ABA LEARNING OUTCOMES COMPLIANCE AND THE REAL ESTATE COURSE TRAJECTORY—REFLECTIONS OF AN OUTGOING ASSOCIATE DEAN

Daniel B. Bogart[*]

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I. INTRODUCTION

Professor Tanya Marsh kindly asked me to participate in the Real Estate Transactions Panel for the 2017 Annual Meeting of the Association of American Law Schools, and this Essay is my attempt, in advance, to set my thoughts to paper. I am especially pleased to join my friends and colleagues Celeste Hammond, Wilson Freyermuth, and Greg Stein on this panel. Our topic is "Keeping the 'Real' World in Real Estate Transactions: New Ideas, Best Practices, and Partnership Opportunities to Strengthen Teaching and Scholarship." I am a Real Estate Transactions teacher at the Dale E. Fowler School of Law at Chapman University. My package of courses typically includes Property and Commercial Leasing as well. This is also my fifth and (I am happy to report) final year serving as associate dean of academic affairs. My focus therefore will be institutional, and to a large degree, administrative.

One thing is clear to me at the outset: my Essay will overlap Professors Hammond's, Freyermuth's, and Stein's. We work on many of the same topics and in the same circles; we see one another at conferences; and to some extent, we carry the same chip on our shoulders. And here is that grudge we share: law schools only as of late have considered transactional practice to be weighty enough to

* Professor of Law and Bolinger Chair in Real Estate, Land Use and Environmental Law, Dale E. Fowler School of Law, Chapman University. I was associate dean for academic affairs at the time I delivered my comments. I stepped down as an administrator at the end of May 2017 and have returned to the role of professor. However, I have not revised my comments to place them in past tense. To some degree, I crafted my remarks (particularly those towards the end of this Essay), as though I was giving an exit interview as an administrator.

deserve serious time in our curricula. As I have previously written,[1] most of our colleagues in law school academia come from litigation backgrounds. Real estate attorneys are alien to much of our faculty. Look, if you have time, at the most common syllabi for negotiations courses. They are survey courses, but only weakly touch upon the professional work of transactional attorneys. Instead, they reflect the background of the instructors who teach these courses; they largely emphasize negotiations in the adversarial context. Dirt lawyers[2] do not see their reflection in these courses, or for that matter in many of the doctrinal courses taught in law schools, even when the doctrinal material seems to invite a transactional approach.

There is something very revealing about serving as academic dean. I hear from students and faculty, often in those moments of frustration we all feel from time to time in the academic world. I hire part-time faculty, and to the degree possible, explain to them what is expected in their courses. The reader should keep in mind that full-time faculty are often unfamiliar with adjunct faculty, even though the latter may teach a significant portion of the curriculum. I work with faculty (full- and part-time) to implement new programs and to resolve problems that arise day to day.

Now, more than at any time in the past, I function as a compliance officer: law schools must meet standards set by both the American Bar Association (the "ABA") and regional accrediting agencies and respond to reporting and survey requests.[3] The associate dean for academic affairs is heavily involved in all of these efforts.[4]

Yet throughout all of this work (or perhaps despite all of this work), I remain a teacher and real estate lawyer. My two worlds—academic dean and real estate teacher—collide more often than one might think.

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1. My piece in the *Pittsburgh Law Review* was one of several articles of the same generation bemoaning the lack of transactional training and emphasis in law school curricula. *See* Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten "Dirt Lawyer,"* 62 U. PITT. L. REV. 335, 335–36 (2001).

2. Among my colleagues, and in organizations such as the American College of Real Estate Lawyers, the term "Dirt Lawyer" has a fairly common meaning. We use it to describe attorneys who help clients purchase or sell, finance, or lease real property, buildings, and improvements. Dirt lawyers may help real estate developers with a wide array of work leading to the successful development of retail and business centers, or residential subdivisions. *See also* Hoge, Fenton, Jones & Appel, *Q&A With Geoffrey Etnire*, DIRTLAWYER.COM, http://www.dirtlawyer.com/whatis.html (last visited Nov. 6, 2018). A dirt lawyer is a lawyer who deals in real estate and government approvals. *See id.*

3. *See Law School Accreditation*, USLEGAL, https://lawschool.uslegal.com/law-school-accreditation/ (last visited Nov. 6, 2018).

