

# INTEGRATING DOCTRINE AND SKILLS IN FIRST-YEAR COURSES: A TRANSACTIONAL ATTORNEY'S PERSPECTIVE

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## INTRODUCTION

Todd D. Rakoff, Martha Minow,<sup>1</sup> and Michael A. Mogill<sup>2</sup> are among the critics of traditional legal education taught from the Langdellian approach of analyzing appellate court opinions.<sup>3</sup> Calls for reform of legal education by both the MacCrate Report<sup>4</sup> and the Carnegie Foundation,<sup>5</sup> in addition to those who urge specific initiatives, have followed. Preparation of students for lawyering, rather than a career as a law professor, has gained the attention of faculty planning and curriculum committees. The increase in availability of clinical/live client experience for every student is consistent with achieving this reform goal.<sup>6</sup>

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1. Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 Vand. L. Rev. 597, 603–605 (2007).

2. Michael A. Mogill, *Dialing for Discourse: The Search for the “Ever After”*, 36 Williamette L. Rev. 1, 1–3 (2000).

3. See also Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Material for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrate Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 Transactions 9, 18–22 (2009).

4. ABA Sec. of Leg. Educ. & Admis. to B., *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (ABA 1992) [hereinafter *MacCrate Report*].

5. William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007) [hereinafter *Carnegie Report*].

6. Erwin Chemerinsky, *Radical Proposals to Reform Legal Pedagogy: Rethinking Legal Education*, 43 Harv. Civ. Rights-Civ. Liberties L. Rev. 595, 596 (2008).

Moreover, recognition that lawyering for many law graduates will be on the business side advising clients about legal risks and how to achieve business goals has led to a new focus on transactional practice and transactional law. Tina L. Stark urges legal educators to respond to this recognition by developing what she has termed an “integrated transactional curriculum”<sup>7</sup> to prepare law students for transactional practice, much like the integrated litigation curriculum that exists at many law schools. Yet, students need to become aware of the transactional/problem solving/preventive<sup>8</sup> approach to lawyering and its differences from a dispute resolution approach early in their law study. For students to realize the significance of transactional practice and the likelihood that they will work as transactional lawyers, rather than as litigators, they need to encounter the model in their first semester or at least during their first year of law school.<sup>9</sup>

Part I of this Article discusses the progress in legal education developing a transactional curriculum and what is needed to support it. What will it look like? What changes are needed in course materials and teaching approaches? Part II of this Article explains why law students should learn about transactional practice, law, and skills in their first year. Part III of this Article provides two examples of how the Author integrates transactions into her first-semester Property course.

## I. PROGRESS IN DEVELOPING A TRANSACTIONAL LEGAL EDUCATION

### A. *An Integrated Transactional Curriculum*

In the integrated litigation curriculum, instructors introduce the basics in first-year courses (e.g., Civil Procedure and Lawyering Skills courses that require students to prepare memoranda of law and appellate briefs). Law schools offer more sophisticated litigation courses in the second- and third-year courses, either as

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7. Tina Stark includes this idea in her outline for the Workshop on Transactional Law, presented at the mid-year AALS conference on June 10, 2009 (copy on file with Author).

8. See R. Wilson Freyermuth et al., *Property and Lawyering*, at v (2d ed., Thomson/West 2006).

9. Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Client*, 55 Clev. St. L. Rev. 59, 100 (2007).

required courses (e.g., Evidence and Trial Advocacy) or as electives (e.g., Pre-trial Practice). The same integrated transactional features can be incorporated in a curriculum directed at or designed for students who plan careers as transactional attorneys and for those who plan to be part of a business group, rather than working in a traditional law firm setting as an attorney. Thus, Property and Contracts courses should include an introduction to both the substantive law (e.g., Bona Fide Purchaser, Statute of Frauds) as well as an introduction to the transactional skills of interviewing, negotiating, and drafting. Second- and third-year courses would build on that learning. For example, Real Estate Transactions courses bring together doctrine from both Property and Contracts when considering the sale of real estate. This Real Estate Transactions course introduces students to careful review of legal documents like the sales contract and the mortgage as preparation for negotiations and final drafting. A Workshop on Negotiating and Drafting in Commercial Real Estate or a course in Real Estate Development would complete the integrated transactional curriculum, using real estate as the industry.<sup>10</sup>

