

TEACHING CONTRACT LAW, TERMS, AND PRACTICE SKILLS THROUGH PROBLEMS

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I was thinking at the 3:45 slot, for the “Try This” session, I should do a chicken dance. But no, I will stick with the script. I would embarrass myself. Today my session has a dual purpose. This is indeed a “Try This” session about using problems to teach contracts. But the dual purpose is that I am writing a Contracts textbook with my co-author, Eric Zacks. We already have produced our manuscript and it is forthcoming by Wolters Kluwer. It will be available for 2019.

Our textbook relies heavily on problems to teach the law. But we made a few design choices that I would like feedback on. So, in addition to showing you how I use problems to teach contract law, I will identify a few key design choices that I would love your input on for the book to help us make some final decisions as we finish up the book.

What I am going to do first is go through some of the key choices that we have made in the book that I think are necessary to actually have this be a useful tool for students to learn contracts through problems. I will discuss why that is an important way to learn contracts. And then included within one of those design choices is the problem that we will use for today’s “Try This” session. We will then do the pairing exercise for that problem that I typically do with my class so you can see how it plays out in class. Then I will get your feedback.

Again, let me briefly walk through our book design choices that support the problem-solving nature of contracts as I see it. Having taught contracts for eleven years, I was not always satisfied with the way I would teach it: relying fairly heavily on cases that discussed some narrow aspect of contract law with some supporting description of other aspects of contract law, but really just focusing on the law. As a former practitioner, a corporate lawyer, you are mindful of contract *law*, but that is such a minimal component to what you do when you work with contracts. Ensuring compliance with law comprises only a fraction of where you spend your time. Where you largely spend your time is privatizing the contract, customizing it to fit the deal, to make sure you achieve the client's goals.

So that is one important goal that we hope to achieve: to not just describe the law but also to explain how parties can actually set the rule

for their private bargain. For example, even for the mandatory concept of mutual assent, parties can agree up front that they both have to sign and deliver a copy of the signature page to manifest assent. In the book, we not only set out the law but also describe the ways in which parties can and typically do privatize. Then typically we include excerpts of contract provisions to show how that is done.

So that is our first design choice. In the handout, I have included excerpts from our book to show you how we are achieving each of these objectives in our book.

On design choice one, our focus is to pull in practical material on contract terms and structure; not just the bare minimum of the legal requirements for contract formation but how people typically customize it, what it looks like, and why might they do that. In the handout, we have a whole chapter in which we walk through each of the typical parts of a contract, starting with the preamble. There, we explain what they are and why they are used so that students are familiar at the outset with the terms of a contract that will repeat throughout the book.

The excerpt in the handout is from the section on deal conditions. It addresses what a condition is. Then we give sample language, and as you can see, we explain how a party would use a condition. This does not mean we do not discuss conditions when we talk in a later chapter about conditions as a common law excuse to performance. We do, but students will have already seen them in the early chapter and how parties can and why they often do customize conditions. We can then incorporate the discussion later when we discuss excuses to performance. So, students learn early on that a contract is really a mechanism to privately order, and that working with contracts requires more than just learning basic minimal requirements of the law.

Example two is the one that is going to be more relevant for today because I am going to focus today's discussion on chapter four, which is on mutual assent. Example two is also an example of the design choice we have made to have the book show how parties can customize contracts. This example talks about what mutual assent is and why mutual assent is an aspect of law for which parties can create their own rules. The excerpt also discusses how parties with lawyers will typically do that by setting out in a writing that assent requires the parties to sign and deliver a copy of the writing. And we have sample language in the book as well.

This first design choice I have discussed is really important for the problem method because the problem method is not only having students

solve problems related to litigation, but also having them help their clients plan and customize that contract to help the client achieve its objectives. In other words, the problem method helps us give students a transactional view of contract and contact law.

Design choice two explains the role of the lawyer in each of the stages of a contract's lifecycle. Our book, like most contracts text book, follows the life cycle of a contract through formation and performance, followed by litigation and enforcement of obligations. In each of those stages, we try to explain the role of the attorney and how they will use this material to represent clients. We do this so students have a narrative of what they are going to be doing with this class, instead of merely learning abstract law. Again, mutual assent provides a good example where a lawyer can customize by proving that the parties are only bound once each party signs and delivers a copy of their signature page.

