1. OBJECTIVES

Course Plan

1. Objectives
2. Intellectual property: copyright, trademark, patent, secret
3. Real estate ownership
4. Real estate transactions
   - agreements
   - finance-transfer docs
   - issues: Anatomy of Real Estate Trans
   - title
   - closing; remedies
5. Economics of property
6. Gov’t actions; taking
7. Land use: laws, servitudes
8. Complex transactions
   1A. Lease regulation
   1B. Leases: the agreement
“A Very Different Subject”

1. Traditional parts:
   a. subject-matter cov’g
   b. cases, statutes, notes (most)
      --notes are useful
2. Non-traditional:
   a. lawyering strategy problems
   b. transaction (anatomy) book
   c. methods for policy analysis
   d. life as a transactional lawyer: satisfaction?

“A very different kind of course”

Most law school courses deal solely with this context:

This course, however, includes this context, by definition:

What will the differences be?
1. “Policy” questions?
2. Customary kinds of transactions?
3. Private negotiations and ordering?
4. “Private” property?
5. Cases . . . or, documents?
6. A “deal-oriented” course? (Can “deals” be taught?)
Special Methods in This Course

1. Calling on you—sequence
2. “Anatomy” book—transactional papers, in sequence
3. Handout of powerpoints
4. Internet video reviews
   • 3 of them; periodically
   • noted in syllabus
   • keyed to transp. Handout
   • can be used as preview
5. Syllabus: differential reading
6. Problems: simulations
7. Practice xam; sample ans; confs
8. Exam preview (later)

The Lawyering Strategy Problems:
An Overview (We Won’t Do Them All)

<table>
<thead>
<tr>
<th>Ch. No.</th>
<th>Subject Matter</th>
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<tbody>
<tr>
<td>2A</td>
<td>Analyze copyright agreement</td>
</tr>
<tr>
<td>3A</td>
<td>Analyze land sale agreement</td>
</tr>
<tr>
<td>3B</td>
<td>Prepare deed</td>
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<tr>
<td>4A</td>
<td>Argue: land agreement</td>
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<tr>
<td>4B</td>
<td>Renegotiate land agreement</td>
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<tr>
<td>5A</td>
<td>Draft boundaries</td>
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<tr>
<td>5B</td>
<td>Mortgage foreclosure</td>
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<tr>
<td>6A</td>
<td>Analyzing title</td>
</tr>
<tr>
<td>6B</td>
<td>Curing title</td>
</tr>
<tr>
<td>7A</td>
<td>Takings, subdivision regs</td>
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<tr>
<td>10A</td>
<td>Zoning request</td>
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<tr>
<td>11A</td>
<td>Easement dispute</td>
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<tr>
<td>11B</td>
<td>Easement conveyance</td>
</tr>
<tr>
<td>13A</td>
<td>Commercial lease negotiation</td>
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</tbody>
</table>

Competencies: document prep, document analysis, negotiation, counseling, dispute resolution (litigation)

Class Policies

1. Wonderful course
2. Absences—don’t tell (exception: long time)
3. Unprepared—don’t tell
4. Reading
5. Hold up hand—understand, move on
6. Speak audibly
7. Out-class assignments
8. “Anatomy” book
9. Practice exam; grade (exam: closed book, comprehensive, emphasis of course, essay, strategy)
10. Attendance
11. Double absences before day of Legal Research; Excuses policy
12. Seating Chart
13. Disability
Professor Crump,

I am writing to thank you for how you taught your property class. It has been very helpful already at my job with a law firm this summer. My first big project was closing a complex $13.5 million commercial real estate deal. There were SNDAs, tenants in common, 1031 exchanges, triple net leases and the whole works! I felt very prepared and I couldn’t have done it without your class. The lawyers that I have been working with are very impressed by what UH students learn in 1L property.

Sincerely, [A Property Student from my Last Course]
2. INTELLECTUAL PROPERTY

Constitution: how read it?
1. “To promote the Progress”
2. of “Science & useful Arts”
3. for “limited Times”
4. to “Authors & Inventors”
5. the “exclusive Right”
6. to “Writings & Discoveries”

Notes
1. Reading the Constitution: it’s different
2. a. idea without an invention
   b. trivially simple invention
   c. the “updated” Shakespeare
3. statute versus Constitution

copyright statute: how read it?
1. original works
2. of authorship
3. fixed in tangible medium
4. communicable
5. list of 8 types
6. not an idea, process, . . . or discovery

Notes
1. originality: “updated” Shakespeare?
2. originality: Shakespeare in Spanish?
3. copyright is automatic
4. tangible medium: “idea” for Shakespeare in Spanish?
OddzOn v. Oman

1. Background: Koosh; Copyright Register; this suit
2. Holding: refusal upheld
3. The originality issue
   a. familiar shape? [this isn’t the issue; why?]
   b. originality?
   c. deferred to Register?
4. the functionality issue (why not functional aspects)?

Notes
1. adding originality: colored pattern & copyright? But not helpful?
2. Koosh patentable as “invention”?
3. non-artistic creation: directory
   a. Supreme Court: no copyright
   b. correct decision—or wrong?
   c. if commentary added?

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Types of IP we’ll study

1. Copyrights
   expression, fixed medium, original [registration],
   categories
2. Trademarks
   distinctiveness, priority, use, nonconfusion,
   commerce [registration]
3. Patents
   novelty, utility, nonobviousness
4. Trade secrets
   substantially secret, bus use, ec value
5. [other types]

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Trademarks & Unfair Competition:
Lanham Act

- [There are other sections that create a broad protection against “unfair competition.”]
- § 1127: registrable unless (1) “resembles” registered mark so (2)
  “likelihood of confusion”
- [registration is not required]
- § 1114: infringement & remedies
- § 1127: trademark—any (1) “device” (2) “used [by or intended]” (3) “in
  commerce” (4) “to ID, distinguish, & indicate source” of goods/services.

