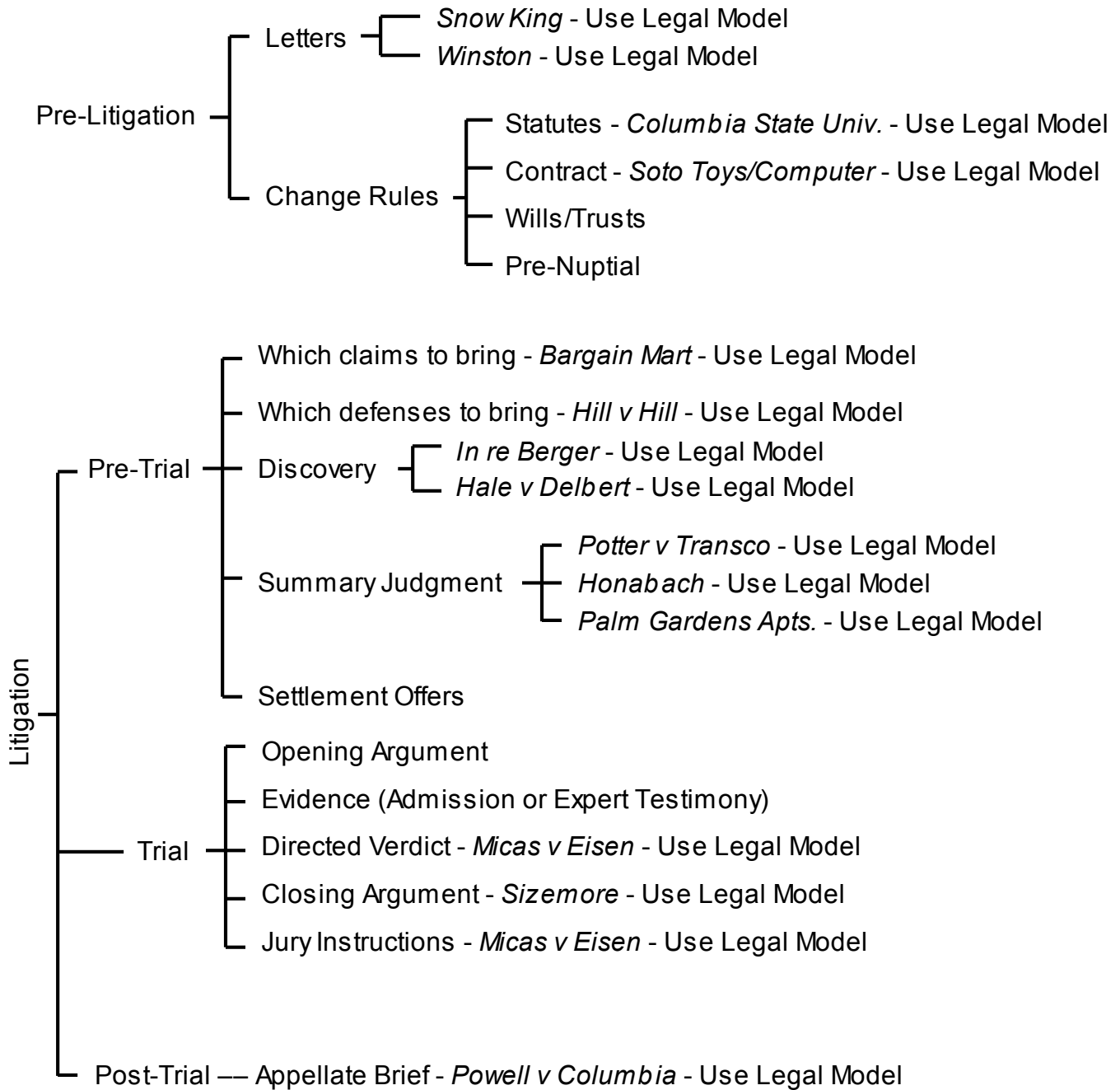
THE LEGAL MODEL

ALL PERFORMANCE TESTS ARE ABOUT
HOW TO USE THE LEGAL MODEL
TO ACHIEVE YOUR CLIENT'S GOALS

Use FACTS (in File)	Apply STANDARDS (in Library)	Reach RESULTS (Client's Goals)
<ul style="list-style-type: none">• Facts as given (<i>Hill</i>)• Facts to gather (<i>Berger</i>)• Control the facts (<i>Snow King</i>)	<ul style="list-style-type: none">• Standards as given (<i>Berger</i>)• Revise standards (<i>Columbia Univ</i>)• <i>Choose cases</i>• <i>Choose statutes</i>	<p>Achieve client's goals as much as possible</p>

TIME LINE

The time line is the chronological list of events in the lawyering process. The legal model is used at each step in the time line where you are asked to perform a lawyer-like task.