In discussing the role of the lawyer in the book, we talk about transactional lawyers and litigators. You probably know this, but a student could pass through the first-year of law school and not know what a transactional lawyer is. I have had lunch with senior partners at law firms who do not know what transactional attorneys do. One of my goals is to demystify it. I want students to see what a transactional lawyer does. I think contracts is the right 1L class to do that, so it is not a surprise in contract drafting the 3L year. I want students to know that they can act as a transactional lawyer and help plan. This, I think, is really useful to have students see before they take property, trust and estates, and other transaction-minded classes. Transactional lawyering is a mindset and a use of the law that I think students are not aware of at the outset.

You can see an example of design choice two on page four of the handout. Here, the material explains that the question of whether your client has entered into a contract is relevant in two transactional scenarios. In one scenario, they want to be bound and they want to make sure the other side is bound too. In the other scenario, the client does not want to be bound too early— like with a term sheet.

The book is not shunning litigators but adding the transactional perspective. So, the last paragraph says litigators also need to be able to analyze if there is a bargain for a contract and explains why. I think that discussion is a little more intuitive, but again, we emphasize the role of the transactional lawyer.

We also demonstrate this design choice by presenting problems in the book that require students to start doing tasks that an early lawyer might do when working with contracts. In the book, after we present the

law we discuss the role of the lawyer and contract terms that you often see on that subject. Then we set out problems.

For example, after a discussion of the objective nature of mutual assent, we have a problem about what an offer is. We have a problem so that students are being active learners and being forced to think for themselves—they are not just reciting what they are reading in a case. They themselves must use the law and to solve an entirely new problem. Problem-solving is somewhat of a misnomer for transactional lawyer because there is not a traditional problem yet—you are providing a solution. In other words, the word “problem” suggests a dispute, and there just is not one for a transactional lawyer. But I am still going to use that lingo. Is there a question?

Audience:

Yeah, I was just wondering is this written in anticipation for a semester on a four-credit course or a yearlong six-credit course?

Grossman:

Both. The book can be used for either. I teach a single semester four-unit course. My co-author teaches a two semester six-unit course. We are designing it for both and are putting together syllabi for both. It is a little shy in some areas. Like right now we need to beef up UCC. As a transactional lawyer, my experience is I did not use the UCC article two very much in practice. However, I realize people like it and want to teach it, and that material helps develop other skills that are important. So we are expanding on that material, but it will definitely be enough for a two-semester course.

The book has students perform different tasks that you would typically see in early practice. The example I have handed out is on page five. This is the problem we are going to come back to at the end for the “Try This” part of the session to show you what I do with my classroom with such problems. The problem here involves someone who wants to lease shared office space. Students should find this relevant because as newer attorneys they might have to look for shared office space because they cannot afford their own office space. At least my former students seemed to have had this trouble and turned to these types of contracts. So, we try to make problems relevant for the students.

Then we set out the actual lease agreement. Again, our problems sometimes are disputes, but they are not always disputes. Our goal, again, is to have students see a variety of different issues that might come up in practice, many of which are transactional. So, we might ask them to draft

an arbitration provision using the AAA drafting tool. Again, we try to make students be active learners, here by seeing what is involved in drafting. But our book is not all drafting exercises. Sometimes it asks students to write a correspondence to a client to let them know that the provision they asked for is not enforceable. So, there are a lot of different types of practice skills that students would be performing throughout to keep things fresh and mix it up.

Again, I think of contract as an entrée to other practice areas. You do not have contract lawyers in practice—they specialize in some area. I view the 1L contracts course as a tool to lead to other things like business or property. Because of that, I think the skills we intend to introduce in the book are also fundamental, as they lead to classes on drafting, negotiation, and others. So, we try to have a big variety of skills that students would be doing.