Notes:
1. a. name on your law firm
   b. green-handled hammer
   c. red fire equipment
   d. “General Motors” on tools
2. registration: not required; advantages
Trademark: Qualitex Co. v. Jacobson

1. Background: Qualitex’s green-gold pads; registered; Jacobson used similar colors; Qualitex suit under §1114—registered mark; likelihood of confusion [potential damages & injunction]. Also, unfair competition.


3. Reasoning: a. color is a “device.” b. admittedly, it isn’t alone enough, like (1) fanciful, (2) arbitrary, or (3) suggestive symbols. “Weaker” marks include (4) suggestive and (5) generic (not usable as Tmark). c. but: can indicate source (red bolt head & pink insulation examples) if d. secondary meaning, and e. not functional (light bulb shape; red fire equip examples). f. court rejects arguments about uncertainty, limited supply, old statute, no need.

Notes after Jacobson

1. when color alone? (device, ID source, secondary meaning, not functional.)
2. functionality: why excluded? (red fire-fighting equipment)
3. likelihood of confusion: what meaning? (a) side-by-side, ability to distinguish or (b) easy distinguishability alone? (Jacobson adopts close-but-different color OR Jacobson adopts orange paisley)

Notes

1. Secondary meaning; why not required here?
2. hierarchy of mark (or dress) strength: “Apple” Computers; “Coppertone,” “Nice N’ Soft,” “Bathroom Tissue
Patent Limits: Anderson’s Black-Rock

1. background: patent issued for combined heater, spreader, shaper; spreader-shaper combination well known, heater well known
2. held: patent invalid
Notes:
1. 3 requirements; what’s missing?
2. expense, delay, risk of patent application
3. judging obviousness: hindsight

Patent Grant: United States v. Adams

1. background: patent issued for magnesium, CuCl, & water battery. Each element known, but combination filled need. Useful, unexpected.
2. held: patent valid.
3. reasoning: prior art must be examined. Differences from prior art are important. So are unexpected results, etc. Novelty, utility, nonobviousness are present.
Notes
1. Was Adams’ battery really nonobvious? (Novel or different, yes, but nonobvious?)
2. Combination patent: ALL patents!
3. Distinguishing Adams from Anderson’s Black-Rock: 3 well known ingredients in each, commercial success, etc.
4. Expert doubts, results, need, commercial success don’t count?
5. What is “nonobviousness”? Is it arbitrary?
6. The “claims” in a patent
a. claims are the heart of the patent
b. exact words used to determine infringement
c. note focus on claims in Adams
d. strategy: (1) multiple claims; (2) broadest claims possible—but not so broad as to threaten novelty, utility, nonobviousness

“UTSA”: Uniform Trade Secrets Act-- BP Chemicals v. Jiangsu Sopo

1. background: “real” issue is personal jurisdiction, which requires connection between elements of claim & act in U.S. For that, must explore claim. Sopo, a foreign sovereign entity, worked with SPECO to obtain BP secret methods from BP licensees & then disseminated them to American contractors.
2. Held: claim elements exist in U.S.; therefore, jurisdiction exists.
3. Reasoning: a foreign sovereign is subject to suit in the U.S. for a claim “based on commercial activity” in the U.S. A “trade secret,” under UTSA, is (1) information, w/ (2) economic value, (3) not generally known, and (4) with secrecy reasonably maintained. Misappropriation, under UTSA, is defined & includes dissemination.
Notes
1. Secrets v. patents: why didn’t BP patent all secrets?
2. Subjects: customer lists, prospects, customer specs?
3. “Reverse engineering”: what difference, trade secrets v. patents?
property transfer agreements
the “six elements” approach (a method of analysis devised by this professor)

I. Parties
   Can they perform? Do we have all we need? Are they financially responsible?

II. Preconditions
   What has to happen before the other party is obligated? On the other side, is the client protected from obligations that shouldn’t exist?

III. Obligations: Other Party
   What does the agreement say, and how specifically, about what the other party must do? Do these obligations fit the client’s expectations as written?

IV. Obligations: Client’s
   What does the client have to do? Is it specifically limited, or can it be read to require more than the client expects to do?

V. Breach & Remedies
   If the other party performs in a way we don’t like, can we clearly prove breach? And what relief can we get? On the other side, can the other party possibly claim breach after sound performance by our client, or obtain ruinous remedies?

VI. Termination
   Can we tell when and why the other party’s and the client’s obligations end? What happens then?

WHY THIS SYSTEM IS NEEDED: It’s what’s NOT expressed that really matters, and you won’t notice what’s not there if you don’t look at it systematically.

Problem 2A: Arthur-Public Copyright Assignment & Pub. Agreement

1. Novice writer; small informal publisher
2. Badly written agreement
3. What makes a bad agreement?
   a. provisions give plenty to other party, nothing to you or your client
   b. ambiguity in important matters
   c. lacks desirable flexibility


