

## USING BOTH NONLEGAL CONTEXTS AND ASSIGNED DOCTRINAL COURSE MATERIAL TO IMPROVE STUDENTS' OUTLINING AND EXAM-TAKING SKILLS

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*Brutal Choices in Curricular Design ... is a regular feature of Perspectives, designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. Readers are invited to comment on the opinions expressed in this column and to suggest other "brutal choices" that should be considered in future issues. Please submit material to Helene Shapo, Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611, phone: (312) 503-8454, fax: (312) 503-2035.*

### I. Pedagogic Strategies

Exercises requiring the application of challenging legal doctrine create the risk of focusing student attention almost exclusively on mastering the doctrine and away from the critical lessons of legal method.<sup>1</sup> Accordingly, I have espoused the benefits of using exercises set in familiar, nonthreatening, nonlegal contexts to introduce new students to difficult concepts of legal method and to the challenges of outlining

<sup>1</sup> See Charles R. Calleros, *Introducing Students to Legislative Process and Statutory Analysis Through Experiential Learning in a Familiar Context* (hereafter, *Legislative Process*), 38 Gonz. L. Rev. 33, 33–34 (2003).

course material and taking essay exams.<sup>2</sup> Whether presented in orientation week as an overview of things to come, or in November as a way of consolidating skills of case analysis and easing student fears about impending exams, the nonlegal context of the exercises helps to focus student attention solely on the skills of legal method that we hope to develop.<sup>3</sup>

On the other hand, the decision to set legal method exercises in nonlegal contexts raises other risks, because the success of the enterprise depends on the abilities of students to transfer the skills that they have developed in the nonlegal contexts to their analyses of judicial opinions and to their preparation for examinations in doctrinal courses. A combined approach of assigning exercises in both legal and nonlegal settings may bring out the maximum benefits of both kinds of exercises.

In the spring semester of 2003, I presented a 90-minute workshop for our Academic Success Program (ASP), in which I experimented with a combination of exercises set both in nonlegal and in legal contexts. In this essay, I describe the workshop and reflect on its strengths and limitations.

### II. Substance of the Workshop

#### A. Achieving a Focus on Method: Exercises in a Nonlegal Context

I began the workshop by presenting the "Rules for Monica" video and exercises, which are set in the nonlegal context of parental rulemaking but which draw close analogies to facets of common law legal method. With these exercises, workshop participants reviewed and refined their skills of analyzing and synthesizing cases, outlining course material, and composing essay examination answers; or at least they deepened their understanding of the nature of those tasks.<sup>4</sup>

<sup>2</sup> See Calleros, *Legislative Process*, *supra* note 1; *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis* (hereafter, *Demonstrations*), 7 J. Leg. Writing Inst. 37 (2001). Examples of such exercises are set forth in Charles R. Calleros, *Legal Method and Writing*, 133–34, 145, 167 (4th ed. 2002), and are analyzed in Charles R. Calleros, *Legal Method and Writing: Teacher's Manual* (hereafter, *Teacher's Manual*), 23–27, 28–30, 34 (4th ed. 2002).

<sup>3</sup> See Calleros, *Demonstrations*, *supra* note 2, at 37–39.

<sup>4</sup> For fuller descriptions of the Monica exercises, see Calleros, *Legislative Process*, *supra* note 1, at 34–39; Calleros, *Demonstrations*, *supra* note 2, at 49–62.

I set a fairly rapid pace for this part of the workshop, because the participants had more than a semester of law school under their belts, and some of them had even participated in the Rules for Monica exercises in their first semester. Accordingly, I alternated between (1) asking students to perform the exercises themselves and to share their interpretations in class discussion, and (2) taking the shortcut of describing the various arguments and interpretations that they likely would advance if provided more time.

Nonetheless, these students were struggling in law school and still harbored confusion on some fundamental concepts of legal method, so I devoted nearly half of the workshop to the Monica exercises. This lengthy introduction allowed workshop participants to assimilate critical concepts of legal method without fretting about whether they were fully comprehending the twists and turns of formal legal doctrine in a subject such as contracts, property, or torts. With this foundation in place, we were ready to transfer the lessons from Monica to more complicated legal doctrine.

### III. Overview of Legal Method and Exam Skills in a Formal Doctrinal Setting

To infuse the second half of the workshop with maximum relevance for the ASP students, I asked them to analyze the section in a contracts casebook addressing rescission for “concealment and misrepresentation,” covering a little more than 13 pages of the Farnsworth, Sanger, and Young casebook.<sup>5</sup> All contracts sections that year had begun the spring semester with this topic, so this was the first contracts topic that students would outline in preparation for examinations. Because the workshop participants had briefed and discussed these cases in class, I assumed that they were roughly familiar with most of the basic doctrinal principles and that they could—with a little help from me on rough spots in their doctrinal analysis—focus a good deal of their

<sup>5</sup> E. Allan Farnsworth, William F. Young & Carol Sanger, *Contracts Cases and Materials* 352–65 (6th ed. 2001). In conjunction with this section, I also assign a footnote on “Confidential Relations” from the preceding section. *Id.* at 351 n.2. Most of the contracts sections at my school used this casebook for the two-semester contracts course in the 2002–03 academic year.

attention on the tasks of synthesis and outlining in preparation for examinations.

