HOFSTRA UNIVERSITY
School of Law

BUSINESS DRAFTING, Spring 2017
Kushn 0243, 4:10pm - 6pm, Mondays

Professor J. M. Platt

Assignment in Advance of 1st Day of Class

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Due: January 23, 2017
(First Day of Class, Spring 2017)

Although there will be no *writing assignment* in preparation for the first class, I would like everyone, prior to the first class, to read the following three (3) New York Times newspaper articles and one (1) Wall Street Journal newspaper article, all of which are available on the TWEN site for this course (for which you must register), and are also attached for your convenience:

1. ***"The Comma that Costs One Million Dollars (Canadian),"*** dated October 25, 2006; and

2. ***"Attack of the Fine Print,"*** dated July 26, 2009.

3. ***"J.P. Morgan, Regulators Wage War of Wording,"*** dated October 31, 2013.

4. ***"What they Don't Teach Law Students: Lawyering,"*** dated November 19, 2011.

I look forward to meeting you.

JMP

The New York Times
nytimes.com

October 25, 2006

The Comma That Costs 1 Million Dollars (Canadian)

By IAN AUSTEN

OTTAWA, Oct. 24 — If there is a moral to the story about a contract dispute between Canadian companies, this is it: Pay attention in grammar class.

The dispute between Rogers Communications of Toronto, Canada's largest cable television provider, and a telephone company in Atlantic Canada, Bell Aliant, is over the phone company's attempt to cancel a contract governing Rogers' use of telephone poles. But the argument turns on a single comma in the 14-page contract. The answer is worth 1 million Canadian dollars ($888,000).

Citing the "rules of punctuation," Canada's telecommunications regulator recently ruled that the comma allowed Bell Aliant to end its five-year agreement with Rogers at any time with notice.

Rogers argues that pole contracts run for five years and automatically renew for another five years, unless a telephone company cancels the agreement before the start of the final 12 months.

The contract is a standard one for the use of utility poles, negotiated between a cable television trade association and an alliance of telephone companies. French and English versions were approved by a government regulator about six years ago.

The dispute is over this sentence: "This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party."

The regulator concluded that the second comma meant that the part of the sentence describing the one-year notice for cancellation applied to both the five-year term as well as its renewal. Therefore, the regulator found, the phone company could escape the contract after as little as one year.

"The meaning of the clause was clear and unambiguous," the regulator wrote in a ruling in July.

But Kenneth G. Engelhart, vice president for regulatory affairs at Rogers, disagreed. "Why they feel that a comma should somehow overrule the plain meaning of the words is beyond me," he said. "I don't think it makes any sense."

He acknowledged, however, that lawyers for his company might have underestimated the regulator's interest in grammar.

"We were obviously too confident the first time around," he said.

But this time, Rogers has turned to Canada's other official language, French, as well as its own outside grammar expert to appeal the ruling.

Aliant, which is controlled by the Montreal-based BCE, declined to comment. But in a filing with the Canadian Radio-television and Telecommunications Commission, it called the issue "a classic case of where the placement of a comma has great importance."

Mr. Engelhart said the grammar fight began when Aliant told Rogers in February 2005 that it was canceling a pole agreement for the province of New Brunswick one year early. The cancellation was necessary because a local electric utility was taking direct control of poles that Aliant previously managed on its behalf.

The power company, Mr. Engelhart said, planned to "really crank up rates," a change that would cost Rogers about 1 million Canadian dollars over that final year.

To bolster its appeal, Rogers commissioned a 69-page affidavit, mostly about commas, from Kenneth A. Adams, a lawyer from Garden City, N.Y., who is the author of two books on contract language. It disputes the regulator's analysis of what Mr. Adams calls "the rule of the last antecedent."

Rogers is also pointing to the official French version of the pole agreement, which has equal status under Canadian law. While differences between the languages will not settle the comma question, Mr. Engelhart said the phrasing removed any ambiguity about the contract's life span.

"It becomes very clear once you read the French version," he said.

The New York Times

July 26, 2009

BIG DEAL

Attack of the Fine Print

By JOSH BARBANEL

THE Rushmore, a new 41-story glass and stone condominium tower on Riverside Boulevard at the Hudson River, seemed serene on a recent visit. The flowers in the interior courtyard were in full bloom; the ground-level pool had been filled. Sixteen buyers had already moved in.