<table>
<thead>
<tr>
<th>Why This Course Is Different: Property (&quot;Private&quot;) Property</th>
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<tbody>
<tr>
<td>1. Property law is PRIVATE LAW.</td>
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<td>2. Property law is DOCUMENTS.</td>
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<td>3. AGREEMENTS form much of the law.</td>
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<td>4. If you WRITE it, a court (almost always) will ENFORCE</td>
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<tr>
<td>IT.</td>
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<tr>
<td>5. It becomes the LAW.</td>
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<tr>
<td>6. CUSTOMARY language and structure are important.</td>
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<tr>
<td>a. understood among DIVERGENT PARTIES. A suspicious</td>
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<td>buyer or seller on the other side more likely can</td>
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<tr>
<td>trust it.</td>
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<tr>
<td>b. the EXPERIENCE factor: a document that has been</td>
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<tr>
<td>through thousands of transactions (or for that matter,</td>
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<td>even a few) is more likely to reflect experience</td>
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<td>about risks than one you scribble on a legal pad or</td>
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<tr>
<td>type out on a laptop with no experience.</td>
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<th>Intellectual Property: Rosenthal’s “Four Issues”</th>
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<tbody>
<tr>
<td>1. creation?</td>
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<tr>
<td>2. protected?</td>
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<td>3. prevented?</td>
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<td>4. pitfalls?</td>
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<tr>
<td>[compare to the “Five Questions”]</td>
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<tr>
<th>Patents: Defining Infringement</th>
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<tr>
<td>1. the claims control, compared to device—&quot;literal&quot;</td>
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<tr>
<td>infringement</td>
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<tr>
<td>2. doctrine of equivalents: most alleged infringements</td>
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<tr>
<td>exhibit small differences</td>
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<td>3. pros. history estoppel: Pat. Off. challenges as</td>
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<tr>
<td>overbroad; applicant narrows (rather than appeal);</td>
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<tr>
<td>then, estopped from claiming abandoned item as</td>
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<tr>
<td>&quot;equivalent&quot;</td>
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<tr>
<td>4. Adams-based example: applicant specifies water;</td>
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<tr>
<td>infringer uses another liquid; applicant claims</td>
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<tr>
<td>&quot;equivalent.&quot; *(But what if applicant gave up the</td>
</tr>
<tr>
<td>word liquid in response to rejection &amp; substituted</td>
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<tr>
<td>water; &quot;estopped&quot;?)</td>
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<tr>
<td>5. equivalents expands patent; BUT: prosecution hist</td>
</tr>
<tr>
<td>estoppel limits equivalents</td>
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</table>
Infringement, Equivalents & Estoppel:  
*Festo Corp. v. FMC*

1. Patent rejected; amended to cover only devices w/pair of 2 sealing rings; defendant’s device had only 1 sealing ring.
2. P argues: infringement by equivalents
3. D argues: pros hist estoppel
4. Held; even if there is pros hist, abandoned item can be equivalent if:
   a. infringing equiv was “unforeseeable”;
   b. reason for amendmt was “tangential” to equivalent; or
   c. some other reason for not describing equivalent

Festo case, continued:

5. Policy underlying equivalents
6. Resulting uncertainty
7. To prevail, what must Festo show?

**Infringements of Other IP types**
- Copyright: substantial similarity
- Trademark: likelihood/confusion
- Trade secret: types of misappropriation

Notes:
- (1) Who’ll win?
- (2) Copyright infringement
- (3) The “similar Superman” problem
- (4) Trademark infringement (Huggies v. Dougies)

Problems about Patents, Trademarks, Copyrights, and Trade Secrets

1. “Valcom”: computer prog; base inputs lead to mkt valuations; used known algorithms/commands combined by programmer; sold printout to investor customers; how protect?
2. Wrestler, “The Hammer”: steel-like plastic helmet & gloves, distinctive gait & speech; how stop imitation/neg publicity, get paid when pictured;
   Note: “right of publicity” (not studied, but appears in Ch. 8 if interested)
Legal Analysis: The Logic

- Syllogism (Deductive)
  - First Premise: “All emeralds are green.”
  - Second Premise: “This object is an emerald.”
  - Conclusion: “This object is green.”

- Analogy (Inductive)
- Generalization (Inductive)

Here’s the key! Law school analysis is heavily deductive (syllogistic).

1. PRINCIPLES (all) (First Premise)
2. FACTS (all) (Second Premise)
3. CONCLUSION (this comes last!)

Syllogism

Major Premise: “All emeralds are green.”
Minor Premise: “This object is an emerald.”
Conclusion: “This object is green.”
[1. Identify Issues]
2. Set out Principles
   a. From legitimate source
   b. Generally
   c. Neutrally
   d. Declarative sentence
   e. Exhaustively
3. Compare Facts
   a. Exhaustively
   b. Analyze against principles
4. Conclusion
5. Go to next issue
Conversion; trespass

1. Forms of action; conversion & trespass
2. Are intangibles propty?
3. Subject to conversion?
   a. early rule: no
   b. later: if merged in doc
   c. later: broad
4. Policies against–
   a. strict liability?
   b. cost-benefit? (economic test)

3. REAL PROPERTY
   OWNERSHIP
property interest creation: gift, devise, descent, transfer

1. gift: a. donative intent, b. delivery, c. acceptance
   
   Brewer v. Brewer: trial court erred in applying presumptive gift among spouses where transfer was one day before marriage; delivery & acceptance present, but intent to be tried. Notes:
   a. formal requirements: why?
   b. burden (heavy) on donee: why? Presumptions: why?

2. devise (bequest if personal prop) or descent (intestate)

3. transfer by conveyance: “equitable” title

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property interest creation cont’d: transfer

3. purchase
   Problem 3A: Pravelka-Damani
   a. residence sale for $380,000 by Pravelkas to Damans
   b. assignment very similar to previous problem (2A)
   c. six elements: parties, preconditions, buyer’s obligations, seller’s obligations, breach & remedies, termination
   d. again, a terrible agreement
   e. some examples: financing contemplated, but no precondition that buyer be able to obtain it (literally, K seems to require buyer pay cash then); no seller obligation to provide warranties or quality assurance (and no inspection conditioned, etc.)
   f. again, issues w/all 6 elements
   g. issue isn’t case law or statutes
   h. objective: to teach you to analyze a private agreement not just for conformity to the law, but as creating private law for the parties
property interest creation cont’d:
adverse possession

4. adverse possession: a. actual & open, exclusive, c. continuous
   (tacking), d. hostile (or non-permissive claim of right), e. time period
   (state statute of limitations)

(1) Totman v. Malloy: landowners assumed creek = boundary; BUT: surveys
   showed creek on Malloy’s record propy. Use by Totman &
   predecessors: open, exclusive, for required period (What evidence
   shows? Why 20 years?) The issue: “hostility.” Held, no presumption of
   permissive use within family (Why?)