The University of Tennessee College of Law, Northwestern University School of Law, and Loyola University Chicago School of Law have made transactional/entrepreneur clinics available to add the live client experience.<sup>11</sup> The John Marshall Law School offers placements in private firms and corporations to help students learn what the career of the transactional attorney is like and to reinforce the idea that a transactional lawyer will make use of the specialized transactional curriculum.<sup>12</sup> Lawyering skills programs now include legal writing of the type that would be used in a transactional practice, including the drafting of transactional documents;<sup>13</sup> however, those courses are offered or

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10. Additionally, building upon the Contracts course, a Corporation course would follow a similar approach. An Advanced Business Planning course can teach skills required for drafting and advising clients in addition to substantive law.

11. For example, the University of Tennessee Law School (<http://www.law.utk.edu/ccel/>), Northwestern University (<http://www.law.northwestern.edu/legalclinic/sboc/about/index.html>), and Loyola University (Chicago) (<http://www.luc.edu/law/academics/special/center/business.clinical.html>) have Entrepreneurial Clinics.

12. For example, The John Marshall Law School offers a Legal Practicum in Commercial Real Estate course for credit. This is an externship in a private law office or business. It involves working with transactions. Supervision by an experienced transactional attorney on real estate deals is a very different experience from the typical internship in a government or non-profit office where litigation is emphasized.

13. For example, the Lawyering skills curriculum at The John Marshall Law School

required in the second and third years. Finally, Karl Okamoto has developed a national competition in transactions.<sup>14</sup> These courses provide students with opportunities to become more familiar with transactional practice and to practice transactional skills.

### B. *Appropriate Course Materials*

Along with the new perspective has come new course materials including documents used in practice,<sup>15</sup> a casebook on Business Law consisting entirely of case studies,<sup>16</sup> a professional responsibility casebook<sup>17</sup> that splits attention between transactional and litigation lawyering, and a proposal for using legal case studies, similar to the course materials used in business schools and transactions-oriented electives.<sup>18</sup> Nevertheless, a recent study titled "The Nature of the Property Curriculum in ABA-Approved Schools and its Place in Real Estate Practice"<sup>19</sup> consisted of a study that analyzed only the allocation of time for standardized or traditional topics and study methods, including course credit allocated by different law schools and topic coverage at various institutions. The study focused on the first-year Property course. Although the study polled law professors, it did not solicit information about a transactional approach in teaching or incorporation of transactional skills within these courses.

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requires each student to complete one of an array of drafting classes. John Marshall L. Sch., *Lawyering Skills Program*, <http://www.jmls.edu/academics/jd/lawyeringskills.shtml> (accessed June 5, 2011).

14. See e.g. Ryan Bolger, *Novel Law School Competition Tests Deal-Making Skills*, Leg. Intelligencer (Mar. 8, 2010) (discussing a transactional lawyering competition designed by Karl Okamoto to mirror litigation competitions).

15. See e.g. Steven Bender et al., *Modern Real Estate Finance and Land Transfer: A Transactional Approach* (4th ed., Aspen Publishers 2008); see also Daniel B. Bogart & Celeste M. Hammond, *Commercial Leasing: A Transactional Primer* (Carolina Academic Press 2007) (using the ABA office form lease to provide the structure of the text; the book covers one lease provision per chapter explaining motivations of the landlord, tenant, and lender and the substantive law while providing transactional exercises).

16. D. Gordon Smith & Cynthia A. Williams, *Business Organizations: Cases, Problems and Case Studies* (2d ed., Aspen Publishers 2008).

17. John S. Dzienkowski & Amon Burton, *Ethical Dilemmas in the Practice of Law: Case Studies and Problems* (Thomson/West 2006).

18. Hammond, *supra* n. 3.

19. Joanne Martin, *The Nature of the Property Curriculum in ABA-Approved Schools and Its Place in Real Estate Practice*, 44 Real Prop. Tr. & Est. L.J. 385 (2009).