And yet an error of a single digit in an arcane document — the densely worded 732-page offering plan — could upset that happy picture, and cost the sponsors, the Extell Development Company and the Carlyle Group, tens of millions of dollars in lost revenue, lawyers say.

The Rushmore, surrounded by parks and with extensive river views, sold well when it went on the market, and 60 percent of the apartments are now in contract. But as the economy soured and the real estate market slid, sponsors were forced to allow new buyers discounts.

Buyers at the Rushmore and at other new condominiums began struggling to get out of their contracts and to repocket their deposits — at the Rushmore, 15 percent of the purchase price. Lawyers pored over the offering plan and pondered obscure state and federal laws looking for ways to invalidate the contracts.

At the Rushmore, they may have found a loophole. Both the buyers and the sponsors agree that there was an error in a date in the offering plan, a document painstakingly prepared by a major New York law firm. Now they are debating whether the mistake was a trivial clerical error that should simply be ignored, or a one-time opportunity for Rushmore buyers to back out and recover their deposits or negotiate a better deal.

Late last month, Richard N. Cohen, a real estate lawyer, filed an application with the New York State attorney general's office seeking a refund of deposits for a group of buyers in contract at the Rushmore. After several buyers joined the action last week, he now represents 23 who paid about $10 million in deposits on $70 million in apartments, including a four-bedroom apartment with a terrace that is in contract for $7.1 million.

Under state regulations, a sponsor is required to provide an operating budget for the first year of a new condominium, so buyers know what to expect when they move in. If the first closing does not occur by the end of the budget year, the sponsor is required to submit a new budget, and give the buyers a right to rescind their contracts.

At the Rushmore, somebody goofed. The offering plan promised to give buyers a right to back out of the plan if the first closing did not occur before the first day of the budget year, Sept. 1, 2008, rather than Sept. 1, 2009, after the last day. The first closing occurred in February 2009.

At the time the plan was prepared, in 2006, law firms were deluged by developers with plans for new condominiums. In those heady years of rising prices, few buyers paid much attention to the fine print.

Now that the market has turned, Mr. Cohen is arguing that the error in the plan was significant. He said that although Extell had a right to choose a deadline a full year later under state rules, it also had the right to choose an earlier date. Many buyers relied on the 2008 date and statements from sales agents that the project would be completed by the fall of 2008, he said.

The delay, he said, damaged "the very fabric of purchasers' lives and their financial obligations." Buyers had leases that were expiring, he said, and at least one timed the purchase to a baby's arrival.

Extell, in turn, is arguing that the error was insignificant, what lawyers call a "scrivener's error," which should be interpreted to reflect the plain meaning of the state regulations. The plan for the Rushmore was prepared by Stroock & Stroock & Lavan, a firm with 750 lawyers, and reviewed by the development team at Extell, but no one caught the mistake.

Michel S. Evanusa, a real estate partner at Stroock, did not return a telephone call or an e-mail message. In an interview, Gary Barnett, the president of Extell, declined to discuss the legal challenge while it is pending.

Other lawyers were divided over whether the challenge would be upheld. One condominium lawyer noted that the error was an easy one to make in boilerplate paragraphs, but should be enough to give buyers a chance to back out of the contract. The lawyer, who is not involved in the case, declined to give his name because he is a colleague of some of the parties.

Steven Sladkus, a real estate lawyer at Wolf Haldenstein Adler Freeman & Herz, said that unless other contradictory dates or language appeared in the offering plan or the sales contract, the attorney general was likely to treat the error as a serious one.

Yet another real estate lawyer, Adam Leitman Bailey, was of a different opinion. He said the burden was on the buyers to show that a reasonable buyer would have relied on the 2008 date, or that the error harmed a buyer in some way.

Property records show that in the last few months, buyers have negotiated discounts of as much as 12 percent, and brokers say discounts of as much as 18 percent have been offered to prospective buyers on some units. If all buyers still in contract walk away from the apartments with their deposits, the sponsors will have to resell the units at current market prices and stand to lose perhaps $50 million or more. The building was valued at nearly $800 million under the offering plan prices.

But many buyers at the Rushmore don't want to walk away. What they want is the chance to buy in at a lower price, Mr. Cohen said.

The complaint before the attorney general does not focus on the construction quality or apartment size discrepancies used in other buyer challenges.

