

The Humanizing Legal Education Movement:
One Teacher's Efforts, Opportunities, Obstacles and Challenges

Professor Marjorie A. Silver
Touro College Law Center
Oct. 20, 2007

I

Parker Palmer's Four Stages of a Movement for Education Reform:¹

Stage 1. Isolated individuals make an inward decision to live "*divided no more*," finding a center for their lives outside of institutions.

Stage 2. These individuals begin to discover one another and form *communities of congruence* that offer mutual support and opportunities to develop a shared vision.

Stage 3. These communities start *going public*, learning to convert their private concerns into the public issues they are and receiving vital critiques in the process.

Stage 4. A system of *alternative rewards* emerges to sustain the movement's vision and to put pressure for change on the standard institutional reward system.

¹ PARKER PALMER, THE COURAGE TO TEACH 166 (1998)

II
CIVIL DISPUTE RESOLUTION & PROCEDURE

A.

2005 Touro Law Center Draft Curriculum proposal *redacted for*
Humanizing Legal Education Symposium
Washburn University School of Law, Oct. 19th-21st, 2007

* * *

DATE: February 22, 2005
TO: Curriculum Committee
FROM: Professor Marjorie A. Silver
RE: Dispute Resolution/Civil Procedure Proposal

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As the subcommittee has previously explained, this proposal is premised on, *inter alia*, the following justifications:

- Using the case method almost exclusively in the first year sends an inaccurate message that law happens and is practiced primarily (if not exclusively) in appellate courts.
- The messages we send in the first semester have the greatest impact on students' acculturation to the legal profession.
- Our graduates are increasingly more likely to employ alternatives to litigation to resolve clients' disputes.
- Alternative models of dispute resolution and client representation offer the possibility of a more fulfilling practice for the lawyer, and more therapeutic outcomes for the client and society.
- Although close analysis of appellate decisions is an excellent vehicle for teaching legal analysis, it is unnecessary and unwise to use this as the primary vehicle in *every* course. It is a relatively inefficient method of teaching procedure. Problem-based learning would be a more efficient and effective pedagogical approach.
- Students need, early on, some exposure to litigation rules and procedure in order to better appreciate the procedural postures of the cases they are reading in their other courses.

This proposal addresses these justifications as follows:

- The course will be taught primarily if not exclusively through a problem-method approach. Two or three basic problems that would be woven throughout the course. The draft syllabi contemplate using the story told in *A Civil Action* and *A Documentary Companion to a Civil Action* (Foundation 2002) as one of the problems, as well as the primary vehicles for

exploring federal civil procedure. The other problems would be designed to achieve a variety of goals.²

- The **first semester (3 credits)** would begin with approximately ten hours of an introduction to legal process, sources of law, and an overview of dispute resolution methods, starting with the least formal and working up to the most formal, litigation. This overview would (1) challenge the paradigm that litigation is what lawyering is all about and (2) still provide relatively early on an overview of litigation concepts and procedures needed for students to understand the procedural posture of cases they are reading in their other courses.³ This, too, would utilize a problem-based approach, using an uncomplicated and accessible fact pattern—such as an automobile accident or landlord-tenant dispute—with which many of the students might already have had some experience.⁴
- The course would then begin to explore the available dispute resolution processes more methodically, beginning with the least formal—negotiation (4 hours)—and moving through mediation (7 hours), arbitration (1 hour), and administrative adjudication (2 hours), after which the students would take a midterm (1 hour). For both negotiation and mediation, students would read text, apply what they have learned to the course problems and engage in exercises designed to practice what they have learned. They would then write reflection pieces on the exercises. The goal would be, consistent with our verticality model, to *introduce* students to these skills that they will then be able to develop in their upper level courses.⁵
- This proposal contemplates then that fifteen hours or so of the first semester would be devoted to exploring personal jurisdiction, subject matter jurisdiction, venue, transfer, governing law in diversity actions (*Erie*), remedies and pleadings, using the actual documents in *A Documentary Companion* and the federal rules of civil procedure as vehicles for discussion. Where necessary, those texts would be supplemented with case law.⁶ Students would then be called upon to apply these concepts and rules to the other course problems.
- The remainder of civil procedure would be covered during the spring semester. This would include respect for judgments (preclusion); joinder of claims and parties; class actions, discovery, pretrial, summary judgment, Seventh Amendment, judgment as a matter of law, new trials and appeals. The last two classes or so would be devoted to a retrospective

² In a conversation Marjorie had about *A Civil Action* with Yale clinical law professor Jean Koh Peters, Jean noted that there is a dearth of strong women or minority players in that story. So one goal would be to insure that other problems compensated for this imbalance. It would also be useful to use a combination of public and private, simple and complex disputes as vehicles for exploring the comparative merits of various dispute resolution mechanisms for different kinds of disputes. For example, Marjorie often points out to her class that we probably wouldn't have wanted *Brown v. Board of Education* to be resolved through mediation, without any public declaration of constitutional rights.