4. In my final year as academic dean, I chaired our Learning Outcomes and Assessment Committee. Our ABA site visit takes place in 2018–19. In anticipation, we thoroughly revised and replaced our learning outcomes, and established performance criteria.

So, with the "who am I and why am I in a position to opine" out of the way, I would like to speak (and write) just a bit about several matters of importance to me, especially now that my term as associate dean for academic affairs winds down.

What makes for a good real estate transactions and practice-oriented course? Is there a learning arc for real estate transactions— that is, is there a "best" way to set up real estate courses in your curriculum? Whether you are full-time faculty, an attorney seeking your first teaching position, or part-time faculty, how do you sell your faculty or associate dean (or both) on the idea that your school would benefit from more real estate oriented courses? The answers to these questions run together, and I will allow my answers to these questions to do so here.

As I began to sketch out my thoughts, I realized that the compliance aspects of my job as associate dean would impact my answers heavily. To understand my perspective as an associate dean for academic affairs, my suggestion is that both full- and part-time real estate teachers should start by looking to the new ABA Learning Outcomes and Assessment Standards.[5] These standards will be primary in any conversation you may have with the associate dean concerning emphasis programs, course packages, new course additions, and curricular resources on a going-forward basis. And this is where I start now.

II. LEARNING OUTCOMES AND ASSESSMENT

If you have been teaching for some time, and if you have been awake during faculty meetings, then this will not be news to you: the ABA has now more fully addressed the need for the academic programs of law schools to accommodate stated learning outcomes and to assess whether graduates achieve competence in these outcomes. ABA Standard 302 provides:

> A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:
>
> (a) Knowledge and understanding of substantive and procedural law;
>
> (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
>
> (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and

5. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016–2017 Standards 301, 302, 314, 315 (AM. BAR ASS'N 2016) [hereinafter 2016–2017 ABA STANDARDS].

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession.[6]

Note several aspects of Standard 302 at the outset: the outcomes described are the *minimum* that a school must adopt and assess; these outcomes must bring graduates to a state of *competency*; and schools may adopt additional outcomes under Standard 302(d).[7] Learning outcomes are general and broad, although under Standard 302(d) a school may adopt additional requirements that are more specific.[8] For example, these additional outcomes may focus on a particular mission of the law school or more directly on graduates' abilities to practice law. The outcomes adopted by the ABA now focus on more than legal doctrine. The standards specifically require schools to inculcate skills and values central to practice, including problem solving and oral and written communication.[9]

Learning outcomes required by Section 302 are often referred to as "program learning outcomes" because these are objectives set for the overall academic program.[10] Individual courses may address one or more of these outcomes, or perhaps other unlisted outcomes, but the law school must provide to all students a program of instruction that accomplishes the ends set out in Standard 302.[11]

Adoption of a learning outcome forms a promise of sorts—that graduating students will achieve competency in that skill, value, or subset of knowledge. Schools also must demonstrate that they

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6. *Id.* Standard 302.
7. *Id.*
8. *See id.*
9. *Id.*
10. *See, e.g, J.D. Program Learning Outcomes*, LOY. L. SCH., https://www.lls.edu/academics/officeoftheregistrar/jdprogramlearningoutcomes/ (last visited Nov. 6, 2018) ("In compliance with ABA Standard 302, the Faculty of Loyola Law School, Los Angeles has adopted the following institutional learning outcomes[.]").
11. *See generally* ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, MANAGING DIRECTOR'S GUIDANCE MEMO: STANDARDS 301, 302, 314 AND 315 (2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_learning_outcomes_guidance.pdf. *See also* LORI E. SHAW & VICTORIA L. VANZANDT, STUDENT LEARNING OUTCOMES AND LAW SCHOOL ASSESSMENT (2015); BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD (Deborah Maranville et al. eds., 2015). Professor Shaw and VanZandt's book is particularly clear and helpful, viewed from the perspective of faculty members placed on outcomes and assessment committees and tasked with reviewing existing outcomes and assessment programs to assure compliance with the new standards. I draw on their book liberally in this Essay, and I encourage the reader to consult their book directly. In addition, readers may consult many of the excellent sets of materials that have been prepared in connection with conferences in recent years. This includes, among others, INST. FOR LAW TEACHING AND LEARNING & BOS. UNIV. SCH. OF LAW, RESPONDING TO THE NEW ABA STANDARDS: BEST PRACTICES IN OUTCOMES ASSESSMENT (2016), http://lawteaching.org/wp-content/uploads/2017/04/Conference-Handouts-Compilation.pdf.

