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EVERYTHING I NEEDED TO KNOW ABOUT BEING A LAWYER I LEARNED IN PROPERTY

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I. INTRODUCTION

“To AMW for life.”¹ I vividly remember struggling through the chapter on common law estates in our first year property course, trying to grasp the difference between a fee simple determinable and a fee simple subject to a condition subsequent. Of course, like the rest of my classmates, I spent long hours desperately trying to understand the destructibility of contingent remainders, the rule in Shelley’s case, the doctrine of worthier title and the rule against perpetuities. Yet, after the class had ended and the exams were completed, my memory quickly faded as to the importance of these rules and as to exactly what they entailed. While it is true that I forgot some of the substantive law learned there, my first-year property class touched on several topics that have not only been helpful in other law school courses, but that will have lasting significance when I journey into the real world to practice law.

Professor Peter W. Salsich, Jr. wrote an essay in which he noted that Contracts and Property are similar courses, in part, because they both provide opportunities for first-year students to explore two topics: (1) non-adversarial dispute resolution techniques; and (2) ethical and professional responsibility issues that transactional lawyers face almost daily.² Furthermore, the property textbook Salsich co-authored integrated these topics into the curriculum.³ In this Essay, I suggest that these two topics are among the most important

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1. “AMW” is a reference to Professor Alan M. Weinberger, Saint Louis University School of Law. Professor Weinberger was my Property professor, and this example was a familiar one to students in his class. He is a wonderful professor, and I thank him not only for his work in the classroom, but also for taking on the role of mentor and friend.

2. Peter W. Salsich, Jr., *A Property Law Instructor Looks at the Contract Law Course*, 44 ST. LOUIS U. L.J. 1215, 1215 (2000).

3. SANDRA H. JOHNSON ET AL., *PROPERTY LAW: CASES, MATERIALS AND PROBLEMS*, at v (2d ed. 1998).

concepts I learned in Property: not only did they provide an excellent foundation for future courses, but they offered students insight into some of the problems attorneys face everyday; and when all else is forgotten from Property (or perhaps just stored far in the back of my mind), these ideas will remain with me for the duration of my career. While it may be that I could not begin practicing as a lawyer after a course in property law, much of what I needed to know about being a lawyer at least began with Property.

II. NON-ADVERSARIAL DISPUTE RESOLUTION

Negotiation and mediation were perhaps two of the most fun and interactive topics I encountered in my first-year property course. While the professor gave some background information about the importance of non-adversarial dispute resolution, most of what I learned came from first-hand experiences in small group exercises performed in class.

The first assignment was “The Sect and the Shelter.”⁴ The class was broken down into small groups to negotiate a dispute regarding a religious sect’s attempt to enter the property of a homeless shelter to recruit people to move to the sect’s community. The small groups were then divided into four sub-groups: the shelter, the sect, the homeless invited to join the sect and the homeless not invited to join the sect. The members of each sub-group met to discuss their position, and then all four sub-groups got together to begin negotiations. At the end of the exercise, the entire group prepared a memorandum relaying to the professor the results of the attempted negotiation.

Prior to this exercise, I had read two cases: *State v. Shack*⁵ and *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance*.⁶ These two cases explored the topic of an owner’s right to exclude. In *Shack*, a farmer, Tedesco, employed migrant workers and provided them housing on his property as part of their compensation. The first defendant, Tejas, was one of these workers, and he was associated with the Farm Workers Division of the Southwest Citizens Organization for Poverty Elimination (SCOPE), a non-profit corporation funded by the Office of Economic Opportunity. The second defendant, Shack, was a staff attorney with the Farm Workers Division of Camden Regional Legal Services, Inc. (CRLS), also a non-profit organization funded by the Office of Economic Opportunity. The defendants arranged to go to the farm together so that Shack could help Tejas arrange for another migrant worker to receive medical treatment and so Shack could discuss a legal problem with another migrant

4. See Memorandum from Alan M. Weinberger to his Property students (Sept. 15, 2000) (on file with author).

5. *State v. Shack*, 277 A.2d 369 (N.J. 1971).

