The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten 'Dirt Lawyer'

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For some years, law professors who hark from careers making deals rather than trying cases have complained that law schools do not train students for transactional practice.\(^1\) The bench and bar echo this complaint.\(^2\) Law school curricula contain a bevy of courses directed at litigation training. Many of these courses are devoted to small section classes and emphasize a variety of niche practices. Indeed, even the standard core courses, from contracts to business associations, typically focus upon case opinions and have a litigation bent.\(^3\) As important as these litigation courses may be, training

\(^1\) E.g., Karl S. Okamoto, Learning and Learning To Learn By Doing: Simulating Corporate Practice in Law School, 45 J. LEGAL EDUC. 498 (1995) (lamenting “the almost complete absence of ‘lawyering’ courses focusing on the work of transactional attorneys”). Professor Okamoto’s article does a very nice job of explaining the need to teach transactional lawyering in the normal law school curriculum, and then provides a solid and creative basis for teaching these skills in a course entitled “Advanced Corporate Practice.”

\(^2\) The failure of law schools to teach the most elemental aspects of transactional practice forces law firms to take over this role. E.g., JoAnne D. Ganek, Successful Development for Transactional Lawyers, in IN-HOUSE TRAINING: MAXIMIZING YOUR LAWYERS’ PROFESSIONAL POTENTIAL 165 (ALI-ABA Course of Study, Feb. 18, 1994).

\(^3\) E.g., Paul Brest, The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 5 (“American legal education is as strong as ever in doctrine and legal analysis. But it is strikingly weak in teaching other foundational skills and knowledge that lawyers need as counselors, problem solvers, negotiators, and as architects of transactions . . .”). There is a growing and general dissatisfaction in some quarters with the model of legal education that focuses purely on theory. Perhaps the most vocal recent judicial critic of what law schools do is Judge Harry T. Edwards, Circuit Judge, United States Court of Appeals for the District of Columbia. See generally Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 MICH. L. REV. 34 (1992). The judge asserts that the lines of communication and understanding between law professors and lawyers are failing, although he recognizes that law professors are not alone to blame. He states:

The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use. . . . But many law schools . . . have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy. . . . While the schools are moving toward pure theory, the firms are moving toward pure commerce, and
students for this type of practice ignores half of what law students might ultimately do in law practice.4

Law schools should correct this curricular failure. Although the basics of legal practice are the same for those people who litigate as for those who do deals, there are many differences, some of which are subtle. Lawyers, whether deal makers or litigators, draft, negotiate, do basic legal research and writing, review case law, and argue with (and persuade) opponents and clients. But each of these aspects of practice takes on a different cast for the transactional lawyer. These differences are important and demand instructional time.

Clearly, then, this article takes on a topic not typically grist for law reviews, and addresses an issue of law school pedagogy, rather than substantive legal rules. But who better to take on this subject than law reviews, staffed as they are by the consumers of legal education? These consumers have been poorly served by even the best and most prestigious of law schools—which often foster the impression that lawyers are all litigators, and devote fewer resources and less curriculum to transactional practice.

Others have already made clear the need for a transactional emphasis in law school teaching.5 Professor Karl Okamato, for example, recently described his method for simulating corporate practice in law school.6 Yet, compared to all that law faculty have created to teach litigation oriented practices, transactions pedagogy is still in its infancy. Precisely because law schools have been late to the party, the question remains: how may law professors best structure and teach courses devoted to transactional practice? Should these courses be centered upon traditional casebooks? Should negotiations be taught in the same manner as elsewhere in the curriculum? How can the disparate elements of practice listed above be incorporated into one course? Law faculties have only begun to grapple with the difficult issue of how transactions based legal practice might be taught in schools.

Not surprisingly, I agree with Professor Okamato. I believe that it is

the middle ground—ethical practice—has been deserted by both.

Id. at 34. Judge Edward’s primary focus in this piece is law professor scholarship, and its irrelevance to what most judges and lawyers do most of the time. Id.

4. One might compare this to medicine. Medical students are forced to choose “medicine” or “surgery” specialties at the end of the basic four-year stint. A good medical school would prepare students for either type of medical practice. Similarly, transactional lawyers have argued that law school should prepare students to move into this half of law practice.


6. Okamato, supra note 1.
possible (and preferable) to tie most if not all the ends of a transactional learning experience together in one course—both the substantive law learning and skills. Indeed, in this article, I proffer one approach to teaching transactional practice that I believe to be especially effective. This approach focuses first on documents and client objectives, rather than case opinions and problem sets. I have put this pedagogical method to the test over the last several years in a course I teach titled “Commercial Lease Law and Practice.” From a description of the course, and my experiences with it, I will draw some general points that indicate just how different transactional training should be, and that, I hope, will aid teachers devoting courses to other areas of transactional practice.

Documents and client objectives must drive transactional courses, not case opinions in the traditional fashion (although case opinions are certainly provided in my textual reading). At the conclusion of a course focused on an area of transactional practice, students should be able to read, understand and negotiate the major documents of the transaction. Case law should be directed at developing this expertise.

This article proposes a basic strategy: the instructor should make a particular type of transaction, and the document or documents that form the basis of the transaction, the day-by-day foundation for a course. For example, at the outset of my Commercial Leasing course, I provide students with a copy of a sophisticated commercial office lease. The table of contents for the lease forms the basic syllabus for the course. I then assign textual materials that I have created and that discuss the leased “Premises,” followed by “Term,” then “Rent,” and so on. Skills exercises similarly focus on lease provisions, in this same chronological order. By the end of the semester, students will have read, thought about and worked with all of the major provisions of the lease.

This structure provides for an orderly presentation of substantive law, and one that is tied to the transaction that is the subject of the course. In addition,

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7. The discussion of how this might occur in the “transactional” arena is still relatively recent. We have just scratched the surface for opportunities to accomplish this within the law school curriculum. For reasons I explain later in this article, I think that Lease Law presents an ideal forum to teach good transactional practice. I found Professor Okamoto’s article helpful as I refined my course. I hope that this description of Lease Law will be similarly helpful to other professors in the transactional area.

8. A teacher utilizing this approach must carefully choose the “basic document.” As I am prone to tell students, the term “form document,” when connected to sophisticated transactions, is misleading and inaccurate. For example, although landlords begin with a form of lease, it is often so heavily modified by the end of the negotiations that it barely resembles the starting document. Therefore, I chose as the basic document a typical (if lengthy) landlord’s commercial office lease, since this is a very common document and something lawyers practicing in this area see often.
this order makes the incorporation of negotiations and drafting exercises easy and understandable to the teacher and students. Throughout the semester, students are confronted with fact sets and asked to draft, or modify the language of, commercial lease provisions. These exercises follow discussion and treatment of the substantive law governing that provision. As the semester advances, the students’ store of knowledge in the substantive area and practice area grows, permitting wider ranging assignments.

Perhaps the most important skills lesson that a student might learn in a course devoted to transactional practice is simply that good lawyers do not (and cannot) separate a knowledge of substantive law from successful practice skills. This lesson is particularly important to developing good negotiation skills in the transactional context. Students in my lease law course find first hand that the best transactional negotiators are those lawyers who fully grasp the substantive law. 9

9. Others have also identified the connection between a lawyer’s knowledge of legal substance and negotiation outcomes. However, these scholars have not yet fully explained the pedagogical implications of this insight. Some of this work comes from law professors. E.g., Carrie Menkel-Meadow, Toward Another View Of Legal Negotiation: The Structure of Problem Solving, 31 U.C.L.A. L. Rev. 754 (1984) (providing a feminist approach to negotiations and an insightful comparison of problem solving and adversarial models of negotiation); Denton R. Moore & Jerry Tomlinson, The Use of Simulated Negotiation to Teach Substantive Law, 21 J. Legal Educ. 579 (1969). Menkel-Meadow correctly points out that “[p]rincipled negotiations in the legal context may be more complex….” Menkel-Meadow, supra, at 825. She states:

In addition to proposals based on the parties’ underlying needs, negotiators can focus on the legal merits as a justification for a particular proposal. Indeed, negotiators are told to use “the law” or “the facts” to make arguments or justify positions in analyzing how concessions can be justified in adversarial negotiations.

Id. This author then suggests, however, that where parties have “widely divergent views of the [legal] merits” of a proposal, “negotiators may find themselves involved in precisely the sort of unproductive argumentation inherent in adversarial negotiation.” Id. at 826. Although Professor Menkel-Meadow is right that disagreements over the state of the law can sometimes lead to unproductive and time-wasting give and take, the good lawyer knows that a disagreement among parties to negotiation also provides the good and prepared lawyer with an opportunity to advance her client’s position.