³ JUDITH RESNIK, *PROCESSES OF THE LAW: UNDERSTANDING COURTS AND THEIR ALTERNATIVES* (Foundation 2004) and ABRAHAM P. ORDOVER & ANDREA DONEFF, *ALTERNATIVES TO LITIGATION* (NITA 2d ed. 2002) are two paperbacks that might be used as texts for this Overview.

⁴ Currently, Marjorie spends about four hours on an overview of litigation arising out of an automobile accident, called "A Skeleton of a Lawsuit," the facts of which come from the *Yeazell* casebook.

⁵ This is, of course, only one possible approach for achieving the goals of the pilot, and is presented solely by way of illustration. Once the learning objectives and some other basic parameters for the course are established, faculty would be free to develop their own syllabi for accomplishing these objectives. Individual faculty would determine which exercises and writing assignments they wished to assign. Similarly, while this proposal contemplates adoption of one of the several dispute resolution texts such as CARRIE MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (Aspen 2005), it is not necessary that all faculty adopt the same text.

⁶ For example, faculty may choose to have their students read *International Shoe Co. v. Washington*, the landmark Supreme Court decision on personal jurisdiction.

reflection on the suitability of the various dispute resolution mechanisms to the various course problems.

What we have described is a vision, and not the only vision, that would accomplish our identified goals and objectives. It is, hopefully, nonetheless enough to assuage any concerns that the proposed course would be insufficiently rigorous or complete, or in any other way disadvantage our students. We think that this course will serve as a critically important building block of the new curriculum.

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B.

Required Syllabus Approved by Touro Faculty May 2005:

CIVIL DISPUTE RESOLUTION AND PROCEDURE

(5 credits)

Goals:

- To familiarize students with a range of lawyers' dispute resolution strategies and procedures, including litigation, negotiation, mediation and arbitration.
- To familiarize students with federal rules of civil procedure.
- To employ problem-based (case file) approach to teaching civil dispute resolution and procedure.
- To offer students multiple opportunities to practice related skills and to reflect on them.

I. OVERVIEW OF LITIGATION PROCEDURE AND DISPUTE RESOLUTION

II ALTERNATIVES TO LITIGATED DISPUTE RESOLUTION

A. Negotiation

B. Mediation

C. Arbitration

III. JURISDICTION

A. Personal Jurisdiction

B. Federal Subject Matter Jurisdiction

C. Venue

D. Service of process/notice

IV. LEGAL VS. EQUITABLE REMEDIES

V. PLEADINGS

- principles of modern pleading
- Rule 11
- VI. JOINDER OF PARTIES AND CLAIMS
- VII. DISCOVERY
- VIII. ROLE AND RELATION OF JUDGE AND JURY
 - A. Summary judgment
 - B. Right to jury trial
 - C. Judgment as a matter of law
- IX. CONCLUSIVENESS
 - A. Claim preclusion
 - B. Issue preclusion

Revised 5/06

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C.

CIVIL DISPUTE RESOLUTION & PROCEDURE I
FALL 2007

Course Information & Requirements

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Required Texts

- RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE (Aspen 2006) (“FREER”)
- MICHAEL ALLEN & MICHAEL FINCH, AN ILLUSTRATED GUIDE TO CIVIL PROCEDURE (Aspen 2006) (“A&F”)
- LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO A CIVIL ACTION (3rd ed., Foundation Press 2006) (“Docs” “COMPANION”)
- JONATHAN HARR, A CIVIL ACTION (Vintage paperback 1995) (“ACA”)
- Federal Civil Rules Booklet, January 2007 edition, Dahlstrom Legal Publishing, Inc. (“FRCP” or “Rule”)

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D.

