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# Contracts

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## *A Context and Practice Casebook*

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THIRD EDITION

**Michael Hunter Schwartz**

PROFESSOR OF LAW AND DEAN

MCGEORGE SCHOOL OF LAW, UNIVERSITY OF THE PACIFIC  
CONSULTANT, INSTITUTE FOR LAW TEACHING AND LEARNING

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# Series Editor's Preface

Welcome to a new type of casebook. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. **Student learning and preparation for law practice are the guiding ethics of these books.**

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

**The problems with traditional law school instruction begin with the textbooks law teachers use.** Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, Context and Practice casebooks make it easy for law professors to change.

I welcome reactions, criticisms, and suggestions; my e-mail address is mschwartz@pacific.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning. In fact, students,

if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Michael Hunter Schwartz, Series Designer and Editor  
Consultant, Institute for Law Teaching and Learning  
Dean and Professor of Law, McGeorge School of Law,  
University of the Pacific



# Preface to the Third Edition

The third edition of *Contracts: A Context and Practice Casebook* reflects an effort to move the book and accompanying teaching materials into the next generation. Like prior editions of the book, the third edition adopts a learner-centered approach and draws deeply from modern brain science. The book contains dozens of problems, many of which the authors created in collaboration with practicing attorneys, and, in the very extensive teacher's manual, includes learning objectives for each doctrinal area, dozens of multiple-choice questions, and detailed teaching notes. What's new are the integration of the multiple-choice questions, which have been substantially revised, with Carolina Academic Press's Core Knowledge software and the use of color throughout the book, which we hope adds visual interest, promotes clarity, and provides emphasis.

We remain eager for your feedback, have retained our love for all things contract law, and wish you all the best as a professor or student using this book.

Michael Hunter Schwartz

Adrian J. Walters

August 2019

## Note

In many instances, some or all of the footnotes in the cases and excerpts have been omitted or renumbered. Readers should consult the original sources for exact citation information.



# Preface to the Second Edition

Six years ago, when I launched the Context and Practice Casebook Series by publishing the first edition of this book (with Denise Riebe), the world of legal education was in the middle of a boom era. Although the Carnegie Foundation's *EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW*<sup>1</sup> and Roy Stuckey's *BEST PRACTICES FOR LEGAL EDUCATION*<sup>2</sup> had made compelling arguments for legal education reform, legal education, as a field, was feeling pretty good about itself and not so eager to change. Why fix it if it ain't broke?

Legal education in 2015 looks quite a bit different. We are in the middle of a perfect storm of: greatly declined applications, increased pressure from the state bars and legal employers to produce more practice-ready lawyers, and newly-adopted ABA standards that require law schools to provide more formative and summative assessment and to adopt and measure student learning outcomes. Law schools are closing, merging, and shrinking, and law professor hiring has slowed to a trickle.

This changed landscape has made books like this contracts text and book series like the Context and Practice series a necessity. Legal educators need turnkey tools that allow them to teach more effectively, teach students more about the actual practice of law, and provide multiple formative and summative assessments. Consequently, while my new co-author, Professor Adrian Walters of Chicago Kent, and I concluded that a second edition was necessary and valuable, we were not inclined to change the essential structure and features of the original version. Accordingly, we have retained the first edition's heavy emphasis on good teaching, multiple assessments, visual learning aids, professional identity development, and practical lawyering. We also have kept most of the cases from the first edition, and, as to the cases we did eliminate or replace, we moved them to the teachers' edition so that no former user will suffer withdrawals. We even retained the preface from the first edition because we believe everything it says is still true.