Not surprisingly, some of this literature comes from those best able to discern the connection between substantive legal knowledge and negotiations: sophisticated and active practitioners. E.g., Charles A. Goldstein & Sarah L. Weber, The Art of Negotiating, 37 N.Y.U. Sch. L. Rev. 325 (1992). This is precisely the type of practitioner piece termed unhelpful thirty years ago by scholars advocating survey-style negotiations courses. Infra notes 42-44 and accompanying text. For example, this piece urges lawyers to “[u]nderstand [y]our [c]lient” and to work hard to develop appropriate and effective attitudes and reputations. Goldstein & Weber, supra, at 325. Yet it contributes an important element to an understanding of negotiations: a practice based knowledge of the connection between knowledge and success. Although not written with an academic edge (which may be a good thing) the words of these two practitioners are instructive: “Your knowledge will have a direct impact on your negotiating abilities. Here, as elsewhere, knowledge is power. Your knowledge of statutes and of the common law is indispensable and is one of the most important contributions you will make to the negotiating process.”
Part I of this article will briefly describe commercial leasing practice. Although the primary point of this article is to focus teachers (as well as their students) on the need for transactional training, I also hope to convince law school faculties to add this particular course to standard curricula. Traditional law school curricula have ignored many crucial aspects of transactional practice, and one of the most important is commercial leasing. On its own, commercial leasing should be incorporated into law school curricula simply because it occupies so much of the time of real estate lawyers, and because, in financial terms, this practice accounts for billions of dollars in finance and economic activity each year.

Part II presents my document-driven approach to teaching transactional practice, using the course in commercial real estate leasing as a model. Commercial leasing is an ideal substantive law area in which to teach basic transactional skills. This is because a leasing transaction typically focuses on just one document—the lease—enabling a student to become more expert with the core material of the practice quickly. Drafting, negotiation, client counseling and legal research and writing all focus on this document. My commercial lease law course is designed to provide students with exposure to each of these aspects of practice. In addition, because the substantive law that controls commercial leasing is only barely discussed in the first-year Property course, and because the business aspects of this area of practice are entirely ignored, substantive law learning remains a critical issue.

Perhaps fortunately, there is presently no law school textbook for

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[Id. at 326.] These authors use as an example the meaning of a landlord’s absolute consent to assignment of the lease, and suggest that parties do not have to “squander” time and energy negotiating this provision where the law is “clear.” Id. As a result, it is not necessary for landlords’ attorneys to “beat to death” these provisions during the drafting and negotiating of lease agreements. By contrast, these two lawyers suggest that the landlord’s duty to mitigate damages may not be so firmly resolved and explained. Id. at 326-27. They state, “In such a context, it is worth everyone’s resources to delineate the parties’ respective rights and obligations carefully. In the course of... practice, [a lawyer] will learn what must be said and what is better left unsaid.” Id. at 327. Clearly, the lawyer with the greater substantive knowledge, in addition to knowledge of different negotiating techniques, is better able to determine what is “better left unsaid.” It is knowledge of the consequences of saying something that should not have been said—the substantive legal consequences—that informs a good lawyer.

10. I say “fortunately,” because, like most teachers, I probably would simply have adopted any text that might have been available. In creating my course materials, I have benefitted from the help and advice of a number of friends and colleagues. Larry I. Bogart, partner at the Atlanta law firm of Powell Goldstein, Frazer and Murphy (and, coincidentally, my father), and John C. (“Jack”) Murray, Vice President and Special Counsel of First American Title Insurance Company, each provided a wealth of materials. Professor Wilson Freyermuth of the University of Missouri at Columbia School of Law has also been generous with his time and insights, and is presently using the materials described in this article as the basis for a course he is teaching. Finally, my colleagues, first at the Drake University School of Law, and now at Chapman
commercial leasing, and I was forced to create my own “text” and to think creatively about pedagogy. Therefore substantive law learning is based on textual readings that I developed. There is a separate set of readings for each major provision in the commercial office lease, presented in the order of the provisions in the lease document. The reading material always follows the same pattern, by focusing first on the lease provision (drawn from the sample commercial lease provided at the outset of the semester), then on the motivations of the crucial parties, and finally upon the substantive law necessary to understanding the particular provision. (It is this substantive law section that includes case opinion, problems, and the like.11)

In addition to reading assignments, students taking transactions-oriented classes should do work that simulates a lawyer’s actual practice. Therefore, my course does not use a final exam. Instead, students work in two person partnerships on a series of increasingly difficult assignments. These begin with the drafting of modifications to the basic lease form, then to a lease evaluation and an accompanying letter to a tenant client, and finally to a full blown lease negotiation. By the end of the semester, students will have worked with three entirely different commercial lease forms. In addition, each student team is required to prepare one research memorandum of the type typically assigned to younger lawyers practicing real estate law.12

Student assignments are intended to simulate individual aspects of transactional and commercial leasing practice, and ultimately, an entire transaction. In the process of helping students to develop writing, research and negotiation skills, these exercises help students become attuned to the distinct and subtle ethos of transactional practice. There are attitudes, values and styles common to successful transactional lawyers, and these are best learned when doing the work of transactional lawyers.

Finally, Part III examines the literature and material presently extant covering negotiations and negotiation courses, and demonstrates that courses such as commercial real estate leasing add much to the equation. My experiences teaching commercial leasing have led me to believe that the present methods of teaching negotiation skills do not (on their own) sufficiently prepare students for transactional practice. It is not the purpose of this article to suggest that well-taught survey courses are not valuable in law school curricula; rather, this article will suggest that these courses must

University School of Law, have provided the curricular support to make this course possible.

11. All textual material, documents and provisions are available online.

12. Students post their work online. I then post my critique of each assignment. I have discovered the public posting of assignments is a wonderful motivator of high quality student work-product.
be supplemented by courses that teach negotiations against the backdrop of advanced substantive law learning.\textsuperscript{13}

\section*{PART I—LEASING AS A DESPERATELY NEEDED COURSE}

The overriding purpose of this article is to develop a general approach to structuring transactions focused courses. A second but nevertheless important point of this article is to explain the extraordinary importance of commercial real estate leasing, and the need for law faculties to add this course to their curricula. In essence, commercial leasing is the ideal advanced real estate transactions course.

Commercial leasing forms a huge component of the everyday practice of real estate lawyers, including those lawyers who practice in the most sophisticated and elite law firms.\textsuperscript{14} Indeed, commercial lease practice often drives development and finance.

This is easily understandable. If you imagine a new shopping center or office tower, financing and development of the project are only the first steps. A developer will only go about the trouble (and incur the risks and liabilities)

\footnotesize{13. Throughout this article, I will highlight my use of the Internet in the preparation and teaching of this course, and my reactions to this new technology. Perhaps because the rulebook for transactional teaching is still largely unwritten, and because much less exists in the way of traditional teaching materials, the Web holds extraordinary promise for professors teaching these kinds of courses. Transactions practices are document driven, and very deadline sensitive; done well, so are courses devoted to these practices. A course in which materials and assignments (and student work-product) is posted online, as and when needed, helps simulate a transactional practice. That said, people who use technology often do so in ways wholly unexpected by the creators of that technology. I found this to be very true of my use of The West Educational Network (“TWEN”) and web-based technology as I created my course. TWEN and competing resources from other legal publishers are presently structured to supplement existing course materials, to provide “discussion forums.” As I will describe, my course did not require any online discussion.


The improvement in the U.S. economy has resulted in a fair amount of commercial expansion with new shopping centers and malls springing up everywhere. As new businesses enjoy prosperity and some commercial enterprises succumb, commercial leasing of space has become often frenetic, generally lucrative, and increasingly complex.

While standardized forms are available, in some areas and for some applications, for commercial space leasing, this area of legal and real estate practice usually involves negotiation, compromise, and a resultant tailor-made lease. Commercial leases are usually for periods of time considerably longer than that found in residential leases. The lessor must be protected against early abandonment of the lease, improper and possibly wasteful use of the demised premises, and tort liability, the range of which seems to be expanding exponentially.

Id. at 94.}
with this type of transaction if the developer believes that the income stream generated from tenant leases will pay for debt service on the loans as well as other expenses associated with the project. Therefore, once the building is built, **all of the rest of the lawyer’s work is leasing.** In markets where office or retail space is over-built, prospective tenants have tremendous leverage in their dealings with potential landlords. In these markets, real estate lawyers spend a vast amount of their time with leasing.

Now imagine the dollars involved. In even a modest new office tower (one perhaps no greater than 15-20 stories tall) with an urban rental rate of $25 a square foot, a five-year lease involves a lot of dollars. A 20,000 square foot lease at $25 a square foot, with a term for five years, will generate 2.5 million dollars in revenues.\(^{15}\) Large businesses, law firms and accounting firms can lease well in excess of 100,000 square feet with options to expand their space and to renew the term. When these tenants sign on the dotted line for expensive and premium space in a new office tower, the dollar amount is staggering. These documents are therefore very thoroughly provisioned and heavily negotiated.

