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Teaching Remedies as an Introduction to Transactional Thinking

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TEACHING REMEDIES AS AN INTRODUCTION TO TRANSACTIONAL THINKING

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INTRODUCTION

I have been teaching Remedies every year, at least once a year, since 2000. After twelve years of teaching Remedies, I still find it to be one of the most fun courses to teach in the curriculum. In this Essay, I hope to share with you some thoughts about why I enjoy teaching Remedies. To do this, I would like to discuss my main goals in teaching Remedies, why I think Remedies is particularly well suited to these goals, and the method I have developed for achieving these goals. I also hope to offer thoughts about what I have seen as some of the successes of this approach to teaching Remedies and the challenges I have encountered in implementing it.

I. WHY I LOVE TO TEACH REMEDIES

During my first Remedies class each semester, I use an anecdote from my practice experience to illustrate for the students how I became interested in the study of Remedies. The anecdote runs as follows:

> While I was in practice, I primarily handled large complex litigation matters. I devoted most of my time to discovery and motion practice, and most of the cases on which I worked resolved themselves through settlement or dispositive motions. When I finally had the opportunity to see a case on which I had devoted substantial effort go to trial, I was fascinated and excited as I watched the case play out over the course of a ten-week trial. The case had been vigorously, and at times bitterly, contested during discovery, and that continued at trial. At (what I thought was) the conclusion of the trial, I was filled with mixed emotions as I listened to the judge announce his verdict and decision. Our client lost on all counts. I was disappointed with the outcome. I also felt disappointed and deflated about the fact that something to which I had

* Associate Dean for Academic Affairs and Professor of Law, Capital University. Thank you to the editors of the *Saint Louis University Law Journal* for inviting me to participate in this symposium. Much as the practice experience I describe in this Essay kindled my interest in Remedies and re-ignited my enthusiasm for lawyering, the opportunity to devote sustained attention to meaningful reflection on the reasons why I teach Remedies has left me refreshed and energized to start the new semester.

> devoted so much time and energy was concluding. However, I also was relieved and anxious to be moving on to a new challenge—a new case.
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> It turns out my feelings were misplaced because my assumption was incorrect. Almost immediately after the judge announced his verdict, the parties became embroiled in a ten-week series of hearings and motions concerning the proper remedies to be awarded in the case and the enforcement of those remedies. The proceedings raised issues regarding under what circumstances a prevailing party may recover its attorneys' fees, how to measure compensatory damages, whether compliance with an injunction was impossible, whether the defendant should be held in civil contempt for failing to comply with an injunction, and whether a representative of an institutional defendant could be held in criminal contempt for her actions in the courtroom. The remedial proceedings were more vigorously contested than the litigation itself.

I have several reasons for telling this story on the first day. Some of my reasons for telling this story have changed as my career has progressed;[1] others have remained constant. Ultimately, I think the main reason I tell this story is because it illustrates all of the things I love about teaching Remedies.

I like teaching Remedies because it is a dynamic and exciting topic.[2] I find that some of my students do not immediately perceive the vibrancy and relevancy of topics such as equity jurisdiction, writs of replevin,[3] and damages for harm to real property. Instead, for some students these topics can seem quite dry and antiquated. This anecdote breathes life into Remedies. Seeing

1. As a new professor, I hoped my practice experience would compensate for my lack of teaching experience. Now, as a more senior professor, I hope my former career in practice will compensate for my significant teaching experience.

2. Since 2005, the U.S. Supreme Court has issued several significant decisions dealing with various remedial issues. These significant decisions include issues related to permanent injunctions. *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910 (2011); Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006). The Court also has dealt with several preliminary injunction issues. *See, e.g.*, Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). A number of punitive damages issues have come before the Court in recent years. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); Philip Morris USA v. Williams, 549 U.S. 346 (2007). Lower courts are still sorting through the implications of these decisions. *See* ELAINE W. SHOBEN, WILLIAM MURRAY TABB & RACHEL M. JANUTIS, REMEDIES: CASES AND PROBLEMS 231–32 (5th ed. 2012). Additionally, the ALI has issued a new restatement on restitution. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011). Finally, several state supreme courts have considered the constitutionality of various legislative measures aimed at reducing damage awards in personal injury litigation. *See, e.g.*, Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440 (2005).