May, 2007: As part of larger curriculum reform, the curriculum committee proposes and the faculty votes to reduce all first semester substantive courses to one semester four credit courses effective fall 2008. This proposal passes, narrowly. In response, one of my Procedure colleagues moves that ADR be dropped from the required curriculum. I move to table his motion to have the matter referred to the Procedure faculty to determine what changes need be made to the required syllabus in light of the reduction in credit hours. My motion to table is denied and the faculty votes to remove ADR from the required curriculum.

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III

CIVIL PRACTICE SEMINAR

Civil Externship Seminar packet *redacted for*
Humanizing Legal Education Symposium
Washburn University School of Law, Oct. 19th-21st, 2007

M E M O R A N D U M

DATE: August 20, 2007
TO: Students in Civil Externship Seminar, Fall 2007
FROM: Professor Marjorie A. Silver
RE: Course Information & Requirements

This seminar will enhance your externship experience this semester, by giving you the opportunity to reflect on and learn from your experiences.

GENERAL COURSE GOALS

- To understand what the day-to-day work of a lawyer involves and to develop an appreciation for the challenges that lawyers face.
- To increase understanding of the attributes of professionalism, and what it means to become a professional.
- To develop the habits of being a *reflective practitioner*.
- To enable thoughtful choices about what kind of lawyer you want to be, and what kind of work you want to do.

COURSE REQUIREMENTS

1. Prerequisites: It is expected that all of you have already taken, or are currently taking, Professional Responsibility.
2. Required Texts:
 - J.P. OGILVY, LEAH WORTHAM & LISA G. LERMAN., *LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS* (2nd ed. 2007) [hereinafter "OWL"]
 - *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* (Marjorie A. Silver, ed., 2007).

3. Recommended Readings:
 - AMIRAM ELWORK, PH.D., *STRESS MANAGEMENT FOR LAWYERS: HOW TO INCREASE PERSONAL & PROFESSIONAL SATISFACTION IN THE LAW* (3rd ed. 2006).
 - CARL HORN III, *LAWYERLIFE: FINDING A LIFE AND A HIGHER CALLING IN THE PRACTICE OF LAW* (2003).
 - STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (paperback 1999).
4. Class Presentations: You will have opportunities during the course of the seminar to make short presentations on assigned topics relating to your externship experience.
5. Journaling: One of the best methods for enhancing your educational experience is through reflective journaling. You will be required to write and submit weekly a reflective journal. Although you may write about any aspect of your externship experience that you wish, you will also be asked to address specified questions in your journal.
6. Time sheets: Lawyers in private practice are often required to keep detailed time sheets. In addition to providing necessary information for client billing, these time sheets can provide valuable feedback to the individual attorney on how (s)he is spending his or her time. Independent of any time sheets that your field supervisor may require for your externship, you will be required to submit time sheets to me weekly, at each class session. ***Please see sample Time Sheet.***
7. Participation: Participation is a *requirement* of this seminar.
8. Professionalism: This responsibility includes attendance, promptness, preparation, checking email for TWEN communications regularly, meeting deadlines, and advance consultation on problems with same.

TWEN

I will regularly post assignments, announcements, and other information and materials on this course's page on The West Educational Network (TWEN). TWEN also gives me the ability to easily communicate with any or all of you by e-mail. Among other things, it also affords all of you a discussion forum to continue the classroom conversation, as well as inform one another of relevant items of interest you may come across in the news or elsewhere.

* * *

SPEAKERS

I will be inviting speakers selected from the bench, bar and elsewhere to share with you their experiences with the opportunities and challenges of practicing law and being a professional. If you have thoughts about the kinds of speakers you would like to hear from, or know individuals who you believe would make valuable contributions to the seminar, please let me know.

GRADES

Keep in mind that there is no mandatory curve for this seminar, so that each of you has the *potential* for getting an “A” for the course. That requires, however, much more than just pleasing your field supervisor. Your grade will be based on consideration of all of the course requirements discussed above, as well as feedback from your supervisor.

* * *

TOPICS & SUGGESTIONS

In addition to the above, we will explore other challenges, opportunities, and concerns relating to becoming a lawyer and practicing law. I welcome suggestions from you on what you would like to have discussed in the seminar.

TENTATIVE TOPICS and READING ASSIGNMENTS

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Below is a tentative list of readings for the seminar. I anticipate that both additions and deletions to this list will be made as the semester progresses, as appropriate.