To give students a head start in that outlining process, I condensed the 13 pages of excerpts from the casebook into three pages quoting critical passages from cases and presenting brief notes of my own composition.<sup>6</sup> This condensed format enabled students to read and review an example of underlying source material (albeit artificially condensed source material) in a few minutes of class time. From there, we addressed the process of outlining the material.

#### A. Outlining

As an introduction to outlining, I shared the following views with students:

I believe that a particular outlining technique is the most effective means of summarizing and reorganizing your case briefs and class notes into an effective study aid. If you find that some other method works better for you, then by all means adopt the approach that best suits you, but the traditional outline is one option for you to consider. Although it results in a document that is a very handy study guide, much more important is the activity of constructing it. It’s hard work, but the process of expressing your analyses and syntheses in your own words will prepare you well for examinations, even if you misplace your outline the day after you complete it.

#### 1. Laundry List of Critical Points

I then invited students to review the condensed source materials and simply jot down ideas that seemed to be important to the courts in determining whether to rescind a contract for misrepresentation during contract formation. During this brainstorming session, we paid no attention to questions of organization, such as whether one critical point related to others on the list. Instead, we simply listed words or phrases that represented concepts that courts emphasized or analyzed in their case analyses. For example, the

<sup>6</sup> These condensed materials are available on request from the author. The author also plans to incorporate these materials into the fifth edition of *Legal Method and Writing*, supra note 2, and its teacher’s manual.

students and I listed the following words and phrases in a vertical column on a computer projection: bare nondisclosure; false statement; justifiable reliance; material fact; opinion; arm's length transaction; fiduciary or confidential relationship; half-truth; special rules for sales of homes; active concealment; superior knowledge. Other students undoubtedly could come up with a different list, but this "laundry list" was a fine start.

## 2. Recognizing the Legal Significance of Points and the Relationships Among Them

Next, I asked students to explain why and how each of these points might be relevant to an analysis of rescission for misrepresentation. This assignment required students not only to analyze each case in isolation, but also to synthesize groups of cases, so that we could derive some legal norms from the cases by comparing facts and holdings. We weren't writing on a clean slate, because the students had previously prepared these cases, had discussed the cases in their contracts class, and likely had already begun reviewing the material, perhaps while consulting a commercial study aid. Still, the students gained new doctrinal insights during this process, as is typical when students review material and prepare for exams a month or more after first studying the material.

No one student had all the answers, and all of them needed some hints or other assistance from me on occasion, but they instructed each other, as members of a study group might. For example, one student synthesized two cases to recall that a misleading "half-truth" was viewed as a misrepresentation, but that bare nondisclosure of a fact generally was not. Another student remembered a note and a segment of class discussion, however, that explored a modern statutory and common law trend to require disclosure of material facts in the sale of a home. The same student also remembered a second context that gave rise to an affirmative duty to disclose: a special relationship between the parties,

such as a fiduciary or confidential relationship; I added that courts often describe the parties in such relationships as not bargaining "at arm's length." Another student recalled a pair of cases establishing that rescission generally was not available unless the misrepresentation related to facts, rather than opinion; I agreed and suggested that the distinction between the two might be less than clear in some cases. The same student added that the fact must be material, a characteristic that we agreed warranted further exploration. Another student remembered that the party seeking rescission must normally prove that he or she relied on the misrepresentation, and justifiably so. Finally, I reminded the students that rescission was an equitable remedy that allowed for some flexibility, so that a strong showing on one element of a claim for rescission, or the presence of other special circumstances, might compensate for a relatively weak showing on another element. One of our cases provided an example of this flexibility: the superior knowledge of a contractor regarding one facet of his service induced a court to relax the requirement that the misrepresentation be in the form of fact rather than opinion.

## 3. Reorganization of Course Material

I shared my view that some ways of reorganizing case briefs and class notes in an outline were more helpful than others. A student might distill his or her understanding of each case into a single sentence or two and then list summaries of several cases down the pages of the outline, without any attempt to synthesize them. And such a summary would at least reflect the student's analysis of each case, and it would certainly condense the mass of the material to be reviewed. But such an outline would also resemble a mediocre office memorandum, in which a student has plopped down one case brief after another, without any attempt to show each case's relationship to another or to extract some larger meaning from groups of cases—in other words, an analysis without synthesis. Such an outline would

not adequately prepare a student for examinations, because it would not substantially improve the student's ability to spot issues or to express legal rules in a meaningful way. To develop those skills, the student should synthesize the cases to derive rules of general application from them, and then should organize the outline around those rules, rather than around cases.