1 **DEWEY, GONZALES & HOWE**
2 Attorneys and Counselors at Law
3 1811 Tower Avenue, Suite 1200
4 Los Diablos, Columbia
5

6 **MEMORANDUM**

7 Date: February 27, 2001
8 To: Applicant
9 From: Igor Moon
10 Re: Sierra Corporation

11
12 We have been asked by Claude Barrow, Chief Executive Officer of the Sierra
13 Corporation, to advise him regarding a union organizing effort at the company. Sierra
14 sells, installs and services heating and cooling equipment for commercial builders
15 throughout this part of the United States. All 146 technicians employed by Sierra have
16 been represented for the past twelve years under a collective bargaining agreement
17 with Local 841, International Union of Sheetmetal Workers. Recently, however, Local
18 841 began a campaign to organize Sierra's fifteen clerical workers who have never been
19 represented by a union.

20
21 Union President J. L. Lewis has requested in writing that Barrow voluntarily agree to
22 recognize Local 841 as the bargaining representative of the clerical workers. He claims
23 that the majority of the fifteen have signed authorization cards designating Local 841
24 as their bargaining representative. Lani Carovick, Vice President in charge of
25 personnel, has spoken to each of the clerical workers individually and has told Mr.
26 Barrow that the workers generally favor being represented by the Union. However, Mr.
27 Barrow is still not convinced that the union would ultimately win an election, especially
28 if certain key clerical employees were entitled to vote. The problem is that he wants
29 those key employees excluded from any bargaining unit that the Union might end up
30 representing. The Union, so far, has said it will insist on representing all the clerical
31 employees.

32
33 The key employees are Dorothy Street, Mr. Barrow's secretary; David Drake, Ms.
34 Carovick's secretary; and Patricia Norris, secretary to the head of the Purchasing
35 Department.

1 I've made an appointment to discuss the matter with Mr. Barrow tomorrow at 4:00 p.m.
2 We are to deliver to him by close of business today a pre-counseling letter that he can
3 review in preparation for our meeting. Please draft a pre-counseling letter to Mr. Barrow
4 in which you:

- 5
- 6 1) State your understanding of Mr. Barrow's goals;
- 7 2) Explain the substantive criteria the National Labor Relations Board applies in
8 determining whether to exclude as "confidential" employees from a bargaining
9 unit sought to be represented by a union;
- 10 3) In light of those criteria, evaluate the likelihood that Street, Drake and Norris
11 would be excluded as "confidential" employees; and
- 12 4) Explain the courses of action available to Sierra in response to the Union's
13 request for voluntary recognition, and also in the event the Union files a petition
14 for a representation election and refuses to stipulate to the exclusion of the three
15 key employees, Ms. Street, Mr. Drake and Ms. Norris. For each course of action,
16 make sure to discuss the possible consequences for Sierra, whether legal,
17 economic or personal.

18

19 Although Mr. Barrow is a sophisticated businessman, he is not a lawyer. Thus, be sure
20 to write the pre-counseling letter and explain your reasoning in language that can be
21 understood by a layperson.

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Coates, Hildebrand and Shull
101 Riverfront Plaza, Suite 1150
Cranfield, Columbia

To: Applicant
From: Rebecca Newell
Re: Request from Cranfield Downtown Improvement Association
Date: July 30, 1998

As you may know, Cranfield Downtown Improvement Association (CDIA) is a nonprofit corporation established to promote the revitalization of downtown Cranfield. We helped CDIA incorporate several years ago and since that time have provided them with advice and representation on a number of matters. Yesterday I met with CDIA's current president, Brent Richards, concerning CDIA's third annual "Great Pumpkin Festival," to be held the Saturday before Halloween in and around the City Center Mall in downtown Cranfield. The festival may seem a long way off, but apparently final booth assignment decisions need to be made in the next few days. CDIA is anxious to preserve the family-oriented nature of the festival, and needs our advice on how to do that.

I did not attend the first two pumpkin festivals, but I have heard good things about them. Richards says they were very successful in attracting families with young children, and that the festival demonstrated to this largely suburban-based group that downtown Cranfield is a "fun place to go." He attributes the reported growth in sales by downtown merchants who target these customers directly to the drawing power of the festival, and wants to maintain its family-oriented atmosphere. The first year the exhibitors, vendors and entertainers who rented booths were all invited to do so by CDIA, and all of them were in keeping with the festival's light-hearted Halloween theme. Last year a number of unsolicited applications were received, and since there was space available, CDIA allowed every group that applied to participate. The CDIA Board now thinks that this was a mistake. Richards says some of the participating groups were "too controversial," that complaints were received about them, and that CDIA is afraid they will drive young families away. At this point, however, some of the groups who participated last year seem to feel they have a "right" to be involved again this year, and he came to us to find out if there are in fact any legal problems with scaling back some participants. I told him I wasn't sure, but we would research the issues and get back to him right away.