Mr. Barnett of Extell says that buyers who do close won't be disappointed, no matter what price they pay. He expects the entire Riverside Boulevard development only to increase in value as the neighborhood is completed over the next few years.

"People who move into the building will be getting a bargain," Mr. Barnett said. "They will buy into water views, park views and a super high-quality building."

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J.P. Morgan, Regulators Wage War of Wording
Terms of 2008 Purchase of Washington Mutual in Dispute

By DAN FITZPATRICK and RYAN TRACY CONNECT
Updated Oct. 31, 2013 8:25 p.m. ET

In the frenzied final hours before J.P. Morgan Chase JPM +1.48% & Co. acquired the banking operations of failed thrift Washington Mutual Inc., WMIH -0.91% the bank's lawyers tangled with regulators over the wording of the 39-page purchase agreement.

The question of who bears responsibility for Washington Mutual's legal liabilities is taking on increasing urgency as J.P. Morgan negotiates a pact with the Justice Department. Ryan Tracy joins MoneyBeat. Photo: Getty Images.

Five years later, J.P. Morgan and the Federal Deposit Insurance Corp. are still fighting over the meaning of those words.

Washington Mutual Purchase Agreement
The document governing J.P. Morgan's purchase from the FDIC of Washington Mutual Inc.'s banking operations is at the heart of a dispute over which claims each party is liable to pay.

The question of who bears responsibility for Washington Mutual's legal liabilities is taking on increasing urgency as J.P. Morgan negotiates a pact with the Justice Department that would end probes of soured mortgage bonds issued by J.P. Morgan and Washington Mutual during the housing boom.

The Justice Department is trying to insert language into the settlement stipulating that none of the costs the bank pays regarding Washington Mutual will be passed to the FDIC, said people close to the talks. J.P. Morgan wants the ability to recover costs associated with Washington Mutual from the FDIC receivership that liquidated the thrift in 2008.

The settlement talks are at risk of falling apart over this and other disagreements, said people close to the talks.

At issue is exactly which liabilities J.P. Morgan assumed when it took control of Washington Mutual in September 2008.

J.P. Morgan has argued in court documents that the purchase agreement shields it from lawsuits targeting alleged misconduct on the part of Washington Mutual. The FDIC has countered that J.P. Morgan inherited those headaches, which include mortgage bonds that are the subject of numerous lawsuits from investors and regulators.

The collapse of Washington Mutual was the largest-ever U.S. bank failure, and it presented immediate benefits to J.P. Morgan. The purchase gave it $188 billion in deposits and a coast-to-coast presence. FDIC chose J.P. Morgan's $1.88 billion bid over a competing offer from Citigroup Inc.

But J.P. Morgan since 2008 has identified more than 35 lawsuits or claims it believes qualify for payouts from the FDIC receivership, according to documents submitted to the FDIC between 2008 and 2012.

On these requests the bank cites a key section in the original purchase agreement: The FDIC receivership "agrees to indemnify and hold harmless" J.P. Morgan for any liabilities of Washington Mutual that "are not assumed" by J.P. Morgan.

The claims submitted to the FDIC include a mortgage-bond investor lawsuit seeking $10 billion, millions of dollars in unpaid state taxes, cleanup duties on a contaminated site in Oregon and injuries sustained by 67-year-old Raffaela Izzo after she slipped on a ceramic tile outside a Washington Mutual branch in East Islip, N.Y. Ms. Izzo and J.P. Morgan settled for $13,000, Ms. Izzo said.

J.P. Morgan hasn't included specific dollar requests to the FDIC, but the potential damages cited in the lawsuits are larger than the $2.7 billion remaining in the receivership.

The FDIC declined to comment on specific J.P. Morgan claims. The agency said it has denied some claims and accepted at least one, while others are pending or are the subject of continuing lawsuits. Washington Mutual bondholders also are seeking billions from the same receivership.

Another point of contention is the true meaning of a section in the original purchase agreement stating that J.P. Morgan "agrees to pay, perform and discharge all the liabilities of the Failed Bank which are reflected on the Books and Records of the Failed Bank as of Bank Closing." The phrase "Books and Records" isn't defined. d in the document

The agreement "was remarkably unspecific," said Kevin Starke, an analyst with CRT Capital Group LLC in Stamford, Conn.

Yet the FDIC and J.P. Morgan sparred over the final wording up until hours before signing the final agreement.

