# ABOUT THE MATERIALS

I was hired by the University of Miami School of Law to teach commercial law. I left a partnership at Cravath, Swaine & Moore in New York City in 2002 to come to Miami to teach. In New York, I had what many would call a paradigm Wall Street practice, focusing for 17 years primarily on syndicated lending, structured finance and financing for mergers and acquisitions. My clients included JP Morgan Chase, Citibank, AOL/Time Warner, IBM, Capital One, Salomon Brothers, First Boston, Blackstone, Financial Security Assurance, among others. Secured lending necessarily played an important role in this practice. On a daily basis, one dealt with Article 9 of the Uniform Commercial Code and its related provisions and exceptions (e.g. Article 8 on investment securities, rules governing US treasury obligations, etc.) As the law of secured transactions forms the core of most introductory commercial law courses, this was a natural teaching fit that utilized my finance background.

In practice, there is no time to write textbooks or prepare teaching materials. Thus, at the start of my full time teaching career I necessarily used texts prepared by others. As time passed, I reordered the material and prepared extensive supplements for my students. Increasingly, I was frustrated using materials prepared by others—even though the texts were excellent from an academic standpoint.

What I perceived missing from the text's of others was a distinct transactional perspective. One might learn various aspects of secured transactions piecemeal—but it was hard to convey the bigger picture by moving from isolated topic to topic. Indeed, I think the use of case law forms too large a percentage of the required reading in the leading commercial law textbooks—even in the texts which make an effort to include more problems and textual explanation.

I took a break from teaching commercial law in 2008. The school needed other subjects taught and I wanted to think about how best to teach commercial law to students who might actually practice in the area. I had decided that I would not teach commercial law again until I could use my own materials, prepared from a transactional and practice perspective. What you hold in your hand is my first effort in this direction (and the necessary prerequisite to bring me back to commercial law teaching). It does not purport to be a textbook or a treatise. The materials form the basis for classroom instruction.

These course materials likely are very different from any others you have used in law school (or are likely to use). This “text” does not include a single case (either reprinted in full or edited). In the place of cases you will find various forms of

agreements. I decided to structure the core of the course around agreements (rather than cases) because, first and foremost, these are the sorts of documents you will be working with in practice—regardless of whether you are a transactional lawyer or a commercial litigator. You will either be structuring a new transaction or litigating about a completed one. The starting point is always the transaction documents. Indeed, major law firms retrain new law graduates by teaching them about documents —how to draft them, how to interpret them, how to negotiate them. Law schools are not equipped, by and large, to perform this task because it is outside the scope of professorial expertise. This is why new law firm hires "go back to school" when they arrive at a firm. Not only do I think the law firm method is a better way to learn about secured transactions, but it may give you an advantage when you enter the working world.

The agreements which form the core of your study come from a variety of sources.

I drafted the security agreement and note in the Simple Secured Transaction for instructional purposes. It has certain defects, quirks and issues which should help you learn about the basics. It is short enough and simple enough that we can easily return to it over the course of the semester as a point of reference. The Simple Secured Transaction is completed by an actual—though reformatted—UCC-1 for use in the State of Florida. You immediately start with a real world document that beginning associates are asked to work with when beginning practice. With this transaction in mind, the materials then proceed through a number of problem sets.

Following consideration of a basic transaction and the related problems, the materials turn to a number of specialty security agreements used for particular types of investment collateral—deposit accounts, stock certificates, and securities accounts. These various agreements have all been tweaked and adapted from actual forms used by JP Morgan Chase in real transactions—though they are not *in haec verba* the forms actually used. The materials incorporate by reference ABA prepared materials on deposit account accounts by way of comparison.

The next specialty collateral considered is intellectual property. For these agreements, we start with a brand new form (released August 2, 2012) by an ABA task force as an initial draft of a stand alone agreement to cover copyrights, patents and trademarks. We are fortunate to have this resource—and at its inception. If we, as a class, have suggestions as we study this effort, we might send them to the ABA—who knows? I follow up this general intellectual property security agreement with two examples of 2012 agreements signed by Frederick's of Hollywood. I kid you not —these were the best current examples I could find of a copyright security agreement and a trademark security agreement designed for use as a supplement to a larger

security agreement. In my experience, these sorts of supplements are, by far, the more common form of intellectual property security agreement. They are used specifically for filing with the Copyright Office and the PTO.

We next move to a partial agreement—subordination language from a form of indenture used by investment banks to issue high yield debt. Subordination language takes many forms, and appears in many different contexts. However, public debt subordination language is a good place to start to learn the basics. Though a subordination agreement is not a security agreement, subordination provisions are in widespread use—either as an alternative or as a supplement to secured debt. You can not really understand secured financing without understanding this drafting tool. By way of comparison, we then compare and contrast the language and purpose of this subordination language with a form of intercreditor agreement prepared by an ABA task force (which focuses on lien subordination), also incorporated by reference.