Oddly, perhaps the best recent description of the importance of commercial leasing comes not from law journals, empirical studies or case opinions, but from literature. Tom Wolfe, the acclaimed author of *The Right Stuff*\(^{16}\) and *Bonfire of the Vanities*\(^{17}\) recently published what many consider to be his masterwork, *A Man in Full.*\(^{18}\) It is the tale of an Atlanta real estate developer and financial impresario, whose fortunes take a stunning nosedive. In the book, Charlie Croker, the protagonist (and a megalomaniac of the highest order), builds a multi-use office and shopping center at a cost of hundreds of millions of dollars. Unfortunately, Charlie makes the terrible error of building this complex in Cherokee County, Georgia, a remote suburb of Atlanta. Defying Atlanta tradition, he even names the complex after himself, “Croker Concourse.”

The plot of the book, Charlie’s fall from grace results entirely from his failure to lease up the space in Croker Concourse. Without tenants, he cannot pay the immense mortgage payments he owes to his lender, PlannersBanc; that loan is in excess of 500 million dollars. And, as is typical of extravagant

\(^{15}\) A good deal of a real estate lawyer’s stress may be generated by commercial brokers. Assuming a five percent commission, the broker for the deal described above would earn $125,000. One can understand the broker’s desire to see such a deal reach a successful conclusion.
developers, he originally pledged his personal assets as security for the loan. The book details the inexorable destruction of Charlie, and the lengths to which the lender goes to break him and recover its security.

Although the personalities may be fictional, the underlying scenario of _A Man in Full_ most certainly is not. Leasing, much like the broader practice of commercial real estate law of which it is a part, can be high stakes, tense, colorful and glamorous. Millions of dollars may hang in the balance. And from the perspective of the lawyer, the deadlines are short, and the substantive law on which the practice is based may be every bit as sophisticated as the finance and tax issues that regularly appear.

Leasing practice is one of the very first areas in which senior real estate lawyers “turn loose” their younger associates. That is, this is an area in which an attorney can become relatively sophisticated as to the substantive law (because there are fewer documents to work with) and left to negotiate. It is

19. Charlie does reach an epiphany by the end of the book and, in a rather bizarre way, redeems himself. But he does not in any way manage to keep his fortune or save his complex. In the real world, even dismal failures such as “Croker Concourse” eventually become fully leased and profitable. But financial success comes long after the initial developer goes belly up and the bank takes over and sells the project. Success happens as a function of demographics, as populations move to and surround previously underdeveloped areas. Thus, a developer’s dream may be realized—but not by the developer.

20. One of my favorite scenes comes toward the beginning of the book. Charlie, unable to pay his lender, flies to Atlanta to meet with the “loan workout” team at PlannersBanc. During the course of that charged meeting, Charlie comes to understand that when you fail to pay the bank, the bank is no longer your friend. This is a great passage for teaching the “Golden Rule” to the reader: “He who has the gold makes the rules.” Charlie is forced to turn over virtually all of his assets, including the car he drove to the meeting, in front of his subordinates. As Wolfe tells it, the bank officer (the “Artiste”) pulls no punches:

“By the way, how’d you get here this morning?”

Croker gave the Artiste a long death-ray stare, then said, “I drove.”

“What’d you drive? A BMW? The Ferrari? The customized Cadillac Seville STS? Which one?”

Croker eyed him balefully but said nothing. The steam was coming back into his system. His mighty chest rose and fell with a prodigious sigh. The dark stains were inching closer, from either side of his chest, toward the sternum.

Harry [the Artiste] said, “Seven company cars . . . Sell ‘em.”

“Those cars are in constant use,” said Croker. “Besides, suppose we sold ‘em—to the distinct disadvantage of our operations, by the way. What are we talking about here? A couple of hundred thousand dollars.”

“Hey!” said the Artiste with a big smile. “I don’t know about you, but I have great respect for a couple of hundred thousand dollars. Besides, your arithmetic’s a little off. It’s five hundred and ninety-three thousand. A thousand more insignificant items like that and we’ve got half a billion and plenty to spare. See how easy it is? Sell ‘em.”

WOLFE, supra note 18, at 51.

Perhaps Charlie should have known what was coming. As Wolfe tells his story, at about the time the loan workout meeting turns ugly, the chief loan officer takes off his jacket to reveal suspenders emblazoned with a skull and crossbones. WOLFE, supra note 18, at 44-45.
common for second- and third-year associates in many of the more substantial law firms to be given lease negotiation and practice responsibilities early on. Where some transactional areas, such as mergers and acquisitions, might require a new lawyer to become familiar with a variety of sophisticated documents (and the substantive law that lies in back of each of these documents), a sophisticated lease transaction still typically revolves around one primary document—the lease.21

The economic importance of commercial leasing (and its corollary importance as a source of revenue to lawyers), is discernable in the abundance of literature produced for lawyers, conferences devoted to the subject, from trade journals and the like. Lawyers do not typically release financial information indicating the fees derived from different types of client activity, but a brief glance at Martindale-Hubble—and specifically at lawyer biographies and work emphases—reinforces the idea that commercial leasing matters greatly to a broad swath of sophisticated practicing lawyers. And these lawyers are not concentrated solely in one city or region. Any urban area with a growing population and an active real estate market will produce legions of attorneys practicing in this area.22

Commercial leasing is a critical element of real estate practice, and should be taken seriously by legal educators and planners of law school curricula. If it does nothing else, this article serves a purpose as a plea to faculties to create advanced courses in leasing.

PART II—AN APPROACH TO TEACHING TRANSACTIONAL PRACTICE

But what if law school faculties answer this prayer for commercial leasing? How should an advanced transactions course be taught? Every

21. Other documents may be part of the package. In many instances, the lawyers will negotiate personal guarantees of the principals behind the tenant. In addition, lawyers increasingly negotiate letters of credit demanded by the landlord and perhaps even the landlord’s lender in a variety of situations. In some instances, the tenant may obtain a right to buy the property that he leases. This option or right of refusal may be in the lease, or it may be a separate agreement.

22. Real Property, Probate and Trust is one of the largest sections of the American Bar Association. The Section includes real estate lawyers, and schedules conferences and publishes materials of interest to lawyers who do commercial leasing work. Indeed, members of that section request commercial leasing materials more often than other materials published in the real property and real estate area. Yet despite the intense interest of the bar, and the significant importance of this area of practice, there are no textbooks devoted to commercial leasing practice. I am not the only person to teach a commercial leasing course. Even without surveying law schools formally, I am aware of a number of law schools that offer the course. In each case, the instructor has been forced to create his or her own materials, given the complete death of commercially available texts.
aspect of a course devoted to transactional practice should be different structurally from other courses in the law school curriculum. My lease law course is divided into substantive law and practice elements. Although not perfectly split, I try to devote roughly equal time to each of these aspects of the course. This Part will describe the course, and extract a general model for teaching transactional lawyering.

A. Textual Readings

One might assume that textual and case law reading serves the same purpose in a course devoted to lease law as to a course focused on litigation. This assumption is, I believe, wrong. Substantive law understanding forms the backdrop to a lawyers’ drafting, review or negotiation of documentation; but substantive law is not an end in itself.

Chapters in traditional casebooks typically begin with a brief introduction to some substantive point of law. Chapters are then subdivided by substantive law topic. To the extent those casebook chapters reprint provisions from key documents and discuss the motivations of typical parties to a transaction, this occurs haphazardly, and only occasionally, throughout the chapter. In the real world of transactional practice, however, lawyers start first with their clients’ objectives, then move to documents and provisions. Indeed, the first thing many young lawyers discover they are missing is an understanding of terms of art appearing in the documentation, rather than an understanding of case law.

The syllabus for the course is simply the table of contents for the basic lease form distributed to students at the outset. As previously mentioned in the Introduction, I have created textual material—chapters really—for most of the major provisions listed in the table of contents for the commercial lease form. Some of the most significant provisions in the lease, and therefore the most time consuming substantive law discussions, come early in the course. “Rent,” “Term” and “Use of the Premises” are heavily negotiated and implicate many crucial legal issues. For example, a lawyer’s drafting and negotiation of the Use provision requires that lawyer to deal with exclusive rights that might be granted by Landlord to Tenant. There are reams of case opinions dealing with enforcement of exclusive uses.

My textual material always follows the same order, and confronts students with contractual language, the pertinent terms of art, motivations or the parties, and the substantive law. I suspect that some students, confronted with a more traditional casebook presentation of cases, would simply rush into the reading without reviewing the pertinent lease provision. Placing the
contractual provision up front forces students to attack the chapter by first becoming familiar with the language of the contract. This carries on throughout the course so that students are always confronted first with what matters most to transactional lawyers: documents and provisions.

Having read the important provisions, the first thing a transactional lawyer in training generally should confront is an explanation of the basic definitions and terms of art contained in the paragraph, so that the paragraph can be understood. This discussion comes in a section titled: “What the Words Mean.” It is disappointing just how often students can develop a good grasp of the common law, but be wholly unable to pick up and understand even a basic provision from a document dealing with that practice area. Therefore, this section is an explanation of what these terms actually mean and where these words come from.