measure learning outcomes. To this end, many law schools adopt a corollary set of performance criteria to accompany each outcome.[12] Performance criteria give a school something concrete that can be measured. For example, the learning outcome that requires knowledge of procedural and substantive law may be accompanied by an indicator which states that "graduates will be able to evaluate facts, spot issues, and reach valid conclusions in areas of substantive and procedural law tested by the Bar Exam." This performance criterion will then be measured by rubrics administered by professors in doctrinal courses, by Bar preparation teachers in courses taught at the school, and so on.

In addition, Standard 314 provides that "[a] law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students."[13] A formative assessment is an evaluation on the fly—an assessment made while it is still possible to address a student weakness.[14] In contrast, final exams are "summative."[15] Taken together, these standards require law schools to revisit their curricula and teaching methods, as well as the mechanisms schools use to assess their success in imparting skills, knowledge, and values of the practice of law.

At a minimum, law faculty will be required to identify key learning outcomes on their syllabi. But more than this, law faculty and administrators will be asked to create curricular maps and assessment plans. These documents demonstrate year by year whether graduating students receive the minimum level of instruction necessary to reach competence in each of the listed learning outcomes.

To be blunt, it is no longer sufficient for law faculty and administrators to rely on the Bar Exam as the sole mechanism of evaluating the quality and success of their academic programs. Nor is it sufficient for a faculty to create an academic program that primarily relies on courses based on lecture, Socratic dialogue (or some combination) followed by a single exam. As Professors Lori E. Shaw and Victoria L. VanZandt explain in their book on law school outcomes and assessments, the ABA has shifted focus from what schools teach to what graduates learn.[16]

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12. *See, e.g.*, *Student Learning Outcomes and Performance Criteria*, TEMP. L., https://www.law.temple.edu/academics/student-learning-outcomes-performance-criteria/ (last visited Nov. 6, 2018).

13. 2016–2017 ABA STANDARDS, *supra* note 5, Standard 314.

14. *Id.* Standard 314 (supported by interpretation 314-1 for Standard 314).

15. *Id.* ("Summative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student's legal education that measure the degree of student learning.").

16. SHAW & VANZANDT, *supra* note 11.

III. THE REAL ESTATE SURVEY COURSE

Well then, how do real estate transactions courses fit into this changing outcomes and assessment picture? A quick review shows that a set of well-designed real estate courses will hit most, if not all, of the learning outcomes prescribed by the ABA, and furthermore, that many law faculty teaching in this area utilize teaching methods that include formative, and not simply summative, assessments.

Let's start with the basic real estate transactions survey course. At the very least, this course covers a wide range of substantive and procedural knowledge. These topics can include the following: the differing legal implications of terms sheets and letters of intent; the type of activity and advice that rises to the level of the practice of law; the duty of care expected of an attorney; brokers and the duties that brokers owe to sellers and purchasers, and vice versa; the contract for purchase and sale (and the myriad legal topics contained in that section, including the parol evidence rule, termination rights, and enforceable descriptions of real property); the statute of frauds; closing issues, including the obligation to deliver title of a certain quality; fraud and the duties to disclose defects and post-closing issues, including title insurance; and the loan relationship, from loan commitment to foreclosure of a mortgage (and all the mortgage and note issues in between).[17]

Yet the point of the real estate survey course should be broader than simply to cover doctrine. The course ought to explain and expose law students to real estate practice and to develop (or if students come in with exposure to transactions, reinforce) an understanding of a transaction (its beginning, middle, and end) and the attorney's role in doing the deal. Taught well, a student will connect the doctrine covered in the course with key phases of a transaction, the objectives of parties, and the meaning of provisions contained in transactional documents. In addition, this course may aid a student in the development of the professional judgment that he or she will need to bring to bear in actual practice.

