

The Challenge of Practical Legal Education: A Study in Real Estate Transactions

by Chad G. Asarch

Historically, lawyers in the United States were trained primarily by experienced counsel through a form of independent study or apprenticeship known as “reading law.”¹ In the late 1800s, though, legal education became a more formalized course of study focused on standard concepts and theory of the law.² Today, the traditional law school curriculum has focused on training students to understand the theoretical underpinnings of our legal system and to learn how to analyze legal problems, identify legal issues and salient facts, read and digest case law, and apply the relevant law to the circumstances of a particular fact scenario.³ Law schools also generally require students to master a minimum level of proficiency in legal research and writing.⁴ Until recently, established lawyers (often working in large law firms) took on the task of training newly minted lawyers in the actual practice of the law “through on-the-job training that was billed to clients.”⁵ Apart from clinics, which focused primarily on litigation skills, and externships, law schools on balance did not provide a significant number of opportunities for practical legal education.

The division of labor between law schools and law firms in educating new lawyers worked well enough for a long time. However, whether because of technological advances that have reduced the time needed for legal research and due diligence, the outsourcing trend for certain legal services, the continued impacts of the recession on the legal profession, or some combination of all of these factors, new law school graduates face a much gloomier job market today than was the case even just five years ago.⁶ At a 2013 managing partner roundtable, participant Natalie Hanlon-Leh from Faegre Baker Daniels, LLP commented that law firms now bemoan the dearth of practical skills carried by newly minted lawyers⁷ and actively seek lateral hires to avoid spending time training new associates (time for which many clients will no longer agree to pay as billable hours), especially when new associates very likely will switch jobs multiple times in their careers. In addition, Hanlon-Leh said that “clients don’t want to pay for first-year associates to be learning” anymore.⁸

Whatever the cause, the old model appears to be under serious strain. The decline in the number of law school applications has captured a fair amount of attention recently,⁹ with many commentators lamenting the challenges facing legal education.¹⁰ As a result, law schools now face the question of how to ensure that law students graduate with sufficient practical legal skills to make them competitive in the legal marketplace, without relying solely on clinics and externships. This article provides a detailed description of a real estate transactions course taught at the University of Colorado Law School (Colorado Law). This is one approach to practical legal education that is replicable, does not rely on legal clinics or externships, and ensures that law students acquire practical legal skills.

Inception

About three years ago, shortly after Phil Weiser became Dean of Colorado Law, he and I spoke about my presenting to students in the Construction and Real Estate Law Association (CRELA)¹¹ about the different roles I had played in real estate and the many options open to lawyers in the field. A longtime friend, Dean Weiser and I both clerked for the Tenth Circuit Court of Appeals. After clerking, I worked as a lawyer at a medium-sized firm, and then served as in-house counsel for a large real estate investment trust. Nine years ago, I left the practice of law and began my life as a real estate developer, focusing on affordable housing.

CRELA programs usually revolve around an interview of a guest by a student. I took a few liberties with the setup and, instead of beginning with a monologue and segueing into the interview, I asked the students if they had any questions for me. Immediately, about ten hands shot up. An hour-and-a-half later, there still appeared to be several questions that had not yet been asked.

It became clear to me that the students were eager for information about the realities of practicing law. One student asked quite simply that I describe what I do each day—both as a lawyer and as a developer. My attempt to successfully respond to the question



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and related follow-up queries occupied most of the discussion. Until that moment, though, I had never given thought to just how inadequately the traditional law school approach had prepared me for the actual practice of law. Having been involved on both the lawyer and the client side of numerous transactions, I found myself trying to educate the students about the difference between how lawyers and business professionals see the world and what a transactional lawyer actually does.

My dialogue with the students that day sparked the idea about how to teach the practice of law versus the theory of law. Dean Weiser encouraged me to contemplate the matter further. Soon after my presentation to the students, I had lunch with Tenth Circuit Court Judge Ebel. We discussed the difficult job search faced by new law school graduates as a result of the lingering impacts of the 2008 recession and technological progress. We also talked about the implications of those economic forces on the future of law schools. I shared my still nascent thoughts about modifying the way law schools teach. With the benefit of Judge Ebel's keen insight, the idea grew into the outline of a law school course.¹²

Around the time I presented my draft syllabus of a practical real estate transactions course, Dean Weiser and Colorado Law were undertaking an evaluation of the law school's approach to educating its students. Also, *The New York Times* had published an article about the lack of practical education in law school, and how law firms had begun holding three-day training sessions for first-year associates to introduce the new lawyers to the actual practice of law.¹³ Soon after, I accepted the offer to teach Real Estate Transactions at Colorado Law.