1 I had a transcript of my interview with Richards typed up and have attached relevant
2 portions, so you can get more detail on what the problems are and what CDIA wants to do.
3 You will see that I asked a number of questions about CDIA's relationship to the city and
4 where their funding comes from and so forth. I have also attached some notes that were
5 made at the time CDIA was incorporated. On the face of it, CDIA is an association of private
6 individuals and businesses, and they should be able to establish whatever policies they
7 want. But since the festival takes place on public as well as private property, and there is at
8 least a working relationship with the city, there may be a question of "state action" that would
9 make the First Amendment applicable.

10
11 I want you to do two things:

- 12
- 13 1) Read the relevant case law in the library and write a memo to me on the state action
14 issue. Don't give me an abstract legal treatise: what I want is a concise, to the point
15 analysis of the facts we have about CDIA and the Great Pumpkin Festival, and your
16 conclusion about whether a court will find a basis for attributing CDIA's actions to the
17 state.
 - 18 2) We need to prepare our client for the worst possible outcome. Assume a court would
19 find state action. Draft an opinion letter for my signature to Richards and the CDIA
20 Board. The letter should do the following:
 - 21
 - 22 a. Explain the limitations the Constitution places on CDIA's actions and
23 decisions in operating the Great Pumpkin Festival if it is considered to be a
24 state actor;
 - 25
 - 26 b. Explain whether CDIA can allocate space the way it wants and still be
27 consistent with constitutional requirements; and
 - 28
 - 29 c. Regardless of whether CDIA's plans would pass constitutional muster, the
30 client needs to know all its options in order to decide how to proceed.
31 Suggest all other possible options available to it for deciding how to allocate
32 booth space. Be sure to discuss whether these options would meet its needs
33 and whether they are consistent with constitutional requirements.
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Holden and Gordon, P.C.
236 Jefferson Avenue
Augusta, Columbia

MEMORANDUM

July 26, 1994

To: Applicant
From: Kimberly R. Holden
Re: Richard D. Martinek

We have been retained by Richard Martinek, an attorney here in town, to represent him in a matter of concern not only to him, but to many other lawyers. You may be familiar with Mr. Martinek. He is quite well known in this area as a civil rights attorney. For years he was employed by Augusta Community Legal Services and was a participant in a great deal of significant civil rights litigation. He also has been active with the American Civil Liberties Union, acting as lead counsel in the recent challenges to Columbia's redistricting.

The case involves a civil rights claim Richard filed against the Farmers Home Administration (FmHA). The actual substance of the action is not particularly relevant, though you will get a sense of the nature of the underlying claim from the interview with Richard. What is significant is that as a result of the success of that representation, Richard would be entitled to an award of attorney's fees against FmHA. However, FmHA has proposed a settlement in which those fees have been waived. Richard has sought hour advice about how to respond to this proposal.

Apparently some months ago, after years of litigation, Richard and his client, the Columbia Housing Development Corporation (CHDC), sent a written settlement offer to FmHA. Yesterday Richard received a letter from FmHA's attorney offering to accept CHDC's settlement in its entirety, if CHDC waived Richard's right to attorney's fees. To make matters worse, FmHA informed Richard that CHDC had to accept or reject the counteroffer within two days. Richard came to see me immediately. My transcript notes are attached. As you will see, we must act quickly.

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- A. Please draft a letter to Richard which provides our opinion on the following matters:
- a. Is Richard obligated to present the settlement offer to the client?
 - b. Should Richard withdraw from the matter because of a conflict of interest?
 - c. What issues should Richard address in counseling the client to accept or reject the offer?
- B. There is another task on which I need your help. Assuming that CHDC will accept the pending FmHA offer and that Richard will decide to seek an award of fees from FmHA or from CHDC, write me a memorandum which identifies the specific facts we should try to obtain to support such an award.

