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Teaching Commercial Law in the Third Year: A Short Report on a Business Organizations Commercial Law Clinic

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Recently Wayne State University initiated a business organizations and commercial law transactional clinic for third-year law students. Its purpose is to offer advanced study in business organizations and commercial law in a setting as different from the classroom as we can make it. This report summarizes the considerations that prompted our move, the way we implemented the program, and the incidental benefits we are observing in this clinic.

Objectives

Our major objective was to fashion a course that builds vertically on prior study so that the students can deal more rigorously with more sophisticated subject matter. A second consideration was to put students in contact with practicing lawyers in an academic setting.

The second year of our business organizations and commercial law curriculum builds on the first year, but the third year of commercial law study at Wayne has largely repeated the second-year experience. We must confess that, in fashioning this transactional clinic, we were responding to what we see as a valid lament: that the third year here adds little to the second.

Some law schools respond rather successfully to this universal student lament by implementing capstone offerings in the third year. Capstone courses build on both the first and the second year; in the business and commercial area they can amalgamate UCC study with such courses as Bankruptcy, Corporations, Securities Regulation, and Corporate Income Tax. At Wayne, however, we face budgetary constraints that prevent us, with one exception, from teaching capstone courses with full-time law faculty. Enrollments in such courses tend to be low. More important, few of us in the commercial field are qualified to teach advanced courses dealing with the complex statutes that govern even a simple commercial enterprise. With the traditional capstone option unavailable to us, we were forced to turn to the practicing bar for help.

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We also hoped for and found collateral benefits in our little experiment. First, we thought that by involving practitioners in law teaching we could provide benefit to them as practitioners; benefit to the students, who would see the legal culture in a more dynamic form than they confront in the classroom setting; and benefit to the full-time teacher, whose experience the exercise would surely broaden. It is our plan to extend the experiment to other courses and other firms. As we pursue that plan with lawyers here in Detroit, we find that senior practitioners see advantages for their firms that only one of us anticipated: senior lawyers, it appears, are pleased with the prospect of engaging senior members of the firm with junior members in a structured problem setting. They tell us that, often, the demands of law practice in the large firm leave diminished opportunity for the kind of mentoring that was common in other days. The transactional clinic with a team of firm lawyers teaching law students on the firm's premises provides an opportunity to reinstate, to an extent, the mentoring benefits that may have been lost in the fast pace of modern lawyering.

Implementing the Clinic

We staffed the clinic with four teachers, all of them practitioners in the sponsoring firm, one of them the firm's chairman. The four lawyers practice in areas relevant to the clinic: enterprise organization, business planning, acquisitions, secured lending, corporate tax, and loan workouts. It was rather easy for them, with a modicum of sanitation, to draft problems and generate documents from firm files at levels of sophistication and complexity that full-time academics could not easily replicate. And because the firm teaching and sponsoring the course has offices near the law school, we scheduled the class in those offices, in part as a convenience to the faculty, whose time is at a premium, and in part to create for the students not just difference in subject matter and approach but difference in learning ambience. We credited the course with three hours and graded it on a pass/no-credit basis.

The first part of the course considered the basic forms of business organizations from the sole proprietorship to the limited liability company and the corporation. The problem involved the asset sale by a seller planning to retire to a buyer that owned one business and viewed the asset purchase as a way to acquire assets that complemented the buyer's operations. The sales agreement between the seller and the buyer ultimately called for a cash down payment and a series of deferred payments. The buyer consisted of two principals active in the buyer's business and a third principal who was interested in becoming involved as an investor.

In lecture format, the teachers discussed the tax and legal implications of selecting an organizational structure for the acquisition of the business. The fictitious client selected a corporate form with three shareholders who would have equal ownership, but only two of whom would be active in the enterprise.

The instructor gave the students forms for the basic corporate documents and the initial corporate actions. The assignment for the students was to complete the documentation in a way that provided for two classes of stock, a super-majority voting feature, and maximum director and officer indemnifi-

cation. Later, the instructors asked the class to draft shareholder buy-sell agreements, a voting trust document, and warrants for the purchase of the corporation's securities. After each drafting assignment, the instructors discussed the appropriate drafting solution and critiqued the students' work. This setting also offered the opportunity to discuss the ethical problems in representing a corporation and individual shareholders.

After settling on the corporate form of the venture and preparing the corporate documents, the class considered the forms an acquisition might take and the tax, corporate, and financing implications. The fictitious client, armed with the advice of his lawyers, decided on an asset purchase; and the instructors led the class through the kind of investigation for security interests, tax liens, and the like, that an asset purchaser must pursue. The students had an opportunity to fashion the letter of intent, to study other acquisition documents, and to evaluate the benefits of noncompetition covenants, earnout agreements, and post-closing price adjustment mechanisms.

The drafting problems never required students to start on a clean slate. The instructors provided the students with suggested forms and left it to the student to review them to see that they satisfied the needs of the fictitious client, to suggest revision or rejection of offending provisions, and to complete incomplete documents.

With the fictitious corporation in place, the instructors framed a negotiation problem between the seller and the buyers that included resolution of various open terms and the fashioning of an arbitration provision. The class next turned to the closing documents, fashioning them in pairs, one student representing the seller, one the buyer.

The second phase of the clinic involved financing the buyers' enterprise. The instructors invited an investment banker and a commercial banker to discuss relative advantages of financing the acquisition with bank or money-market borrowing or equity capital. Ultimately, the fictitious client decided on commercial bank borrowing. The students negotiated the terms of the loan agreement (e.g., commitment fee, guaranties, subordination arrangements, security interests, default and notice provisions) and participated in the drafting of the relevant documents, in much the same way that they fashioned and discussed the corporate and acquisition documents.

After the loan closing, the fictitious enterprise encountered financial difficulties that resulted in a default under the loan agreement and related documents. A bankruptcy expert from the firm lectured on options under the Bankruptcy Code, and the class considered those options along with loan renegotiation strategies. The class resolved the default with a loan workout solution that involved the granting of additional collateral, a higher interest rate, and modifications to the loan forbearance agreement.

Had there been time, the class would have ended the semester with a simulated exercise in alternative dispute resolution. Given time constraints, the instructors confined that part of the class to study and discussion of ADR possibilities.

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The first year of this clinic has been encouraging. Formal and informal surveys of student interest and satisfaction have been strongly favorable. We are sufficiently confident of the success of the concept that we plan to expand the approach to other areas of the curriculum, including some that are not exclusively commercial-law-oriented, such as environmental law, family law, and estate planning.

Initially, it was our concern that the third-year study of commercial law tended, too often, to be a repeat of the second year, and that we were graduating students who intended to practice in the commercial arena but who might not have been sufficiently acclimated to the commercial law culture. Our experience in the clinic to date suggests that we are on to something that is not so much new as it is new to our third-year commercial law teaching and to our clinical offerings. The clinic permits us to combine related subjects and to teach them rigorously. We find in the clinic, moreover, exactly what we predicted: student enthusiasm that is missing in our traditional commercial law offerings in the third year. We also find collateral benefits in accelerated acculturation for the students and educational benefit for the teaching practitioners and for the full-time teacher.

The student enthusiasm we witness could be simply the consequence of novelty. We hope not. We hope it is a response to the intellectual gratification that comes from learning.