C. *Association of American Law Schools—New Sections  
Focusing on Transactions*

An emphasis on the transactional perspective of lawyering is reflected in the creation of the Real Estate Transactions Section of the Association of American Law Schools (AALS), the holding of a noteworthy Workshop on Transactions Law in spring 2009, and the regular conference on transactional lawyering at Emory University Law School under the direction of Tina L. Stark. A proposal to create a broader committee, Transactions, was on the agenda for the 2011 AALS Annual Meeting.<sup>20</sup>

II. STUDENTS SHOULD LEARN ABOUT TRANSACTIONAL  
PRACTICE, LAW, AND SKILLS IN THE FIRST YEAR

The majority response to the criticism of traditional legal education has been to change the approaches to learning for second- and third-year course study only. I have seen the results of law students not having had early exposure to transactions. When I teach the Real Estate Transactions course, a second-year elective that continues the introduction of Property law doctrine (especially when that course carries only four credits), Contracts, and an introduction to what happens in the ordinary real estate transaction, oftentimes using a residential house buy/sell case study, the failure of the first-year curriculum and teaching to prepare students adequately is clear. Students are frightened to deal with actual documents, convinced that the only learning materials are appellate opinions. In comparison, my LL.M. in Real Estate Law students at John Marshall “get it.” Most of my LL.M. students are attorneys who have returned to specialize in commercial real estate law/practice. They are ready to learn doctrine in the context of lawyering and of the business of their clients, which the LL.M. program emphasizes. They are well aware that their JD education has not prepared them for transactional practice.<sup>21</sup>

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20. See generally Assoc. of Am. L. Schs., *Core Educational Values: Guideposts for the Pursuit of Excellence in Challenging Times* (2011) (available at <http://www.aals.org/am2011/brochure.pdf>).

21. For an overview of the curriculum and goals to the program see the webpage of Center for Real Estate Law at John Marshall Law School. John Marshall L. Sch., *Center for Real Estate Law*, [www.jmls.edu/academics/re\\_law?index.shtml](http://www.jmls.edu/academics/re_law?index.shtml) (accessed June 5, 2011).

### III. INTEGRATING TRANSACTIONS INTO FIRST-YEAR PROPERTY

This Article is a report of my experience integrating, in the first-semester Property course, property law doctrine with both the transactional lawyering perspective and transactional skills. I write from my personal experience and the commentary of others that “students crave the work of lawyers.” Notably, the emphasis on reading and briefing appellate cases misrepresents the work of most lawyers. Most lawyers now specialize in a field of law for which they soon know the substantive law and keep current through continuing legal education seminars and other secondary sources written by lawyers in the field for lawyers, rather than for judges. These lawyers do not spend much time reading opinions.<sup>22</sup> In fact, most lawyers never litigate. Instead, they function as planners and problem solvers in supporting their clients’ business goals.

#### A. *First Exercise: Interviewing Clients and Negotiating the Terms of a Residential Lease*

My Property class is divided up into groups—the client is represented by an attorney for the purposes of the initial fact-finding interview, as well as subsequent interviews during the negotiations for a lease of an apartment unit. Each client is either a residential landlord or tenant.

By interviewing a client, students experience talking with a “client” to solicit and understand the client’s goals. Then, students who play the attorney roles negotiate terms of the agreement. Always the attorney students negotiate without agreeing to any term. The attorney students communicate what they have been able to negotiate and seek direction from their clients. Only after two negotiation sessions and two interviewing sessions may the attorneys agree to any terms, subject to client approval. A fishbowl involving the entire class provides feedback to students about their success and serves as a means for me to assess much of the learning of the course.

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22. See e.g. Amy Deen Westbrook, *Learning from Wall Street: A Venture in Transactional Legal Education*, 27 *Quinnipiac L. Rev.* 227, 261 (2009) (concluding that “the Langdellian model is particularly out of touch for the simple reason that transactional lawyers rarely have much to do with appellate cases”).

The first exercise I use provides my students an experience interviewing clients about their goals in renting an apartment and then negotiating several relevant terms. I conduct the in-class simulation during the ninth week of a fourteen-week semester. Before that two-hour class session, students will have studied basic landlord-tenant law, including the reform in residential leasing relationships since the 1970s. I present the traditional view of the lease as a conveyance of an interest in land with doctrine of *caveat lessee* surrounding the transaction. The traditional treatment of covenants in the lease whether express (from promise of landlord to make repairs to promise of tenant not to commit waste) or implied (tenant duty to pay rent; landlord covenant of quiet enjoyment) are independent of one another. This is in sharp contrast to the dependent covenant doctrine that students are learning in Contracts, under which the breach by one party permits non-performance by the other.