The commercial lease form’s provision on “Assignment and Subleasing” is a perfect example. Landlords want the ability to sue not only the original Tenant, but any transferees of Tenant who take over the Premises. Whether Landlord has this legal right, however, depends on whether the Landlord can be said to be in “privity of contract” or “privity of estate” with the transferee, and these terms of art are carefully explained.

With the lease provision read and the terms explained, my material moves to a section titled “Basic Motivations of Parties.” The parties include not just the Landlord and Tenant, but the Lender whose money has financed the development of the office tower, shopping center or other project. How can a student be confronted with substantive law dealing with such issues as rent or subordination or default until the student understands the overriding goals of the parties?

The last section of each chapter—admittedly the most substantial—is a discussion of the substantive law implicated by each of the major provisions of the lease. This section is titled, simply, “The Substantive Law.” This section provides case opinions, numerous problems and textual discussion, and thus contains elements common to traditional casebooks. But most
importantly, it comes only after students have been forced to think about contractual language and the nature of the parties to the transaction.

The substantive law materials, even the case opinions, are always tied closely to discussions of transactional documentation and contractual provisions. My goal with this textual material is simple. Any student taking a course in commercial lease law practice should conclude their semester with an ability to pick up a sophisticated commercial lease and genuinely and fully understand the document in front of them, the substantive law underlying the language, and the motivations of the parties involved. This is the real goal of a course aimed at teaching a student some aspect of transactional practice.24

B. Student Work Product

Young transactional lawyers often make a critical mistake: they assume that the substantive law loses its importance as they acquire important lawyering skills, such as drafting and negotiation. Unfortunately, this is an error in judgment that is fostered by traditional law school curricula and courses. Negotiations and drafting courses, by their nature, suggest to students that knowledge of substantive law is somehow not relevant to success in outcome. If a course did nothing else but terminate this view early in a young lawyer’s career, it would have easily justified its reason for being.

Lawyers who practice in a transactional area quickly learn that they must

already created, during the semester in which the course is taught. Whenever I change a page mid-semester, I let the class know that changes have been made. TWEN makes this easy, since each “forum” reflects dates that postings have changed. I can add or substitute cases to the reading, or link to newly discovered and interesting sites. Students do not need to purchase casebooks. Instead, members of the class print out textual readings, and associated cases, as and when needed for class discussion. I have not yet completed all the text pages, but I am well on my way. As to those chapters as yet undone, I have listed case opinions for students to read. I have a separate web page on TWEN listing cases and providing links to the opinions on WESTLAW. The list of cases also notes the section of the commercial lease form to which the case pertains.

24. Professor Okamato makes a similar point in his article. That piece describes a course simulating corporate practice. In explaining the benefit of simulations, Professor Okamato states, “[s]imulations provide a transitional experience in which students may apply theoretical knowledge within a context of practical relevance.” Okamato, supra note 1, at 502. Practicing attorneys realize the importance of combining skills and substantive legal theory when training younger lawyers “in-house.” JoAnne D. Ganek of Fried, Frank, Harris, Shriver & Jacobson states:

Ask a law firm training director to describe a recent successful program, and you’ll invariably hear how well the last litigation skills program went. But ask the same director about business transaction training, and you’re likely to get a discouraged shrug. Transactional skills training must combine substantive law training with practical skills training, but finding the right formula is a challenge.

Ganek, supra note 2, at 167.
be able to work with many different forms of the same document. A real estate lawyer representing tenants will see, in the course of a year, many different forms of a commercial office lease. A class emphasizing transactional practice should simulate this dynamic environment. Thus, although my students become very familiar with the form initially distributed, students’ written assignments always ask students to modify or negotiate documents based on unfamiliar forms. Good lawyers develop a mental checklist for time bombs and problems buried in important documents. This is a skill that only comes after repeated exposure to a variety of forms. Focusing on a basic form at the outset of the course, and then forcing students to work with other documents, begins this process in law school.

Developing written assignments for a transactions-oriented course is neither easy nor self-explanatory. The teacher should take a moment (at least) to reflect on the nature of the particular practice area that is the subject of the course, and the kinds of assignments that are routinely parceled out to new lawyers confronting the practice area. The teacher’s job will be to create a series of assignments that replicate within law school walls the work common to that practice.

I explain to the participants that they should view their assignments as “lawyer work product,” and not merely as exercises. Although perhaps just semantics, this word choice helps establish early that students will be doing the work of transactional lawyers.

1. Drafting

Early in the semester, I confront students with the first of six written assignments. These written assignments are the only graded product.

All student work is done in two person teams. Actual practice is often a cooperative endeavor, and the ability to work effectively as a team is itself an important skill. (There are inevitable conflicts between members of teams, and in our class discussions we examine the possible resolutions. On occasion, these sessions take on an almost Jerry Springer cast.)

The assignments require students to use substantive learning acquired to date. These assignments begin with basic drafting exercises. The first textual materials students encounter deal with the Premises (which is the subject matter of the leasehold) and the Term of the lease. These two provisions are arguably the most important of the lease. Indeed, if these two provisions were not clearly dealt with in the body of the lease, the document would likely be unenforceable in many jurisdictions, either because the court would hold that the parties never had a meeting of the minds, or because of the Statute of
Frauds.

The first two drafting assignments require student partnerships to draft two common additions to a commercial office lease. First, Tenant will anticipate the possibility that their businesses may grow to such an extent that the space will become cramped, prior to the expiration of the Term. For this, Tenant will often request the right to expand the Premises to include sufficient additional space. In addition, a Tenant will often desire the right to extend the Term of the lease for an additional period of time. Both of these modifications raise serious concerns for Landlord and Tenant, as well as the Lender, whose concerns motivate the Landlord in myriad ways.

One point of this article is that it is often counterproductive to speak of skills in a vacuum: the practice area and substantive law matter even here. The styles and strategies of lawyers change from practice area to practice area, if only in subtle ways, and so do the styles and goals of research memoranda and styles of practice when reviewing documentation. This is true of legal drafting.

What a real estate lawyer considers “good drafting” is often not pretty. I suspect that if asked, most good real estate lawyers would respond that good legal drafting has two key elements: 1) if read carefully, the provision makes sense; and 2) the provision must be susceptible to only one meaning—that is, the provision cannot be interpreted to mean anything other than what the drafter intended. It is not necessary that the language be elegant or even simple; the language must be effective and functional.

These dual goals may seem self explanatory, and obvious. But students initially find it difficult to accomplish effective drafting of even simple provisions. To help students develop this skill, I project student assignments onto an overhead screen, and critique student work-product in class. Often I will take the “other side” to the provision—if the provision was drafted by Landlord attorneys, I will play the Tenant—and demonstrate how a student’s provision may be read to mean many things.25 In actual practice, young lawyers learn the hard way that the other parties to a transaction will actively work to find more sympathetic interpretations of what the drafter thought was

25. Good transactional drafting has certain hallmarks. In practice, lawyers learn—and often the hard way—that a good provision is one that cannot be read and understood in any other way than that intended by the drafter. When critiquing student work, in writing or in class, this is the first problem that we pinpoint. A team may think that they have clearly written a provision, but very likely there will be alternate plausible readings of their language. This desire to draft toward a single understanding drives transactional lawyers to write in a style that is hardly prosaic, and instead encourages the use of long provisions, subparagraphs and numbered paragraphs, among other devices.
a crystal clear provision. A course devoted to developing transactional skills should therefore encourage student lawyers to think carefully about the implications of word choice, sentence and paragraph structure, and syntax.

2. Letter Writing and Review of Lease

After a number of these drafting exercises, approximately halfway into the semester, I ask students to review an entirely new commercial lease form, ostensibly as Tenant’s lawyer. Students are required to prepare this review in the form of a letter to the Tenant. For this assignment, I typically use a lease form intended for light industrial and office space. Although similar to the basic office tower lease, this form is different in a number of respects.

This exercise follows actual practice. Tenant’s lawyer will often begin the process of negotiating a lease with Landlord with a letter to Tenant reviewing the lease, provision by provision. This review, and the Tenant’s comments, then forms the basis of the lawyer’s negotiation with Landlord. Indeed, the letter may be altered easily so that it can be sent directly to Landlord (or Landlord’s lawyer) objecting to the myriad problems in the lease. The first time students read and review a lease typically takes many hours. Only after they complete the project do I tell them that, in practice (and with practice), good real estate lawyers can accomplish this type of lease review in less than an afternoon.

Where a transactional lawyer’s document drafting may be difficult to parse through, that lawyer’s letter to his client should be a model of clarity and permit an easy read.

This assignment requires student lawyers to explain the legal pitfalls associated with the lease form to the client, hopefully without scaring the client to death. And the letter must explain the relative weight of the various issues, so that the client will understand that some provisions in the lease form are worth protesting loudly, while some are not worth the effort.