(2) Notes: 1. What’s “open” enough? 2. Why permissive occupation
   insufficient? 3. what if landowner repudiates permission? 4. practical
   effect of permissiveness presumption? 5. “tacking”?

Not considered:
5. discovery and occupation
6. “patent” (grant) from sovereign
7. other means: a. accretion v. avulsion, b. capture v. correlative rights

Decotiis & Steele, *The Skills of the Lawyering Process*

1. “capabilities”: which?
2. reading, writing, case analysis, research? NO(!?)
3. skilled generalists, here; contrast other practitioners
4. strategies that matter: client relations, negotiation,
   document preparation, learning, courthouse
   activities, management
5. teaching documt prep: start w/legal pad?

Notes: 1. existing form: good practice? 2. law-
   intensiveness of practice v. school? 3. lawyers = bad
   managers? 4. relevance of school to the observed
   skills? 5. update?

possessory estates:

1. fee simple absolute
   “O to A & heirs”
2. life estate
   “O to A for life”
3. others: later
   future interests:
4. Remainder
   “O to A for life] and then to B & heirs”

problems:
1. “to Grantee & heirs”
2. “to Grantee & heirs”; heirs claim a remainder
3. “to Grantee in FSA”
4. “to Grantee for life; then to Grantee’s son & his heirs”
5. “to Grantee for life”; no further gift
tenancy in common

1. creation: “O to A & B & heirs” (or “O to A & B in fee as tenants in common”)
2. rights: (a) convey (your interest only); (b) use (but not waste); (c) not be excluded; (d) partition only by agreement or legal process

Chinn v. Chinn: tenancy in common: creation; characteristics

Notes
1. rights and duties: agreeing cotenants had “right”; other’s objection “not relevant”: why?
2. accounting: must employ “good faith to make it profitable” and account. objecting cotenant had reasonable argument! why?
3. TIC: useful, but messy. why?
   a. many cotenants
   b. don’t know/trust well
4. a family disaster
5. partition suit: division, sale

j. ten rt. survivorship

1. creation: “as jt’s w/ rt/ survivorship and not tenants in common”
2. (if not abolished in the State)
3. statutory forms; TOD statutes
4. [historic “4 unities”: time, title, poss’n, interest]
5. doesn’t pass by will or inheritance
6. severance
7. presumption against
Estate of Mitchell

1. took title “as joint tenants.” (meaning? presumption?)
2. dissolution suit, TRO
3. Robert’s severance declaration
4. what’s a joint tenancy?
5. how to sever?
6. community property: a. presumption of community, b. death before severance/divorce, c. after divorce: cotenancy, unless awarded, d. effect on passage at death

Notes
1. parties’ strategies; severance: what effect?
2. Robert’s severance: dirty trick, or what law expected?
3. what if K not to sever?

Problem 3C: Pravelka-Damani Deed

1. the assignment; the previous problem
2. tenancy in common: what language?
3. the deed form
   a. elements (look at form)
   b. how to complete it
4. detailed instructions
   a. confirming guidance; singulard plural
   b. consideration: why?
   c. property description: careful: why?
   d. burden & warranty to H & W heirs: defend against all: why?
   e. all exceptions to title
   f. taxes
   g. acknowledgement: why?
5. EVERY remaining encumbrance
   a. MUST be an express exception: Why?
   b. but not those that will be removed at closing: Why?
6. what if joint tenancy desired?
7. function of the title report

Deed Components
(see form in previous chapter)
Security Interests

1. What are they?
2. Other names: “lien,” “mortgage,” “deed of trust”
3. Relation to “ownership”
4. Creation
5. Perfection (relevance of recording)
6. Priority (insolvency)
   - commercial law, bankruptcy, etc.
7. Thought Problem
   - mortgage on one JT interest: usually unwise. why?
   - mortgage on TC: less risky. why?

marital property: historical

1. Historic common law:
   - unity; dower/curtesy
2. Married Women’s Acts
3. Uniform Dissolution of Marriage Act
4. Equitable Dist.
5. UMPA
6. Meanwhile: community prop–continental system

community property

Estate of Mitchell shows:
1. divisible on divorce
2. characterization important
3. passage on death too
4. community presumption
5. protections of community

additional points:
1. which States? (southwestern rim)
2. separate: gift, devise, descent; inception/title; partition
3. differences among States
4. what’s community?
5. the presumption; commingling
6. homestead
notes on community property

1. mixed-up bank acct: W premarital acct check → earnings acct; check → 100 shares. 5 yr, 10 x value; who gets it?
2. H prefers characterizing as community, not reimbursement. Why?
3. medical degree as "prop"?
   career as "prop"?
   a. the dumpor-dumpee scenario
   b. the professional-as-wage-slave scenario

notes on community (continued)

5. valuation (very important to property lawyers)
   a. capitaliztn/earnings
   b. multiple/earnings
   c. market value
   d. hist. cost (book val)
   e. replacement cost
6. should difficulty of valuation mean it’s not prop? (Graham case)

Is earning capacity “property”?

1. Graham = most states (Tx.)
2. NJ: “reimbursement alimony,” based on “contributions”
3. how value spousal “contributions”?
4. business goodwill is divisible. Should “pers goodwill” be?
5. refusal to characterize human labor as “prop”?
6. N.Y. approach, based on its D.R. statute: prof degree is prop; so is career
[common law States; difference]

UMPA–[not read]:
1. marital, individual, “mixed”
2. mixed equals marital unless traced
3. broad power/agreements
4. management: titling, etc.
5. creditors: presumption marital
6. survivorship
7. reimbursement

EXCEPT DETAILS, this is commun prop system!