I explain the paradigm shift from a Property to a Contracts perspective that developed in the last forty years, especially for residential leases. Reform features include the warranty of habitability; illegal lease doctrine that excuses performance for the tenant; and recognition of equitable remedies for the tenant of rent abatement and repair and deduct self-help, which initially were changes reflected in new precedents and later in statutes and ordinances.<sup>23</sup> Importantly, the shift to a Contracts perspective treats the covenants as dependent and may also bring in traditional contracts requirements like the mitigation of damages obligation of the landlord.<sup>24</sup> Three theories explain this paradigm shift: (1) as a change in public policy reflecting the needs of urban tenants seeking shelter compared with the common law tenants who leased agrarian real estate primarily for producing income; (2) the history of the civil rights movement, which pushed the agenda for improved housing, especially for low-income renters; and (3) the contracts thinking of Richard Posner that the courts may have a role in changing the default rules to fill gaps in negotiated leases with remedies that would have been economically

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23. For example, see the Chicago Residential Landlord and Tenant Ordinance that is modeled on the Uniform Residential Landlord and Tenant Act. City of Chi., Mun. Code, tit. 5, ch. 12 (2010) (available at <http://www.chicityclerk.com/tenantsVRSlandlords.php>).

24. This is important when a tenant leaves or is evicted by landlord and the lease is not terminated. Does the landlord have a duty to mitigate damages?

efficient from the perspective of the parties.<sup>25</sup> I provide my Property students with the substantive doctrine that applies to residential leasing transactions.

### INTERVIEWING

Instead of bringing in actors or non-students to serve as the tenant and landlord, I assign a student to each role, as well as to the roles of attorneys for the clients. It is just as important for the students to get the feel for being a client as for being the attorney. Once the students in the role of attorney understand what their respective tenant and landlord clients *need* versus what they *want*, the attorneys proceed to negotiate several provisions in the lease, always checking with their clients before committing to a specific term. I divide the often large class into groups consisting of a renter, a landlord, and two attorneys representing each party in the transaction—a total of six students in each group. In a typical class of eighty students, I end up with about fifteen groups. The number of groups is important because I must make arrangements to have each group work in a secluded location within the law school building, no easy task in a facility that is often full.

I hand out the basic lease ahead of that class session and require students to be familiar with the provisions. They will need to negotiate several terms, including the starting date of the lease, which is among the “fill in the blank” parts of that form. Whether the landlord is willing to waive the no-dog provision of the lease and to accept the tenant, though she is a single parent with two young children who relies on child support for her economic needs, are issues set up in the scripts for the tenant and the landlord. In preparation for this class, I assign basic published materials on client interviewing in the transactional context and even more material about negotiating a “deal,” rather than negotiating settlement of a lawsuit—very different animals.<sup>26</sup> I use materials from two upper-level real estate casebooks

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25. See Richard A. Posner, *Economic Analysis of Law* 118–120 (8th ed., Aspen Publishers 2011).

26. The failure of ABA Model Rules to address the ethical rules that apply when an attorney is negotiating parts of a transaction, instead of settlement is one of my pet peeves. See ABA Sec. of Litig., *Ethical Guidelines for Settlement Negotiations*, <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf> (Aug. 2002).

that I co-authored, which have a transactional perspective and include chapters on negotiations and client interviewing.<sup>27</sup>

I hand out the scripts to the students/clients as soon as they arrive. They have ten minutes or so to read and understand; that period seems adequate for the limited scope of the exercise. Those students in the role of attorney are placed into firms of two attorneys for each party. As the clients become familiar with their facts, the attorneys who are to collaborate in representing one of the clients have a chance to meet. In a large first-semester class, this is important to their appreciation of collaborating as attorneys. Especially in transactional practice, a group of attorneys with different specialties will work together to advise the client (*e.g.*, real estate transactions attorneys work with finance attorneys, tax attorneys, and even securities attorneys to advise a client considering securitizing real estate assets). Of course, teaching this part of lawyering in a first-semester course is limited in scope; however, it should be one of the building blocks upon which more advanced transactional courses build.