The Pedagogical Premise

In developing the course, I analyzed the actual work practicing lawyers undertake in representing a client in a real estate transaction. Among other tasks, real estate lawyers must be able to (1) draft a transaction document, and (2) identify potential changes to a transaction document prepared by counsel representing other parties to the transaction. To practice successfully, a real estate lawyer (or any transactional lawyer) must understand the mechanics of a transaction document and how the provisions of such a document fit together.

My goal became teaching students how to review and suggest revisions to actual real estate transaction documents (for example, a purchase and sale agreement for real property), as though they rep-

resented one of the parties—buyer or seller—to the transaction. To comment successfully on a transactional document, the students had to learn what the document is designed to achieve and how the document is structured to accomplish that objective. The students had to apply the concepts they learned in their property and contracts law classes (and to a lesser degree torts, civil procedure, and constitutional law) to identify the manner by which a transaction document allocates risk and memorializes the agreement of the parties.

I recalled that, during my law school experience, I never saw the entirety of a transaction document. Certainly, we all studied cases that recited the language from a transaction document relevant to the dispute decided by the court, but those glimpses of actual contractual provisions gave only a limited perspective of the entire transaction. As a result, I decided to build the course solely around documents used in actual real estate transactions. To teach students how to review and revise transaction documents, I structured the class so that they would have to practice reviewing and revising those documents as described below.

In the end, the course introduced students to the practice of real estate law by engaging in an intensive review of documents used in actual real estate transactions. The course not only explored the various issues involved in drafting and negotiating such documents and in structuring and closing a real estate transaction, but also required students to understand the practical skills involved in representing clients in such transactional work. The relationship between a law firm partner and a first-year associate offers an effective pedagogical paradigm for instructing students in the practice of transactional law. As a result, the course was designed to simulate the partner–associate dynamic purely to assist with the educational enterprise.

The First Class

Because so much of law school education is focused on litigation and case law, I wanted to introduce the students to the mechanics of how the provisions of a transaction document fit together through the prism of litigation. In that vein, before the semester began, I distributed to the students an actual, real life four-page letter of intent (LOI) for the purchase and sale of a large luxury apartment property that eventually led to costly litigation by the presumed buyer under the LOI (First Buyer). The LOI had been prepared and executed by the First Buyer and was signed by the Seller after the Seller made handwritten changes to the document. The Seller had initialed all of the hand-marked revisions. The students were expected to familiarize themselves with the LOI before the first class.

The students also received the following brief description of the facts surrounding the LOI:

A short time after Seller executed the LOI, Seller received an unsolicited offer to acquire the property from a different buyer (Second Buyer) at a price millions of dollars higher than the price set forth in the LOI. Soon after the receipt of the higher offer, the First Buyer, per the LOI, submitted the first draft of the purchase and sale agreement (First Buyer PSA) for the property to the Seller. However, based on Seller's extensive experience in closing hundreds of transactions in the preceding few years, Seller found the first draft to be overly friendly to the First Buyer in a manner that was inconsistent with prevailing market terms. Consequently, Seller sent a revised purchase and sale

agreement (Seller PSA) to the First Buyer that resembled Seller's typical form contract document for such transactions, which Seller had used successfully to close dozens of property sales in just the last few months. The First Buyer continued the negotiations by commenting on the Seller PSA, proposing a number of changes, some of which the Seller accepted, some of which the Seller accepted in modified form, and some of which the Seller rejected. The Seller circulated a redraft of the Seller PSA based on these changes, which the First Buyer further attempted to modify. Before the parties were able to reach a final agreement, the exclusivity period for negotiations under the LOI expired. The Seller then terminated the negotiations and sold the property to the Second Buyer at the higher price. The First Buyer sued for breach of contract.

I then asked the students to craft the basis of the First Buyer's lawsuit using the actual language of the LOI. The students had to figure out how the various provisions of the LOI fit together and then identify which obligations under the LOI (and contract law generally) the First Buyer would allege the Seller breached—for example, breach of the agreement to use the First Buyer PSA as the basis for negotiations, and breach of the duty of good faith and fair dealing (the Seller wanted to sell for the higher price). Once the students identified the potential arguments available to the First Buyer to claim breach of contract for the sale of the property to the Second Buyer, the students were asked to switch sides and compile the basis of the Seller's response to the First Buyer's lawsuit—for example, the First Buyer ratified the use of the Seller PSA by continuing negotiations on that basis, and the First Buyer breached the duty of good faith and fair dealing by submitting a draft First Buyer PSA that markedly varied from prevailing market terms.

