TEACHING ELDER LAW IN CONTRACTS

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When I was asked to write a piece on "Teaching Elder Law in Contracts," I agreed, even though, at that time, I did not cover any elder law topics in my contracts course. But the deadline was a long way off, and there would be plenty of time to figure out how to incorporate elder law in the course.

What fascinated me about the topic, however, was not *how* to raise elder law issues in core courses like contracts, but *why* raise those issues? The reasons were not self-evident. Why not discuss antitrust issues? Corporate issues? Business planning issues? AIDS issues? Before tinkering with a successful course, as I think my contracts course is, one should know why. Theory should precede practice.

To understand my thinking on this topic, you should know what I attempt to accomplish, not only in my contracts course, but also in my elder law seminar. In my contracts course, I teach both process and doctrines. As for process, I hope to teach students how to read and analyze statutes and cases and how the doctrine of precedent works. I also provide the students with some idea of the limits of language, rules, and "doing the right thing."

Can elder law cases be sandwiched in a contracts course to help achieve these process goals? Perhaps. There may be elder law cases that would achieve these process goals as well as the cases I currently teach. But why bother? I love the cases I currently teach; over the years, they have become old friends. I don't sacrifice my old friends.

What about the doctrinal goals of a contracts course? Every law student should graduate with a knowledge of contract law, because many will end up practicing in the area of contract law. Contract principles, such as commitment, reliance, remedies, and interpretation, cut across many legal areas. Should every student graduate with a knowledge of elder law? I don't think so. A knowledge of elder law is no more important than a knowledge of antitrust law, corporate law, business planning, or AIDS law. Unlike contract law, which deals with deep and reoccurring legal problems, elder law is

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a series of specific instances: a little of this (torts, health law, and real estate law) and a little of that (social security law, administrative law, and trusts and estates). And, unlike contract law, few students will end up practicing in the area of elder law, and, at least from what I know of the practice of elder law, it is not hard to pick up the substantive knowledge once one enters the field.

I cannot think of a substantive facet of elder law that first-year contracts students need to know. Furthermore, I don't see much need to teach substantive legal elder law doctrines *even* in my elder law seminar.

This is not a knock on elder law. I feel the same way about many of our second- and third-year courses, many of which I have taught over the years. I believe that once students know how to read and analyze cases and statutes, know how to construct and write legal arguments, and know the basic principles of law as taught in the classic first-year courses, they can pick up most any substantive area once they are in practice — and thankfully so. Many lawyers do not practice the kind of law they thought they would when they were students. Indeed, a vast majority of elder law lawyers did not have a course in elder law.

Rather than focusing on substantive law in my elder law seminar, I use the seminar to discuss topics that we generally do not talk or write about: death, disability, and what we owe our parents, our children, and one another. The movie *I Never Sang for My Father*[1] works brilliantly in these discussions, and these discussions are important, no matter what area of law one practices. To give the students an overview of the problems facing elderly clients and the law's responses to those problems, I have the students read a book that I coauthored with Allan D. Bogutz entitled *Fifty and Beyond: The Law You and Your Parents Need to Know.*[2]

When I focus more in-depth on substantive doctrines, generally my goal is not to teach doctrine, such as the ins and outs of Medicare, but rather to explore the lawyering skills that will help students no matter what kind of law they practice: statutory drafting (drafting a statute outlawing Medicaid Planning), the examination of expert witnesses (Was the elderly woman incapaci-

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1. *I Never Sang for My Father* (Columbia Tri Star Home Video 1998) (videotape movie).

2. Kenney F. Hegland & Allan D. Bogutz, *Fifty and Beyond: The Law You and Your Parents Need to Know* (Carolina Academic Press 1999). This book is *not* a self-help book. It was designed to educate the reader on what legal problems the reader and the reader's parents might face. *Id.* at xvii–xviii. Some of the chapters are Medicare and Health Insurance, Abuse and Neglect, Con Artists, and Wills and Estate Planning. *Id.* at xx, xxi, xxii.

tated when she gave her house to the neighbors who cared for her?), and legal ethics (Should a lawyer tell a corporate client that, even though age discrimination is illegal, the remedies are rather weak?).