3. Complete Lease Review and Negotiation

Finally, student teams are presented with yet a third, and different lease form, and are assigned Landlord and Tenant positions. Teams are given confidential instructions, then paired up to negotiate. In this assignment, Tenant teams direct a letter to Landlord’s attorneys, reviewing the lease form,
and objecting to onerous or unreasonable provisions.\textsuperscript{26} In this final lease review, Tenant lawyer teams again prepare a review letter, this time directed to the Landlord’s attorneys.\textsuperscript{27} This letter objects to provisions that Tenant finds unreasonable and requests that Landlord make changes that suit Tenant’s needs. After Landlord’s attorneys read and reflect on the Tenant lease review letter, Landlord and Tenant’s attorneys meet to negotiate the lease in person. Landlord’s written assignment follows this meeting: Landlord’s attorneys draft the set of “Special Stipulations to Lease” or “Amendment to Lease” that memorializes the agreements of the lawyers.

Ultimately, Landlord’s attorneys deliver this lease modification to Tenant’s attorneys. It is at this point that students often learn one of the most important lessons of transactional lawyering. And it is only within the context of an actual full-blown lease negotiation that this lesson may be taught. \textit{Tenant’s lawyers must be vigilant to ensure that the changes they agreed to, no more and no less, appear in the revised document}. Students who are not diligent and patient in reviewing the modifications discover that they pay dearly for the lack of these traits.

All of this work is done under relatively intense time pressure (at least, by student standards). Tenant teams are allocated no more than five days to complete their lease review and produce a letter to Landlord’s attorneys. Landlord teams are subjected to the same time requirement.\textsuperscript{28}

At the last class sessions of the semester, we discuss the different agreements reached by the parties, and the concessions that teams made to conclude the transactions. I pull up the different documentation on screen in the classroom for the entire class to review. There is nothing so enlightening as seeing and evaluating the concessions made by colleagues in identical predicaments, and to read the work of other lawyers addressing the same issues. These sessions, which typically take most of two class periods, are often raucous but fun. Although we discuss negotiation technique throughout the semester, these lessons come home in these last class sessions.\textsuperscript{29}

\begin{itemize}
\item[26.] This assignment is discussed again briefly in Part III of this Article. That Part emphasizes negotiations training from a transactional viewpoint.
\item[27.] Thus, this assignment skips immediately to the conversation between Landlord and Tenant attorneys. In real life, Tenants lawyers’ initial lease review would take the form of a memo to file, or a letter to Tenant (as in the earlier Tenant lease review assignment).
\item[28.] Students are required to post their work during a specific window of time. If the work is posted too early, lazier teams might simply read and work from their peer teams efforts. If posted too late, teams will have had and used more time than would be realistic.
\item[29.] I extensively discuss negotiations training in Part III, \textit{infra}.
\end{itemize}
4. Research Memorandum

The sixth assignment is a research memorandum on an issue of importance to leasing lawyers. Contrary to some rather common misperceptions, real estate lawyers do in fact engage in legal research and writing. However, these research projects tend to be quite a bit more focused than the work of lawyers in other practice areas. Although there may certainly be exceptions, legal research projects for the transactional lawyer, and especially the real estate lawyer, are designed largely to aid the lawyer in drafting enforceable contracts. The memorandum will therefore often end with suggested new language or modifications to existing language in documents that the lawyer uses in practice. What is more, new lawyers find quickly that their busy colleagues and supervisors do not want to read tomes describing the history of the law. Rather, real estate lawyers demand careful explanations of particular provisions, and some indication as to the direction of courts and legislatures on those points.

In practice, able lawyers and well-run law firms build libraries of this kind of research. And, every couple of years, lawyers will return to the same research issue and update the conclusions and recommendations of the original author. In my class, student teams have researched a variety of issues important to the leasing lawyer. These topics have included the enforceability of liquidated damages provisions, the ability of major retail tenants to “go dark,” before the expiration of the term of the lease,30 or the existence of some form of the implied warranty of habitability in commercial leases. In each case, the results of the search might have an impact both on the students’ negotiations and drafting.

I make every effort to conclude the research projects prior to the final negotiation and drafting exercise. In this way, students can use their work, and the work of their colleagues, in their final simulation exercise. Those students who pay attention to the presentations often find that they can work their newfound knowledge into the final project. I have found this to be an

30. Retail leases typically require tenants to pay landlords a percentage of gross sales as rent. This percentage rent is never less than some fixed amount of “base rent.” Occasionally, a tenant will decide to cease operations at a particular location, even before the lease has expired. In these instances, since the tenant does not continue to derive revenue from the location, the tenant will pay landlord the base rent required under the lease. This behavior is often described as “going dark,” because the tenant turns out the light and closes the door. Landlords despise this behavior, of course, because it deprives the landlord of percentage rentals. Unfortunately for landlords, in the absence of specific contractual language requiring tenant to remain open for business, some courts do not read such a requirement into the lease. This issue is discussed in Patrick A. Randolph, Jr., Going Dark Aggressively, PROB. & PROP., Nov./Dec. 1996, at 6.
effective approach to teaching law students the connection between doing research, and paying attention to the research of others, and transactional outcomes.

Beyond the lessons learned in doing the research and writing, there are lessons to be learned in each team’s presentation of their research memorandum. Each team presents their results to the entire class, much as a new lawyer might present the results of a research project at a practice group meeting. I inform the class of the date and time that teams will be required to publish their work. Teams upload their documents and memos to my TWEN page and the other teams are on their own to retrieve the work. In this way, the course mimics the operation of a small law firm. Each team distributes its memorandum to the rest of the “real estate practice group,” and at our weekly “team meetings” we discuss this research, among other topics.

Students can be far more critical than the teacher. I ask students to bring hard copies of the memoranda to class, but I often have the computer page displayed on a screen and the class discusses the work. During the proceeding, I offer my own critique of the work. I require the memoranda to be short, cover the pertinent case law and statute, speculate on the course of this legal development and suggest the impact, if any, on documentation and behavior of parties.

5. Putting it All Together

By the end of the semester, students will have read complicated lease documents, researched an issue of importance to that practice, negotiated a complex lease form and drafted language. In addition, students will have, as a part of the “substantive law” portion of the course, read materials and cases fleshing out the important legal issues that emerge in this practice. And all of this work will be confronted in an order dictated by the document at issue: the commercial lease.

This progression of assignments can simulate some of the more subtle aspects of practice. Beyond the traditional litany of “skills,” there is an ethos to transactional practice to which students should be exposed prior to practice. Good transactional lawyers learn to read contracts as checklists, and carefully acquire the documents, and put out the fires, described in the contract. This calls for organizational skill and a sense of ownership of the transaction. These skills do not develop when students recite briefs, or even work through
There is an “ethos” to transactional practice, and it is subtly different to that which accompanies litigation-oriented legal practice. Certainly care and thoroughness are hallmarks of legal practice, no matter what the practice area. But the nature of transactional practice, with its reams of long and complicated documents that are negotiated over time and under often short deadlines, calls for a particular kind of rushed obsessiveness. The process of blue book exams cannot and should not test for this value. Student’s time is pressed; it is the worst environment to examine whether this lesson is taught and learned. Class time in substantive law courses does not accomplish this feat; students may do all the reading or none, and fear only being called upon. Finally, courses that survey negotiation technique do not really teach the necessity of care; this trait is usually reinforced when the same parties see a transaction develop over time with consequences following an error several moves later in the game. Survey courses, however, typically move from exercise to exercise with a new game beginning on a regular basis.

One of my themes, and indeed that of others who have written about teaching transactions in the law school curriculum, has been that incorporating skills should be a routine and thoughtful aspect of a successful transactions-oriented course. Drafting and legal research are skills critical to transactional lawyers, but there is another skill that should be of primary concern, and that skill is negotiations. For a transactional lawyer, negotiation is where the rubber meets the road. It is at the point of negotiation that knowledge of the substantive law, the goals of one’s client, and the persuasive abilities of lawyers combine. Negotiations as a transactional skill demand an extended discussion, and hence this Part III.

Law schools already teach survey courses devoted to negotiation skills, and these do, to a limited extent, deal with transactions. But in teaching my commercial lease law course, I have become convinced that, although these more general courses have tremendous value (and I encourage my students to take these courses), something important is missing. This missing element is simply that some of the most important negotiation lessons can only be taught against the backdrop of a sophisticated (perhaps even expert), understanding of particular practices of law, and the substantive law that forms the bedrock for these practices. Yet traditional

31. There is an “ethos” to transactional practice, and it is subtly different to that which accompanies litigation-oriented legal practice. Certainly care and thoroughness are hallmarks of legal practice, no matter what the practice area. But the nature of transactional practice, with its reams of long and complicated documents that are negotiated over time and under often short deadlines, calls for a particular kind of rushed obsessiveness. The process of blue book exams cannot and should not test for this value. Student’s time is pressed; it is the worst environment to examine whether this lesson is taught and learned. Class time in substantive law courses does not accomplish this feat; students may do all the reading or none, and fear only being called upon. Finally, courses that survey negotiation technique do not really teach the necessity of care; this trait is usually reinforced when the same parties see a transaction develop over time with consequences following an error several moves later in the game. Survey courses, however, typically move from exercise to exercise with a new game beginning on a regular basis.