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4. TRANSACTIONS:
THE PURCHASE AGREEMENT

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road map for real estate transaction

1. Brokerage
2. Negotiations
3. “Earnest Money Contract” or “Agreement of Purchase and Sale”
4. Fulfilling Financing Preconditions
5. Fulfillment of Inspection Preconditions
6. Fulfillment of Title Preconditions
7. Preparation of Core Documents: Note, Deed, and Mortgage (or Deed of Trust)
8. Preparation of Ancillary Documents
9. Closing: Execution of the Documents
10. Title Insurance, Funding, Recording, Delivery, Possession
getting in the mood--why be careful about agreements?

1. Asimov, *Foundation*
   a. meaningless rhetoric
   b. promises don’t mean what you want them to
   c. what isn’t said matters
   d. how to analyze

2. McElroy, *Rose and Me*
   a. enthusiasm seems to promise results & prompts “victim’s” investment; then, pull the rug out
   b. changing the deal
   c. refusing to make reasonable agreements
   d. selling the deal arbitrarily
   e. exploitation of vague or half-way deal
   f. nonperformance
   g. aggressive interpretation of the deal
   h. accusations & hardball
   i. killing the deal arbitrarily
   j. Nonperformance
   k. accusations of nonperformance

People do these things:  a. because they are sloppy, b. because of wishful thinking, c. because of strategy

3. Professor Stark’s approach

4. Is litigation a good remedy?

brokerage

1. roles of brokers
2. the brokerage agreement
   a. distinction v. misrepresentation
   b. proof, willful & able
   c. liability & exclusive
3. terms: duration, post-term sales, Statute of Frauds
4. terminology

*Frady v. May: the transaction; the financing condition; the two contracts; 1st failed, 2d closed; the parties’ strategy.*

Statute/Frauds prevents recovery except under written K.

Courts salvage recovery here?

Notes:
1. “cheat the broker” cases
2. requirement of a writing
3. closed under 1st or 2nd K?
4. passage of equitable title—meaning?
5. what if buyer defaults—seller still owe?

extra-contractual liability

• tension: prospective defendant wants to limit liability to K. fairness, predictability, risk; prospective plaintiff wants open non-contractual liability. fairness, expectation, risk.

*Hoffman v. Connall*

2. Broker adopts seller’s representations that reasonably seem true. (Broker must.)
3. Three approaches: (a) warranty (strict) liability, (b) negligence liability, (c) no duty to buyer.
4. Court adopts (b). why?
5. Seller’s liability here? [why?]

Notes:
1. seller’s liability here? (what if honest mistake?)
2. broker lost by winning
3. broker’s liability reduced
4. strict liability, negligence, no liability?
brokerage agreement

1. exclusive right to sell--why?
2. ready, willing, able--why?
3. limitation of liability--how, why?
4. sales after term (if “procuring cause”)

```
agreements to negotiate”;
“letters of intent/understanding”:

1. is there such a thing?
2. damages: certainty
   a. importance of damages
   b. liquidated
   c. proof--hard
Notes
1. enforceability?
2. usefulness--why?
3. danger--why?
4. “status” letters--why?
5. suggested 2-part form (to avoid K--why?)
6. how to do it if you do want K--why?
```