I would love your input on design choice four. This choice is to present much of the material in the book using explanatory text. We do use some cases, so it is not that we have totally shunned cases, but we very much rely on explanatory text to provide the law. In addition, in that text we also talk about why parties might want to customize each aspect of the law, how they would do it, and the role you might play as a transactional lawyer or litigator.

Let me ask: do you think this choice is one that might tank the whole project? We have a version of our book in which we have footnotes to every single statement of law, but is that bothersome? I feel like if a student were to see that, they would think “I am not reading this book, I will get the cliff notes version if there were such a thing.”

I really would welcome input on this. Our theory is to give students the law, and the terms and structure of a contract, and then have students use that information to solve problems. After all, what is difficult in practice is solving the client’s problem and help a client plan for the future.

Audience:

What about jurisdictional differences? Are you dealing with those in your text?

Grossman:

In the preface we explain that we do not pick a single jurisdiction. As with most textbooks, we are going largely with the majority rules. If there is a clear split, we describe that in the book. We do have some footnotes to minority rules, but we tend to describe majority. There is a

risk that we over-represent that this is the law everywhere, and I do not want to do that—especially because we do not have opinions identifying the state the legal matter was decided in. I will have to think about how we can make sure we are not saying this is universal law because that is not our intent.

The last design choice is a long one and describes how we have decided to approach cases. We have decided to approach cases by including more modern cases rather than all the traditional cases that you might find in a typical case book. We have done background research for all the cases too, so if there is any relevant contract language that is not actually in the case, we put it with the case. We include if there is any context from the pleadings that we think is relevant, so that students can read this and really get a picture for the dispute. We are hoping this will enable a more fulsome and complete discussion of cases with more context.

And again, the cases are modern, so students can see how the dispute might play out in the real world. Some of our peer reviewers initially were a little disturbed by the fact that we did not include some of the classic cases. We have included some paragraphs describing the foundational cases, but they are not featured cases. Is that adequate? And then maybe most controversially, after the cases, our notes walk students through what the law was in the case. It helps them understand the law and the court's reasoning. The theory is we are trying to demystify the law and the decision that the students read in order to hopefully flip the room in hope that class time is spent less on understanding the case and more on using the case to solve the next problem.

That is an area I would really welcome input on because my sense is that I do not want to intrude on what professors do in class. However, I do want class time to be as useful as possible and I want to make sure there is plenty of time for problem-solving. Doing that on the theory that we want to make sure we save class time for a team discussion of the new questions and using the law, we have tried to take away some of the time spent just understanding the case. But I would very much welcome input on that, because again, that was the area of resistance.

Yeah, Joan?

Audience:

One thing I am thinking about is an outline and sort of your questions are a lot of different teaching objectives that you could have for a class. Some of what I think that relates to, which is hard when you are

writing a case book to deal with, is how the teaching objectives for your course relate to the other first-year curriculum courses. For example, your questions about cases, should you put them in and which kind should you put in? These last two questions that you have asked are things where it depends on what you want the students to be getting out of the first-year. Some of it is how much of what you are teaching of this course as opposed to the other courses is the digestion of cases or is the progression of the law from the whole.

Grossman:

Right.

Audience:

You could design a case book either way, right? To teach the whole spectrum and then people can pick and choose. Your teacher's manual can tell them how to pick and choose. If you are having the students read, depending on what the overall objectives for the first-year curriculum are in terms of establishing case analysis, I think it is hard in the abstract to answer that. My suggestion is look at the other case books that are out there, and if you want to carve out a new niche, you just describe your case book as what it is. This is good for a course in which you are not teaching the development of law from time immemorial to today and watching the progression of rules. It is more than a foundation for practical application.

Grossman:

Right. Right. Yup.

Audience:

Or vice versa, this is part of a larger field and it has got everything, and you can do all this, this is like the al-things-for-all-people book. It is positioning and it has to do with how the course fits in. We are all doing this assessment thing and maybe that is where my head is at right now—thinking about institutional assessment and the assessment of our J.D. degree requirements in general.

Grossman:

Right. I think that is an excellent point. And what I probably should be doing is just owning our approach, right? Which is kind of what you are saying. That is my co-author's approach too, but I like to please everybody (ha-ha).

You do not like it, why not? What is wrong?