After concluding the analysis of the varying legal arguments of the two parties, the students discussed what legal advice they would have given the Seller about how to proceed if they had been the Seller's counsel at the time the Seller received the higher offer from the Second Buyer. After discussing the risks, possible outcomes, and impacts of different behaviors and strategies, the students eventually collectively agreed on a course of action very similar to the approach actually taken by the Seller:

Seller took the risk that First Buyer would accept the draft Seller PSA as first proposed by Seller, in which case Seller would have to sell the property to First Buyer at the lower price, but gave itself the right to terminate the negotiations with First Buyer while still acting in good faith once First Buyer continued to negotiate the document in an attempt to secure terms more beneficial to First Buyer than generally available to buyers in the real estate market at that time.¹⁴

Reaching this conclusion required not just consideration of the legal issues involved, but also an analysis of how the parties to the transaction could be expected to behave and the level of risk the seller was willing to take to advance their position.

The remainder of the class was spent closely reading each provision of the LOI and discussing how the language could have been modified to improve the document. For each provision, the students had to identify ambiguities that existed in the draft and how the language could be modified to eliminate or at least minimize such ambiguities. For example, the exclusivity period for negotiations under the LOI expired twenty days after the execution of the LOI, but the date of the Seller's signature was left blank. We discussed how the students would advise the Seller in calculating the

date that the exclusivity period ended. Any termination by the Seller before that date, among other causes of action, could give rise to an anticipatory breach of contract claim from the First Buyer. We also discussed how the students would redraft the document to avoid any such possible ambiguity about the date of the start of the exclusivity period—for example, using a defined term in the document to identify an effective date of the document, regardless of the actual date of the signature of either party to the document, from which the exclusivity period would begin to run.

Toward the end of the class, I circulated a standard form LOI prepared by a law firm for general use by a client. We then reviewed the manner in which the document was drafted, comparing the LOI at issue in the lawsuit and the legal consequences/allocation of risk inherent in the language used in that form document. Though a simple document, the LOI proved a useful vehicle to help students begin to understand the interplay of the provisions of a transaction document and the extreme importance of the particularities, details, and language of such a document.

The Learning Process

At the conclusion of the first class,¹⁵ I circulated a draft PSA (Form PSA) for the acquisition of an apartment property.¹⁶ The Form PSA was drafted from the perspective of the seller of the property and included terms very favorable to the seller. The students were assigned homework to (1) review the sections of the Form PSA covering representations and warranties of the parties as though the students represented the buyer to the transaction, and (2) provide revisions in writing to the Form PSA to advance the interests of the buyer/their client. Specifically, students were asked to prepare a brief memorandum identifying the list of issues and possible recommended revisions to the relevant provisions of the assigned transactional document, as though the student were a first-year associate. They were asked to prepare suggested changes for review by the senior partner responsible for the transaction. The homework had to be turned in two days before the next class. I collected all of the homework and then aggregated the comments from the homework submissions into a single homework compilation document capturing all of the issues collectively raised by the students. Among the twenty-eight students, the comments in the homework tended to repeat the same issues. Further, in an effort to come as close as possible to approximating the partner-associate teaching dynamic, I took at least one comment from each individ-

ual student's homework so that each student would receive at least some individualized responses to their work.

In the subsequent class, we reviewed the compilation of their homework comments. I asked the students to identify whether they believed each comment was necessary and if it was beneficial or harmful to the buyer. Sometimes, students would make comments that initially seemed important or necessary to clarify some ambiguity, but on reflection actually harmed their client's interest. When the students were stumped, I reminded them to think through the issue by first articulating the seller's objective in drafting a specific provision of the Form PSA in a particular way.

The comments made by students in that first homework assignment, as I expected, showed promise, but still left much to be desired. For example, in commenting on a clause in the Form PSA that specified that the property would be sold from the seller to the buyer "AS IS," "WHERE IS," and "WITH ALL FAULTS," and that stipulated the buyer would not rely on any information provided by the seller, one student wrote:

Are there documents that the Seller will turn over that the Purchaser should be able to rely on, such as those that the Purchaser otherwise would not be able to replicate on its own? It would be advantageous to have required Seller to represent at least some of what it claims not to.

This comment, representative of what other students submitted, showed the student had grasped the concept at issue in the language. However, the student did not identify any specific sections of the as-is clause that the buyer would wish to change, nor did the student identify what kinds of documents the buyer would wish to rely on and what types of facts the buyer would most want the seller to represent as true. The comment also failed to catch the connection between the due diligence section of the Form PSA, which discussed the extent to which the seller was required to produce background (due diligence) materials about the property with the limitation in the as-is clause on the buyer's right to rely on those very materials.