We had engaged in the process of synthesis and derivation of rules in step 2 above, and we had even begun at that stage to see how the rules related to one another. Our next task, then, was to state these rules in some logical fashion in outline form, constructing a legal framework into which we could insert one-sentence case summaries as illustrations of the rules. No single organizational approach can be viewed as the single correct one, but I did express views about the relative merits of a few common approaches.

First, I do not favor students simply dividing cases into those that justify relief and those that do not. Two decisions that both denied relief may have done so for very different reasons, and it advances a student's understanding very little to place in the same category a case that denied rescission for lack of a misrepresentation with one that denied rescission because the party seeking relief was the target of a misrepresentation but did not rely on it.

Conversely, two decisions that reached different conclusions about the availability of rescission might have much in common because they addressed the same issue of justifiable reliance and applied the same rule regarding that issue, even though they reached different conclusions because of critical fact distinctions between the cases. Synthesizing those cases by comparing their facts and holdings can help the student define the line between justifiable reliance and inexcusable failure to discover obvious facts. The student can then begin that section of the outline with the rule of law that he or she derives from his or her synthesis of the cases, and can illustrate the rule with a one-sentence summary of the fact-specific holding of

each case. It follows that a case with more than one holding may appear as an illustration of more than one legal principle, at different places in the outline.

By organizing the outline around rules, issues, and potential problem areas, rather than around the disposition of cases or some other superficial characteristic, students will improve their ability to spot issues. Moreover, by showing how the facts of different cases (including hypothetical ones<sup>7</sup>) either satisfied a particular rule or fell short of that mark, students gain an appreciation for fact analysis and better prepare themselves to construct arguments on the facts in new cases.

I also advised students to begin their outlines of each section or subsection at the most general level and then to address issues or sub-issues with increasing specificity. For example, a student would do well to begin his or her outline of misrepresentation by identifying the elements of a claim for rescission for misrepresentation and then to address more specific issues relating to each element:

**I. Rescission for Misrepresentation:** Because rescission is an equitable remedy, courts apply the elements flexibly.

**A. General Elements:**

During bargaining, a party

1. misrepresents
2. a material fact [not opinion]
3. on which the other party justifiably relies.

**B. Misrepresentation:** This may be a false statement, a half-truth, or active concealment, but generally not bare nondisclosure. Even an innocent misrepresentation may justify rescission.

**1. Half truth:** A party engages in half-truth when he or she misleadingly addresses a topic by selectively revealing some, but not all, of the material facts.

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<sup>7</sup> Some of the best cases for illustration in an outline are hypothetical cases raised by the professor in class for the specific purpose of defining the limits of a rule. Moreover, as one pair of authors reminds us, a sophisticated outline includes hypothetical cases devised by the student herself to illustrate a point, and it includes references to matters that remain uncertain and unresolved. Richard Michael Fischl & Jeremy Paul, *Getting to Maybe* 120–21 (1999).

At some level of specificity in the outline structure, it becomes profitable to illustrate a point with case summaries:

1. **Half truth:** A party engages in half-truth when he or she misleadingly addresses a topic by selectively revealing some, but not all, of the material facts.

a. Example: In *Kannavos*, advertisements created a false impression by revealing that property had been used as income-producing apartments, without revealing that this use violated zoning laws.

b. Example: In *Vokes*, the court hinted that dance instructors' flattery left a false impression when they failed to provide the "whole truth" about a student's potential.

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We did not have time in the workshop to fully construct such an outline together, but I invited students to spend a few minutes planning their basic organizational strategy; I projected sample excerpts onto the screen;<sup>8</sup> and I invited students to complete the process on their own. My aim was to provide them not with an outline but with sufficient knowledge and skills to enable them to develop their own after class. In other words, I was interested not in throwing a few fish their way, but in helping them construct a net with which they could catch their own fish.

## B. Taking the Examination

Once the students have engaged in the analysis, synthesis, reorganization, and expression required to construct a meaningful outline, they should have acquired the knowledge and skills to apply legal principles to new facts. With that in mind, I ended the workshop by distributing a few simple problems that were inspired by cases or other material studied in class:

1. Hilda and Louis had sexual intercourse on July 1 and July 2. Unknown to Louis, Hilda also had sexual intercourse with Alex on July 4. On none of these occasions did any of the parties use birth control. In August, Hilda

approached Louis, accurately reminded him of their two occasions of intimacy in July, accurately announced that she was pregnant, and accurately stated the doctor's estimate that Hilda conceived the baby in early July. Without disclosing more, she told Louis that she expected him to provide reasonable support and that she had a written agreement for him to sign. The agreement called on Louis to provide certain payments to Hilda in exchange for her promise not to bring a paternity suit against him, which she stated she likely would win. Based on Hilda's statements, Louis signed the agreement. Louis later discovered through blood tests that Alex fathered the child, and Louis seeks to rescind the contract for misrepresentation. What issues might arise in such an action for rescission? (In other words, what element or elements of misrepresentation might reasonably be disputed by the parties?)