Audience:

So maybe offering a teacher's manual then so you are not going to do old cases. Or you are not going to do full cases and you think that should be done. So offering a teacher's manual supplementation. If you want to teach an old case from this or if you want to teach the progression, here is what I would recommend.

Grossman:

Yeah. Yeah.

Audience:

Then maybe, you get it both ways. I do not know.

Grossman:

Yeah. Yeah. Our theme in this class is not necessarily to heavily focus on case comprehension or analysis. It is taking the law from the case and using it to solve problems. I just want to make sure that is not offensive. I want to make sure because it makes sense to me, and like I said, my co-author and I have taught from this book and loved it. I want to largely stick with it but I also want to make sure it is useful to the people I think would be most inclined to like it, which I feel is you all. So I totally take your point Joan and I think that is absolutely right. I just need to own it and maybe we can put more useful info in a teacher's manual.

Yeah?

Audience:

I always select problem-based books, so I love that concept. But my concern—and obviously I do not have the book in front of me, so maybe this is not even a valid one—is that maybe the de-emphasis of some of the rules, the restatement, and the UCC. I know that you said you are not UCC heavy, but I am and I want my students to see cases as tools that apply the rules that we have learned from the restatement or from the UCC, because it is something in their transition through the first-year of law school. They are all going to have contracts, and so understanding how to read a case and how to understand how judicial opinion takes a rule of law and interprets it is a critical part of that. My concern is if you have taken out a lot of the rules that the judges are, in fact, applying, then I would be concerned about not having that as part of the book or as part of the problems.

Grossman:

Mm-hmm (affirmative). Yeah. It is true, we de-emphasize reading and understanding the law on the theory that this is covered largely in other classes. At our law school we do not even have Civ. Pro the first semester-

Audience:

You do not have what the first semester?

Grossman:

Civ. Pro.—Civil procedure.

Audience:

Oh.

Grossman:

I end up having to do a lot of work with cases. We do help students read cases in our book. In fact, in our first case, we walk students through how to read a case. We have comments in the column, like here is what the heading is, this is the jurisdiction. So we do not ignore cases, but we do not heavily rely on cases.

Audience:

You mean the rules? The restatement?

Grossman:

Cases.

Audience:

Oh, the cases.

Grossman:

Cases.

Audience:

No, I am not even as concerned about the cases.

Grossman:

It is the law.

Audience:

It is the rules.

Grossman:

We do have that. Yes.

Audience:

Okay.

Grossman:

We do have rules. And I think we are possibly going to include more citations to the restatement. I worry that when students see that over and over again, they think it is law, so I try to use a variety of sources. We are adding more to the UCC because I think there is utility to the UCC apart from the fact that you do not need UCC Article 2 very much in a transactional practice.

Audience:

But you need it for the bar.

Grossman:

We do not have the bar, but yes, for other states.

Audience:

There you go. Okay.

Grossman:

Other states do.

Audience:

That is, okay.

Grossman:

You do need it for the bar.

Audience:

Right. Right. Right.

Audience:

That really helps with the bar question.

Grossman:

Okay.

Audience:

I was almost ready to ask you only in the multi-state bar.

Grossman:

Mm-hmm (affirmative).

Audience:

How do you use assessment? What were your exams like?

Grossman:

So, there are usually two parts to my exams. They are split much like the problems. I usually have one or two fact patterns and part of it asks students to give advice to a client about a contract provision, because during the semester, we have talked a lot about the terms of the contract. And I will typically focus on just a few types of terms so they know different ways you can customize.

My exam will test students on how to customize the terms to achieve the client's goal, and then later on in the exam there is a dispute. Now often I do that through two separate fact scenarios because it is just easier to do that. For my book, I am going to make all my old exams available, as I actually publish them to my students afterwards, so they can practice from old exams. So, my co-author and I are going to make our exams available. For the exam I am not focusing as much on drafting language because I am not evaluating them on how effectively they draft. I am more looking at the substance. For example, I would say there is a business and the client does not know how much it is worth because it is new. So the buyer is going to pay a portion now, but a portion based off of how much money it is going to make in a year. I would want them to identify, and we will have talked about how you should use an earn out, a provision that will calculate how much the business earns and then pay a portion of that back to the seller.