So, why teach elder law in contracts? Not to teach process, because my contracts course works just fine, thank you. Not to teach substantive elder law, because substantive elder law is not a core area. Then why? I gave up trying to answer that question. I decided to forge ahead and just do it. I would try teaching elder law issues in my contracts course by developing some exercises and assigning them to the students in my contracts course. Practice precedes theory.

THE THIRD-PARTY BENEFICIARY EXERCISE

For a long time, I have wanted to discuss with my students the scope of a lawyer's obligation to his client and to third parties. An elder law problem opened that door. At the end of our discussion on third-party beneficiary law, I gave my contracts class the following hypothetical fact pattern:

> *Dad had inherited all of his money from his father. Dad cut Son out of his will. Why? Because Son was gay. Dad's Lawyer simply did Dad's bidding. Lawyer did not attempt to discuss the propriety of Dad's choice with him and did nothing to try to bring about a reconciliation between Dad and Son. Lawyer did nothing to try to end this horrible family hurt. Dad dies and Son now brings an action against Lawyer, claiming standing as a third-party beneficiary.*

Substantively, this hypothetical might be a tad fanciful. However, the doctrine of third-party liability has grown from very modest beginnings to unique and expanded applications. Who knows what tomorrow will bring? Courts have held that disappointed heirs can sue the decedent's lawyer for improperly drafting his will with the result that his desire to leave them the estate was defeated.[3]

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3. *E.g. Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961). In *Lucas v. Hamm*, the California Supreme Court overruled *Buckley v. Gray*, 42 P. 900, 902 (Cal. 1895), which held that an attorney was liable only to the client for whom the attorney drafted the will. 364 P.2d at 687. The court articulated various factors from *Biakanja v. Irving*, 320 P.2d 16, 17–19 (Cal. 1958) (in bank), that a court must examine when determining whether a lawyer is liable to third parties, such as "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of

This hypothetical presents an interesting doctrinal wrinkle. In the prior cases, the decedent intended to *benefit* the plaintiff; here, the decedent intended to *harm* the plaintiff.[4] Maybe the doctrine of third-party liability could be expanded into the doctrine of "intended to affect" the plaintiff. The California Supreme Court once flirted with such a notion by converting third-party beneficiary analysis into negligence analysis and conferring standing on a nonparty when the contract was intended to affect that person.[5]

Since the fall of privity, the extent of liability to nonparties has become an important contracts problem. This hypothetical triggers a good discussion about the pros and cons of expanding third-party beneficiary liability. Does it undermine a lawyer's duty of loyalty to his or her primary client?

But, even if Son convinced the court to allow him to sue Dad's Lawyer, to prevail, Son would have to show that Lawyer breached the contract she had with Dad. In the cases allowing heirs to sue the lawyers, the lawyers committed legal malpractice when, for example, they misapplied the rule against perpetuities.[6] Dad's Lawyer, however, didn't make a legal mistake. Therefore, should we read an additional duty into the contract between Dad and Lawyer?

What are lawyer's obligations in these situations? My colleague, Professor David B. Wexler, has come up with a very provocative notion — therapeutic jurisprudence, which is the notion that the lawyer should minister not only to a client's legal situation, but to his life situation.[7] It is a horrible life situation for a father and son

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preventing future harm." *Lucas*, 364 P.2d at 687. The *Lucas* court also added an additional factor to the factors articulated in *Biakanja*, which was "whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession." *Id.* at 688.

4. *Lucas*, 364 P.2d at 686. The *Restatement (Second) of Contracts* confers third-party standing where "the promisee intends to give the beneficiary the *benefit* of the promised performance." *Restatement (Second) Contracts* § 302(1)(b) (1979) (emphasis added).