So, what did we change and why did we change it? The most significant changes we made involved replacing or editing many of the chapter problems and a large number of the other problems sprinkled throughout the book. At some point, the

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1. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, & Lee S. Shulman, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

2. Roy Stuckey & Others, *BEST PRACTICES FOR LEGAL EDUCATION* (2007).

internet had made answers to the first edition's problems so readily available to our digital generation students that the problems became less valuable as teaching tools. We also changed some of the cases. For example, Professor Walters abhors the *Lefkowitz* case, and I caved in when confronted by his marked distaste for this terrific, old case. Third, we expanded and clarified the materials on contract reading and contract terms, and we made it clear that, while the Schmo contract is a wonderful teaching tool, it is not a well-drafted contract. Finally, we cleaned up typos and other editing errors in the first edition; at least, we *believe* we caught all or nearly all of the typos this time. Experience tells me, however, that students and faculty users will still find a few and, for those errors, we apologize.

A word or two about my new co-author. Professor Walters was an early adopter of the text, and I had found myself drawn to his blog. He is a wonderful legal thinker and a great teacher (and, in fact, this year, he won a teaching honor). He is funny, gregarious, and hard working, and, because he is British, everything he says sounds smarter than it really is. I am honored by his choice to add his name to the book.

I hope you find the book useful and wish you wonderful contracts students and professors.

~Michael Hunter Schwartz, May 2015

## Second Edition Acknowledgments

Adrian Walters thanks Mike Schwartz for inviting him to co-author this edition and for trusting him not to ruin all the good work! He also thanks the following for their help and support: Rachel and Alice Walters, Shohreh Davoodi (Chicago-Kent class of 2015), Sarah Harding, Steve Harris, Hal Krent, Nicole Lechuga, Matthew Smart (Chicago-Kent class of 2016), and Scott Vanderlin.

Michael Hunter Schwartz thanks Adrian, his administrative teammate Patti Bell, his wife Stacey, his daughters Samantha and Kendra, and his colleagues at the University of Arkansas at Little Rock, William H. Bowen School of law. He thanks the folks at Carolina Academic Press, including Tim, Linda, Keith, Ryland, and Meredith, for their patience and support.

# Preface to the First Edition

By our count, there are at least 20 other contracts casebooks out there. And legal publishers offer a wide variety of casebook series. Why write another casebook? Why create a new casebook series?

Because legal education can and must improve.

For years, law professors have complained that, no matter how hard they tried to be effective educators, their students' performance fell short of their goals. In 2000, the editor of this series, Professor Michael Hunter Schwartz, took a community college class in learning theory and instructional design. It changed his whole outlook on legal education. He learned there are better ways to teach what we wanted our students to learn.

In the meantime, a series of studies found that, while law students come to law school with the same levels of depression, anxiety and substance abuse as their graduate and professional school peers, by the end of their first year, law students are more depressed and more anxious and abuse substances at a greater rate.<sup>1</sup>

The problems with traditional law school instruction begin with the textbooks law teachers use. Law professors are like members of fraternities or sororities who, having been through an initiation process that included hazing, continue hazing all new initiates. Professors often think, "If it was good enough for me, it should be good enough for my students." In this way, legal education is disturbingly similar to the fraternity paddling rituals depicted in the movies.

In Spring 2007, the Carnegie Foundation's *EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW*<sup>2</sup> and Roy Stuckey's *BEST PRACTICES FOR LEGAL EDUCA-*

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1. G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 *Am. B. Found. Res. J.* 225; Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 *Behav. Sci. & L.* 261 (2004); Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 *J. Personality & Soc. Psychol.* 883 (2007).

2. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (2007).

TION<sup>3</sup> measured the effectiveness of modern legal education and concluded that legal education, as presently practiced, falls quite short of what it can and should be. Both works severely criticize the rigid adherence to a single teaching technique and the absence of law practice and professional identity development in legal education.

Inspired by the call to action reflected in these works and by the absence of teaching materials designed in light of these studies and of the hundreds of educational studies in the instructional design field, law teaching experts from around the country have gathered as a group and envisioned a casebook series responsive to the research on teaching and learning and to the Carnegie and Stuckey studies. The result is this series. We hope this book and the series serve as tools to allow law professors and their students to work together to improve students' learning, reduce students' stress, and better prepare students for the rigors and joys of practicing law.