6. *Western Penn. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331 (Pa. 1986).

worker. When the two entered Tedesco's property, Tedesco inquired as to their purpose, offered to help find the men, but insisted that he be present for the consultations. The defendants refused, insisting that they had a right to meet with the men alone, and Tedesco filed a formal complaint charging violations of a trespass statute.⁷

The issue in *Shack* was whether the camp operator's property rights could stand between the migrant workers and those who would aid them. The defendants were convicted of trespassing in a municipal court, but were acquitted on appeal to the county court. The New Jersey Supreme Court noted: "the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens."⁸

In *Western Pennsylvania Socialist Workers*, a political committee, its chairman and a gubernatorial candidate began a drive to collect signatures on nominating papers in an effort to place a candidate on the gubernatorial ballot. They sought permission from a shopping mall to solicit signatures and to educate the public about their cause on the mall's premises. The mall, however, had a uniform policy to forbid all political solicitation and denied the request. Litigation ensued to enjoin the shopping mall owner from enforcing its no political solicitation policy on the grounds that it violated speech and petition rights under the Pennsylvania Constitution. The Pennsylvania Supreme Court held that the Pennsylvania Constitution did not guarantee access to private property to exercise the rights of speech and petition where the owner of the property uniformly prohibited all political activities and precluded the use of its property as a forum for discussion of political matters.⁹

Having read and discussed these two cases in class before undertaking our negotiation exercise, each sub-group was armed with some substantive law to aid them in the process. The activity was not only a nice break from the usual classroom setting, but also gave students an opportunity to experience a negotiation first-hand. While I no longer remember my group's ultimate resolution, I recall some difficulty in cooperating with sub-groups whose objectives were quite different from those of my group. Although this was only a hypothetical situation involving no consequences for failure to reach a conclusion, I walked away from the project having learned valuable lessons about the negotiation process.

7. The applicable statute provided that "[a]ny person who trespasses on any lands . . . after being forbidden so to trespass by the owner . . . is a disorderly person and shall be punished by a fine of not more than \$50." N.J. STAT. ANN. § 2A:170-31 (West 1985); *Shack*, 277 A.2d at 370 (citing statute).

8. *Shack*, 277 A.2d at 374. Although, this is what the court stated in its opinion, the holding was quite narrow, suggesting that only government agencies charged by Congress were not subject to the New Jersey trespass statute.

9. *Western Penn. Socialist Workers*, 515 A.2d at 1338.

The second activity, which involved both negotiation and mediation techniques, came in the context of landlord-tenant law. The problem, known as the Red Devil Dog Lease Problem, involved a commercial landlord who entered into a lease agreement with a local entrepreneur. The tenant planned to open a franchise of a Red Devil Dog fast-food restaurant, but one month before the lease term was to begin the Red Devil Dog chain filed bankruptcy and could no longer carry out its normal advertising and promotional activities. The tenant, concluding that he could not make a profit from the restaurant without the support of the national franchise, told the landlord that he could not rent the building. Prior to this determination, the building was modified to suit the tenant's needs, and the tenant had bought equipment and locked it in the building. After receiving the news, the landlord sent the tenant a letter demanding payment for fixed rent, an estimate of the percentage rent, and the cost of the modifications. The letter also stated that until the landlord was assured these responsibilities would be met, the tenant could not gain access to his equipment.

Again, the class was divided into small groups, only this time each group negotiated with a group of first-year students from another Property section. Initially, each team met on its own to determine its goals and strategies for the negotiation, and then opposing teams met and commenced the negotiations.

What made this activity more valuable than the first, however, was that the class later viewed a video produced by the Center for Dispute Resolution at the University of Missouri-Columbia School of Law.¹⁰ The actors in the video demonstrated a mediation of the Red Devil Dog Lease Problem the students had just negotiated. This provided an opportunity to compare negotiation strategies and styles used in the classroom exercise with those employed in the video.

The integration of these negotiation and mediation exercises into the first-year Property curriculum allowed students to observe and perform some practical applications of important subjects. In contrast to some of the common law rules taught in Property that have been abolished in most states or are the subject of judicial reform and thus obsolete, negotiation and mediation skills are useful tools for lawyers. Many law students never have an opportunity to take a course devoted to these topics; introducing them in first-year Property is a meaningful way to provide exposure to them.

III. PROFESSIONAL RESPONSIBILITY

Remembering all of the cases studied in law school is an impossible task, but there is one case I have never forgotten. *Pigg v. Haley*¹¹ arose in the

10. Salsich, *supra* note 2, at 1222 n.35.

11. *Pigg v. Haley*, 294 S.E.2d 851 (Va. 1982). The following contributions to this symposium also discuss this case: Peter W. Salsich, Jr., *Property Law Serves Human Society: A*

casebook chapter on common law estates. In *Pigg*, the Haleys, married for forty years, purchased and managed a 152-acre farm. Mr. Haley, who engaged in genealogical research as a hobby, discovered a fourth cousin, Garland Pigg, living nearby, and the Haleys developed a close personal relationship with him, treating him like their own son. When Mr. Haley died, a holographic will was found in his desk, which included Pigg as a beneficiary. Mr. Haley left his land to his wife for the duration of her life and, and upon her death, all real and personal property that remained went to Pigg.