Negotiating techniques

```
- firm, fair offer
- high, low, middle
- client's goals
- other techniques
- burnout
- wind up
- deluge
- main point
- collateral issues
- floor
- test/strength
- legalese
- strength
- softness
```

```
Negotiation continued

Notes
1. ethics? (what about, agree, repudiate, & raise?)
2. importance of negotiation?
3. importance of the merits?

Problems
1. “out-of-pocket medical only”
2. “give me your best shot”
3. “client is unreasonable”
4. “tell me what’s fair”
5. “doesn’t want to cash out”

Requisites of the property transfer agreement: the writing requirement

1. Statute of Frauds (Oregon example)
   - held: cash sale enforceable; non-surveyable description sufficient if owner owns only 1 tract that fits, aided by extrinsic ev. with “ascertainable objective facts.”

Notes
1. loose v. strict cases
2. other terms--price?
3. kinds of documents covered

Problem 4A: Wilson v. Prairie

1. the set of pleadings
   a. Complaint
   b. exhibit A (the “agreement”)
   c. answer (and counterclaim)
   d. motion to dismiss
   e. setting of hearing
2. Statute of Frauds
3. roles assigned
4. types of arguments (based on Meyer v. Kesterson)
5. standard: assume all in petition true; if, under law, no way plaintiff can win, dismissal
6. how to argue motion
   a. introduce selves
   b. legal standard
   c. GET TO POINT--or “learned counsel,” etc.
   d. explain why, if we is intelligent lawyer
conditions precedent/preconditions

1. inspection conditions
   *Allen v. Cedar Real Estate*
   a. K: subject to purchaser’s “approval” of environmental; “satisfaction” std.
   b. condition not met, but purch claims K enforceable
   c. condition precedent
   d. seller’s responsibility to pay, under law; BUT—no K!

2. financing conditions
   *Frady v. May*
   a. must land is financed
   b. what if condition omitted?
   c. usually more detailed
   d. why a condition instead of pre-financing?

3. title conditions
   a. why agree, if title unsure?
   c. the “free look” concern & how it arises
   d. Texas custom: “good” title, plus insurance

options

1. what is an option?
2. document: term, extension, exercise, full agreement
3. either condition precedent or particular kind of K
4. *Beale St. v. Miller*: Calvin claims he made repeated attempts to pay but Miller prevented by saying wouldn’t accept. Held, no compliance by tender
5. Notes
   (1) Calvin’s waiver argument: didn’t Miller waive by saying wouldn’t accept?
   (2) Statute/Frauds: what if parties orally agree to extend?
   (3) strategies re: (a) term, (b) extension, (c) exercise, (d) payments: don’t say “six months.” (Why?)
   (4) full agreement included

escrow

1. three-way deal, with stakeholder
2. attys, title co’s, etc.
3. seller escrows; buyer escrows (earnest $)
   *Matter of Akiviz*: escrow to secure seller’s removal, held by atty; no standards in escrow K; held, escrowee has duty of reasonable inquiry, liable for breach

notes

1. caught in the middle (as trustee!)
2. escrowee prefers agreement allowing action on party’s certification
3. earnest $ as escrow
real estate sales agreement

1. “Can you give me big picture?”
2. yes— and no(!)
3. the six elements
4. competing objectives: a. obtain expected benefits, b. reduce/shift risk, c. reduce ambiguous obligations owed, d. clarify & increase obligations received
5. mutual objective: agreement
6. purchaser’s view
7. seller’s view
8. purchaser’s 3-time protection:
   a. time of agreement, b. period of pendency, c. closing
9. value of knowing traditional and customary solutions
10. universality

sample sales agreement

1. parties
2. property
3. price
4. financing
5. earnest $
6. title policy/ survey
7. condition, inspection
8. broker fees
9. closing
10. possession
11. special provisions
12. settlement expenses
13. prorations
14. casualty loss
15. default/remedies
16. mediation
17. attorney’s fees
18. escrow
19. representations (warranties)
20. [tax]
21. notices
22. merger, etc.
23. option
24. consult attorney

merger clauses and extra-K liability

1. the parol evidence rule
2. the policy basis for the rule
3. extent of the rule: inconsistency
4. merger clause: entire agreement
5. fraud: the dilemma
6. compromise solution to dilemma

the types of claims: 1. actual fraud, 2. nondisclosure fraud, 3. innocent misrepresentation (4. strict liab), 5. negligence, 6. consumer laws, 7. warranty, etc.
Cases about Disputes & Claims

Woodlands Land v. Jenkins: actual fraud, note case
1. merger clause, but “boilerplate,” not sophisticated, not used as dispute resolution
2. Tx. statutory fraud (§ 27.01(a)-(a) false rep. b. real estate, c. purpose of inducing, d. reliance
3. common law fraud: similar
4. Tx. § 27.01(d)-non-disclosure, actual awareness (not here)

Stambovsky v. Ackley: nondisclosure of ghost reputation that seller created. Held: no damage claim, but equitable recission.
disclosure statutes: specify disclosures req’d, moderate liability
Amylot v. Zechini: erroneous disclosure = negligence liability, not strict liability
consumer legislation: beyond fraud or warranty

Problem 4B: Damani-Pravelka
Renegotiation
1. the problem: inadequate agreement
2. how: use document analysis (6 elements), plus this chapter
3. status letter: format, terms
4. renegotiation assignment
   a. use all possible negotiation techniques
   b. explain them
   c. give all offers/counteroffers
   d. ethical issues
   e. must reach agreement (but tell why you wouldn’t have, if not)

You really should watch the internet video reviews!
The Lending Market

1. Real Estate Lenders
   - FNMA; secondary market
   - S&L crisis of the 1980's
     - private law, FNMA-driven

2. Loan Documentation
   - retail & secondary markets
   - result: negotiation, but uniform nationwide elements
   - public law: e.g., required disclosures; but mostly private law
   - flat-rate & adjustable loans
   - the "credit quartet": rate, term, amortization, amount
   - core documents: note, deed, mortgage or deed of trust
   - other documents at closing
   - recording

Figure 1
Real Estate Finance: A Simplified Diagram
real estate promissory notes: general principles

(between discussing Moore case)
1. promise (contract) to pay
2. acceleration
3. relation to mortgage
4. deficiency judgments
5. legal limits on deficiency j’s
6. resale:
   a. “assumption” (liability on note);
   b. “subject to” debt (no liability, although can lose propty)

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Moore v. Bank Midwest

1. lenders: Gibraltar, which sold note to Midwest
2. original buyer-borrowers: Moores. Then:
   a. “assumption” sale to HSA
   b. HSA’s “subject to” sale to MGM
3. MGM abandoned property. But: who’s liable? not MGM; assumption v. subject-to