5. *J'Aire Corp. v. Gregory*, 598 P.2d 60, 62 (Cal. 1979). In *J'Aire Corporation v. Gregory*, the court listed the following criteria that should be considered in deciding whether the defendant owed a duty of care to the plaintiff:

> (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm.

Id. at 63 (stressing that these criteria were set forth in *Biakanja*, 320 P.2d at 18–19).

6. *Lucas*, 364 P.2d at 689.

7. David B. Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* vii (Carolina Academic Press 1990).

to be estranged. A good lawyer, one hopes, would not simply cement this hurt for all time. She would recognize it and at least raise the possibility that it might be redressed through counseling, religion, or, perhaps, a six pack.

The question whether a lawyer has a duty to a third party led the students into a good discussion concerning Lawyer's role. Most students agreed that a good lawyer wouldn't just sit there. A good lawyer would raise the issue of reconciliation. But should we make reconciliation a *duty*, enforceable by Son through a civil action? Bright-line tests helped to focus the discussion. If the question is, "Should the lawyer do this?," most students will grunt, "Yes." However, when the question becomes, "Should the lawyer have a *legal duty* to do this?," it generates debate; both sides will be tested and may end up discovering what they actually believe.

I liked this discussion in the context of elder law, because elder law attorneys, probably more than most, must consider how the decisions of their clients will impact their clients' families. And there is a hidden issue in the hypothetical. Dad is cutting Son out of the *family* fortune. Should one person hold this power when it involves inherited wealth? Who owns what, and for what purposes?[8]

A vibrant issue underlying contract law and, in fact underlying all law, is the issue of individualism and community. Do we "own" our money — our talents, our hard work — for ourselves or for others? Obviously, by giving Dad this power, the law has taken a position on this controversial matter. One point I stress in all my teaching is that, below the Black Letter and under the case holdings, lurks all the great issues of philosophy (only here, they matter!).

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8. *Ortelere v. Teachers' Retirement Board of the City of New York*, 250 N.E.2d 460 (N.Y. 1969), is one of the staple cases in contracts courses that indirectly raises this issue of who owns what and for what purposes. A retired school teacher chose for herself the highest payment of retirement annuity, and consequently, she revoked the election of her husband as beneficiary. *Id.* at 462. Two months later, she died and her husband brought an action to set aside the election on the basis that his wife did not have contractual capacity. *Id.* While the court focused on the question of capacity, the background concern was that the wife's retirement benefit was one of the few assets the couple owned, and it did not seem right for the wife to have the power to cut off the husband. Today, under federally approved retirement plans, the issue has been resolved; one must elect at least a fifty percent survivorship annuity unless one's spouse consents to a lesser amount.

THE LIVING WILL ROLE-PLAY

The other elder law topic I used in my contracts course was to assign my first-year students a role-play that I use in my elder law seminar: drafting a living will. I had thirty students, and I divided them into groups of lawyers, clients, and observers. Outside class and over a period of a week, the lawyers were to meet with their clients to discuss whether the client should have a living will and, if so, what the living will should provide. The observers would lurk below the surface. I advised a formal setting for this role-play. If the client wished, this role-play would result in a legal document.

The schedule went like this: I first passed out a form living will to the lawyers and observers.[9] Two days later, I met separately with the students playing lawyers and observers. We discussed the background law and what happens if you don't have a living will.[10] I also raised the issue, "If one were to say 'that was a good counseling session,' what would one mean?" One of the things I always stress with my students is, *"You can never prepare too much"* in the sense that you should think about a task before rushing into it and should plan how you are going to accomplish it. I also warn my students that preparation can kill spontaneity so that the execution of the task becomes wooden and lifeless. I tell them, *"Preparation is death!"* and find it very amusing; my students generally don't. Which is it — the best of times or the worst of times?

After our discussion on counseling, we agreed: "A good counseling session would be one where the client understands all of the options and feels comfortable in discussing them."

Then I met separately with the students playing the clients. I told them to play it straight. After reminding students of car wrecks, I suggested that living wills were not only for their parents. I also reminded the students that, if they signed the living will, it would be a legal document and not simply a class exercise.