32. Lease work is particularly appropriate for teaching negotiations skills to entry level transactional lawyers. Although financing statements, guarantees and letters of credit may be involved (and heavily negotiated), the majority of an attorney’s time will be spent negotiating the lease document. The commercial landlord/tenant lawyer therefore needs a store of knowledge primarily explaining the legal implications of provisions in a lease. This may be contrasted with loan workout practice, mergers and acquisitions and other real estate and corporate transactions, that involve a multitude of important
negotiations courses do not assume great understanding of specific areas of the law, but just the opposite. These courses bop from subject matter area to subject matter area. One week, the professor might present a family law issue, the next, a trial matter, and perhaps at some point, a business or transactions-oriented matter. Students are given the “law that matters,” and are not assumed to have (nor is there time in such a course to develop) expertise.

Traditional negotiation courses, for all their considerable value, often teach that the fact that lawyers are negotiating, and the law is involved, is tangential, perhaps even irrelevant. But the law does matter and makes our negotiations unique, and calls for students to approach the business of negotiating differently than, say, MBA students. Law students would therefore gain important and different lessons from the development of at least some negotiation technique in substantive law courses.

This Part is not intended as a broadside attack on survey courses, and hopefully is not perceived as such. It is simply intended to show that law schools have not always taught some of the lessons graduating law students need to cope in transactional negotiations. This has resulted from the documents.

33. Indeed, in actual practice, business people may occasionally reject the use of lawyers to negotiate their legal documents—not just the business terms—for a number of reasons, some quite cynical. This occurs precisely because some parties recognize that lawyers focus on substantive legal details that a layman may ignore. I once helped negotiate a lease with a very well-known national retailer. My firm represented the Landlord. Given the prestige and size of the Tenant, the Tenant provided Landlord with a lease form. The Tenant, however, was not represented by an attorney in the actual negotiation. Instead, the Tenant employed an individual I will name “Marge.” Marge began working for the Tenant years ago when the operation was small and store locations were primarily rural. Apparently, some lawyer, in some local firm, had provided Marge with a lease, and shown Marge where to fill in the basic terms. The form addressed issues of that state’s law, and was, in modern terms, woefully inadequate and incomplete. Yet, every request we made for a modification to the lease failed. No matter how reasonable and unexceptional the demand, Marge refused to change the document. Her response was simple and direct: “it’s written this way for a reason—I don’t know what the reason is and I don’t care—take it or leave it.”

Clearly, exceptional leverage permitted the Tenant to take this position. Still, we asked for changes that would have been acceptable if we represented the Tenant. And just as certainly, there must have been sophisticated counsel lurking in the chain of command somewhere in the labyrinths of the Tenant’s corporate structure, or on some mailing list. Yet we were never able to penetrate the Marge line of defense.

Marge was a screen. Her inability to rate substantive legal rights made her invaluable, and frustrated us to no end.

34. Robert Whitman makes a similar point in his article. Robert Whitman, Conducting Contract Negotiations: A Seminar on Legal Problems Exercise, 15 J. LEGAL EDUC. 72, 78 (1962). In that article, Whitman describes a course in which students were required to prepare significant research memoranda on substantive legal issues, followed by negotiation exercises involving those issues. Among the many benefits of this approach, he states, is that students “realize[] that [they] could not make a move without researching the law” and thus discovered the immediate connection between legal substance and negotiations. Id.
separation of substantive law and negotiating technique, the largely “litigation bent” of the scholars who have previously written on the subject and teach these courses, and a general misunderstanding of transactional practice to begin with.

A. A Brief History of Negotiations Courses

To understand why most negotiations courses presently taught are survey courses, one has to know a bit about the history of negotiations in American law schools. The modern trend of teaching negotiations in law schools began following the publication of seminal articles by Robert Mathews and James White. Academic lawyers began to recognize the place of negotiation skills in the professional lives of lawyers, and correspondingly the importance of teaching these skills in law schools. In the intervening years, a variety of courses have sprung up and become commonplace, and professors have created a wealth of materials.

The earliest discussions of negotiations pedagogy inculcated the need for survey courses, that is, for the creation of courses in which students would be exposed to a multitude of negotiation approaches. In the time since articles


37. E.g., Mathews, supra note 35; Peck & Fletcher, supra note 36 (proposing a course consisting of problems from different substantive areas; does not involve at least a few transactional problems); White, supra note 35; Ortwein, supra note 35 (proposing a series of problems, including at least one real estate transactional problem). But see Moore & Tomlinson, supra note 9 (encouraging the teaching of negotiations technique in substantive law courses) (Discussed further below).
proposing such courses first appeared in academic discourse, many faculty have adopted variants of this strategy, and numerous casebooks have appeared catering to this approach.\footnote{38}

With a few exceptions, law professors who have described their negotiation courses, and employ a survey approach,\footnote{39} include only one or few

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\item Proposed techniques and styles, and only to a very limited degree address legal substance. The message of these otherwise very valuable books is clear: negotiation technique—what it is and how it should be taught—is a separate issue.
\item I do not wish to slight any author by not mentioning his or her book here. In reviewing many, although perhaps not all, of the textbooks available in the area, it is clear to me that each possesses special strengths and areas of particular excellence and creativity. Still, some of the texts that examine negotiations technique largely separated from legal substance include: Robert M. Bastress & Joseph D. Harbaugh, Interviewing Counseling & Negotiating (1990); Gary Bellow & Bea Moulton, The Lawyering Process: Negotiation (1994) (emphasizing nicely the newly emerging law and economics analysis called “game theory”); Charles B. Craver, Effective Legal Negotiation and Settlement (3d ed. 1997); Donald G. Gifford, Legal Negotiation, Theory and Applications (1989); Stephen B. Goldberg et al., Dispute Resolution (2d ed. 1992) (although largely a survey of negotiation concepts and approaches, contains nice explanation of the differences between deal making and dispute resolution); John S. Murray et al., Processes of Dispute Resolution (2d ed. 1996); Larry Tepley, Legal Negotiations in a Nutshell (1992); Gerald F. Williams, Legal Negotiation and Settlement (1983). Some books used by law faculty in their negotiations courses, although very useful for that purpose, have a more general bearing and would be appropriate in a variety of settings. See, e.g., Avinash K. Dixit & Barry J. Nalebuff, Thinking Strategically (1991) (excellent explanation and application of game theoretic basis of negotiations); Roger Fisher & Danny Ertel, Getting Ready to Negotiate (1995); Roger Fisher & William Ury, Getting to Yes (1992); E. Wendy Trachte-Huber & Stephen K. Huber, Mediation and Negotiation: Reaching Agreement in Law and Business (1998) (containing both case study problems and well edited excerpts from very interesting and scholarly negotiations literature). Also, the good people at the National Institute for Trial Advocacy recognize the importance of negotiation skills in resolving disputes, and have produced a variety of materials addressing the subject. See, e.g., Thomas F. Guernsey, A Practical Guide to Negotiation (1996); Melissa Nelken et al., Problems and Cases in Interviewing, Counseling and Negotiating (1986); Abraham P. Ordover, Alternatives to Litigation (1993). Students may find books on negotiating by attorneys that, while not texts, are often useful. Still, these typically separate legal substance from technique. See, e.g., Mark K. Schoenfield & Rick M. Schoenfield, Legal Negotiations (1988).
\item In the few exceptions, Moore and Tomlinson explicitly suggest teaching substantive labor law and negotiations technique. See Moore & Tomlinson, supra note 9. See also Rabinovitz, supra note 36. The Moore and Tomlinson piece is both valuable, and bizarrely dated. On the one hand, the article correctly notes that students often learn substantive law more effectively in the competitive context of negotiations exercises. And, presaging literature that followed a number of years later, they observed that this approach helped to cure students of their “curiously lop-sided attitude toward the problem-solving aspect of law practice”—that is, the incorrect assumption that cooperation and mediation is ineffective as a method of resolving disputes. Moore & Tomlinson, supra note 9, at 579.
\item On the other hand, despite these contributions, that article contains some of the most unusual and explicitly sexist blather one might find in a law review, let alone in one of the few peer review journals in the legal discipline (The Journal of Legal Education). The authors report that, at one point during their course, they asked one of the female law students in the class to enter into her negotiations “acting sexy.” They explain themselves as follows:
\begin{itemize}
\item One of the actors was a female. She was shifted from side to side during subsequent mediation
\end{itemize}
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\end{footnotesize}
sessions in an effort to discover whether her sex had any impact upon the mediation process.

Contrary to the expectations of the instructors, her presence, even when she was instructed to act "sexy" had no apparent impact on the outcome of the process. From the perspective of many lawyers, this is an exceptional statement. Professor White accepts as fact that knowledge of the law does not affect negotiation outcomes. This assumption explains his suggestion that negotiations courses be based on a survey format. After all, if a sophisticated knowledge of substance does not increase the likelihood of success in negotiations, what possible reason could there be for teaching negotiation technique in substantive law courses, or more generally, connecting the idea of expertise in substance with effectiveness in negotiating?