2. S decides to move out of her home after her only son died there of AIDS, in his childhood bedroom, while she held his hand. Because the house is physically unaltered by her son's death, and because his illness could not possibly be transmitted to anyone else through anything in the house, S does not mention to B, a buyer, anything about her son, his illness, or his death after spending his final days in the house. Nonetheless, because of irrational fears about AIDS commonly held in the community, the market price of the house would fall if these facts were widely known. B purchases the house without knowing anything about S's son. When B later learns about S's son, he seeks to rescind the contract. What issue or issues might arise?

On either of the issue-spotting exercises above, draft a full exam answer, using IRAC (the issue, rule, application, conclusion model) as a guide and discussing arguments for both sides. Specifically, for each issue (1) identify the issue with a heading or introductory sentence, (2) summarize the rule that will help resolve the

<sup>8</sup> A sample outline is available on request from the author. To encourage students to build skills while preparing their own outlines, I highly recommend that workshop facilitators refrain from distributing the sample outline and use it only as a visual aid to facilitate classroom discussion.

issue, (3) apply the applicable rule to the facts and (4) state the conclusion that you believe to be most strongly supported, even if either of two conclusions would be reasonable. You can argue both sides if the content of the applicable rule is in doubt in a material way or if the facts could support different conclusions about whether the facts satisfy the applicable rule. If you cannot construct plausible arguments for both sides in either of those ways on a given topic, then that topic is not in issue; at most, you might want to state your certain conclusion on that topic as a premise that sets up a viable issue on another matter. Neither problem is set in a particular state; you may discuss and apply general principles of contract law.

Problem 1 is a spin-off on a case that the students analyzed in the first semester of contracts, *Fiege v. Boehm*.<sup>9</sup> In that case, students learned that Louis' agreement to provide child support and other payments to a pregnant Hilda was supported by consideration, because Louis exchanged his promise for Hilda's surrender of a statutory paternity claim that the parties believed had potential validity at the time of contracting, even though blood tests later established that Louis could not be the father.<sup>10</sup> In the second semester, students are ready to return to this case, or to a similar hypothetical case, to address the separate issue of whether any contract formed might be subject to rescission for misrepresentation. The second problem raises issues related to some articles that I distributed in contracts class earlier in the semester. Both problems contain provocative themes that challenge students to remain focused even if distracted by the subject matter.

The first two problems limit the scope of the students' assignment by asking only for brainstorming about issue-spotting. In my 90-minute workshop, we had just enough time remaining to begin this process of issue-spotting, which I defined for the students as their

<sup>9</sup> 123 A.2d 316 (Md. 1956).

<sup>10</sup> See *id.*; see also Farnsworth, Sanger & Young, *supra* note 5, at 34–38 (reproducing excerpts of *Fiege v. Boehm*).

identification of matters that the parties might reasonably dispute in court in light of the law and the facts.<sup>11</sup> The ability to identify issues for discussion is obviously a critical threshold skill, so I try in workshops like these to carve out some meaningful time to discuss the thought process through which the students identify issues for discussion—which they might plausibly describe as the process of identifying issues that they believe the professor intended to raise.

Discussions about the students' thought processes in identifying issues can be prompted by asking workshop participants to spend a few minutes independently jotting down issues that they believe are raised by the problems and to explain in writing why they did so. This writing exercise, in turn, provides a basis for generating oral discussion in the group. If the workshop facilitator gently digs a little with sensitive questions, and if students are candid, discussions about their process of identifying issues may reveal some possible explanations for disappointing performance on previous exams. Some students may drop hints that they discussed certain issues because they anticipated prior to the exam that I was likely to test on those issues, because I seemed to emphasize them in class, and they read the exam question with a bias toward discussing those issues, even when the facts didn't comfortably raise them. Discussion might reveal that other students will lean toward identifying an issue that they encountered in a case earlier in the semester, simply because the general factual context of the earlier case is similar to that of the current problem (at the level, say, of both cases involving sales of homes), and even though the current problem and the earlier case raise very different issues (such as one raising an issue of materiality and the other an