An attorney who reviewed the will told Mrs. Haley that she had only a life estate in her husband's property: "You own nothing; you have the use of the property, the use of the farm; the proceeds of the farm until you die; and you have the interest of the money until you die."¹² After consulting a bookkeeping tax service, Mrs. Haley and the Piggs met with another attorney who suggested seeking a court interpretation. Wishing to avoid litigation, Mrs. Haley allowed the attorney to draft an agreement which specified that all personal property went to Mrs. Haley with the right to dispose of it, and that "the interest in any real estate . . . shall be construed as to give [Eva Haley] a life estate therein exclusively, with the remainder over to Garland Pigg, upon her death, in fee simple and absolutely."¹³ Subsequently, Mrs. Haley executed a real estate contract to sell thirty acres of the 152-acre tract, and Mrs. Haley, along with the purchaser, filed suit against Pigg, claiming that the purchasers had an "equitable fee interest" in the 30 acres."¹⁴ Mrs. Haley argued that the agreement between she and the Piggs was void on several grounds.

Ultimately, the Virginia Supreme Court held that the agreement between Mrs. Haley and Mr. Pigg was enforceable. The court noted that under the will, Mr. Pigg had received a contingent remainder in the personal property, and he relinquished this right for a vested remainder in the real property, which constituted sufficient consideration to support the agreement.

While the case was probably useful in learning common law estates, what I remember it for is its value as a case on legal ethics and professional responsibility. The case was useful in exploring such subjects as whether a lawyer could represent all parties to the same transaction, as well as the lawyer's role in resolving disputes. With regards to the former topic, traditional rules would have required the second lawyer do the following: (1) explain to all parties involved both the risks and the benefits of using only one attorney, including specifically the requirement that the lawyer may not

First Year Course Agenda, 46 ST. LOUIS U. L.J. 617 (2002), Thomas L. Shaffer, *Using the Pervasive Method of Teaching Legal Ethics in a Property Course*, 46 ST. LOUIS U. L.J. 655 (2002) and Alan M. Weinberger, *Suggested Reading for Pleasure and Property*, 46 ST. LOUIS U. L.J. 799 (2002).

12. *Pigg*, 294 S.E.2d at 855.

13. *Id.* at 854

14. *Id.* at 854 (quoting petition).

represent either party in a later dispute; (2) obtain consent from all parties; and (3) determine on his own that he could act with “independent professional judgment” for all parties.¹⁵ While the case did not specify whether the lawyer fulfilled these requirements, it made students aware of these rules, and opened the door for further discussion on professional responsibility.

Pigg also examined the role of the lawyer as a “resolver of disputes,”¹⁶ paving the way for an introduction to the Model Rules of Professional Conduct. The case illustrated that lawyers do not always serve as an advocate for a client, but may also serve as a mediator between two parties to settle a dispute. Rule 2.2 of the Model Rules of Professional Conduct sets out the guidelines for lawyers who take on this role. For example, the rule states that the lawyer must provide an explanation and get consent from all parties, decide that the common interests between the parties and the individual interests of each party will be served by him acting as a mediator, consult with the clients individually, and withdraw from mediation if the conditions are not met or one party asks the lawyer to withdraw.¹⁷

In *Pigg*, the second lawyer represented both parties and served as a mediator to help the parties reach an agreement. He did not coerce the parties into making an agreement; in fact, his initial advice was to get a judicial interpretation. However, in this instance, perhaps the lawyer should have taken further steps to prevent future problems. For example, he never consulted with the individual parties separately, and maybe he failed to recognize that an agreement was not the best solution. Perhaps the lawyer did not take into consideration the emotional aspect of the case, or the fact that Mrs. Haley might have been intimidated by the legal jargon in the agreement.¹⁸ Furthermore, representing both parties in the same transaction is often a bad idea, and *Pigg* serves as an example of what can go wrong. Whether the ultimate conclusion is that the lawyer did or did not act ethically or in accordance with his professional responsibility, the case gave students the first occasion to examine these important aspects of being a lawyer.

IV. CONCLUSION

My guess is that not every Property curriculum takes advantage of the opportunity to include discussions and exercises on non-adversarial dispute resolution and professional responsibility. The property classroom, however, provides the perfect forum for introducing these concepts to first-year students, and integrating these topics makes Property an invaluable course for future lawyers. While it might be a stretch to say that I learned everything I needed

15. JOHNSON, ET AL., *supra* note 3, at 123.

16. *Id.*

17. MODEL RULES OF PROFESSIONAL CONDUCT R. 2.2 (1984).

18. See Salsich, *supra* note 2, at 1221; JOHNSON, ET AL., *supra* note 3, at 122-24.

to know about being a lawyer in Property, the class introduced me to a wide range of problems that lawyers face and to the variety of skills that lawyers need to effectively represent their clients.