## Overview and Structure of This Text

You will notice from the outset that this text, like all the books in the Context and Practice Casebook series, is unlike other law school texts in significant ways. Whereas most law school texts consist mostly of cases with some textual materials and problems thrown in, this text provides a different mix of cases and contextual material, plus thousands of problems.

This text also uses cases in a very different way from traditional law school texts. Most law school texts provide little to no background knowledge and require you to derive rules of law from cases in a way that is very different from how practicing lawyers do so. When they can, practicing lawyers read secondary resources summarizing an area of law before they start reading the cases. That background provides lawyers with a context for understanding the cases. In contrast to traditional model casebooks, this text provides students with the background knowledge a practicing lawyer would develop before considering reading the cases.

Unlike other texts, this casebook has been designed to give students the tools they need to understand the law and the cases. The book guides students through activities that will make it more likely they will remember what they have learned. For example, the book focuses extensively on helping students learn to use rules, to apply rules and cases to analyze legal problems.

In addition, this text provides many exercises to help students build law learning skills as they study contract law. All contract law professors agree that they cannot possibly teach their students every rule of contract law. So, every contract law professor tries to cover the most important aspects of contract law while also hoping students somehow develop a more general skill for learning contract law. This book has been explicitly designed to train contracts students to become expert at learning in the field. In fact, we hope the text becomes a more general resource for students. Students

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3. Roy Stuckey & Others, *Best Practices for Legal Education* (2007).

who internalize the expert learning skills taught in this book will be able to use the skills to help them learn in their other law school courses and to become life-long, expert learners of the law.

By and large, law practice requires that lawyers be expert legal readers and writers. All existing casebooks make challenging reading demands on students. This casebook also emphasizes legal reading skills, and it probably places a greater emphasis on legal writing than most casebooks. In addition, the book provides learning experiences that allow students to make sense of what they are learning from a visual perspective, and learning experiences that are as close to authentic law practice as possible, experiences that allow students to see how practicing lawyers would use the concepts in practice.

The book is also carefully sequenced. Early in the book, the primary focus is on building basic lawyering and legal analysis skills, such as reading and understanding cases and statutes, identifying legal issues, applying rules, and applying and distinguishing cases. Consequently, the first few chapters provide substantial guidance in your development of these skills and, where appropriate, examples, hints and cues to help students succeed. As students proceed through the book, we gradually decrease the guidance and increase the expectations. The last several chapters increasingly put students in the role of a lawyer who not only must understand and account for the application of somewhat indeterminate law to somewhat indeterminate facts but also must account for client interests and goals and the lawyers' professional responsibilities and values. In fact, the final chapter of the book, Chapter 15, focuses on helping you develop problem-solving skills, both in the context of the types of problems you are likely to encounter on your final exams and in the much more contextual, ambiguous and challenging problems contract lawyers handle. Chapter 15 reflects the research on learning that indicates that students learning in new fields learn best if they are taught both the trees (the individual concepts) in the forest (the field) and the how experts work in the forest (how experts combine and use the concepts to solve real-world problems).

Finally, you may notice that this text contemplates a higher level of class preparation and practice in solving problems than texts you have encountered in your past educational experiences. The upside for you is that if you do the work presented along the way, you will learn more effectively and will not need to study as much for your examinations.

## Contracts Course Objectives

This book has been designed to help students develop skills and knowledge in four areas: (1) contract law and its application to legal problems; (2) expert learning skills applicable not only to learning contracts but also applicable to learning any body of law; (3) contract reading skills; and (4) the beginnings of contract drafting skills. The discussion below explains each of these skills and what you should be learning with respect to each.