<sup>11</sup> I also like the following succinct definition: "A legal issue is a question about what the law means or how (or whether) it applies to the facts of a particular situation." Cathy Glaser, Jethro K. Lieberman, Robert A. Ruescher & Lynn Boepple Su, *The Lawyer's Craft* 25 (2002). I use my somewhat earthier definition in class to emphasize the concept of a reasonable dispute, stemming from uncertainty in the way in which relatively settled rules of contract law will apply to the facts. This emphasis on disputed matters may help dissuade some students from gravitating toward "safe" topics, nonissues that have certain answers and that require only statements of conclusion rather than in-depth analysis. See generally Fischl & Paul, *supra* note 7, at 143 ("Focus your fire on points in conflict").

issue about whether a statement is one of fact or opinion). Other students might reveal that they are not spotting “issues” at all, in the sense of matters that the parties might reasonably dispute, but are choosing to write about matters that would not be disputed, perhaps because that approach allows them to avoid uncertainty and to state answers that are not in doubt. If such errant approaches are revealed and discussed, the brainstorming creates a valuable opportunity for correction, adjustment, and improvement.

Of course, we should supplement our correction of problematic approaches with an exploration of the thought process that might successfully identify the issues that the examiner had in mind. For example, the first of the three problems that I distributed to the class raises a red flag to me about whether Hilda made any misrepresentation, because Hilda spoke accurately about certain facets of her pregnancy but was selective in her revelations. If students had earlier synthesized cases and constructed a well-organized outline, they should recognize that, even if Hilda uttered no false statements, (1) she arguably uttered a misleading half-truth by raising the topic of her pregnancy without stating all the material facts, including her intercourse with Alex in the first week of July (although she arguably hinted at that affair by stating that she was only “likely” to prevail on a paternity suit against Louis); and (2) Hilda arguably had a duty to disclose all material facts, including the possibility that another man was the father, because of the potentially confidential relationship between Hilda and Louis (allowing, unfortunately, for some puns about bare nondisclosure and about whether Hilda and Louis engaged in “arms-length” bargaining). A thorough student might also wonder whether Louis was justified in relying on Hilda’s implications that he is the father; after all, if Louis had bothered to ask her about other potential fathers, Hilda would have been compelled to either make a false statement or to evade the question in a way that

might have put Louis on guard that further inquiry was warranted.

Problem 2 invites students to (1) note that at least some jurisdictions require disclosure of material facts in the sale of a home, and then (2) question whether the information about the son’s death is material. This is a viable issue because the students should be able to construct factual arguments for both sides: The death of the son and the nature of his illness arguably are immaterial because they do not affect the habitability or durability of the house in the slightest, but the circumstances of the son’s death arguably are material because they in fact affect the market value of the house, even if that downward effect is the result of irrational fears or prejudice.

The third problem invites students to compose a full response to each of the first two. Because the workshop did not include time for a full in-class examination, I invited students to complete their essay answers on their own time, and I distributed annotated sample answers for them to compare with their own. As suggested by my sample response to problem 1, which covers more than a single-spaced page even when my footnoted annotations are removed,<sup>12</sup> even a short fact pattern can provide opportunities for substantial discussion. Moreover, even a simple set of facts may invite discussion of policy considerations in the application of law to facts.<sup>13</sup> My limited aim in this workshop, however, was to explore effective approaches to preparing for examinations and spotting issues on traditional essay examinations, and to provide students with problems that tested their abilities to marshal opposing factual arguments.<sup>14</sup>

<sup>12</sup> My annotated sample exam answers are reproduced in Appendix A.

<sup>13</sup> See, e.g., Calleros, *Teacher’s Manual*, *supra* note 2, at 34 (even a short and simple exam question set in a nonlegal setting provides an opportunity for policy analysis).

<sup>14</sup> My advice to students about taking essay exams is found in Calleros, *Legal Method and Writing*, *supra* note 2, at 149–67. Other in-depth discussions of law school essay exams can be found in Fischl & Paul, *supra* note 7, at 215–322, and in Kenney F. Hegland, *Introduction to the Study and Practice of Law in a Nutshell* 145–89 (4th ed. 2003).

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### Reflections, Caveats, and Alternatives

The combination of (1) exercises set in a nonlegal context and (2) analysis of legal materials assigned in doctrinal classes appeared to help some participants take an additional step or two in the right direction. Early in the workshop, the nonlegal context helped us focus narrowly on legal method without the distraction of complicated doctrinal law; that focus carried over somewhat to the second part of the workshop, when we shifted to contracts doctrine as the vehicle for analysis. Although measures of “output” for such a workshop are difficult to define, I took some satisfaction in hearing from the ASP director that one student reported after the workshop that she “finally got it.”

