

## **Teaching Comprehensive Law Practice Skills Across the Law School Curriculum**

Susan Daicoff, Professor

Florida Coastal School of Law

AALS Workshop: A Search for Balance in the Whirlwind of Law School

Wednesday, January 4, 2006

### **Abstract:**

The “comprehensive law movement” is comprised of approximately ten emerging vectors, or alternative approaches to law and lawyering, which have steadily gained momentum since about 1990. This movement, and its vectors, intersect in an explicit focus on two goals: (a) optimizing human wellbeing in general; and (b) considering more than strictly legal rights, obligations, entitlements, and duties in resolving legal matters. The vectors include therapeutic jurisprudence, restorative justice, collaborative law, creative problem solving, preventive law, procedural justice, transformative mediation, holistic law, therapeutically-oriented preventive law, and problem solving courts (such as drug treatment courts and other rehabilitative court systems).

To accomplish its goals, the comprehensive law movement relies on knowledge gleaned from the social sciences about individuals’ wellbeing and satisfaction, human relations, intrapersonal and interpersonal dynamics, and mental health generally. It often explicitly incorporates this information in its analysis of legal matters, in an attempt to create more satisfactory solutions to legal problems, either substantively or procedurally, or both. While it is not necessarily humanitarian, it provides a good fit for lawyers and law students with humanitarian values. It may also provide a bit of balance to the law’s tendency to focus exclusively on rights and economic concerns when resolving legal matters.

To date, the vectors of the comprehensive law movement have primarily been offered in legal education in upper-level elective courses. This talk will discuss how the wisdom and processes of the comprehensive law vectors can be dispersed across the law school curriculum, particularly in the first year of law school. It will describe how typical law school fact patterns or appellate cases can be used, in required courses, to teach the vectors of the comprehensive law movement and thus provide a fuller, more balanced learning experience for the student (see two cases, below). Ideally, this teaching method would also include simulations (or role-play exercises) to allow students to develop intrapersonal and interpersonal skills, as well as the ability to analyze problems from a comprehensive perspective.

An early emphasis on comprehensive law practice, via an incorporation of the comprehensive law vectors’ information and processes, may thwart some of the socializing influences of law school that have been empirically linked to law student distress. It may also provide a more balanced development of skills, values, and competencies in law students, as they progress through law school, than is traditionally provided. It may, therefore, contribute to the amelioration of law student and lawyer distress generally.

Lawyers have at least two roles as attorneys -- that of the “counselor at law” and that of the dispute resolution professional – for which the comprehensive law approaches have great utility. It is possible that all lawyers would perform better in these two roles, if they utilized and incorporated the skills and knowledge of the comprehensive law movement’s vectors, in these endeavors. Thus, these skills have relevance to lawyer competence and, ultimately, to client and societal satisfaction with lawyers and legal processes.

### **Contracts Cases:**

#### **Nanakuli Paving and Rock Company v. Shell Oil Company, Inc. 664 F. 2d 772 (9<sup>th</sup> Cir. 1981)**

This case is sometimes included in contracts casebooks to illustrate a dispute over the interpretation of an express price term in a written contract. The opinion explains: “Appellant Nanakuli Paving and Rock Company (Nanakuli) initially filed this breach of contract action against appellee Shell Oil Company (Shell) in Hawaiian State Court in February, 1976. Nanakuli, the second largest asphaltic paving contractor in Hawaii, had bought all its asphalt requirements from 1963 to 1974 from Shell under two long-term supply contracts; its suit charged Shell with breach of the later 1969 contract. The jury returned a verdict of \$220,800 for Nanakuli on its first claim, which is that Shell breached the 1969 contract in January, 1974, by failing to price protect Nanakuli on 7200 tons of asphalt at the time Shell raised the price for asphalt from \$44 to \$76. Nanakuli's theory is that price-protection, as a usage of the asphaltic paving trade in Hawaii, was incorporated into the 1969 agreement between the parties, as demonstrated by the routine use of price protection by suppliers to that trade, and reinforced by the way in which Shell actually performed the 1969 contract up until 1974 [including price protection]. Price protection, appellant claims, required that Shell hold the price on the tonnage Nanakuli had already committed because Nanakuli had incorporated that price into bids put out to or contracts awarded by general contractors and government agencies.” This court reinstated “the jury verdict because . . . Shell breached its contract by failing to provide [price] protection for Nanakuli in 1974 [footnotes omitted].”

. . . .

“[T]he written contract provided for price to be ‘Shell's Posted Price at time of delivery,’ . . . The full agreement must be examined in light of the close, almost symbiotic relations between Shell and Nanakuli on the island of Oahu, whereby the expansion of Shell on the island was intimately connected to the business growth of Nanakuli.” The court noted: “the economics of Nanakuli's bid estimates, which included only two major materials, asphalt and aggregate; . . . realities of the Hawaiian marketplace in which all government agencies refused to include escalation clauses in contract awards and thus pavers would face tremendous losses on price increases if all their material suppliers did not routinely offer them price protection; and Shell's determination to build Nanakuli up to compete for those lucrative government contracts with the largest paver on the island, Hawaiian Bitumuls (H.B.), which was supplied by the only other asphalt company on the islands, Chevron, and which was routinely price protected on materials.”

It then explained the history of the parties’ relationship, before the suit: “Nanakuli, a division of Grace Brothers, Ltd., a Hawaiian corporation, is the smaller of the two major

paving contractors on the island of Oahu, the larger of the two being Hawaiian Bitumuls (H.B.). . . . Until 1964 or so, Nanakuli only got small paving jobs, such as service stations, driveways, and small subdivision streets; it was not in a position to compete with H.B. for government contracts for major roads, airports, and other large jobs. In the early sixties Nanakuli owner Walter Grace began to negotiate a mutually advantageous arrangement with Shell whereby Shell, which had a small market percentage and no asphalt terminals in Hawaii, would sign a long-term supply contract with Nanakuli that would commit Nanakuli to buy its asphalt requirements from Shell. On the other hand, Nanakuli would be helped to expand its paving business on Oahu through a guaranteed supply and a discount on its asphalt prices. Nanakuli's growth would expand the market for Shell's asphalt on the island, which would justify Shell's capital investment of a half a million dollars on Oahu. . . .”