The survey method of negotiations instruction does have significant strengths. Perhaps most importantly, this approach helps break students from relying on one negotiation attitude and methodology. We are all creatures of habit, and students (and professors alike), left to their own devices, would most likely rely on one style alone. Confronting students with a variety of styles can therefore be enlightening. However, there are some problems inherent in this approach. One of the most serious is the litigation orientation that naturally derives from surveying technique to technique, leaving a particular substantive area behind each week.

This is not the reality for

40. Of the survey courses described in the Journal of Legal Education, the following apparently contained at least one transactional exercise: Peck & Fletcher, supra note 36, at 200 (nice discussion of lease negotiation exercise); Ortwein, supra note 35, at 118 (one real estate problem); Moberly, supra note 36, at 317-18 (real estate). Peck and Fletcher, in general, evidence an appropriate sensitivity of the unique aspects of transactional negotiation. See Peck & Fletcher, supra note 36, at 199-200.

41. See supra note 38 and accompanying text.

42. White, supra note 35, at 353 (emphasis in the original).

43. I am not the first or only lawyer to argue that law schools emphasize a litigation orientation in instruction. Peter Sviglia, in the first line to his book, Exercises in Commercial Transactions, states "[l]aw
transactional lawyers, although it may (but not always) describe some litigation practices.\textsuperscript{44}  

There are two reasons that teaching substantive knowledge and negotiation technique in a single course may improve students’ negotiation skills. Knowledge is power; the lawyer who knows, for example, that a particular issue may not be supported on appeal may use this knowledge in the initial transaction when determining which legal right to trade in return for others. This is a dramatically important lesson for students to learn.\textsuperscript{45}  

But teaching substantive knowledge in conjunction with negotiation skills may affect our students for another reason. Professor White criticized the attempts of practitioners to explain negotiation technique by suggesting that the material then extant was merely descriptive.\textsuperscript{46}  Indeed, according to White, the material was then filled with what he regarded as rather useless prescriptions, such as “exhortations to prepare well and work hard.”\textsuperscript{47}  He terms this particular suggestion “neither novel nor helpful.”\textsuperscript{48}  Yet, although that lawyer’s insistence that law students learn to work hard and be thorough is not novel, it is important. Students who graduate to “real life practice” learn that diligence is a value of non-negligent practice, and one that is better learned early. It is precisely those lawyers who learn the value of diligence and thoroughness who prevail in their negotiations. Good negotiators are likely characterized by a willingness to continue seriously their legal educations after graduation, and by an understanding that “keeping up” with

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\item schools, for the most part, train students to be litigators.” Peter Siviglia, \textit{Exercises in Commercial Transactions} 3 (1995). He neatly distinguishes the commercial (transactional) lawyer’s “thought process” from the litigator’s: a commercial lawyer is an architect of relationships, not their destroyer. \textit{Id. See also} Robert S. Redmount, \textit{The Transactional Emphasis in Legal Education}, 26 J. Legal Educ. 253, 261 (1974).
\item 44. This is not to say that these books do not contain individual transaction based problems or components. \textit{E.g.}, Bastress & Harbaugh, \textit{supra} note 38, at 86 (problem requiring interview and counseling of commercial lender client). Other books similarly have non-litigation problem sets and examples. However, the problem in Bastress & Harbaugh is a good example of how these texts separate substance from technique, even when treating transactional fact sets. The problem notes, only in passing, that the reader has “review[ed]” Article 9 of the Commercial Code as a precursor to the meeting. \textit{Id.} This review is essential and it would be in the nuances of the review that a transactional attorney would begin to perceive negotiating strategies, and similarly, interviewing necessities.
\item 45. A lawyer’s negotiations are different than the businessperson’s, precisely because of the negotiations’ substantive law underpinnings. It is the indeterminacy of the law that often frustrates law students. Yet it is the ambiguity of legal outcome that often forms the basis of effective negotiating technique. This is an important lesson, but it is not taught in the present regime.
\item 46. \textit{See} White, \textit{supra} note 35, at 347 (articles by lawyers tended to explain only “what ‘works’ and when it works”).
\item 47. \textit{Id.} at 347 n.18.
\item 48. \textit{Id.}
the law is no luxury but a professional necessity. Similarly, great negotiators do not “breeze through” their preparation prior to a transactional or competitive encounter. There is nothing really self creating about these values; they are learned, and therefore they should be taught.\textsuperscript{49}  

Yet, what in the typical regime of survey courses encourages a student’s appreciation of diligence or thoroughness, and connects these traits or “lawyer-values” to outcomes? To some significant degree, practicing lawyers learn the value of diligent behavior from observing that those attorneys who fail to complete the hard work of learning legal substance lose negotiations.

The reasons that negotiations courses have developed as they have may also have much to do with the well developed trial advocacy courses that exist in law school curricula and serve as models, and the backgrounds of persons teaching negotiations classes.\textsuperscript{50}  

Trial advocacy classes—which have largely

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\textsuperscript{49}  Certainly the good students manage to keep up with material, or at least master it by the exam. Yet, there is sometimes little in the classroom indicating that law students view reading the assigned material as a professional responsibility, or that they have truly inculcated such lawyer values. That students in their third year are already tired of the law school “grind” and traditional courses only amplifies the effect. As useful as a survey of techniques may be, and as energizing, they are rarely intellectually challenging in the way of a heavy substantive course (for example, securities, bankruptcy, etc.). This energy drain in the final year of school further detracts from the successful indoctrination of lawyerliness. Indeed, those few writers who do suggest at least some negotiation training in substantive law courses routinely acknowledge that this addition helps keep advanced classes interesting and staves off third year boredom. \textit{E.g.}, Dallas, supra note 5, at 487-88 (“My foray into simulations did not result from a conscious effort to create a simulation, but grew out of my effort to enhance the students’ understanding of substantive materials . . .”); Rabinovitz, \textit{supra} note 36, at 470 (noting that there was “little evidence that students were willing to work very hard in traditionally structured law school courses”); Moore & Tomlinson, \textit{supra} note 9, at 579 (“students . . . develop an almost intuitive ‘feel’ for the substantive law” as a result of this approach). A common insight of scholars who have written about negotiations courses—including those largely responsible for the survey approach—is that students become emotionally involved in these courses. \textit{E.g.}, White, \textit{supra} note 35, at 35-53; Peck & Fletcher, \textit{supra} note 36, at 199. If this is so, then one can readily see that embedding negotiations exercises in substantive law courses may enhance the students’ zeal for mastering the substance.

In practice, there is no exam waiting to test substantive knowledge and motivate the practitioner. Instead, it is the lawyer’s realization that substance matters that drives lawyers to meaningfully advance his or her knowledge after graduation. A course that combines substantive law learning with a succession of transactional exercises—such as commercial leasing—is ideally suited to teaching these aspects of transactional practice.

\textsuperscript{50}  And it may simply be that transactional lawyers are not prevalent, either among law professors generally or among negotiations teachers in particular. I do not have empirical evidence to support this assertion, but it is my suspicion. In his review of Donald Gifford’s \textit{Legal Negotiation: Theory and Application}, John Murray explicitly recognized that the focus of many course designers is litigation. \textit{See} Murray, \textit{supra} note 36. Negotiations teachers seem more likely to be litigators than deal makers. Although by no means uniform, many of the authors providing valuable contributions to negotiations pedagogy indicate, unintentionally perhaps, a prejudice against the transactional aspect of practice. One author explains that he confines his course “largely to the negotiation of disputes. I leave out the negotiation of
developed along lines suggested by NITA materials—allow students to develop cross examination skills one week, summation skills another, and so on. A good cross examination will contain the same elements regardless of whether the legal issues involve divorce law, securities law or criminal law. Although this author has no empirical evidence, I suspect that there is a general assumption among faculties that what is good for the goose is good for the gander: that if it works for trial advocacy, it should work for negotiations instruction.

However, transactional practice and the negotiations that take place within it are not so susceptible to this kind of organization. For example, the tenor of a real estate transaction involving landlords and tenants—both of whom have much to gain if the other cooperates—and the types of personalities and experiences shared by the players, differ markedly from negotiations in other substantive areas. And transactions in one area (loan workouts, for example), even between the same players, can vary wildly in
substance, and implicate different substantive legal issues.