The Rules for Monica video and exercises are inherently interesting to students, most of whom count themselves as part of the MTV generation and who retain fairly fresh memories of parental rulemaking in their own homes. Moreover, the students had a keen interest in analyzing course material that might be examined on their final exam in the contracts class, so they appeared to remain engaged throughout the second part of the workshop as well. My choice to use the contracts material, however, was easy because I was teaching contracts at the time. If a facilitator of such a workshop is not teaching the doctrinal course whose source materials are used in the workshop, he or she undoubtedly would want to touch base with one or more of the faculty teaching the course, to avoid stepping on any jurisdictional toes and to ensure that the analysis and synthesis explored in the workshop do not conflict with some theme advanced by the leader of the doctrinal course. At best, this courtesy might lead to professionally rewarding collaboration and development of mutual respect between the faculty. At worst, it might require the workshop facilitator to spend some tedious minutes with an unpleasant colleague.

The facilitator should be sensitive to potential criticism that the workshop is providing ASP students with some kind of inappropriate advantage on material that will be examined in a doctrinal course. Such risks should be minimal, however, if the facilitator refrains from distributing an outline of the course material and instead invites students to prepare their own, after showing some examples temporarily projected onto a screen.

The greatest weakness of the workshop—or the biggest cost of combining the nonlegal and legal contexts—was the limitation on directed skill-building activities imposed by the 90-minute format. That time constraint precluded optimum experiential learning in outlining and exam-taking, unless a workshop participant was conscientious enough to perform those tasks after the workshop and to seek feedback from a faculty member or student mentor. Significant benefits could be gained by expanding the workshop to two or three hours, ideally split into two sessions scheduled for the same week or consecutive weeks. In such a format, the first session could run the Rules for Monica portion at a quick pace and begin the process of identifying key points in the misrepresentation materials that might appear in an outline. Between sessions, students could try their hands at outlining the material, preparing them for further discussion about outlining in the first half-hour of the second session, perhaps leaving time to administer one of the misrepresentation problems as a practice exam. With any luck, the workshop facilitator will have a few minutes remaining to discuss the exam with students while the exam is still fresh in their minds. The footnotes in my sample exam answers, which form a running commentary on, and explanation of, various parts of the sample answers, provide examples of points that a workshop facilitator could raise in such discussion.

A workshop like this demands substantial time and effort from students and faculty alike. However, if it causes a few light bulbs to flicker and then to shine brightly, it will be well worth the effort.

## Appendix A

Annotated Sample Responses to Problem 3 (which call for full discussion of problems 1 and 2).

Q1. Rescission for Misrepresentation:<sup>15</sup> Louis may rescind the contract if, during bargaining, Hilda misrepresented a material fact on which Louis justifiably relied.<sup>16</sup>

Misrepresentation: A misrepresentation may be in the form of a false statement, a half-truth, or active concealment, but generally not a simple failure to disclose.<sup>17</sup> In this case, Hilda's statements about her pregnancy, the timing of her relations with Louis, and the general timing of her pregnancy are accurate, so she is not guilty of a false statement. Neither has she actively concealed information by hindering Louis in his gathering of facts.<sup>18</sup>

Hilda could be guilty of a half-truth, however, if she addressed a topic but misleadingly stated fewer than all the facts known to her on that topic rather

than telling the whole truth.<sup>19</sup> In this negotiation, Hilda probably stated a half-truth by addressing the topic of her pregnancy and her expectation of support from Louis without disclosing all of the facts, including the fact that another man, Alex, was nearly as likely as Louis to be the father. Hilda arguably disclosed the whole truth by stating that she "likely" would win the paternity suit, hinting at some doubt in Louis' paternity. I view Hilda's qualifying statement, however, as too vague to prevent her total presentation from being seriously misleading.<sup>20</sup>

Even if we assume no half-truth,<sup>21</sup> and even though parties to most transactions generally do not have a duty to affirmatively disclose material facts, such a duty may arise in the context of a confidential relationship.<sup>22</sup> Such a relationship arises between parties when one of them is so subordinate or dependent, or places such trust and confidence in the other, that he would expect full disclosure from the other party, so that he does not fully protect his own interests as he would in "arms-length" bargaining. A close personal

<sup>15</sup> This simple phrase is enough, in my view, to earn a point for spotting the overall issue of whether Louis can rescind for misrepresentation. I will refer to it as the "level 1 issue," which one might picture as the largest of several toy boxes that each fit inside another. This box is labeled "Rescission for Misrepresentation?" Disputes about satisfaction of individual elements of the claim will raise more specific sub-issues.

<sup>16</sup> This is a good overview of the legal rule, to be supplemented by discussions of the legal definitions of individual elements that are in issue.