Shell vice-presidents "saw Nanakuli's and Shell's relationship as that of partners. . . . As a symbol of that [close] relationship, Nanakuli painted its trucks "Shell white," placed Shell's logo on those trucks, chose the same orange as used by Shell for its own logo, and put the Shell logo on its stationery. . . . [the Shell-Nanakuli contract ran from 1969 to] July 1, 1976. Such long-term contracts were certainly unusual for Shell and this one was probably unique among Shell's customers, at least by 1974. . . . the Nanakuli contract was probably unique for Shell anywhere.”

The court explained that price protection was important in 1969 in “the Oahu asphaltic paving market: [because] the largest paving contracts were let by government agencies and none of the three levels of government-local, state, or federal-allowed escalation clauses for paving materials. If a paver bid at one price and another went into effect before the award was made, the paving company would lose a great deal of money, since it could not pass on increases to any government agency or to most general contractors. Extensive evidence was presented that, as a consequence, aggregate suppliers routinely price protected paving contractors in the 1960's and 1970's, as did the largest asphaltic supplier in Oahu, Chevron.”

But the real controversy is explained by relational factors between the companies; the court notes: “[t]wo important factors form the backdrop for the 1974 failure by Shell to price protect Nanakuli: the Arab oil embargo and a complete change of command and policy in Shell's asphalt management. . . . [T]he partial oil embargo, . . . shortened supplies and increased the price of petroleum, of which asphalt is a byproduct. The federal government imposed direct price controls on petroleum, but not on asphalt. . . . **The structural changes at Shell offered a possible explanation for why Shell in 1974 acted out of step with, not only the trade usage and commercially reasonable practices of all suppliers to the asphaltic paving trade on Oahu, but also with its previous agreement with, or at least treatment of, Nanakuli. . . . [A] big organizational change [occurred] at Shell in 1973 when asphalt sales were moved from the construction sales to the commercial sales department. In addition, by 1973 the top echelon of Shell's asphalt sales had retired. Lewis and Blee, who had negotiated the 1969 contract with Nanakuli, were both gone. Their duties were taken over by three men: Fuller in San Mateo, California, District Manager for**

**Shell Sales, Lawson, and Chippendale, who was Shell's regional asphalt manager in Houston. When the philosophy toward asphalt pricing changed, apparently no one was left who was knowledgeable about the peculiarities of the Hawaiian market or about Shell's long-time relations with Nanakuli or its 1969 agreement, beyond the printed contract [emphasis added].”**

Post-1973, Shell sent a letter to Nanakuli indicating that it would no longer offer price protection, but since the letter went to all Shell customers, Nanakuli believed the letter was not intended to apply to it, due to the special unwritten understanding between Shell and Nanakuli. When Shell discontinued its practice of price protecting Nanakuli after 1973, Nanakuli sued Shell for breach of contract, ultimately winning a jury verdict of \$220,800 in 1981, which is worth about \$500,000 in 2006 dollars.

The consequences of the breakdown in commercial, contractual relations between these two companies are clear. The questions are: what lawyering skills would have been necessary to assist these two companies in resolving this dispute prior to litigation and how would you implement them? This case provides an excellent setting for teaching comprehensive skills and approaches such as preventive law, communications skills, transformative mediation, and creative problem solving.

In contrast, another contracts vignette in KASTELY, POST & HOM'S CONTRACTING LAW 3D ED. 668-75 (Carolina Academic Press 2006) casebook provides an alternate approach, in an attempt to illustrate frustration of purpose. In their excerpt of Raymond Carver's 1993 story, "A Small Good Thing," a baker is in conflict with his customers, who have failed to pick up and pay for a specially-ordered birthday cake. When he learns that the child for whom the cake was intended has died, instead of insisting on contractual performance (i.e., payment for the cake), he apologizes to the parents, whom he has been anonymously badgering, even threatening, by phone for payment. The baker's apology is the turning point in the conflict between the parties; it leads to a sharing of common human emotions that in turn leads to mutual understanding and reconciliation. This vignette, interposed between appellate cases in which no resolution was accomplished without litigation, provides a vivid demonstration of the power of apology and open, honest communication.

### **Selected Resources:**

Daicoff's: <http://www.fcsi.edu/faculty/daicoff/law.htm>

SUSAN DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES (APA Books, 2004)

Therapeutic Jurisprudence: <http://www.therapeuticjurisprudence.org>;

Holistic Justice: <http://iahl.org>

Creative Problem Solving: <http://www.wic.org/orgs/mcgill.htm>

Collaborative Law (representative regional website):

<http://www.collaborativefamilylawfl.com/collaborative.html>

Preventive Law: <http://www.preventivelawyer.org/main/default.asp>

Problem Solving Courts: [http://www.communityjustice.org/ccj\\_cosca\\_resolution.html](http://www.communityjustice.org/ccj_cosca_resolution.html)

Restorative Justice: <http://ssw.che.umn.edu/rjp/>

Transformative Mediation: <http://www.transformativemediation.org/>

Comprehensive Law websites:

Renaissance Lawyer Organization: <http://www.renaissancelawyer.com/>

Steven Keeva's website: <http://transformingpractices.com/>

--All websites visited and accessible on 12/06/05.

© Susan Daicoff, 2005.