3. Indeed, as I was writing this Essay, a former student stopped by my office to tell me that he recently had to refer to his notes from my class because he had to file several motions for writs of replevin. In telling me about this, the student mentioned that he had assumed while he was learning the material for class that he would never actually have to use this knowledge in practice.

how issues arise in the context of a real case helps bring the course to life for these students. This story is a particularly rich example because it gives me an opportunity to preview many of the topics covered in the course: compensatory damages; attorneys' fees; equitable relief and defenses; and contempt. It also raises the issues in a fairly dramatic form. As I note for the students, in the course of the proceedings with which I was involved, the judge presiding over the case indicated that he would consider holding one of the representatives of the firm's institutional client in criminal contempt and indicated that he would consider imposing a jail sentence on the representative. As a result, I had the opportunity to observe a partner advising a client about the possibility of receiving a jail sentence and how to prepare for such a sentence. This was an unusual experience for a civil lawyer who spent most of her time working on complex commercial matters.

The example also illustrates the importance of the topics covered in the course on a visceral level. Remedies matter to clients. For many clients, remedies matter more than the legal theories or litigation strategy used to achieve them. In my illustrative case, the fact that one party had lost the litigation and another party had won the litigation did not matter to the parties as much as the way that the result affected the day-to-day operations of each of the parties. The impact that the judgment had on the day-to-day operations of the parties, in turn, depended on the scope of the relief that the judge was able and willing to impose.

Additionally, the story allows me to debunk a misperception many students hold. Many students come into the course believing that remedies flow automatically from liability and that little room for uncertainty, ambiguity, or differing remedial outcomes exists. Even when they acknowledge the potential for ambiguity or uncertainty, they seem to understate the lawyer's role in resolving these ambiguities. My story previews for students the idea that remedies do not flow automatically from a finding of liability. Rather, claimants must establish entitlement to any specific remedy that they seek, and more than one remedy may be available to address an invasion of any given right. It also introduces students to the idea that even after legal parameters have been set, factual disputes may exist about a claimant's entitlement to any particular remedy.

Ultimately, I recount the story because it resonates with me. It resonates with me because it was my "a-ha" moment. My experience in the remedial phase of the litigation and my reflection on the experiences afterward were the first moments when I began to understand lawyering as legal problem-solving and legal problem-solving as a dynamic and circular process as opposed to a linear and static process. That is, it was the point at which I began to see how lawyering involved starting from a desired outcome, then mapping alternative pathways to get to that outcome in light of the facts and legal principles involved in the particular dispute or transaction. Before that realization, I had

approached legal problem-solving as an effort to identify the appropriate pathway and then to make predictions about the likely outcome in light of that pathway.

My main goal in teaching Remedies has always been to introduce students to this sort of "transactional thinking" and to break students away from their compartmentalized and linear thinking about legal problems. That is, my goal has been to help students begin to see legal problems as a bundle of facts—a transaction—that can be characterized in several different ways and to understand that the way in which the transaction is characterized will affect the outcome. Secondarily, I hope students will begin to see that the alternative pathways will affect not only the ultimate outcome, but will also produce different transaction costs and benefits. And I hope that, ultimately, they begin to realize that legal problem-solving is an attempt to balance these competing costs, benefits, and outcomes. I believe Remedies is well suited to introducing students to transactional thinking, and I find that teaching transactional thinking is one of the things that keeps teaching Remedies fresh and exciting.