<sup>17</sup> The exam is now analyzing an element in a separate IRAC, at a more specific level than the general discussion in the first paragraph. I'll call this sub-issue one that operates on "level 2," like a medium-sized toy box that is labeled "Misrepresentation?" and that sits alongside two others of the same size ("Material Fact?" and "Justifiable Reliance?") within the largest toy box. The first word of this paragraph identifies the sub-issue, implicitly asking whether Hilda uttered a misrepresentation, and the first full sentence supplies the general definition of that element. We can now imagine that the level 2 "Misrepresentation?" toy box contains four smaller, level 3 boxes, labeled "False Statement?," "Half-Truth?," "Active Concealment?," and "Duty to Disclose?"

<sup>18</sup> The second and third sentences of this paragraph engage in some quick fact analysis to arrive at the easy conclusion that Hilda did not make any misrepresentations in the form of false statements or active concealment. This discussion could be viewed as part of the argument in favor of Hilda, but its real purpose is simply to state some premises that help focus attention on the more debatable questions regarding misrepresentations in the form of half-truths and bare nondisclosure.

<sup>19</sup> We earlier opened two of the third-level toy boxes ("False Statement?" and "Active Concealment?") and found their contents to be orderly and unambiguous; however, the box labeled "Half-Truth?" reveals clashing contents that invite some analysis to make sense of them. By now, we have stepped down to yet a more specific level of IRAC, one focusing on the narrow question of whether Hilda engaged in a half-truth, a question that cannot easily be answered without some guidance on the meaning of the term "half-truth." The first sentence in this paragraph has launched this level of IRAC by identifying the issue (half-truth) and stating a rule in the form of a definition of half-truth.

<sup>20</sup> The second and third sentences of this paragraph apply the rule about half-truths to the facts, advancing arguments for both sides before reaching and justifying a conclusion. Although Louis' argument that Hilda engaged in a half-truth may indeed be stronger than Hilda's counter-argument, either conclusion is plausible, and the author of this opinion would have given equal credit (one point) for the opposite conclusion. More important than the conclusion is the student's developing arguments for both sides after recognizing this matter as one that the parties might reasonably dispute.

<sup>21</sup> Even though the exam writer has potentially resolved the second-level sub-issue of misrepresentation by finding a half-truth, he or she astutely assumes a contrary conclusion to preserve the opportunity to discuss a second potentially viable form of misrepresentation.

<sup>22</sup> Up to this point, this paragraph reviews the legal standards for confidential relationships. We now, of course, are using a level 3 IRAC to analyze the sub-issue associated with the "Duty to Disclose?" toy box sitting within the "Misrepresentation?" toy box.

relationship may be the basis of such a confidential relationship, allowing Louis to argue that his negotiations with Hilda were far from arms length bargaining, because he placed great trust in Hilda, his lover, and that it would have been unseemly of him to pry for further information at the delicate moment of her announcing her pregnancy. The facts, however, show only that Hilda and Louis were sexually intimate on two consecutive days; they do not address whether Louis placed great trust in Hilda at the time of negotiations or was otherwise prevented by the nature of their relationship from protecting his interests as he would in a less personal bargain. Indeed, the fact that Hilda was also intimate with another man and that Louis was unaware of that suggests that their relationship could just as likely have been casual or short-lived.<sup>23</sup> In my view, without more facts regarding their relationship, half-truth is a better theory for misrepresentation than an independent duty to disclose all facts.<sup>24</sup>

**Materiality:** any form of misrepresentation on this topic would almost certainly be material, because, had he been aware of all the facts, Louis presumably would not have signed the agreement without further investigation of his paternity or without trying to persuade Alex to share the expenses.<sup>25</sup>

**Justifiable reliance:** Even if Hilda engaged in a form of misrepresentation of material fact, however, Louis might be denied relief if he was unjustified in his reliance on Hilda's suggestion that he was the only one who could have fathered her child. Hilda may argue that Louis' disappointment in his bargain stems from his

failure to make any independent inquiries about paternity, such as by demanding a prenatal test of paternity before signing or simply by asking Hilda questions about the possibility that someone else was the father. Courts sometimes excuse such a lack of diligence, however, in appropriate circumstances. For example, in light of the highly personal nature of Hilda's announcement and her intimate relations with Louis in the previous month, Louis might reasonably have viewed it as crass for him to demand that Hilda arrange for a prenatal test or wait until a blood test could be administered after birth. It's more difficult to defend his failure to simply ask Hilda whether anyone else could possibly be the father, but he might reasonably have believed that he wouldn't necessarily get a truthful answer to such a compromising question. On balance, I believe that Louis' reliance was justified.<sup>26</sup>

I conclude that Louis could rescind for Hilda's misrepresentation through half-truth.<sup>27</sup>

**Q2. Rescission for Misrepresentation:** B may rescind the contract if, during bargaining, S misrepresented a material fact on which B justifiably relied.<sup>28</sup> B will argue that S's silence about the death of her son in the house justifies rescission.<sup>29</sup>

**Duty to Disclose:** Deception justifying rescission normally must be in the form of active misconduct, such as a false statement, statement of

<sup>23</sup> More than half of this paragraph is devoted to arguing both sides of the question whether the facts give rise to a duty to disclose all material facts.