After a brief detour including textual explanation and problems about how to use legal entities to create priority (necessary for certain kinds of structured finance but beyond the scope of this class for any detailed treatment), we arrive at the main event—a full blown loan and security agreement.

I have prepared this agreement from a variety of sources—including recent 2012 loans made by venture capital firms to start up companies, documentation used by the Small Business Administration, and syndicated loans structured by JP Morgan Chase. Though this agreement is a composite—it is essentially a real agreement like those used in many areas of practice. The level of detail is genuine—yet I hope manageable for teaching purposes (unlike a true syndicated loan which is often three times its length). During the course of instruction you will learn what has been abbreviated and why. (Syndication agent, loan sale, and LIBOR interest rate setting provisions have been stripped out, for example). Nevertheless, his agreement includes all of the essential exhibits you would expect to find in a real agreement (including compliance certificates, borrower disclosure and a form of guarantee). The completeness of this document is enhanced by the prior agreements in the materials (which might be added as exhibits for particular transactions and, indeed, are even referenced in the main loan and security agreement).

The documentation closes with three very practical documents to learn about: a security interest legal opinion, a letter used at the start of a transaction to elicit essential information from a borrower, and a certification as to the absence of investment company or public utility holding company status (all prepared by me for teaching purposes—when at Cravath I drafted most of the security interest and structured finance opinion forms in general use at the Firm). You will learn why each of these pieces to a transaction are important. Again, ABA materials supplement our

study by providing valuable resources about opinion letters, again incorporated by reference.

The course materials end with consideration of a complex drafting problem related to mandatory prepayments and a detailed treatment of a critical area of Bankruptcy law—preferential transfers.

Though the core of the course is focused on documents, you also find two other sorts of materials prepared by me listed in the table of contents: extensive sets of problems in a variety of formats (essay, short answer, multiple choice, true-false) and numerous "outlines". The problems are designed to cover almost every sort of basic problem that, if you can solve them, will make you a commercial law star relative to any of your peers. The outlines are designed to supplement the class lectures. In essence, they go into great detail about issues that, from my experience, students find particularly mystifying—they are the refresher text when lecture notes might not suffice. During the course of the semester, I might prepare and distribute additional outlines if I have guessed wrong and some other areas of law need an expanded treatment. I also may distribute additional questions with the same purpose—to emphasize some point of law or structure that students are having difficulty with at the time. You also will find ABA documents incorporated by reference. Where I believe the ABA has an adequate treatment of a subject, or enhances understanding of a subject, I use them rather than reinvent the wheel.

Though the materials do not include the text of cases, they do contain numerous citations to cases. You should read these cases (in the library, on LEXIS, on WESTLAW) to see where various principles of law come from, and how they are derived. I will likely ask you to look at additional cases from time to time as well. For the transactional lawyer case law is important—but not, in my view, important enough to make you pay for it when you can get the cases for free. You are no longer in the first year of law school where edited cases make sense. The value add of an "edited" case is, in my view, not value added at all. In the real world, relevant cases do not come edited for your convenience. Now is the time to grow up and learn how to function like a practicing attorney.

By focusing on documentation rather than cases, you will find a decided shift away from the study of the exercise of remedies under the UCC—the study of which often forms a core part of a beginning commercial law course. This is intentional. At the start of the course we will consider in some detail various judicial remedies and contrast them with the self help remedies available to a secured creditor. However, we will not dwell on the details of UCC remedies for a very practical reason—in the real world they are largely irrelevant. By the time a secured creditor gets ready to exercise remedies, the typical business debtor simply files for bankruptcy. The

automatic stay of bankruptcy halts all collection efforts. Realization on asset value takes place in bankrupcty court and not pursuant to UCC procedures (though you will learn about a few provisions of the Bankruptcy Code that allow creditors to proceed following a filing). Thus, the main event for secured financing of personal property revolves around whether or not the security interest was perfected (which we study in great detail throughout the course) and whether or not the security interest amounted to a preference (also studied in great detail, primarily at the end of the course). The main exception to the irrelevance of UCC remedies is consumer finance—almost all non-judicial exercise of remedies under the UCC are automobile repossessions (add boats and jet skis for locations like Florida). If you want to repo a car, do two things —don't breach the peace and don't take a police officer with you. It is that simple. (In my experience, non-bankruptcy realization on collateral also takes place in the context of structured financings which utilize bankruptcy remote entities—but that is beyond the scope of an introductory course.)

A final note: my view on statutory supplements. For an upper division course, I do not believe in them. We will use, for the most part, actual statutes which are available online for free. If you must purchase a Commercial Law Statutory supplement—by all means go ahead and lug it around. Real lawyers would not be caught dead using such a thing. You should learn to function without such a crutch. I may create some pdfs of important statutes and make them available to the class for those who don't know how to do this (and want to keep a copy on their computer or iPad). It depends on student demand.

I appreciate you patience with the maiden voyage of these materials. I hope you find them instructive and useful. Comments are most welcome as I am sure this product can be improved for future students.

I wish you all the best with your study of commercial law. – WHW