In one exchange, a J.P. Morgan lawyer made it clear he didn't like any language that saddled the bank with liability for breaches of contract that happened before the closing, according to emails uncovered by a bankruptcy-court examiner.

"In a normal [purchase and assumption agreement] between parties this is not something a buyer would ever assume and it really doesn't make sense (nor frankly is it fair) here," the lawyer, Dan Cooney, wrote to FDIC lawyer David Gearin at 9:29 p.m. on Sept. 23, 2008. Mr. Cooney no longer works for the bank, said a person close to J.P. Morgan. Mr. Gearin's response: "Ok I will look at again."

The back and forth continued through 4:42 p.m. on Sept. 24—less than two hours before bids were due. Mitchell Eitel, a lawyer with Sullivan & Cromwell representing J.P. Morgan, sent a message to Mr. Gearin saying that "the indemnity provision does not work and we understood you were re-drafting it...what should we be assuming from that?"

J.P. Morgan in the end convinced FDIC to change a section that allows the bank to pursue the FDIC receivership for liabilities. J.P. Morgan, said a person close to the bank, believes the change lets it pursue the receivership for an array of liabilities regardless of whether they were explicitly assumed at the sale.

Another ambiguity in the final agreement is the absence of specific liabilities included and excluded from the Sept. 25, 2008, sale. The lack of such detail makes the deal unusual compared with agreements drawn up to resolve other large institutions that were seized during the financial crisis, such as IndyMac Bank of Pasadena, Calif. and Colonial Bank of Montgomery, Ala.

Write to Dan Fitzpatrick at dan.fitzpatrick@wsj.com and Ryan Tracy at ryan.tracy@wsj.com

"Subsidiary" has the meaning set forth in Section 3(w)(4) of the Federal Deposit Insurance Act, 12 U.S.C. Section 1813(w)(4), as amended.

ARTICLE II
ASSUMPTION OF LIABILITIES

2.1 Liabilities Assumed by Assuming Bank. Subject to Sections 2.5 and 4.8, the Assuming Bank expressly assumes at Book Value (subject to adjustment pursuant to Article VIII) and agrees to pay, perform, and discharge, all of the liabilities of the Failed Bank which are reflected on the Books and Records of the Failed Bank as of Bank Closing, including the Assumed Deposits and all liabilities associated with any and all employee benefit plans, except as listed on the attached Schedule 2.1, and as otherwise provided in this Agreement (such liabilities referred to as "Liabilities Assumed"). Notwithstanding Section 4.8, the Assuming Bank specifically assumes all mortgage servicing rights and obligations of the Failed Bank.

2.2 Interest on Deposit Liabilities. The Assuming Bank agrees that it will assume all deposit contracts as of Bank Closing, and it will accrue and pay interest on Deposit liabilities assumed pursuant to Section 2.1 at the same rate(s) and on the same terms as agreed to by the Failed Bank as existed as of Bank Closing. If such Deposit has been pledged to secure an obligation of the depositor or other party, any withdrawal thereof shall be subject to the terms of the agreement governing such pledge.

November 19, 2011

What They Don't Teach Law Students: Lawyering

By DAVID SEGAL

PHILADELPHIA — The lesson today — the ins and outs of closing a deal — seems lifted from Corporate Lawyering 101.

"How do you get a merger done?" asks Scott B. Connolly, an attorney.

There is silence from three well-dressed people in their early 20s, sitting at a conference table in a downtown building here last month.

"What steps would you need to take to accomplish a merger?" Mr. Connolly prods.

After a pause, a participant gives it a shot: "You buy all the stock of one company. Is that what you need?"

"That's a stock acquisition," Mr. Connolly says. "The question is, when you close a merger, how does that deal get done?"

The answer — draft a certificate of merger and file it with the secretary of state — is part of a crash course in legal training. But the three people taking notes are not students. They are associates at a law firm called Drinker Biddle & Reath, hired to handle corporate transactions. And they have each spent three years and as much as $150,000 for a legal degree.

What they did not get, for all that time and money, was much practical training. Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England. Professors are rewarded for chin-stroking scholarship, like law review articles with titles like "A Future Foretold: Neo-Aristotelian Praise of Postmodern Legal Theory."

So, for decades, clients have essentially underwritten the training of new lawyers, paying as much as $300 an hour for the time of associates learning on the job. But the downturn in the economy, and long-running efforts to rethink legal fees, have prompted more and more of those clients to send a simple message to law firms: Teach new hires on your own dime.