A cross examination may be intended to develop a base for a legal argument, but the use of cross examinations is not more or less advantageous in a trial involving one area of substantive law rather than another. Negotiation technique, by contrast, may vary depending on the area of law and the manner in which lawyers rate the entitlements of the various parties.\textsuperscript{52}

What is more, trial practice courses are, in a sense, drama courses. The emphases and expectations of students and teachers are to a large degree performance (that is—theatrically) oriented.\textsuperscript{53} There is nothing wrong with this; indeed, good trial lawyers most definitely need to appreciate and develop skills of persuading an audience, whether judge or jury.\textsuperscript{54} In contrast, although persuasion is a necessary element of good transactional negotiating, a dramatic performance is not really necessary. There is usually no disinterested third person acting as audience, but a heavily involved and self-interested opponent. And again, the lesson a trial advocacy-like negotiations course may teach, if there are no counterbalances, may be destructive for this very reason. If it is the performance alone that counts, why know the substance?\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{52} In the real estate field, lawyers often observe that developers are risk preferring salesmen so good at persuasion that they come to believe their own propaganda. Lenders, by contrast, focus on the bottom line and are usually risk averse—often with distinctly bureaucratic personalities. Attorneys who are effective at representing lenders learn that certain styles are not only more effective in the actual negotiation, but are complementary to the personalities of their clients. There are lender clients who typically demand that their lawyers “Just Say No”: the lawyer is instructed to say no to almost every demand of the borrower.
\item \textsuperscript{53} Robert B. Moberly, in a fine piece describing a survey approach to negotiations pedagogy, notes that one important goal of a negotiations survey course is “to develop student competence and effectiveness in this fundamental skill, utilizing . . . [among other features] detailed critiques of student performances . . . .” Moberly, supra note 36, at 316 (emphasis added).
\item \textsuperscript{54} I do not discount the need to evaluate performance. Rather, I merely want a more honest acceptance of the relative value of a performance orientation to negotiations classes, when this element, in the transactional field, has a somewhat different character. I agree with Professor Bernard Ortwein that law school does provide the opportunity to critique style; something that actual practice rarely provides in a formal manner. Ortwein, supra note 35, at 114 (“Exposing students to the Negotiation Process while in the academic setting presents an atmosphere conducive to thoughtful analysis with direct impartial criticism of the student’s performance rarely available to the practicing attorney.”). I would not overstate this point, however. Supervising lawyers have a stake in the development of their charges, and there are plenty of attorneys who train their associates well with a careful eye on negotiating style. The problem for transactional lawyers is often that the first time out of the gate is unobserved. A litigation attorney serving as second chair may be observed by her supervising lawyer while carrying out a cross examination or voir dire. Although a transactional lawyer (in the real estate field, for example) may accompany a more senior lawyer many times before handling a closing alone, when that time comes, there is likely no senior attorney in the room watching.
\item \textsuperscript{55} That dramatic skills are less (but not un-) important to the transactional lawyer should be
Indeed, my students often learn that the anti-theatrical approach works best. In their final lease negotiation exercise, I pepper the opposing parties’ instructions with starkly contrary goals, at least as to a few aspects of the lease. Some teams begin immediately by taking a tough, even imperious, line. Invariably, however, those students who approach the negotiations quietly, with an air of true knowledge and preparedness, fare better.

B. Some Transactional Considerations

Transactional negotiations are rarely a one day affair; a complicated transaction may be hashed out over weeks or months. It is one thing to be diligent in learning the substance of the law, and still another to be careful throughout the often-lengthy period in which documents are drafted, criticized, revised and again reviewed.

One important aspect of legal practice, and especially of transactional practice, with its endless reams of long, dense and complicated documents, is the lawyer’s ability to follow the changes agreed upon by the other lawyers involved to the end of the process. This is not a feature of practice that is easily replicated in law school, either in a survey or substantive law course. A negotiations course that moves from one substantive area to the next is not well positioned to expose students to this aspect of transactional negotiation. It is not just that lawyers must read changes carefully, and that we should therefore tell our students: “Be Careful!” This is a truism. Rather, transactional lawyers negotiating documents and reviewing changes know that careful substantive analysis is necessary to make the most of the review process.

There are forms, and real estate lawyers develop and use them. In any minimally sophisticated transaction, however, these forms are mere starting points; the documents are always negotiated and change prior to execution. Often the final product contains whole sections that do not exist in the form, and many other smaller changes throughout the document that render the document unique. Yet, somehow, even other lawyers poorly understand this

obvious. Imagine a real estate partner training a young associate. The following is not likely: “Bill, when you suggested that the seller confirm receipt of that wire transfer, you lacked gusto. Next time, move up real close to that speaker phone, lower your voice, and kick some butt.”

56. I am not the only person whose grandmother, in the same tone, used to say “Don’t jump in puddles!” The admonition to law students to take care will probably, without more, be received with the same appreciation as I did my grandmother’s statement those many years ago.
aspect of transactional practice. 57

A commercial lease—the documentation that forms the “deal”—is often filled with hidden time bombs. The documents are drafted, if not actually to hide the opportunistic attempts of one party, to at least avoid highlighting them. 58

A good commercial lease lawyer will therefore read the lease line by line, even a lease that is printed in the smallest and least legible font. This practice, although not part of the actual give and take over the phone or across the table, is certainly an integral part of a good negotiating style. Similarly, once the lawyers agree to a change in documents as a result of negotiations, the same level of care (or distrust) must be taken to scrutinize the modifications that are then made. The face of some changes may seem appropriate and accurate, but the legal implications of minor word choices may make all the difference. The lawyer who too quickly reads the “second” or “third” round may have won the battle only to lose the war. Throughout this process, it becomes clear that “care,” as understood by a trained and competent lawyer, means something a good bit more stringent than what the typical law student expects of that word. 59

C. Negotiations in Commercial Leasing Course

My lease law course puts to the test my concerns about negotiations training for transactional lawyers, and concludes with a rather drawn out, and involved, negotiation. 60 One student team represents a Landlord in a

57. Real estate law accounts for a significant portion of legal malpractice. One unfortunate reason is simply that lawyers with no real expertise seem quite willing to engage in the occasional real estate transaction, assuming that it is nothing more than filling in forms.

58. Although not the norm, some authors do explain the importance of document review. See Schoenfield & Schoenfield, supra note 38, at 361-80. Not surprisingly, this aspect of actual practice is most often recognized, as here, by practicing attorneys. And even though that book makes this critical contribution, it does not do so within a substantive law framework, instead relying on a nonsubstance specific survey.

59. I have occasionally asked students whether they proofread work before they hand it in. The answer—uniformly—is yes. And yet what a student understands to be thorough proofreading is quite different from the expectation of their future attorney employers. Students, even the best students, usually explain that they read the work product slowly, perhaps out loud, in an attempt to catch mistakes. I then show them what a lawyer does prior to sending out this documentation: I hold up a ruler (and a copy of a mortgage or other long document) and proceed to show how a lawyer in practice will actually read his or her own work product line by line. I also explain that nothing makes a lawyer, or that lawyer’s firm, look more stupid and incompetent than misspelled words and incomplete or incomprehensible sentences. (Finally, I admit that I was a prime offender in my first years.)

60. See supra Part II.
commercial office lease transaction, and the other team, the Tenant. Each side receives a confidential note from the client, but otherwise, they are left to negotiate. Tenant proposes changes to the lease form. Landlord receives these requests in the form of a letter, to which they have no more than 5 days to respond. The parties meet, and hopefully, hash out a set of compromise positions. It is at this point that a Tenant might persuade the Landlord to delete a paragraph, or otherwise modify it, often because Tenant’s arguments simply work. And these arguments always reflect knowledge of the substantive law, not just appreciation of each party’s leverage.

Landlord then drafts a set of modifications to the lease form, allegedly incorporating the agreements of the parties. The stipulations are sent to Tenant, who, after review, again meets with Landlord to discuss whether the changes are acceptable. Only after this process is complete is the deal done.

This process ultimately takes several weeks. There is no better setting in which to teach the skills crucial to transactional negotiation—that of following the document carefully as it mutates and is surgically altered to reflect the often subtle agreement of the parties. Students best develop this understanding after they have become intimately familiar with the workings of lease law, and recognize the impact of even a minor word change.

In short, law students come to understand the value of expertise, and how this grants their clients a comparative advantage over parties who are not so capably represented.61

CONCLUSION

To varying degrees, we are all damned by inertia. The models of instruction dominant in most American law schools have existed, with minor modifications, for many years. As new elements have been added to the pedagogy, they too have become fixed. Students have not been exposed to the transactional side of the law to the same degree that they have seen and worked with other aspects of legal practice. Yet, although overlooked to some degree, the very fact that there is much yet to be done holds tremendous opportunity. Given the exciting new technologies available to law professors—including the Internet—this is an ideal time for teachers to experiment with teaching classes focusing on transactional practice.

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Commercial leasing is the ideal practice area in which to teach lessons common to transactional practice. Leasing emphasizes document review and negotiation, but keeps things simple by focusing a single important document—the lease. The substantive law behind lease practice may be largely taught in a semester to law students, while they encounter practice-oriented exercises. And, to be blunt, leasing is simply too important an area of practice for law faculties to ignore, especially in a time when the bar has noted the failure of law schools to prepare transactional lawyers.

Courses that combine serious instruction of substantive law with negotiation, drafting and other skills exercises inculcate lawyer values of care and diligence. These courses teach students a crucial lesson: great transactional lawyers are invariably lawyers who have and maintain a sophisticated substantive knowledge of a practice area. These are the lawyers who are open to the nuances and subtleties of practice.