I feel like using that example makes people panic if you have not done transactional work. But in my class, I explain earn outs because I think that is something students can learn in contracts and it is a good way to teach why and how to customize a contract. I should add that in addition to having many problems throughout the book, we have a simulation that is intended to be a capstone for that chapter. And it currently includes an earn out.

I think maybe make it more tangible if you all do one of our sample practice problems. It starts on page five, which comes from our chapter on mutual assent. I am not presenting the law on mutual assent today. But this problem follows a discussion of what an offer is and the factors that courts often look at in determining objectively did a party manifest assent, looking at things like definiteness of terms, the authority of the person who made the communication, and the formality based off of what you would expect for this type of communication. After we have discussed that law, now we have a practice problem on what is an offer.

I was going to have you all entertain me by going through it. In my classroom, I would say I probably have students pair up to go through problems like this three times on average a class. I first discuss and go through highlights of the material. Then students pair with other students to answer problems. And I think the beauty of the pairing is that they build confidence knowing the other person got something similar. Teams are a great sounding board for ideas. I think it is good to help facilitate collaboration and working with others. Students are much more willing to speak in teams, plus then I call on teams to respond, versus a single person. And I will usually circulate as students are discussing and I casually say, “Hey, you guys are going to share on this one,” and then I can give them a little extra attention, so they are not as nervous to share out.

I am going to have that happen right now. So, if you would not mind pairing up. I usually say teams of three or so. Two to four is the best size of team to just look through this practice problem and I will give you ten minutes to review it. Look at the questions. Talk with your team members on how you would respond to those questions and then we will share out verbally.

Unfortunately, I have to call time. Okay. We only have three minutes left. Normally in class we have more time, but then again, I would have circulated and I would have called on a team to share. We can at least see how this type of presentation goes. With the two minutes we have left, is there a person or team that would be willing to share? And we will just look at number one. What did your team talk about on question one? Has Miranda made an offer by delivering the lease agreement to Dale, and what facts would point to yes versus what facts point to no? Anyone who would want to share on behalf of your team what you all talked about on that question?

Audience:

Well you have got a lot of specificity in there, but on the other hand, there is no starting day or date that you are paying the deposit.

Grossman:

Well the contract is not dated—it is still in brackets, which means it is still open.

Audience:

So, we did not understand what the Xs stood for in 20XX.

Audience:

Right.

Grossman:

Yeah, I need to put in the date. It depends on when the book gets published. I do not want to be putting old numbers, so I should have probably put them in for this version.

Audience:

So those would have been numbers?

Grossman:

Those would have been numbers.

Audience:

The other thing we talked about is it is signed, and instead of her responding saying “I am sending you a copy,” or a draft, or a form of release, she actually says a contract.

Grossman:

Right. I think sometimes students just focus on the document, but you have to look at the accompanying correspondence because that, too, is part of the manifestation. So, there it says “here is a contract for office space,” which suggests I am ready to go, ready to be bound, and ready to the specified the space. Plus the language “I look forward to hearing back from you” seems to invite acceptance. Again, this would have been proceeded by a discussion of offer that has to confer on the offeree the power to assent. That language looks like it does. On the other hand, the fact that there is a signature block suggests that she might be looking for a written signature. She might just be like, “hey are you interested, let me know yes or no, and if so then we will go ahead and formalize this and put in the date and you can sign.”

This is the back and forth I see in class. I do not look for a right answer, as it depends on who you represent, right? But I like for students to identify the issues and get a conclusion. Again, the same exercise would have happened for each of these questions. Of course, again, we do not have time but question four is more of a planning question: What do you tell Miranda to do next time? Do not sign this stinking lease.

Like I said, we rely on this type of problem through every section of the book. Thank you very much for attending. I know that there is an evaluation sheet that they need to be handed in up front. If anyone has

additional feedback on the book and the decisions that we made I welcome that now, tonight, tomorrow, or whenever.

Audience:

Good luck.

Grossman:

Thank you. Thank you.