"The fundamental issue is that law schools are producing people who are not capable of being counselors," says Jeffrey W. Carr, the general counsel of FMC Technologies, a Houston company that makes oil drilling equipment. "They are lawyers in the sense that they have law degrees, but they aren't ready to be a provider of services."

Last year, a survey by American Lawyer found that 47 percent of law firms had a client say, in effect, "We don't want to see the names of first- or second-year associates on our bills." Other clients are demanding that law firms charge flat fees.

This has helped to hasten a historic decline in hiring. The legal services market has shrunk for three consecutive years, according to the Bureau of Labor Statistics. Altogether, the top 250 firms — which hired 27 percent of graduates from the top 50 law schools last year — have lost nearly 10,000 jobs since 2008, according to an April survey by The National Law Journal.

Law schools know all about the tough conditions that await graduates, and many have added or expanded programs that provide practical training through legal clinics. But almost all the cachet in legal academia goes to professors who produce law review articles, which gobbles up huge amounts of time and tuition money. The essential how-tos of daily practice are a subject that many in the faculty know nothing about — by design. One 2010 study of hiring at top-tier law schools since 2000 found that the median amount of practical experience was one year, and that nearly half of faculty members had never practiced law for a single day. If medical schools took the same approach, they'd be filled with professors who had never set foot in a hospital.

But sticking to the old syllabus has had little downside. The clients of law firms may be scaling back, but the clients of law schools — namely, students — are spending freely. Or rather, borrowing heavily. It is hard to imagine a 21-year-old without a steady income securing a private or federally guaranteed loan to buy a $150,000 house, but sums like that are still readily available for just about anyone who wants a doctor of jurisprudence degree. And while word of grievous job prospects is finally reaching undergraduates — there was an a 11.5 percent drop in applications this year — there were no empty seats in any of the 200 law schools in the country.

"I gather change is afoot at some law schools," Mr. Connolly says, "but it's going to be very slow."

So at Drinker Biddle, first-year associates spend four months getting a primer on corporate law. During this time, they work at a reduced salary and they are neither expected nor allowed to bill a client. It's good marketing for the firm and a novel experience for the trainees.

"What they taught us at this law firm is how to be a lawyer," says Dennis P. O'Reilly, who went through the program last year, and attended the George Washington University School of Law. "What they taught us at law school is how to graduate from law school."

Allergic to the Practical

Law schools' aversion to all things vocational has been much debated, both inside and outside the academy. But critics are fighting both tradition and the legal academy's peculiar set of neuroses.

"Law school has a kind of intellectual inferiority complex, and it's built into the idea of law school itself," says W. Bradley Wendel of the Cornell University Law School, a professor who has written about landing a law school teaching job. "People who teach at law school are part of a profession *and* part of a university. So we're always worried that other parts of the academy are going to look down on us and say: 'You're just a trade school, like those schools that advertise on late-night TV. You don't write dissertations. You don't write articles that nobody reads.' And the response of law school professors is to say: 'That's not true. We do all of that. We're scholars, just like you.' "

This trade-school anxiety can be traced back to the mid-19th century, when legal training was mostly technical and often taught in rented rooms that were unattached to institutions of higher education.

A lawyer named Christopher Langdell changed that when he was appointed dean of the Harvard Law School in 1870 and began to rebrand legal education. Mr. Langdell introduced "case method," which is the short answer to the question "What does law school teach you if not how to be a lawyer?" This approach cultivates a student's capacity to reason and all but ignores the particulars of practice.

Consider, for instance, Contracts, a first-year staple. It is one of many that originated in the Langdell era and endures today. In it, students will typically encounter such classics as Hadley v. Baxendale, an 1854 dispute about financial damages caused by the late delivery of a crankshaft to a British miller.

Here is what students will rarely encounter in Contracts: actual contracts, the sort that lawyers need to draft and file. Likewise, Criminal Procedure class is normally filled with case studies about common law crimes — like murder and theft — but hardly mentions plea bargaining, even though a vast majority of criminal cases are resolved by that method.

Defenders of the status quo say that law school is the wrong place to teach legal practice because law is divided into countless niches and that mastering any of them can take years.

This sort of instruction, they say, can be taught only in the context of an apprenticeship. And if newcomers in medicine, finance and other fields are trained, in large part, by their employers, why shouldn't the same be true in law?