4. the deficiency statute in this State: limited by FMV, found by jury; prevents windfall
5. customary vs. negotiated provisions: here, “20% of outstanding principal balance,”
   individually negotiated
6. costs, etc. recoverable; atty fees
7. ambiguity is not desirable!
Notes:
1. assumption v. subject-to
2. battle of the appraisers
3. what should deficiency statute say if bidding is vigorous?

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sample promissory note: the document

1. negotiable instrument (¶’s 1-3)
2. adjustable rate (¶ 4)
3. “caps” (¶ 4(D))
4. right to prepay (¶ 5) v. penalty
5. usury/illegality savings clause (¶ 6)
6. default & remedies (¶ 7): late fee, acceleration, recovery, costs
7. other provisions (¶ 8-10)
8. uniform secured note (¶ 11); relation to mortgage
promissory note ownership

1. the note is a contract—and also “property”
   named payee; or, “bearer”
2. sales of notes; markets
3. evidencing ownership after multiple transfers?: the problem
4. possession as establishing owner
5. the UCC
   Cadle Co. v. Errato
   1. possession = prima facie proof of
      a. ownership
      b. rest of case
      c. [overcomes defenses—for value, w/out notice]
2. Here, only a copy is in evidence: why is this a problem?
3. Testimony: we bought note in transaction; “if assigned, I’d have been informed”—enough

promissory notes continued:
“holder in due course”

1. special status: overcomes even fraud by earlier holder
2. Why? Marketability!
3. reqts: for value, good faith, w/out notice of defects, negotiable instrument (signed, unconditional, definite time, payee or bearer)
4. destroying HIDC status: a. “I agree to pay $100; /s/ maker” = no HIDC; why?
   b. including conditional promises
5. Wilson v. Toussie:
   a. “predatory lending” claims
   b. claims against original participants and also “current lenders” who bought notes
   c. current lenders = HIDC. why?
   d. what effect on claims vs. current lenders?

Deed Components

(see form in previous chapter)
deed descriptions

1. plats v. metes-and-bounds
2. reference to other landmarks; reservations
3. rules of construction: ambiguities; conflicts

Ferriter v. Bartmess

1. ambiguous reservation
2. the “dance hall” is reserved (aren’t land titles fun)
3. conflict: a. deed says reserves at SW corner but b. also locates it by road
intersection that is not at SW corner!
4. rules/construction: a. liberal construction to effect intent; b. interpret grant
favorably to grantee; reservation favorably to grantor; c. rights to center of
road; d. avoid extrinsic evidence if unambiguous; e. if conflict, prefer
definite & ascertained description
5. here, SW corner prevails—why? (definite & ascertained?)

Notes

2-3. The Shady Oaks ambiguous
description (why is it ambiguous?) What the
attorney in Shady Oaks advised doing:
nothing(!)

Problem 5A: sketch plat

1. the assignment–draw a sketch plat from metes &
bounds. Harder than it looks, even if “mechanical.”
2. the point: you have to do this to: a. perceive
ambiguities, b. see whether reality conforms to
mental picture.
3. tendency to neglect
the property description: to assign to most junior
lawyer, etc.
4. purpose: how see ambiguities?
how resolve?
should we neglect the description?
Sample solution to Problem 5A

Thought problem: Shady Oaks Deed

deeds and warranties

1. Ohio:
   a. general warranty,
   b. limited warranty (also, “special” warranty)—
      only defects created by grantor,
   c. quitclaim
2. language: Ohio, other States, our State
notes
1. grantor by SWD who never had title: no recovery on warranty
2. when use SWD?
3. what difference if grant by GWD?
4. suit under warranty is not the preferred method of protection?
5. quitclaim to the moon?
6. when use quitclaim?
7. conveyance w/out warranty
8. what if variance from prescribed or customary language? (wisdom?)
**Brown v. Lober**

1. general warranty contains 3 covenants:
   a. of seisin, b. against encumbrances, c. of quiet enjoyment
2. problem: seller sold without excepting 2/3 of minerals, which seller didn't own.
3. suit on warranty fails, though. Why?
   a. covenant of seisin was breached at conveyance (long ago); limitations has run.
   b. covenant of quiet enjoyment requires ouster; none, here.

notes
1. how should deed have been written? (write the exception!)
2. what if suit on covenant vs. encumbrances? (probably violated at time of conveyance)
3. up-chain warrantors are liable too—(but limits based on their consideration)

financing documents

- deed as a financing doc: title to mortgage depends on deed; lender usually drafts/approves deed
- the straight mortgage
  1. explicit conveyance to lender; mostly east of Mississippi
  2. judicial foreclosure
  3. New York approach: protect debtor to time of sale, much less after

Figure 3
**The Deed of Trust Mortgage**

[Diagram showing the relationships between Seller, Lender, Buyer-Borrower, Trustee, and Deed of Trust]
deed of trust mortgage

1. historical origin: used straw “trustee” to expedite
2. equity said: it’s still a mortgage
3. use today; “trustee” isn’t a trustee
4. regulation by law
5. trustee’s duties: notice, process, reasonable auctioneer
6. debtors remedies: wrongful foreclosure, injunction, set-aside

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deed of trust mortgages:

Dreyfuss v. Union Bank

1. multiple defaults, modifications, bankruptcies; 2 more properties added
2. foreclosure (at last): bank sequentially sold each property
3. how does the d/t work?
4. why did bank insist on additional security?
5. buyer-borrower’s argument:
   a. 2d & 3d foreclosures were collection of “deficiency” on a “note”
   b. so, violated anti-deficiency statute
   c. court rejects: why? (nature of a d/t!)

Notes
1. power of pvt sale
2. usually, lesser price received
3. tradeoff: private sale, no deficiency
4. bank’s prolonged workout: why?
5. giving a “deed in lieu”: why?

---

sample deed of trust: big picture

1. reading documents; how?
2. fine print matters
3. is there a “big picture”?! (yes & no)
4. the “other golden rule”
5. lender’s interest in valid security
6. lender’s interest in payment
7. lender’s interest in protecting
8. lender’s interest in foreclosure and remedies
9. lender’s interest in short duration: due-on-sale clause
10. rights provided to borrower
sample deed of trust: notes

1. is “conveyance” to trustee really a conveyance? what’s meant by the “power of sale”?
2. default: what remedies, with what requirements?
3. default other than nonpayment: what if borrower removes walls?
4. hazard insurance: why? what if borrower doesn’t obtain? what if destruction by fire?
5. other default: what if maintenance assessment unpaid, and association records lien?
6. foreclosure method? process?
7. substitute trustee: why?
8. other remedies by law (deficiency)