I also reviewed a list of representations and warranties a buyer would want from a seller not included in the draft. For example, the students failed to note:

- the absence of the seller's representations regarding the authority of the seller to execute the contract and close on the transaction (the seller didn't need the consents of limited partners or shareholders)

- that the seller was not in bankruptcy
- that other than the mortgage, no other liens encumbered the property
- that the financial information provided by the seller to the buyer was true and correct (and the buyer could rely on that information)
- that the property was not subject to pending or threatened litigation, among other standard clauses found in the market.

None of the students included these additional concepts in their homework. The students hadn't yet figured out the need to comment on what is missing in a draft document rather than merely suggesting changes to the language included in the document.

This process was repeated throughout the remainder of the semester. Students were asked to comment on a different section of the Form PSA, such as covenants, title, closing, due diligence, conditions to close, remedies, casualty, and condemnation. I aggregated the comments and reviewed them in class against the underlying provisions of the Form PSA. In addition, I circulated relevant ancillary documents to the students that related to the underlying section of the Form PSA we were reviewing. For example, when reviewing the section of the Form PSA on title and title objections, we also reviewed in class an actual American Land Title Association survey of real property, an initial title insurance commitment for that property, a title objection letter from the buyer of that property, and a revised title insurance commitment based on the resolution of items identified in the title objection letter. When reviewing the section of the Form PSA covering the closing, we also reviewed an actual settlement/closing statement (and the attendant proration of income and expenses, interest calculations, and property tax debits and credits). Once we completed all the sections of the Form PSA, the students also reviewed various real estate transaction documents, including a commercial lease and construction loan documents.

Evaluating What They Learned: The Final Exam and Grading

To evaluate what the students had learned, I took an actual purchase and sale agreement my company had used as the buyer in a recent transaction, but modified the document to include mistakes and some key variances from the terms of the deal agreed to by the buyer and the seller. The draft agreement, which the students were to presume was prepared by the buyer, was buyer-friendly, but not so much so that it would be wholly unacceptable to a reasonable seller (unlike the situation at issue with the LOI discussed in the first class).

The students also received a chain of e-mails from the buyer's counsel to the buyer; from the buyer to the seller; from the seller to seller's counsel, a partner at a law firm; and finally from the partner to an associate in that firm. This e-mail chain illustrated how the draft agreement was forwarded from the buyer's counsel ultimately to the seller and seller's counsel. The e-mail chain also contained the necessary information for students to identify both the business terms agreed to by the seller and the buyer and the motivations of the buyer and the seller. Each student was asked to respond to the partner's e-mail as though he or she were the associate receiving the e-mail from the partner.

The e-mail asked the associate to "review and comment on the . . . draft purchase and sale agreement" and provide those com-

ments to the partner. The e-mail requested that the associate include:

all of the issues you identify in the document, but also please note which issues you think are the major/most significant issues that actually need to get raised with the client (the issues you think most need to be revised in the draft agreement to protect our client/conform to the terms of the deal) and note which issues you think are more minor that do not need to be so raised. . . . Please draft your comments in such a manner that they are in a form ready to go out to the client subject only to my edits and revisions.¹⁷

The students had one week to complete the assignment.

Because all of the homework during the semester regarding the Form PSA required the students to act as the buyer's counsel, forcing the students to change sides and represent the seller seemed an excellent way to test the skills they had learned. The students had to take what they learned about the interests and motivations of buyers and sellers generally and apply that to a situation they had not yet experienced.

The results exceeded my expectations. I did not expect any first- or second-year associate at a law firm to even understand how to perform the task, let alone identify a significant portion of the issues in the document. However, the average student identified about 70% of the major issues and about 30% of the total number of issues in the document. The top students identified all of the major issues and about 50% of the total issues. In addition, the students' ability to concisely identify the warranted revisions to the agreement had improved markedly from the first homework assignment they had completed. For example, in her review of the representations and warranties section of the contract, one student wrote:

Insert language that Seller is not responsible to Purchaser for defects, errors, or omissions, or any condition affecting the property. Purchaser releases Seller from and irrevocably waives right to any and all claims and causes of action currently existing or in the future with respect to any and all Losses arising from any defects, errors, omissions, or other conditions affecting the property. Insert language that other than Seller's Representations, Purchaser has not relied on any representation or warranty made by Seller or any Representative of Seller in connection with this Agreement and the acquisition of the Property. Insert "AS-IS" clause: **Except for Seller's Representations, the property is expressly purchased and sold "AS IS," "WHERE IS" and "WITH ALL FAULTS."** [MAJOR]

In both the first and second year of teaching the course, the progress of the students from the first homework assignment to the final exam was self-evident.¹⁸

Finally, in the last class of the semester, I gave the students a list of all of the issues I would have identified in the draft agreement. I highlighted those I considered most important. Showing them what they missed while the exam was fresh in their minds completed the learning process.