II. THE NATURE OF REMEDIES AND ITS RELATIONSHIP TO TRANSACTIONAL THINKING

A couple of things about the general nature of Remedies make the course well suited for introducing students to transactional thinking. First, I find that many students compartmentalize legal problems. That is, they see legal problems as either tort problems or contract problems or property problems but do not recognize that a single transaction or dispute can fit into several if not all of these compartments. Indeed, one frequent challenge I face in teaching Remedies illustrates this tendency. I frequently encounter a few students who have begrudgingly enrolled in the course. They will tell me that they are taking the course because they have been advised that it is a "good bar course," but they are skeptical of this advice because they have looked at the list of topics tested on the bar and noted that Remedies is not included on the list. When I tell them that Remedies encompasses many of the tested topics, they are frustrated by the idea that they may have to draw on two different sources of law to answer bar questions.

Students are preconditioned to think about legal problems in a compartmentalized way, in part, because of the structure of the curriculum. Students think about legal problems as either tort problems or contract problems or property problems because that is the way they are exposed to them. During the traditional first-year curriculum, students are rarely asked to think about the torts and contract implications of a single problem at the same time. Remedies, by its nature, cuts across all of these doctrinal areas. Students read contract cases, tort cases, property cases, and maybe even constitutional law and criminal cases side-by-side. Thus, Remedies sets the stage for a discussion about how all of these doctrinal areas intersect.

Second, I find that many students think about legal problems in a linear and static manner. That is, they approach a legal problem as a set of static facts that they must compartmentalize and, from there, predict outcomes. Because Remedies is focused on outcomes as the starting place, it provides a natural platform for getting students to reverse-engineer litigation in a manner in which they may not have done previously. By focusing on outcomes, Remedies also perhaps gives students the opportunity to see a richer panoply of outcomes beyond liability or no liability. Finally, looking at the precise contours of the outcomes also allows students to gain greater perspective on how the outcome affects the day-to-day operations of the involved parties. For example, instead of focusing on whether certain conduct will give rise to liability for breach of contract as one might do in a Contracts course, Remedies focuses on the form in which the breach will be remedied (i.e., whether the remedy will be through specific relief or substitutionary relief), which losses will be compensated, and at what value those losses will be compensated. This, in turn, leads to a natural discussion about what the parties may have desired from the transaction and a discussion of how the lawyers' choices during the course of litigation and in structuring the transaction may have affected the parties' ability to achieve these outcomes.

A few aspects which may be unique to my experience in teaching Remedies also make the course well positioned for teaching transactional thinking. First, Remedies is generally taught as an upper level course. At my home institution, not only is it an upper level course, but it is open only to students in their last year of law school. Further, many of my colleagues who teach Torts, Contracts, and Property are able to devote some time in the first-year curriculum to remedies. This means that I generally teach students who have fairly well-developed case reading and analytical skills. They also usually have some familiarity with the doctrinal materials covered in Remedies. One possible drawback to focusing on transactional thinking is that it may necessitate reducing doctrinal coverage. However, because my students have familiarity with at least some of the materials and have fairly advanced analytical skills, I am able to cover doctrinal material more quickly than I otherwise would. This allows me to devote more time to skills development.[4]

My students generally have already received significant classroom instruction on legal skills through a course in negotiation, dispute resolution, mediation, appellate advocacy, or trial advocacy. All also have either already

4. I believe the exercises I use to help develop transactional thinking also enhance my students' doctrinal understanding. However, students need a certain level of comfort with the doctrine before they can gain a meaningful skills experience. I find that because my students have some familiarity with the material, I need to devote less time to traditional doctrinal instruction than I otherwise would do and can achieve more of my doctrinal instruction through my problem-solving exercises.

completed or are concurrently completing the law school's required Legal Drafting Practicum. Additionally, they usually have had some experiential learning opportunity such as an externship, part-time legal employment, participation in one of the law school's legal clinics, or participation in a pro bono program. This, in turn, provides me with a few advantages. Most importantly, my students already have had some exposure to legal problem-solving. They have some context for understanding how remedial issues play out in litigation and transaction planning. Their prior exposure to skills instruction also allows me to minimize the time I have to devote to skills instruction to achieve my goals with problem-solving exercises.