After the role-play, each student had to write a page or so on "What I learned about law, about being a lawyer, and/or about myself through the living will exercise." These had to be posted on our Forum (the law school's on-line discussion group) so that

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9. A copy of the living will I handed to the students playing the roles of the lawyers and the observers can be found in Appendix A to this Article.

10. If you are not familiar with the legal issues concerning living wills or with the *Prairie Home Companion* radio shows, a pretty good overview can be found in the book, *Fifty and Beyond: The Law You and Your Parents Need to Know*, *supra* note 2, at 161–166.

everyone could read them before we met one last time to discuss the exercise.

Well, how did the exercise go?

Absolutely terrific!

It was *real*.

While broken shafts mattered to Hadley,[11] and marketing her favor was a great moment to Lucy, Lady Duff-Gordon,[12] for first-year students, the cases are sound and fury, signifying Black Letter. Living wills smack us in the face. We have to confront the deaths of loved ones and of ourselves.

Let's return to the real question, "Why teach elder law in contracts?" Because, unlike widget cases and unlike the Socratic Method, elder law brings it home. Students have parents and they themselves will die. Sitting with another student, working on a real legal document, they suddenly realize what they are studying matters and what they will do as lawyers matters, even to Hadley, even to Lucy.

For some of my students, this was a transforming moment in their legal education.

One student wrote, *"This assignment was different. It was personal. Reading all those cases for all my classes never got to me. Those cases were the plaintiffs' and defendants' personal problems, never mine."* We covered some specific issues as well. One student said, *"Living wills are important for the family. My aunt didn't have one, and when she was dying from cancer, my mother was forced to pull the plug and she has lived with terrible guilt since then."* This was just another illustration, a much more vibrant one, of the issue of individualism and community, and the issue of what we owe one another.

We also stumbled upon two issues often overlooked by lawyers: the "do nothing" problem and the "enforcement" problem.

Before they fix something, lawyers should ask, "What if I don't? What happens if you don't have a living will?" We spent a lot of time discussing these questions. We also talked about legislative solutions, such as "Family Agency Acts" that designate particular family members to make medical decisions for incapacitated patients.[13] We also discussed what happens if you aren't officially approved; for example, gay couples.

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11. *Hadley v. Baxendale*, 156 English Rpts. 145 (1854).
12. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).
13. Hegland & Bogutz, *supra* n. 2, at 161.

And lawyers, as they are fixing things, should ask, "Will my solution hold?" It is fairly common knowledge that doctors, if families insist, will pursue all heroic measures despite a living will to the contrary. We spent a long time thinking about how to combat this, from initial family involvement to shield laws for the physicians. And the students learned a valuable lesson: enforcement always is a lurking issue.

Another important issue in contract law is what I call the "timeframe" problem: I commit myself to do something in the future, but when the future arrives, I don't want to do it. Living wills are a vivid illustration of the current me choosing for the future me.

Brave, healthy law students wave off many choices and say, "I'd rather be dead than . . . ." The fact of the matter is, if they were to get to get there, they would feel differently. Nancy Mairs is severely crippled, paralyzed from the waist down, and unable to feed or clothe herself.[14] Is this a fate worse than death? In her marvelous book, *Waist-High in the World: A Life among the Nondisabled*, Ms. Mairs writes, "There are readers . . . who need, for a tangle of reasons, to be told that a life commonly held to be insufferable can be full and funny. I [am] living the life. I can tell them."[15] This, I believe, is a transforming insight.

The living will role-play covers some basic contracts problems as well. Drafting becomes an urgent problem, not just an exercise. Questions arise, such as, "What exactly is a 'vegetative state?'" or "Under what circumstances might this clause come into play?"