The course can be taught in the old-school way: as a series of case opinions strung together, topic by topic, but unconnected to problem solving or the world of legal practice. However, if done in this manner, the professor loses the opportunity to help create capable lawyers. This is not to say that the basic survey course is a waste of time; just that, alone and unmoored from the world of transactions, it is insufficient.

Look back then at the learning outcomes. Does (or can) the real estate transactions survey course cover some of the bases described in Standard 302? The answer—and this is not news to the vast majority of modern-day real estate teachers—is yes.

17. Of course, real estate teachers often expand or alter this list.

The primary goal of the real estate transactions course is to attach doctrine to the lifecycle of a real estate transaction. More than this, the course should demonstrate the centrality of documents, create an awareness of client objectives to a deal, and raise issues of professionalism and ethics. The survey course may also serve as the springboard for upper-level courses that build on this foundation.

We teach survey courses knowing that many students only want elementary exposure to the subject and not more. As a result, this may be a real estate teacher's only chance to explain the transactional process to students otherwise interested in another area of practice. What we know, and what many students do not, is that many attorneys find themselves negotiating transactions in actual practice, whether this was their goal or not.

As just one example, Professors Robin Malloy and Jim Smith include a wonderful problem in their real estate transactions casebook that seems lifted directly from real life.[18] In the problem, an attorney for the purchaser of real property agrees to the request of the seller's attorney to record documents on the Monday morning following a Friday afternoon closing.[19] The purchaser's attorney is a "young associate" at her firm; the seller's attorney is a much more experienced "senior partner in another large firm in town."[20] Early that Monday morning, just before the county recording office opens, the purchaser's attorney receives an instruction from a senior partner in her firm not to record the closing documents, because over the weekend the purchaser became aware that the property was subject to serious environmental issues.[21] To her chagrin, the purchaser's attorney realizes that she has unwittingly become an escrow agent and has placed herself squarely between the obligation of the escrow and the wishes of her client.

This very circumstance has happened to many attorneys. This dilemma pops up quickly and perhaps before the lawyer has thought through the implications of her actions and words. By definition, Malloy and Smith's problem reaches Standard 302(c)—consideration of the proper professional and ethical responsibilities to clients and the legal system.[22] The problem helps students acquire problem-solving skills required by Standard 302(b).[23] But the problem is only accessible to students if they have first addressed the key doctrines of escrow and fiduciary obligations, thus reaching Standard 302(a) via

18. ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS: PROBLEMS, CASES AND MATERIALS 165 (5th ed. 2017) (referring to problem 6C).

19. *Id.*

20. *Id.*

21. *Id.*

22. 2016–2017 ABA STANDARDS, *supra* note 5, Standard 302(c).

23. *See id.* Standard 302(b) (requiring law schools to establish learning outcomes including competency in legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context).

assigned reading and in class dialogue.[24] With doctrine in place, that teacher will then be in a position to confront students with this problem in a lively class session. If the teacher provides students with a mechanism allowing students to respond to the problems by choosing from a set of possible answers (possibly via electronic voting), then this would meaningfully provide the teacher formative assessment of problem solving, doctrinal knowledge, and professional responsibility.

The basic real estate course can go further still. In my Real Estate Transactions course, I hand out copies of an as-built survey of a shopping center after covering material on title and quality issues to property. I also hand out a copy of the legal description to a parcel displayed on the survey. I take students through the process of reading the legal description with reference to calls on the survey and then ask students to help locate title issues reflected in the completed survey. These problems in the state of title are not obvious. Students will be successful only if they apply what they have learned about easements, encroachments, gaps in parcels, and such. I place students in the position of attorneys asked to evaluate the property, to the degree this may be done just from the survey. Again, a teacher might easily add a formative assessment mechanism at the end of this class period covering each of the legal issues as well as more general questions regarding the objectives of buyers of property.[25]