<sup>24</sup> This conclusion about half-truth is hedged a bit, but it clearly deserves a point because it takes a strategic stance that one theory of misrepresentation is stronger than the other. By comparing the level 3 theories, it also resolves the level 2 analysis of whether Hilda stated a misrepresentation.

<sup>25</sup> We are now back to level 2 analysis, looking into a box labeled "Material Fact?" that sits alongside the "Misrepresentation?" box. Its contents are tidy and generate no debate. The answer therefore simply identifies material fact as a premise that the parties would not dispute.

<sup>26</sup> Within this paragraph are all the elements of a full level 2 analysis: a quick statement of the issue and general rule, followed by arguments on the facts for both sides before reaching a conclusion. Notice that one facet of the rule, relating to excusing lack of diligence, appears in the middle of the fact analysis; the writer reasonably held that point back so that it could serve as a transition from one argument to another.

<sup>27</sup> At last we have returned to the level 1 IRAC. Having analyzed sub-issues at levels 2 and 3, the writer is now prepared to state an overall conclusion to the general issue stated at the beginning of the answer.

<sup>28</sup> If problem 1 and problem 2 appeared on the same exam, the exam writer probably could simply incorporate by reference legal standards that were stated earlier in the exam. I assume here, however, that students are treating each of the problems as independent practice exams, administered at different times.

<sup>29</sup> Although the first complete sentence of the paragraph summarizes the rule at a very general level, the entire paragraph works as a unit to help define the issue. The heading identifies a general category of grounds for rescission, and the final sentence identifies a factual context within which we will apply the rule.

half-truth, or active concealment. Bare nondisclosure of facts known to a party generally does not suffice absent a special relationship between the parties, and the facts provide no basis from which to infer such a relationship here. If the general rule applies, then B has no basis for relief.

On the other hand, a growing number of states have recognized a special duty to disclose material facts during bargaining for the sale of a home. The traditional rule of “buyer beware” is still embraced by courts and legislatures in some states, perhaps because it places healthy incentives on buyers to protect their own interests by making reasonable inquiries. Even without a duty to disclose, for example, B could have protected his interests by asking S whether the house had any hidden characteristics that might affect its value, forcing S to reveal the problem, to state an actionable falsehood, or to give an evasive response that might have put B on notice that further inquiry was warranted. Still, I believe that the trend requiring full disclosure of material facts is supported by sound policy considerations and will eventually be recognized universally within the United States. Although it does increase the number of cases in which courts will upset contracts, it does so justifiably in light of the huge economic undertaking assumed by a home buyer, and in light of the emotional and aesthetic ties between a home owner and the place where the buyer eats, sleeps, and carries on family life. I conclude, therefore, that S likely had a duty to disclose all material facts.<sup>30</sup>

Materiality: Even if S has a duty to disclose, S’s failure to disclose will not justify rescission unless the omitted fact is material and therefore would

<sup>30</sup> The second paragraph recognizes that the facts will support a finding of misrepresentation only if they justify departing from the general rule against imposing a duty to disclose; the third paragraph follows with a policy-rich debate on the relative merits of carving out an exception from the general rule for sales of homes. Because the problem is not set in any particular state, the students are free to couch their conclusions in terms of their preferred view or their prediction of which rule a court would choose if the question were one of first impression.

have affected whether B was interested in buying the house at a particular price. B will undoubtedly advance a market analysis that shows that buyers are generally reluctant to purchase a house in which someone died of a frightening disease, a reluctance that drives down the market value of the house to a significant degree. Using a purely economic analysis, such an effect on the home’s market value and potential resale price establishes materiality almost by definition. B may add that some of the considerations that give rise to a duty to disclose (such as the personal ties between a person and his home) suggest that even purely personal misgivings about a death in the home should be viewed as material. S may argue, however, that the circumstances of her son’s death are private and should not be subject to disclosure unless they affect the essential quality of the house, such as its habitability and durability. Of course, the son’s death has no physical effect on the house, and it arguably affects the house’s market value only as the result of a kind of ignorance and prejudice that a court should not condone. Although this is an extremely close and difficult question, I conclude for policy reasons that the circumstances of the death of S’s son in the house should not be viewed as a material fact that must be disclosed.<sup>31</sup>

I conclude that S would have a duty to disclose all material facts, but that the problem does not reveal any such failure justifying rescission.<sup>32</sup>

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<sup>31</sup> This paragraph sets forth a complete IRAC on the sub-issue of materiality.

<sup>32</sup> In this final sentence, the exam writer sums up the conclusions on the sub-issues, leading to an overall conclusion (no rescission for misrepresentation) on the general issue.