I often use the beginning date of the tenancy, rent, and term of the lease as aspects that will be the focus of both the interview of the client and the negotiations. Questions asked of the client in the interviewing segment require imagination from those doing that task. The clients have been told neither to just recite the scripts nor to hide the ball during the interview. Where are the premises located? Is the tenant renting a single family house, a condominium, or an apartment? If the premises are an apartment, how many apartments are in the building? Does the landlord live in the building? The answers to these questions trigger what law is applicable: traditional common law, state law, or the Chicago Residential Landlord and Tenant Ordinance (RLTO). Other questions posed to the client provide the attorneys with an idea of the client's objectives and their relative importance. How important is it to the tenant to move in on a particular date? What is the expected rent? Do any rules for living in the building affect the tenant? Has the landlord promised to do any decorating or repairs before the move-in?

Questions for the landlord client include as follows: Who is currently occupying the premises? How cooperative have the cur-

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27. Bender et al., *supra* n. 15; Bogart & Hammond, *supra* n. 15.

rent occupants been? What rent does the landlord anticipate from this tenant? How long is the lease? Do any aspects of the proposed tenant's rental cause concern? How long has the landlord owned the property?

If the interviews are successful, the attorneys will discover issues about whether the rent of \$800 per month will or will not include heat; whether the tenant will be given an option to extend the lease; and whether the landlord, who has a strong no-pets rule, will waive that policy for this tenant. Usually, only some of those issues will be apparent after the initial client-attorney interview. Sometimes, in subsequent interviewing after the negotiations begin, the other issues will become known because one of the clients expresses it as a "need" in the transaction. The variety of issues identified during the interviewing process is consistent with the negotiation results, which is eye-opening for students!

### *NEGOTIATING*

The student law firms negotiate directly with each other with no clients present. This seems more like real life, in which the absence of the clients provides attorneys with the excuse to check with the client before agreeing to a term of an agreement. This also reflects the difference between negotiating the settlement of a dispute, in which a dollar amount is often the only or at least the most important aspect, and negotiating the terms of a transactional agreement. In negotiating the terms of a transactional agreement, numerous items may be relevant. The way that a student/lawyer handles one provision may affect resolution of other terms, including the basic decision of clients to proceed with the deal at all.

The negotiations part of the exercise will be in several parts. A first negotiating session is ten minutes, followed by a brief meeting with the client to determine the latter's reaction to any proposal. A time for the attorneys to confer about their strategy for the next meeting in the negotiation is important, lest the attorney students get too caught up in the emotions of interacting with their colleagues. That can trigger unrealistic competitiveness and showing off. A second session of negotiating, by which time the clients should be more invested in their characters than they had been initially and by which time the attorneys should understand their clients' goals more precisely, will proceed for a

second ten-minute period. Then, again the attorneys return to their clients for reaction to what has come out of the negotiations. An important lesson for all involved is that the parties may *not* reach an agreement. This depends to some extent upon how much the tenant or landlord really needs to do the deal. Either or both parties may be in situations with many other opportunities, and one or both clients may decide not to go forward in the leasing transaction with this particular party.

### *FISHBOWL*

The final part of class involves teams of clients and their attorneys coming up in front of the entire class. For some of the groups of six (landlord, tenant, four attorneys), I ask one of the attorneys to report the final agreement that was reached. The clients often are surprised at that unrevealed outcome and may remark that the attorneys did not fully understand their needs. The clients conclude that they may not have communicated well. For other groups, I ask one of the clients to share his or her perceptions about how well the attorneys listened and reflected the directions in coming up with an agreement. In these instances, I am also curious about any insights that students received from playing the role of client. I track the negotiation results for each group. Often, those results are strikingly different from one another! With the same facts for clients, what the attorneys have achieved may vary greatly.

#### *B. Second Exercise: Reviewing Conditions, Covenants, and Restrictions (CC&Rs)<sup>28</sup> in Shared Ownership Community; Interviewing Client; Drafting Letter of Advice to Prospective Buyer*

I introduce this exercise near the end of the semester—class twenty-five out of twenty-eight. It is based upon two parts of the course: non-possessory land use arrangements (easements and covenants running with the land) and government taking and regulation of land (power of eminent domain and regulation like zoning). Property is only a four-credit course at John Marshall, yet, the faculty believe it is important to cover much of the traditional property doctrine both for the purpose of supporting elec-

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28. An example of a typical CC&Rs is found in the Declaration of Condominium, which sets up the relationship between owners.

tive courses and for preparing the students to pass the bar exam. Thus, I spend a lot of time in the property course examining common law doctrine and what is the majority rule on various issues (because almost all the law here has a state jurisdiction basis). I searched for a way to integrate the learning for these two final sections of the course. I believe that students can learn this relatively difficult doctrine both for servitudes and for government regulation of land in a short time if they can see how the rules come up in a real-life context.