III. TEACHING TRANSACTIONAL THINKING THROUGH PROBLEMS AND SIMULATIONS

I have always used a problem-based approach to teaching Remedies. Indeed, the casebook of which I am a co-author includes problems throughout the book.[5] Initially, I used these problems primarily to reinforce the doctrinal materials and to provide context to students to help them understand how remedial issues might arise in the course of litigation. During the course of the semester, I would begin to introduce the idea of transactional thinking through our in-class discussion of cases and problems. I would ask the students a few questions about the problems and cases we discussed, which required the students to think about how employing different legal strategies during the course of litigation or structuring the initial transaction between the parties differently may have affected the outcome. I would try to get the students to think more broadly about the outcome so that students considered things like delay in resolving the dispute, availability of insurance coverage, and cost of the dispute resolution process in thinking about how different legal strategies would affect the outcome. I concluded the course with a few problems that engaged the students more meaningfully in transactional thinking. These problems required the students to draw from several of the remedial doctrines they had studied to solve each problem.

I generally taught these problems using a fairly informal pedagogy. Students were assigned or self-selected into groups. Groups were instructed to play the roles of various actors in the problems and then to meet to discuss their group's interests and desired outcome. We then engaged in a class discussion where the various groups presented their proposed solutions to the problems in light of their actors' interests and offered the most persuasive reasons for adopting that solution.

As of late, I have tried to be more intentional and structured about my efforts to help the students develop good transactional thinking. To that end, I

5. *See* SHOBEN, TABB & JANUTIS, *supra* note 2.

have developed a series of drafting exercises and have tried to structure them in a manner that simulates legal problem-solving. Each exercise attempts to move students further away from linear problem-solving and into transactional thinking. The exercises also attempt to provide students with an opportunity to integrate use of their doctrinal knowledge and academic skills with use of some of the professional skills upon which they have received instruction. I add additional skills as the exercises progress.

The first exercise requires students to draft a memorandum to a client in anticipation of a settlement conference in a personal injury action. This exercise resembles much of the type of problem-solving the students have done already in their careers. The problem clearly involves litigation after the accident has occurred rather than asking students to provide counseling on ways to avoid risk or prepare for risk of liability in advance of an accident. Additionally, the problem limits the remedial outcomes to a claim for money damages only. The problem presents a set of canned facts and requires the students to identify legal issues raised by those facts, apply legal rules we have discussed in class, and make predictions about how a court would rule. However, it also challenges the students to think about some of the collateral costs and benefits a client would weigh in considering settlement and the terms of the settlement. It requires students to think about the type of proof required to establish the claim and the likely cost of gathering and presenting this evidence, as well as the likelihood of success of the claim in evaluating the possible terms of a settlement offer.

The second exercise is intended to inch students a bit further away from traditional linear problem-solving. In this exercise, students are required to draft a memorandum in support of a motion for a permanent injunction and a proposed injunction. They are charged with representing a client-landowner who seeks an injunction ordering a neighboring landowner to raze a structure that is encroaching on the client's land. The exercise again contains many elements similar to traditional law school exams and drafting assignments. Students are given canned facts and are clearly directed to one litigation theory and one specified remedial device. However, by requiring students to draft the proposed order, I hope to focus the students' attention more meaningfully on balancing competing concerns about likelihood of success, ease of enforceability, and the client's desired change in her day-to-day relationship with the opposing party. Ideally, students will recognize the simplest solution as being the easiest to enforce but also less likely to be awarded under existing principles of law. Hopefully, students will then work backward to find a balanced solution that is likely to be awarded while still being enforceable, and which functionally achieves the client's goals. In this way, I hope students will begin to see legal problem-solving as a circular rather than linear process. Rather than making the best arguments in support of an injunction ordering the building to be razed, hopefully students will think of alternative ways to

provide relief that will be less extreme, and thus more likely to be granted, while also achieving the client's goals in light of the client's intended use of the property.