Conclusion

My experience demonstrates that it is possible to teach law students practical/applied lawyering skills in a classroom (non-clinical/non-internship) setting. It also shows that the students crave such instruction. Not every student excelled at the "practice" of real estate transaction law, but many did (not every lawyer is meant to

be a transactional lawyer and not every law student will make a good lawyer). Also, it would have been exponentially more difficult to teach the practical skills of lawyering if the students had not taken the traditional first-year set of courses.¹⁹

I strongly believe that law schools need to retain their traditional core pedagogical competency. Formalized law school education remains the most efficient and effective way to teach students the basic fundamental components of the law. However, to prepare students for their lives as lawyers after graduation, law schools need to teach the skills of lawyering in addition to the theory of the law. This may be necessary for the survival of law schools in general. The legal education system needs to fuse the apprenticeship and classroom/lecture models. Regardless of what future law school classes might look like, law professors can help their students succeed by incorporating real legal documents into their course materials. Students in property law should see a title policy and understand what purpose it serves when learning about publicly recording real estate documents; students in contract law should see a actual contract and identify how the document handles damages and other basic contract law issues. Finally, teaching law students has been a great privilege and joy. Those who do it full time will always have my unyielding admiration.

Notes

1. See generally McManis, "The History of First Century American Legal Education: A Revisionist Perspective," 3 *Washington University L.Rev.* 59 (1981).

2. *Id.*

3. *Id.*

4. See generally Furnish, "The Progression of Legal Education Models: Everything Old is New Again," Northeastern University School of Law, Inaugural National Symposium on Experiential Education in Law (Oct. 26–28, 2012).

5. Brenton, "Law schools implement corporate product development methodologies to produce 'practice ready' lawyers," *Inside Counsel* 51 (Jan. 2014).

6. See Wright, "The Job Market for Lawyers: Side Work on the Rise Amid Continuing Glut of New Grads," *Forbes* (Jan. 10, 2014).

7. "Managing Partner Roundtable," *Law Week Colorado* 15 (Dec. 23, 2013). ("The legal education system equally has to reform. Schools need to be focused on graduating students who have practical skills.")

8. *Id.*

9. See Wright, *supra* note 6.

10. See Brenton, *supra* note 5.

11. Established in 2004, CRELA is a student organization that, broadly defined, seeks to encourage and enable law students to explore the construction and real estate industries. CRELA members work to inform students on employment and training opportunities in the construction and real estate industries and provide events that help students network and learn from practicing lawyers in the field. See www.colorado.edu/law/students/organizations.

12. I also am deeply indebted to my business partner, Hud Karshmer, who patiently listened to my ideas and, using information acquired from having earned a Masters of Business Administration, was able to edify me about the academic approach taken by business schools. His advice proved critical in formulating the course, and the class mirrored many of the educational methods he described from his business school curriculum.

13. Segal, "What They Don't Teach Law Students: Lawyering," *The New York Times* A1 (Nov. 19, 2011).

14. This analysis requires certain emotional intelligence to evaluate the likely ways in which First Buyer would respond (*e.g.*, First Buyer was invested in the draft document; buyers generally never sign the first draft of a document; buyers generally rely on counsel to advise of risks in the

document and on counsel's recommended changes to the document; lawyers tend to want to advocate for their client and make changes in their favor). Good lawyers must be good at reading people. To be effective at negotiating, a lawyer has to understand what the lawyer's client may be thinking and what the other side may be thinking, and why. This became a constant theme throughout the semester.

15. In my second year of teaching the course, based on feedback from the students from my first year, I changed the syllabus slightly by dedicating a two-and-a-half-hour class period to the review of an underwriting spreadsheet prepared by a buyer in evaluating the acquisition of an apartment property (including estimated acquisition costs, anticipated net operating income based on revenue and expenses at the property, cost of debt, and cost of/return on equity). Law students generally have little under-

standing of the economics of a real estate deal. Those economics, however, are crucial to ensuring the transactional document protects the client's understanding of the deal.

16. This was a different document than the one being negotiated by the First Buyer and Seller at issue in the first class.

17. I also gave the students a word limit, so they had to think carefully about what they said and how they said it.

18. Even my nonlawyer assistant, Kristina Hesketh, who did an excellent job translating my scribbles into the homework compilation document, noticed the dramatic progress in student homework responses.

19. In fact, contracts, property, torts, and civil procedure were prerequisites to this class. ■