### GROUNDWORK

We start with a video I made several years ago when my husband and I made a trip to The Sea Ranch<sup>29</sup> in Northern California following an AALS meeting. I bring this real estate site to life by showing the fifteen-minute video. It shows a common interest community stretching along ten miles of the coast at the northwest corner of Sonoma County. It includes 3,500 acres and has 1,634 owners of homes plus sixty-five vacant lots. Fifty percent of the area is devoted to common areas that are kept free from development. Many of the homes that have been built there have won architectural awards. I cover the history of the site as a place for the Pomo Indians. I describe the sale of what had been the Del Mar Ranch to Oceanic Properties in 1963.<sup>30</sup> The video shows the design restrictions on buildings that are prescribed by the CC&Rs, rather than by governmental regulation.

This video links the section on servitudes with that on government acquisition of private property and government regulation of land. Like many developers of shared homeowner developments, Oceanic Properties drafted and recorded a lengthy document containing the CC&Rs, which bind not only the first buyers of lots in the development but also subsequent owners under legal rules applicable to servitudes. At the same time the deal was being completed and the developer was finishing plans for

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29. See The Sea Ranch, <http://tsra.org/> (accessed June 5, 2011) (defining the property objectives); Wikipedia, *The Sea Ranch, California*, [http://en.wikipedia.org/wiki/Sea\\_Ranch,\\_California](http://en.wikipedia.org/wiki/Sea_Ranch,_California) (accessed June 5, 2011) (describing briefly The Sea Ranch).

30. In 2004 the video, "*Making Servitudes, Takings and Public Policy More 'Real' for First Year Property Students: A Video Visit to The Sea Ranch, A Planned Community in Northern California*," was selected for the AALS Conference on Teaching Property Law for the 21st Century, June 15–18, 2010.

the community, California passed the California Coastal Zone Conservation Act of 1972. It established the Coastal Commission, a body charged with protection of coastal resources, which it did very broadly for The Sea Ranch. A seven-year moratorium on development passed while the Coastal Commission, the developers, and The Sea Ranch Homeowners Association reached an agreement, reflected in legislation known as the Baine Bill.<sup>31</sup> Among the results was a payment of \$500,000 to The Sea Ranch for five public access easements across The Sea Ranch property to publicly owned tidelands.<sup>32</sup> Fifteen view corridors from Highway 1 to the ocean,<sup>33</sup> donation of thirty acres of land to the Coastal Conservancy, and a requirement that the developer include forty-five units of low-cost housing are examples of regulations the Coastal Commission exacted as a requirement for the issuance of building permits on The Sea Ranch property.<sup>34</sup>

In preparation for the class viewing of the video, I assign the following materials that are available online: information about the development of the project in the late 1960s; the structure and functioning of The Sea Ranch Homeowners Association; and the CC&Rs, which are recorded as servitudes against all property within the development. Thus, students become familiar with the project and the typical transactional documents that an attorney for a prospective buyer would review. I also assign one of a series of California appellate cases that completed the litigation between The Sea Ranch and the California Coastal Commission about requirements for building permits.<sup>35</sup> The issue is whether the requirements are valid regulation of land use or unconstitutional takings.

Subsequently, students spend an entire week of class learning about the legal doctrine that affects the creation of projects like The Sea Ranch. We cover basic easement law, including the

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31. Cal. Pub. Res. Code § 30610.6 (2007).

32. That such public easements required fair compensation under the Fourteenth Amendment as “takings” was part of the settlement.

33. Regulation restricting the height of buildings and tree lines on the west side of Highway 1 were negotiated to permit viewing of the ocean by those traveling by car; there was no payment to the landowner for this.

34. We use that term, exaction, to describe acceptable government regulation that does not require compensation.

35. *Sea Ranch Assn. v. Cal. Coastal Commn.*, 527 F. Supp. 390 (N.D. Cal. 1981). This case precedes *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which is included in most Property casebooks in the chapter on government regulation of land.

types of easements and the various ways easements are created.<sup>36</sup> Focusing on covenants that are said to “run with the land,” benefitting and obligating those who never personally agreed to them, contrasts sharply with what students are learning in Contracts—agreements discussed there are binding only between those who execute the contract. As with the doctrinal material on the landlord and tenant relationship, students learn about important modifications of the common law rules especially reflected in the Restatement of Property Second (Servitudes).