### ***Objectives Relating to Learning Contract Doctrine and Its Application***

By the end of your study of contract law, if you are given the facts and relevant documents that form the basis of a contract dispute, you will be able to analyze such “closed universe” problems:

1. Identify the contract law litigation or drafting issues implicated by the facts;
2. Know and articulate, at a mastery level, the relevant contract rules and the rationales that support those rules;
3. Develop arguments that reasonable lawyers representing all involved parties would make with respect to the litigation issues and draft contract terms addressing the drafting issues; and
4. Predict how a court would evaluate the arguments to resolve the litigation dispute or how a court would interpret the draft language were it ever disputed.

### ***Objectives Relating to Expert Learning Skills***

In addition, by the end of your study of contract law, you should have increased your level of independent, expert learning skills. Accordingly, you should be better able to self-regulate your law school learning and know when and how to use the skills law students and lawyers need to succeed in law school, on the bar examination, and in practice.

### ***Objectives Relating to Learning Contract Reading Skills***

This text is not designed to help you become an expert in reading contracts, but it is designed to move you closer to that designation. That skill takes a few more years to develop. However, by the end of your study of contracts, if you are given a contract and asked to evaluate it, you should be able to:

1. Identify a wide variety of commonly-used clauses;
2. Evaluate the strengths and weaknesses of the particular versions of the commonly-used clauses;
3. Find ambiguities in both the language used in the commonly-used clauses and in the contract’s other clauses; and
4. Evaluate the implications of the ambiguities in light of a set of client goals.

### ***Objectives Relating to Learning Contract Drafting Skills***

Finally, you will be familiar with and begin to develop contract drafting skills. This text also does not purport to make you a master draftsman. You can expect to learn to:



1. Describe how contracts lawyers think about and approach drafting problems;
2. Be able to use others' "form contracts" thoughtfully, actively and creatively; and
3. Be able to competently draft some contract clauses.

### *Some of the Underlying Objectives*

To achieve the above goals, you will need to develop the following base-level knowledge and skills:

1. Knowledge of the principles of contract law;
2. Knowledge of basic contract drafting principles;
3. The skill of applying principles of contract law to facts;
4. Knowledge of the context within which each of the contract principles arises;
5. The skill of identifying and distinguishing among contract law issues;
6. Knowledge of common argument patterns in contract law analyses;
7. The skill of brainstorming and articulating arguments contract lawyers make;
8. The skill of organizing your thoughts; and
9. The skill of clearly, precisely, and concisely expressing your thoughts in writing.

Of course, hundreds of sub-sub-goals underlie each objective and sub-goal listed above.

## **Organization of This Text and of Each Chapter**

We have structured this text into eight parts: an introduction; the six broad subjects in contract law (formation, defenses, interpretation, performance, third-party rights, and remedies for breach); and, an additional part that focuses on solving the types of problems that contract lawyers need to be able to analyze and solve. Each of the broad subject areas includes several subtopics, each of which is assigned its own chapter. For example, Part II, Contract Formation, includes three chapters: Chapter 2, Mutual Assent; Chapter 3, Consideration; and Chapter 4, Promissory Estoppel.

Each chapter follows a similar format. Each chapter starts with a problem you should be able to analyze and resolve by the end of your study of that chapter. For each new body of law, we summarize or otherwise introduce the law you will be learning and, in many instances, provide a simple example. In particular, in almost every instance, you will learn a rule from the text or from a secondary source that the text instructs you to consult, *before* you read cases in which courts have applied that rule. The chapters also include an overview so that you have a sense of how you will be learning what you need to learn.

The introductions are most often followed by a series of cases, with problems and active learning exercises interspersed throughout. Many of the cases in the first half of the book include commentary alongside designed to increase your understanding of the cases or to teach you something about legal method. Many of the problems and exercises suggest you write a response, and we encourage you to do so. In class, you can expect your professor will ask you many of the questions included in this text.

The chapters also include graphics designed to give you a visual sense of the concepts and the overall body of law. Toward the end of each chapter, we include hints for analyzing and solving the problem presented at the beginning of the chapter. Many chapters also ask you to find the law of the state in which you currently are planning to practice law. Finally, each chapter concludes with reflection questions designed to further your professional development.