Recall that the basic ABA outcomes standard does not demand that students acquire particular skills or exposure to specific areas of practice. *The standards do not require students to demonstrate knowledge of or competence in transactional practice.* The ABA Managing Director's Guidance Memo explains that 302(d) is something of a catchall—to the extent that a school has a specific niche or direction, this may be represented by other outcomes adopted by that school's faculty. However, after reading the learning outcomes of many ABA accredited law schools and talking to colleagues at other schools, I expect many if not most schools will include language that either implicitly or explicitly addresses lawyer judgment or practice abilities of graduates. To that extent, an exercise such as the survey review fits in nicely.

IV. ADVANCED COURSES AND THE REAL ESTATE TRAJECTORY

The Fowler Law School is one of the few to require a second-year course in transactional practice, which at our school is titled Practice

24. *See id.* Standard 302(a) (requiring law school courses to include competency in knowledge and understanding of the underlying substantive and procedural law).

25. I present this material, if at a more basic level, as an interactive problem in the 1L Property text that I co-authored with Drake Law School Dean Jerry Anderson. JERRY L. ANDERSON & DANIEL B. BOGART, PROPERTY LAW: PRACTICE, PROBLEMS, AND PERSPECTIVES 437 (2014) (2d ed. forthcoming 2019).

Foundations Transactions.[26] This rigorous course requires students to draft, review and revise documents, to understand and work with warranties and conditions, to understand the phases of a transaction, and to explore and represent the objectives of parties to a transaction.

A course like Practice Foundations Transactions is the correct "first" transactions course—not a specialized real estate or corporations course. The initial transactions course should address the elements common to transactional practice in a thorough and thoughtful way and set the stage for practice area focused transactions courses. For example, students at our school who take real estate transactions courses do so after having taken (or while concurrently taking) Practice Foundations Transactions. This means that students taking my real estate transactions course, and all the transactional electives that follow, will have a proper foundation.

To the extent that students take a dedicated real estate elective, most students take only a single real estate survey course. Law students usually do not follow this with an upper-level, transactions-oriented, writing intensive elective. This failure to take real estate oriented courses, or to follow up with courses that would lead to a real estate practice, represents: (1) a lack of student interest, however misinformed, (2) a lack of interest on the part of the faculty and administrators who schedule courses and recruit full- and part-time teachers, and (3) the general lack of such courses in the typical curriculum, which is self-perpetuating. Many schools do offer advanced courses in mortgage law, mortgage finance, or some aspect of commercial or residential development, but the primary real estate offering remains the survey course.[27]

I believe a better approach would include, at a minimum, a three-course sequence: a primary course on transactional practice, the basic real estate survey course, and an elective that builds on students' transactional and real estate knowledge and skills. The upper-level elective would add both specialized knowledge and the opportunity to draft and negotiate documents in a practice-focused

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26. My friend and former colleague, Professor David Gibbs, designed this course. David comes from a sophisticated thirty-year practice in Boston. As a prelude to creating the course, David carefully evaluated virtually every set of transactional training materials, texts, syllabi, and courses presently used in law schools around the country. His devotion to the development of transactional skills is evident in the finished product.

27. *See* Joanne Martin, *The Nature of the Property Curriculum in ABA-Approved Schools and Its Place in Real Estate Practice*, 44 REAL PROP. TRUST EST. L.J. 305, 393–402, 408 (2009). To the extent that the Property course directly addresses the real estate transaction, it largely does so in the context of residential real estate practice and not commercial development, financing, or leasing. *Id.* at 404. The 1L Property course has not been as helpful as it might be in developing student interest in real estate practice. Property covers a panoply of doctrine and topics, ranging from future interests to takings law. Real estate conveyancing and mortgage law exist in the course, but typically they are allocated only a little time by the professor.

transactional setting. Students would be required to complete both the foundational transactions course and the real estate survey course during their second year so that they might be ready to demonstrate their abilities in a summer job or externship. Students would then complete the sequence by taking a writing-intensive real estate elective in their third year. (Of course, students with a defined interest in real estate practice might take more than one such elective, if offered by their school.)