After that fast trip through servitudes law and policy, students feel reassured to learn their relevance to situations with which many of them are familiar: condominiums and other shared ownership communities. Finally, they have the chance again to review the transactional documents (here, the CC&Rs of The Sea Ranch) as a way of identifying the variety of servitudes, recognizing how these interests in land were created, and appreciating why the benefitting and obligating features of these affirmative and restrictive provisions make sense. Indeed, it demonstrates creative lawyering at its best: using the very limited array of ownership interests in land to support a modern form of lifestyle.

*INTERVIEW OF CLIENT—OVER THE PHONE OR VIA  
E-MAIL—REAL LIFE*

All students participate in interviewing a pretend client, played by myself and my group of ten teaching assistants, who will meet with them by phone and email. The client is considering buying a house located in The Sea Ranch development. The client is now in Chicago but expects to move to California.<sup>37</sup> The client has definite ideas about how she will live and work there.

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36. As in so much of legal education and traditional courses, the attention given to the implied easements (by necessity, quasi easements, and by prescription) is disproportionate to that of express easements, which are much more important in lawyering. Negotiation and drafting of express easements are important skills of real estate lawyers. Even identifying express easements by performing title searches (or more realistically, ordering a title policy from a title insurance company), is more relevant than memorizing the elements of an implied easement, but for bar exams the latter is relevant.

37. These facts present an opportunity to discuss licensure of attorneys and unauthorized practice of law, a real life risk for transactional attorneys who are licensed in one state and who take on matters in a state where they are not licensed. The ABA Model Rules address multi-jurisdictional practice. Model R. Prof. Conduct 5.5 (ABA 2007).

The interview reveals that the client wants to grow and sell herbs on the land she buys. She also wants to bring Midwestern bushes, plants, and grasses and plant them at her new residence because it will make her feel more at home. As in the landlord-tenant interviewing role play, the attorney asks many questions initially and may need to re-contact the client as the attorney performs his or her task of evaluating whether the purchase of a unit in The Sea Ranch will meet the needs of this particular client.

*CAREFUL REVIEW OF THE CC&RS—TYPICAL TASK OF  
TRANSACTIONAL/REAL ESTATE ATTORNEY*

I instruct the students to read the entire CC&Rs document carefully. It is quite lengthy and may be the longest legal document students will see until they graduate. Students are to keep in mind the goals of the client and to take notes of provisions that may impact those goals. Students learn that no room exists for negotiation of this document.<sup>38</sup> It already binds the land, as it will any owners, including, quite possibly, this client if she completes the transaction.

*ADVICE TO CLIENT: FORMATTING OF LETTER; ROLE OF  
ATTORNEY AS ADVISOR*

From the interview of the client, the review of the CC&Rs, and any other information available, the student as transactional attorney prepares a letter to the client. It explains the limits of the private land use arrangements that would preclude some of the client's planned activities. Also, it should raise issues regarding costs of owning property in The Sea Ranch and concerns over adequate water supply revealed in the video. Although some of the students object to my counting the format of the business letter as a basis for evaluation, this seems to be an important skill with which many students are unfamiliar. Students' signing off with "sincerely," rather than "Yours Truly" is a pet peeve of mine. My comments on failing to include a heading on the stationery with a date and an indication of what the subject matter of the

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38. This is a difference from the role of the attorney in the landlord-tenant scenario where the skills of negotiation are important to achieving the client's goals. In the situation of a planned community, neither the seller of the house nor the association has an ability to change any provision in the CC&Rs.

letter is are probably more important for students to learn than basic letter writing protocol. I ask students to work from an outline to prepare a draft of the letter to ensure that they cover all of the topics and that they refer to a section of the CC&Rs as the basis for their comments to the client.

### *FISHBOWL*

A review and evaluation of how students analyzed the task is important to group learning. As with the first exercise, a report to the entire class of how a student proceeded to interview the client, reviewed the CC&Rs of The Sea Ranch, and drafted a letter of advice to the client is an important part of the learning experience. It allows students to compare their own approaches with those of those of reporting students. It suggests the ambiguity that can reduce the value of the advice.