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State's Attorney's Office

County of Marion
10 The Green
Benton, Columbia

Theodore LeBlang
State's Attorney

March 1, 2001

10 To: Applicant
11 From: Theodore LeBlang
12 Re: State v Sizemore
13

14 As you know, this office is prosecuting Jerry Martin Sizemore on a charge of attempted
15 murder. Trial was completed yesterday, and closing arguments were scheduled for this
16 morning. Unfortunately, Bonnie Miller, the Assistant State's Attorney trying the case, has
17 gone into the hospital for an emergency appendectomy. The court has given us an
18 extension of time until tomorrow to present closing arguments. I will present the closing
19 argument, but I want you to prepare a draft of that closing argument for my review.
20

21 Please write out the argument exactly as you would give it if you were presenting it.
22 Follow the guidelines contained in the office memo on Closing Arguments/Bench Trials.
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State's Attorney's Office

County of Marion
10 The Green
Benton, Columbia

Theodore LeBlang
State's Attorney

February 22, 1994

To: Applicant
From: Theodore LeBlang
Re: Closing Arguments/Bench Trials

Your closing argument should begin with an understanding of the legal principles that will be applied to the facts in the case. In jury trials, you will have jury instructions. In bench trials, however, you must rely on your analysis of legal authority (statutes and case law) during closing arguments. The legal authorities in bench trials (just as the instructions in jury trials) will give you the framework for your closing argument. The argument must show how the evidence admitted during the trial meets the legal standards established by the statutes and case law. While in a jury trial, you do not ordinarily discuss or make reference to the legal authorities, in a bench trial you have more latitude in referring to the legal authority. Indeed, in the absence of jury instructions, you may find it necessary to explain to the court finer points of the law. But, you must not lose sight of the fact that a closing argument is not a legal brief or an essay. The argument is based on the evidence presented, not histrionics or personal opinion.

Your job is to help the judge understand how the law relates to the facts presented, and to persuade the judge that he or she has no choice but to find as you have advocated. In doing that, you may want to do some or all of the following:

- State explicitly the ultimate facts that the court must find for you to prevail.
- Explain how the evidence supports the ultimate facts.

- 1 – Use relevant legal principles to support your argument.
- 2
- 3 – Discuss the sufficiency of the evidence and the credibility of the witnesses.
- 4
- 5 – Draw reasonable inferences from the evidence to support your position.
- 6
- 7 – Anticipate opposing counsel’s arguments and point out weaknesses in his or
- 8 her case.
- 9
- 10 – Refer to equities or policy considerations that merit finding for your position.
- 11
- 12 – Never hold back any argument assuming you will have a second opportunity
- 13 to make it in rebuttal.
- 14

15 Not all of the items in this list fit every case, but they are things you should at least think
16 about. Organization and persuasiveness are very important. If you immerse the judge in
17 a sea of unconnected details, he or she won’t have a coherent point of view.

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Walker And Shapiro
Attorneys at Law
102 Plaza Tower
Plainville, Columbia

MEMORANDUM

July 28, 1987

To: Applicant
From: Deborah Lascher
Re: Edward West, defendant in Hill v Hill et al.

We represent two of the defendants in this action for slander. Our clients are Edward West, a CPA who is also chairman of the board of an organization called Single Parents Co-op (SPC), and the organization itself.

West came into our office a few days ago, bringing the complaint that you'll find in the file. As you can see from the complaint, the remarks which are alleged to have been defamatory were initially made by the plaintiff's ex-wife, but our client admits repeating them to a considerable number of SPC members, both orally and in writing (a copy of his memo to the SPC board is in the file). Unless we can prove the remarks were true or come up with some other defense, there may well be liability. I don't know if the allegations about damages are true, but if they are, West and SPC may also be facing a heavy financial loss. Thus, we need to get on top of this case as soon as possible.

I've drafted an answer, but before we file it, I want you to read the cases and statutes and give me some background on the law. I remember that truth is a defense, and have pleaded that, but I really didn't have time to research other possible defenses. We'll be sending the final draft to West so he can review it and sign the verification.

In addition, I need your help in preparing West for his deposition, which is now scheduled for two days after he returns from vacation. I explained in general terms what will happen in the deposition, but he is understandably anxious to know the areas in which he will be questioned. I told him we would write him a letter this week, telling him more about the issues in his case and detailing the factual areas plaintiff's attorney is likely to cover in the deposition.

1 Therefore, please do the following:
2

3 A. Write me an objective memorandum identifying our strongest defenses and
4 discussing the legal and factual issues involved in each defense. Based on your
5 legal analysis, is the draft answer okay? Should any defenses be added or
6 deleted? (Don't bother with the admissions and denials; we'll work on those
7 later.)
8

9 B. Keeping in mind that I have already provided the client with a general description
10 of the deposition process, please think about the case from the plaintiff's
11 perspective and write a letter to Edward West:
12

13 a. Identifying the likely areas of factual inquiry and their significance to the
14 case;

15
16 b. Describing the specific information likely to be sought;

17
18 c. Identifying any conflicts in the facts which plaintiff's counsel could be
19 expected to probe.
20

21 Remember that our client, although well educated, is not a lawyer, so be certain
22 to write the letter in language that he will understand.
23