1. Introduction

- a. Ogilvy, Wortham & Lerman, *Learning from Practice* [OWL], Introduction; chapters 1: *Learning from the Experience* & 2: *Setting Goals for the Externship*.
- b. *Introduction*, THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION (Marjorie A. Silver, ed., Carolina Academic Press 2007) [AAoC]

2. “Lawyer Know Thyself”⁷

- a. Lawrence S. Krieger, *New Science, Lawyers, and Happiness*, 3 LAT NEWS 7-9 (Summer 2004).
- b. Susan Daicoff, *Lawyer Personality Traits and Their Relationship to Various Approaches to Lawyering* (AAoC, chapter 3).

3. Learning from Supervision: OWL, chapter 3.

4. Ethical Issues in Externships

- a. OWL, chapters 4-7.
- b. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).
- c. Leslie Levin, *The Ethical Work of Solo and Small Firm Practitioners*, 41 HOUSTON L. REV. 309 (2004).

⁷ This phrase is borrowed from SUSAN DAICOFF, *LAWYER, KNOW THYSELF* (2003).

5. **Learning about Lawyering:** OWL, chapter 8.
6. **Reflective Lawyering:** OWL, chapter 19.
7. **Creative Problem Solving:** OWL, chapter 10.
8. **Journals:** OWL, chapter 11.
9. **Multiculturalism**
 - a. *Bias in the Legal Profession:* OWL, chapter 16.
 - b. Paul R. Tremblay & Carwina Weng, *Multicultural Lawyering: Heuristics and Biases.* (AAoC, chapter 5).
10. **Skill Development:** OWL, chapter 14.
11. **Time Management, Planning, Collaboration & Communication**
 - a. *Management Skills:* OWL, chapter 15.
 - b. Marjorie A. Silver, *Emotional Competence and the Lawyer's Journey* (AAoC, chapter 1).
 - c. Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer* (AAoC, chapter 11).
12. **Balancing Personal Life and Professional Life:** OWL, chapter 17.
13. **Vocational Possibilities**
 - a. *Externships & Career Planning:* OWL, chapter 18.
 - b. Pauline H. Tesler, *Collaborative Law: Practicing Without Armor, Practicing With Heart* (AAoC, chapter 8).
 - c. Jonathan R. Cohen, *The Culture of Legal Denial* (AAoC, chapter 9).
 - d. Edward A. Dauer, *Hurting Clients* (AAoC, chapter 10).
 - e. Paula Franzese, *The Good Lawyer: Choosing to Believe in the Promise of Our Craft* (AAoC, chapter 18).
 - f. Lisa Schreibersdorf, *A Public Defender in a Problem-Solving Court* (AAoC, chapter 13).
14. **Looking Backward, Looking Forward**

Bibliography for Civil Externship Seminar

FALL 2007

Prof. Marjorie Silver

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- WALTER BENNETT, *THE LAWYER'S MYTH : REVIVING IDEALS IN THE LEGAL PROFESSION* (2001)
- SUSAN DAICOFF, *LAWYER, KNOW THYSELF* (2003).
- AMIRAM ELWORK, PH.D., *STRESS MANAGEMENT FOR LAWYERS: HOW TO INCREASE PERSONAL & PROFESSIONAL SATISFACTION IN THE LAW* 3rd ed. (paperback 2006) (Highly recommended.)
- AMIRAM ELWORK & MARK R. SIWIK, *SUCCESS BRIEFS FOR LAWYERS: INSPIRATIONAL INSIGHTS ON HOW TO SUCCEED AT LAW AND LIFE* (2001).
- PAULA FRANZESE, *THROW YOUR FEARS OUT THE WINDOW: A BOOK OF WISDOM, INSPIRATION, AND GUIDANCE FOR LAW STUDENTS AND LAWYERS* (1997).
- CARL HORN III, *LAWYERLIFE: FINDING A LIFE AND A HIGHER CALLING IN THE PRACTICE OF Law* (2003).
- GEORGE W. KAUFMAN, *THE LAWYER'S GUIDE TO BALANCING LIFE AND WORK: TAKING THE STRESS OUT OF SUCCESS* (2006).
- DAVID LUBAN, *THE GOOD LAWYER* (1983).
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- DERALD WING SUE & DAVID SUE, COUNSELING THE CULTURALLY DIFFERENT: THEORY AND PRACTICE (2d. ed 1990).
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- RICHARD A. ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, & GREED (1999).

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