A warning is in order: instructors may risk student skepticism by including typical property documents (e.g., the residential lease and the CC&Rs regulating owners in a shared ownership community—the CC&Rs that my students receive) in doctrinal courses in the first year when their students are accustomed to spending all their time considering the litigation model<sup>39</sup> and reading and briefing only appellate opinions. I have had some students tell their TAs<sup>40</sup> that they believe that the interviewing, negotiating, drafting, and document review exercises are irrelevant because they do not cover “what is on the bar.” (So far, no student has shared that view with me face-to-face.) If the other courses of first-year students are taught in the traditional way, the professor using my approach will need to be up-front about why he or she uses this approach and how it is part of a course that focuses on lawyering, not just the learning of doctrine.<sup>41</sup> Collaborating with other faculty teaching the same group may be

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39. See Chemerinsky *supra*, n. 6, at 595 (emphasizing that “new courses taught in traditional ways does not significantly alter legal education”).

40. I firmly believe that first-year students need to brief appellate cases; I use teaching assistants to review and comment on the student briefs.

41. In my Property course, I also incorporate an “advocacy lawyering” section in the landlord-tenant section. I have an attorney who represents residential tenants provide a lecture about his role. I have students attend a session of Eviction Court. Students are required to write short reports about the experience in court and how that experience affected their learning the substantive law. (Again, a few students think this is a waste of their time.)

useful in validating the experience of reviewing transactional documents and developing lawyering skills of the transactional attorney. For example, working with the Contracts professor and/or the Lawyering Skills professor should improve student attitudes and their valuing the experience. Indeed, I often use the same facts of one of these exercises as the basis for a short answer essay in the Final Examination. I do this to reinforce how important I believe these transactional exercises are.

#### IV. CONCLUSION

I have used the Interviewing Clients and Negotiating the Terms of a Residential Lease exercise for many years. I have more recently added the exercise on Reviewing CC&Rs<sup>42</sup> in Shared Ownership Community-Interviewing Client-Drafting Letter of Advice to Potential Buyer in the Community. Both exercises help to give first-semester students a better idea of lawyering as a transactional attorney.<sup>43</sup>

The time allotted for the class preparation and to the in-class participation seems appropriate. This approach to learning enhances most students' understanding of the substantive law of Property. Even those who claim that they want only to learn enough to do well on the final exam often report the experience as "fun." Students have told me that the exercise makes them feel more positive about the law school experience than the traditional Socratic approach of other professors. Students who tell me that they want to participate in a clinic give this report frequently. They use this experience to determine whether they will apply for The John Marshall Law School Fair Housing Clinic or The John Marshall Legal Support Center and Clinic for Veterans in their second or third year. Neither of The John Marshall Law School clinics is transactional, but the experience of dealing with simulated clients and counsel seems to energize the students.

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42. An example of a typical CC&Rs is found in the Declaration of Condominium, which sets up the relationship between owners.

43. Additionally, I introduce advocacy lawyering in several ways. In response to what students are learning about landlord-tenant law, they visit a session of the Eviction Court in Cook County, Illinois. This assignment has the following goals: (1) they see actual court documents that are filed by the plaintiff and the defendant; (2) they see an entire "trial" which may last ten minutes if the tenant chooses to appear; and (3) they appreciate the significance of having legal representation, especially for tenants, as measured by the results of the trial.

Finally, I am encouraged by the development of casebooks that incorporate lawyering exercises, not as afterthoughts but as integral parts of the learning process. *Property and Lawyering* by R. Wilson Freyermuth, Jerome M. Organ, Alice M. Noble-Allgire, and James L. Winokur<sup>44</sup> is splendid. It presents realistic situations that lawyers face in the context of property deals and the ownership of real property; moreover, the Teacher's Manual provides extensive insights and suggestions about handling each of the exercises.<sup>45</sup> The recognition of the advantages of introducing transactions in the first-year texts by professors aware of transactional practice supports my own philosophy of education and provides course materials that help me meet my goals.

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44. Smith & Williams, *supra* n. 16. (I am using it for the first time in fall 2010.)

45. Richard "Ricky" Meade, my lead Teaching Assistant and former Property student compared *Property & Lawyering* with a text that I had used for the past five or six years. He convinced me that it would meet more of my instructional goals.