I devoted a class period to discussing the exercise, and I invited two elder law attorneys to join us. We spent a lot of time discussing the lawyer's role and "Who is the client?" Because the students had "been there," the discussion was more vibrant, more focused. We also discussed some of the practicalities of law practice, such as how much time can you devote to sitting with a client discussing these important matters, while the billable hours' winged chariots hover nearby. And then we discussed career choices and, who knows, maybe I will be proven wrong for saying, "Very few students end up practicing elder law."

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14. Nancy Mairs, *Waist-High in the World: A Life among the Nondisabled* 12–13 (Beacon Press 1996) (including a discussion about how Ms. Mairs prefers to be called "a cripple" rather than "disabled," because she is not disabled or physically impaired). As described in the book jacket, Ms. Mairs's book discusses her disability, specifically multiple sclerosis, and how multiple sclerosis has shaped her life.

15. *Id.* at 10–11.

In that class period, we also discussed what it was like to be a client and to be a lawyer. Again we concluded that a "good interview" would be one in which the client understands the options and feels comfortable discussing them. But it was clear that not all of the interview sessions were "good." While it is not difficult to *define* good practice, it is difficult to *do* good practice. We asked, as we should always ask, "In light of your experiences, what got in your way of doing a good job?" Some of the students' answers were:

> I have religious problems with all of this. Maybe they came across.
>
> I don't like thinking about death. I felt more comfortable talking about whether the document had to be notarized.
>
> I really felt incompetent. Is it painful to die from the lack of hydration? I steered my client away from options because I didn't understand them.

CONCLUSION

This leads me back to my initial question: Why raise elder law issues in contracts? The third-party beneficiary exercise was good to discuss, because the exercise raised issues about extending the law, about the lawyer's role, and who owns what. These are important issues to discuss with first-year students. The living will exercise was even more significant, and the exercise made the law come alive. Both are keepers.

Elder law rocks!

APPENDIX A

LIVING WILL DECLARATION OF

_____

I, _____, being of sound mind, voluntarily make known my desire that my dying shall not be artificially prolonged under the following circumstances:

If I should have an injury, disease or illness regarded by my physician as incurable and terminal, and if my physician determines that the application of life-sustaining procedures would serve only to prolong artificially the dying process, I direct that such procedures be withheld or withdrawn and that I be permitted to die. More specifically but not by way of limitation, I do not want my life to be prolonged and I do not want life-sustaining treatment to be provided or continued if:

(1) I am in a terminal condition or an irreversible coma or persistent vegetative state that my doctors reasonably feel to be irreversible or incurable; or

(2) I am in a coma with a small likelihood of recovery with permanent brain damage; or

(3) I have brain damage or disease, severe in nature, and a terminal illness such as cancer; or

(4) I have severe brain damage or disease without terminal illness; or

(5) I am terminally ill and the application of life-sustaining procedures would serve only to artificially delay the moment of my death; or

(6) Under any circumstances where the burdens of the treatment outweigh the expected benefits.

If I am in a terminal condition or an irreversible coma or a persistent vegetative state that my doctors reasonably feel to be irreversible or incurable, I do want the medical treatment necessary to provide care that would keep me comfortable and free of pain, but I do not want the following:

(1) Cardiopulmonary resuscitation, including resuscitation through the use of drugs, electric shock or artificial breathing;

(2) Artificially administered food and fluids;

(3) To be taken to a hospital if at all avoidable.

Notwithstanding my other directions, I do want the use of all medical care necessary to treat my condition until my doctors reasonably conclude that my condition is terminal or is irreversible and incurable or I am in a persistent vegetative state.

I do/do not want to make an organ or tissue donation and I hereby instruct my agent to authorize/not to authorize donation of my organs or tissue.

IN WITNESS WHEREOF, I have hereunto set my hand this _____.

(date)

_____
(Signature)

STATE OF ARIZONA)
) ss.
County of Pima)

On this (date), (name), the Principal, personally appeared before me and acknowledged the execution of the foregoing Living Will Declaration for the purposes therein set forth, and appeared to be of sound mind and free from duress at the time of execution of this instrument.

_____
Notary Public

My commission expires: _____