due-on-sale: notes
1. meaning of due-on-sale clause?
2. federal legislation about due-on-sale: in public interest?

the foreclosure process

1. Bank-Fund v. Vivado: earlier notice w/amount to cure, but this one, no; sale overturned. [hypertechnical? Vivado had actual notice & made no showing of ability/pay.]

Notes
1. how exacting must compliance be? Should debtor be required to show harm (i.e., ability & effort to pay)?
2. Mills v. Haggard: no notice to James (who’s dead), but to wife Louise; sale overturned.
3. other irregularities; inadequate price?
4. other processes; reasonable auctioneer

Problem 5B: Damani-Pravelka Foreclosure

[1. notice of default & cure; notice of acceleration]
2. appointment of substitute t’ee
3. request to act
[4. notice of sale]
5. affidavit of notice & posting
6. (orally): conduct of the sale--various sub-steps
7. substitute trustee’s deed
equity of redemption

1. common l: mtg conveys seisin; absolute deed; repay by law day = defeasance of deed
2. common l vs. equity: competition; “no adequate remedy/law”
3. “equity of redemption”: petition to set aside deed or reconvey, if mort pd, even if not in conformity/mort
4. uncertainty clouded lender’s title
5. equity responded: “strict” foreclosure (=foreclosure of equity/redemp)
6. lender’s effort to prevent equity of redemp; e.g., initial waiver
7. equity responded: “clogging” equity/redemp prohibited
8. today: foreclosure process set by law; instrument can’t avoid, if a mort

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equity of redemption: Emanuel v. Bankers Trust

1. Florida’s equity of redemption
   a. final judgment of foreclosure (not really “final”)
   b. judgment sets date of sale
   c. sale by auction
   d. [objections; confirmation—not done here]
   e. equity/redemp still exists, until
   f. cutoff: certificate of sale creates “strict foreclosure”
2. here, judge extended 10 days (because no confirmation?)
3. Why? (trying to be “nice guy”?)
4. extension was illegal: statute is clear; strict foreclosure upon certif.
   Notes
   1. contrast foreclosure “when gavel falls”
   2. Is the “gavel-falls” rule better?

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wrongful foreclosure: Hwang v. Stearns

1. notice posted → damage
2. not in default
   a. Stearns evidently miscalculated debt (scary!)
   b. arrears of taxes not considered—not in deed of trust; not in notice
3. ct decides std is strict liability, not negligence. why? (a “property” claim)
   Notes
   1. an “honest mistake” exception: should it exist?
   2. deed of trust document should cover taxes; why?
liens arising by operation of law

1. "purchase money" or "vendor’s" lien—direct financing by lienholder (not a loan). Arises automatically.

   Chrissikos v. Chrissikos: father paid, directly to seller, for home for son & daughter-in-law.

   Notes: a careful real estate lawyer will want the vendor’s lien to be express on the face of the documents. (Why? Public record!)

[2. construction liens ("mechanics"; materialmen’s liens)]

[3. other types]

Bad Loan Bargain . . . or . . . Predatory Lending?

- Types
- Solutions (Are there good solutions?)

Possible Disaster:
1. Current loan practices may lead to inability to pay
2. Widespread “walk-aways”
3. Collapse
4. Solutions?
   a. Private incentives
   b. Regulation of mortg terms
   c. Regulation making foreclosure harder (or easier)?

Problem 5C: Pravelka-Damani Assumption Sale

1. complete the assumption deed (how differ from non-assumption?)
2. not the subject-to deed (why not?)
3. complete deed of trust to secure assumption: purchasers grant security interest to sellers. Why?
4. preparing the DTSA
5. due diligence w/lender:
   a. verify balance; b. and nondefault; c. and due on sale; d. obtain “estoppel letter”
Wraparounds mortgage

1. When? You’re selling; interest rate’s gone up; mortgage assumable
2. Makes sense to keep old, low-rate mortg; you want to capture the interest spread
3. Solution: buyer pays you on new (wrap) mortgage; you pay old
5. Multiple wraps are possible (sometimes 5 or 6)
Brokerage
1. brokers
2. licensing
3. reqmt of writing
4. exclusivity?
5. MLS
6. entitlmt/commiss
7. consumer legisln
8. broker tasks
9. agent of both?

The Earnest Money Agreement
1. blueprint
2. emotional event
3. reqmt of writing
4. finance contngncy
5. good & indefeasible?
6. exceptns/seller
7. risk/loss
8. furniture/fixtures
9. delivery/pos’n
10. equitable title/record

The Terms of Financing
1. fixed-rate
2. ARM
3. ROM/balloon
4. GPM
5. why non-fixed?
6. regulation
7. caps
### The Financing Process

1. loan commitment
2. RESPA: g.f. est.
3. “points”
4. usury
5. fed preemption
6. engineering rept
7. other inspections

### The Deed

1. deed: elements
2. conveyance
3. general warranty
4. exceptions
5. acknowledgement, recording
6. corp resolution
7. fee simple absolute
8. “baron sole”
9. express vendor’s lien

### The Promissory Note

1. negot’bl instrument
2. ARM & cap
3. “limited paymt” note
4. prepayment right
5. default; acceleratn
6. anti-waver
7. personal liability?
The Mortgage
(“Deed of Trust”)

A deed/trust is literally a “conveyance in trust,” but not really; it’s really a privately foreclosable mortgage, and the “trustee” isn’t one.

Terms of the Deed of Trust Mortgage

1. uniform covenants
2. judicial sale mtg
3. ipot sale: D/T
4. foreclosure delay
5. which better?
6. equity redempts
7. escrow: taxes/ins.
8. mortg ins. (PMI)
9. phys integrity
10. foreclosure proced
11. trustee & subst.
12. deficiency?

The Due on Sale Clause; The “Riders”

1. due-on-sale
2. borrower credit?
3. other concern?
4. due/sale controversy
5. “golden rule”
1. PUD rider
2. adjust/rate rider
3. self-destruct rider
4. forms & riders
The Title Assurance Process
1. trace to sovereign?
2. adverse possession
3. “driveway easement”
4. examiner’s method
5. marketable–legislatn
6. marketable, record, good
7. recording system
8. taxes, judgments
9. variations; attys

Title Insurance
1. insurance: function
2. what’s insured
3. contract?
   representatn?
4. boundary agrmt: curing
5. cure by affidavit
6. modified policy

Closing
1. function of closing
2. escrow usage
3. escrow disadvantages
4. borrower’s undertakings
5. voluntary disclosures
6. required disclosures
7. Reg Z statement
8. disclosure cost/benefit
9. closing instructions
Subdivision & Homeowner’s Ass’n
1. deed restrictions
2. force of restrictions
3. lapse
4. zoning compared
5. homeowners assn
6. powers/duties
7. maintenance fee
8. officers/directors

Resale; Tax Issues
1. assumption instrumts
2. assumption v. subject-to
3. lender’s consent
4. terms for consent
5. alternative: new note
6. estopped letter
7. other docs
1. deductibility
2. recognition
3. capital gain
4. ord, nec bus exp