The third exercise requires students to draft a restrictive covenant for use in a standard form employment contract. Unlike the previous exercises, students are given only a brief description of the client and some basic background information. The students must then interview the client to gather information before drafting the covenant. Additionally, they must draft an explanatory memorandum to the client that provides information about how the clause will achieve the client's goals and whether it is likely to be enforceable. The problem again requires students to consider and balance concerns about enforceability, cost of enforcement, and the client's business goals. It adds the additional components of requiring students to determine for themselves what information they think is relevant to understanding and achieving the client's goals and to gather that information for themselves. Furthermore, the problem requires students to render advice in a transaction-planning setting as opposed to a litigation posture.

As stated above, I have tried to give students an opportunity to integrate their doctrinal knowledge with the professional skills they have developed through their upper level classes and experiential opportunities. Thus, I assess all the drafting assignments for the accuracy of legal principles and the thoroughness and soundness of the legal analysis contained in the document as I would a traditional law school exam. I also try to assess the "professionalism" of the document. I assess students based on whether the document is professional in appearance. For example, I consider whether it complies with appropriate court rules, if applicable. I also attempt to assess whether it uses the appropriate tone for the document. For example, I try to assess whether the tone is appropriate in light of its intended audience (e.g., a court, a sophisticated institutional client, or a relatively less sophisticated sole proprietor).

I have also tried to build in opportunities for students to further develop their interpersonal and leadership skills. To that end, I require students to complete the exercises in law firms. While the law firm submits one completed drafting assignment, each member of the law firm must bill her time and submit an individual time diary with each assignment. I require students to use the ABA model task and billing codes to complete their time diaries. I use the time diaries primarily as a tool to assess students on their individual contribution to the law firm's work product. However, I also assess the "professionalism" of the time entries. While my primary purpose behind the exercises is not to develop skills, and I don't purport to provide significant skills instruction, I do use the time diaries as an opportunity to instruct students on considering the value of the work they perform in light of the client's objectives and the scope of the representation. I also use them as an

opportunity to discuss clear and professional ways to describe the services that they provide. To this end, I do provide some supplemental reading and instruction on ethical and effective billing practices.

In an effort to further strengthen interpersonal and leadership skills, I ask students to complete a peer evaluation of each member of their law firm that assesses that member's leadership and collaborative skills. The scores on the peer evaluations also comprise part of a student's final grade for the course. As I prepare for my fall semester Remedies course, I am planning to enhance this portion of the exercises. I intend to develop a task list for law firm leaders that identifies responsibilities that an effective leader should assume. I also plan to assign some short supplemental reading on leadership skills to help students better understand these responsibilities and effective leadership. I then will require each person in the law firm to assume the role of supervising attorney for one drafting assignment. Peers will evaluate each student's performance as supervising attorney through the peer evaluation rubric.

CONCLUSION

Ultimately, as my opening anecdote explains, the remedial phase of litigation gave lawyering context for me. I, like many people, went to law school in the hopes of becoming a lawyer so I could assist people both in solving their disputes peacefully and in a mutually agreeable manner, and in structuring their relationships in a way that helped them achieve personal and professional goals. In the course of discovery and motion practice I lost sight of the impact day-to-day lawyering had on the ultimate outcome for clients. My experiences in the remedial phase of that litigation reminded me of how the law affects the day-to-day operations of people and entities and how effective lawyers can use their knowledge and skills to help clients achieve their goals. In Remedies, I have found a way to introduce students to the value of their lawyering skills, and in doing so I have found teaching law to be exciting and challenging. I hope the course provides my students with a glimpse into the ways in which they can use the knowledge and skills gained in law school to help clients achieve their goals.