As an example, I teach an advanced writing-intensive real estate elective—Commercial Leasing. (Professors Hammond, Marsh, and Freyermuth teach a similar course.) Commercial Leasing covers some of the basic property and contract doctrine students encounter in their first year, particularly and obviously landlord-tenant law. But Commercial Leasing also requires students to contemplate and understand letters of intent, obligations of attorneys to their clients and others, attorney negligence and malpractice, remedies, default and bankruptcy, and so on.[28]

In terms of skills, the course brings together drafting and negotiating under the more general guise of closing a lease transaction. Perhaps most importantly, work required in the course demands that students understand the objectives of the clients and others and work to achieve them. This means that students must advise their clients, in writing (in the form of a letter), and connect this advice to both a lease document and legal doctrine. All of the skills developed in Commercial Leasing are transportable to other areas of transactional practice.

Celeste and I created a text for this course titled "Commercial Leasing, A Transactional Primer."[29] (Tanya will serve as a co-author in our forthcoming third edition.) In courses that use this book, students begin with basic drafting exercises that are tied to material being covered in the chapter (e.g., extension clauses in the chapter on lease term). The exercises move from simple to complex and require students to use what they learn in prior assignments. Students must review whole lease agreements, and in order to do so, they must understand the legal implications of each and every provision that they encounter. To do otherwise is to risk failing the client's instructions. Students are taught the principal rule of careful drafting: to craft provisions and language that make sense and that are susceptible to only one meaning. Ultimately, students negotiate in teams against one another. Students need a thorough understanding of the substantive law and doctrine to fully accomplish any exercise. Issues of professionalism and ethics abound.

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28. *See* Bogart, *supra* note 1, at 337.

29. *See generally* DANIEL B. BOGART & CELESTE HAMMOND, COMMERCIAL LEASING, A TRANSACTIONAL PRIMER (2d ed. 2011).

V. THE ASSOCIATE DEAN'S PERSPECTIVE

The associate dean of academic affairs has a very simple perspective. The associate dean hopes that faculty will resolve problems on their own—whether these are with students, staff, or other faculty. I would say that this is probably at the top of any associate dean's wish list. Upon entering our building every day, I wonder what fires I will have to put out (or at least try to extinguish).

Just as importantly, the associate dean appreciates any help he or she receives when trying to meet the school's compliance obligations. Therefore, to the extent that a faculty member's proposal for a new course or emphasis program meets compliance concerns, the associate dean is likely to give support or grant necessary approvals to that faculty member.

For these reasons, real estate transactions professors should participate fully in the learning outcomes and assessment process (even if this would otherwise be last on a professor's list of things to do). At minimum, you should be fully conversant in the learning outcomes and performance indicators adopted by a school. Faculty can design or revise courses and syllabi to address more obvious learning outcomes and to provide necessary formative and summative assessment. Further, professors who attend this panel should not be content simply to revise syllabi. The curricular maps adopted by schools will reflect the courses that systematically lead to competence in adopted outcomes. I know that I would respond with great favor to any member of my faculty who took the time to demonstrate that his or her course fits appropriately in the curricular map, and that the course in fact leads to competence in an adopted learning outcome.

If you follow this advice, then I would suggest that you attempt to show that your real estate related courses meet requirements of your JD or emphasis programs. These courses will matter most to your associate dean for academic affairs. Thus, even if real estate transactions is not required at your law school, you might construct a real estate oriented course to meet your school's practice, writing, or skills requirements. This will be especially easy to do with upper-level real estate elective courses, which often include drafting and negotiation exercises, oral presentations, review of professional obligations, and the consideration of client objectives.

I would urge you to take part in the process of drafting the rubrics schools will use in formative and summative assessments.

What I would not suggest, even if this is your candid view, is asserting to the associate dean for academic affairs just how time-consuming, valueless, bureaucracy driven, and intrusive you believe his or her outcomes related compliance requests to be. Associate deans cannot dodge demands of the ABA or regional accrediting agencies. A faculty member's request to increase the hours of a course or to adopt some new program will likely land like

a lead balloon if made by a professor who otherwise chooses to make the associate dean's life more difficult than it already is.