But those pushing for more practical content aren't looking for a bunch of classes in legal minutiae, nor do they expect client-ready lawyers to march off their campus. Instead, they would like to see less bias against professional training and more classes that engage the law as it exists today.

"We should be teaching what is really going on in the legal system," says Edward L. Rubin, a professor and former dean at the Vanderbilt Law School, "not what was going on in the 1870s, when much of the legal curriculum was put in place."

During his tenure as dean, which began in 2005, Professor Rubin tried to update some of the school's mandatory classes. First, he held a series of focus-group discussions, meeting with law firms to find out what managing partners wished that their new hires had already been taught.

Eventually, these conversations led to a new first-year class, the Regulatory State, an introduction to federal administrative agencies, statutes and regulations. Vanderbilt also made changes to second- and third-year courses.

But there were limits. Professor Rubin failed to sell his faculty members on a retooled first-year Contracts class.

"Some members of the faculty got a little overstressed by all the change," Professor Rubin says. "Planning a new course, you have to move out of your comfort zone a little in terms of teaching. And there is always the fear that your school will wind up being seen as an oddball place."

Another problem he encountered: there are few incentives for law professors to excel at teaching. It might earn them the admiration of students, but it won't win them any professional goodies, like tenure, a higher salary, prestige or competing offers from better schools. For those, a professor must publish law review articles, the ticket to punch for any upwardly mobile scholar.

There are more than 600 law reviews in the United States — Georgetown alone produces 11 — and they publish about 10,000 articles a year. Some of these articles are worthwhile and influential, and the best are cited by lawyers in arguments and by judges in court decisions. A study to be published in The Northwestern University Law Review found that in the last 61 years, the Supreme Court "has used legal scholarship" in about one-third of its decisions.

But citable law review articles are vastly outnumbered, it appears, by head-scratchers. "There is evidence that law review articles have left terra firma to soar into outer space," said the Supreme Court Justice Stephen G. Breyer in a 2008 speech.

Some articles are intra-academy tiffs that could interest only the combatants (like "What Is Wrong With Kamm's and Scanlon's Arguments Against Taurek" from The Journal of Ethics & Social Philosophy). Others fall under the category of highbrow edu-tainment, like a 2006 article in The Cardozo Law Review about the legal taboos of a well-known obscenity, the one-word title of which is unprintable in a family newspaper.

Still others crossbreed law and some other discipline, a variety of scholarship that seems to especially irk John G. Roberts Jr., chief justice of the United States. "Pick up a copy of any law review that you see," he said at a conference this summer, "and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."

In fact, many of these articles are not of much apparent help to anyone. A 2005 law review article found that around 40 percent of law review articles in the LexisNexis database had never been cited in cases or in other law review articles.

Of course, much of academia produces cryptic, narrowly cast and unread scholarship. But a pie chart of how law school tuition is actually spent would show an enormous slice for research and writing of law review articles.

How enormous? Last year, J.D., or juris doctor, students spent about $3.6 billion on tuition, according to American Bar Association figures, accounting for discounts through merit- and need-based aid. Given that about half of a law school's budget is spent on faculty salary and benefits, and that tenure-track faculty members consume about 80 percent of the faculty budget — and that such professors spend about 40 percent of their time producing scholarship — roughly one-sixth of that $3.6 billion subsidized faculty scholarship. That's more than $575 million.

Much of that comes from taxpayers in the form of federal student loans. Steven R. Smith, dean of the California Western School of Law, described this sum as "the equivalent of an involuntary fee" that students must pay to get a diploma. "It is not obvious that students are the ones who should be paying the cost of legal scholarship. They are generally borrowing the money to do this and they are the least able of all those in the profession to pay for it."

The Prestige Game

About half of all law school hiring begins at the Faculty Recruitment Conference, widely known as the meat market, held by the Association of American Law Schools. It is conducted every year at the Marriott in the Woodley Park neighborhood of Washington.

At this year's conference, in October, nearly 500 aspiring law professors turned up for interviews with 165 law schools. Like the draft of every professional sport, there are superstars here and for two days they were hotly pursued. At the top of the pile were former Supreme Court clerks. Just under them were candidates with both a J.D. and a Ph.D. in another discipline. Law schools, especially those in the upper echelons, have been smitten by Ph.D.-J.D.'s for more than a decade.

Ori J. Herstein, who studied philosophy in grad school and is a doctor in the science of law, says that "an economics Ph.D. is the most valuable," and that "the further away you get from the humanities the better."

Mr. Herstein was sitting in the Marriott lobby between interviews. Israeli-born and cheerful in a boyishly wonky way, he has a résumé that seems custom-built to tantalize law school recruiters. He has two degrees from Columbia, which, along with a handful of other elite schools — most notably Yale — has become a farm team for the credential-obsessed legal academy. He has already published a handful of law review articles with promisingly esoteric titles ("Historic Injustice and the Non-Identity Problem: The Limitations of the Subsequent-Wrong Solution and Towards a New Solution") and has submitted another that sounds perfectly inscrutable ("Why Nonexistent People Do Not Have Zero Well-Being but Rather No Well-Being").

This type of scholarship, and the cash that keeps the law review conveyor belt spinning, are defended by law school professors as a way to attract the best and brightest to teaching. It is also said to enhance the prestige and sophistication of the American legal system. "Students want renowned scholars to teach them, period," said Francis J. Mootz III, a professor at the William S. Boyd School of Law at the University of Nevada and the author of "Neo-Aristotelian Praise of Postmodern Legal Theory. "They want to learn from the best and brightest."

It is true that a law school's reputation, and the value of its diplomas in the legal market, are almost entirely bound up in the amount and quality of the scholarship it produces. That's been especially so since the late '80s, when U.S. News and World Report started to rank law schools. The publisher's annual rankings all but define a school's standing in the legal academy's firmament, and 40 percent of the U.S. News algorithm is based on a "quality assessment" survey by hundreds of lawyers, judges, deans and professors.

The problem is that with rare exceptions, all schools play the same scholarship-and-prestige game. Even professors in the lowest rungs churn out scholarship, and one of the first items of business for new schools is starting a law review. The result is a kind of arms race, with articles playing the role of nukes and students paying the bill.

Experience Unnecessary

Another appeal of Ori Herstein's résumé is what it's missing: many years of toiling in a law firm. It is widely believed that after lawyers have spent more than eight or nine years practicing, their chances of getting a tenure-track job at law school start to dwindle.

"Nobody wants to become a retirement home, or a place for washed-out lawyers," says Kevin R. Johnson, dean of the law school at the University of California, Davis, who came to the meat market with six positions to fill.

This might seem a paradox — experienced people need not apply — but the academy views seasoned pros with a certain suspicion. In fact, a number of veterans of legal practice who failed to land tenure-track jobs say that experience was a stigma they could not beat.

"It can be fatal, because the academy wants people who are not sullied by the practice of law," said a longtime lawyer and adjunct professor, who did not want to be identified because his remarks might alienate colleagues. "A lot of people who are good at big ideas, the people who teach at law school, think it is beneath them."

The exceptions are those who teach legal clinics, which are programs where students learn to counsel clients (usually poor), draft documents and even litigate, all under faculty supervision. Legal clinics are a growing presence on nearly every campus, and many — like Washington University's Law School in St. Louis and the CUNY School of Law in Queens — get high marks for quality and participation.

But a lot of these programs struggle with a kind of second-class status. Many are staffed, in whole or in part, by teachers who are not voting members of the faculty, and the programs are often modest. A soon-to-be released study of clinical programs by the Center for the Study of Applied Legal Education found that only 3 percent of law schools required clinical training.

"There has been an explosion in interest in clinical law programs," says David Santacroce, president of the center, "but the growth parallels an explosion in the total number of law students so we haven't reached anything close to the saturation point yet. The majority of law students still graduate without any clinical experience."

While most of law schools' professoriate still happily dwell in the uppermost floors of the ivory tower, the view from the ground for new graduates is growing uglier. It's not just that the market is now awash with castoffs from Big Law, and that clients can now retain graduates from elite schools and pay them $25 or $50 an hour, on contract. The nature of legal work itself is evolving, and the days when corporations buy billable hours, instead of results, are numbered.

To succeed in this environment, graduates will need entrepreneurial skills, management ability and some expertise in landing clients. They will need to know less about Contracts and more about contracts.

"Where do these students go?" says Michael Roster, a former chairman of the Association of Corporate Counsel and a lecturer at the University of Southern California Gould School of Law. "There are virtually no openings. They can't hang a shingle and start on their own. Many of them are now asking their schools, 'Why didn't you teach me how to practice law?' "