Who am I, and why did I write this book? Why am I writing a third edition?

I am a lawyer, practicing general real estate law, and doing so for more than 50 years. After graduating from Northwestern University in 1959, majoring in political science, I attended Yale Law School and received my LLB in 1962. I joined Jenner & Block, then the sixth largest law firm in Chicago, but left for a one-year clerkship with the Chief Judge of the United States Court of Appeals for the Second Circuit in New York. I returned to Jenner & Block, practiced in the area of antitrust and general litigation for three years, after which I moved into real estate law. I have been practicing in that area of the law ever since, with Jenner until 1999, with Barnes & Thornburg through 2005, then with Holland & Knight, and now as a solo practitioner.

That autobiographical material is important for several reasons. First, it shows that, although I received a fine education, I was not a business or accounting major. I went right from undergraduate school to law school and then into practice, clerked, and went back into practice again. I did not have the training or experience in business to enable me to evaluate the potential benefits or detriments of a transaction. That was both a curse and a blessing: I was not in a position to consult with and advise the client on its business decisions, but neither did I try to substitute my judgment for the client’s or attempt to affect
the progress of a deal because of a difference of opinion with the client. Rather, I viewed my role as the legal advisor, bringing to bear my experience and my own legal expertise to assist the client in making decisions. Of course, over the last 50+ years, I have learned a lot doing transactions and have had quite an education in business matters for my clients and counterparts in deals.

Second, I have spent time clerking and litigating. Although my experience litigating was not extensive, it does afford me some insight into how disputes may arise and why it is so important to avoid them.

Third, I have obviously been practicing law for a long time. That is not necessarily something to be proud of; every transaction lawyer (who survives, that is) gets older, works for many years, and witnesses many changes—some good and some not so good. During that period of time, one does learn something, often from one’s own mistakes, but usually from other people or from simply doing and thinking—using the base of experience to improve one’s own skills and the tools used in one’s work.

That brings us to the question of why I spent my time writing this book. No doubt doing is a better teacher than reading. Mentoring is better than reading. On the other hand, I have seen the practice of real estate law become much more complex over the years, and I have witnessed a change in the way in which law firms, particularly large law firms, now handle the training of young people. With their high fees and an emphasis on billable hours, they often thrust complicated matters on young lawyers and force them to learn through trial and error. I have also seen enormous changes in technology, which has totally transformed the way documents are drafted and reviewed and also the way deals are negotiated and closed.

When I started practicing in the real estate field, the law was much simpler and the documentation was much less extensive. Many of the laws and regulations that are now an unavoidable part of practice did not exist; there was no environmental regulation, no Americans with Disabilities Act, and no Real Estate Settlement Procedures Act, just to cite three examples. To close a residential deal in Illinois in 1966, you needed four documents: a deed, a bill of sale, an affidavit of title, and a closing statement. The residential loan documents usually consisted of a note and mortgage, and the closing took place at the lender’s or the lawyer’s office. The documents required to close a loan on a warehouse building consisted of the note, mortgage, assignment of rents
and leases, usury affidavit, title commitment, and survey. If it was a
construction loan, there would be a construction loan agreement as
well. The closing binder was half an inch thick. How thick are they
today? Do we even assemble a documents binder now or merely scan
documents and email them? We are truly on the way to a paperless
practice.

Years ago, lawyers were trained in ways that are really unavailable
today. In more leisurely times, young lawyers were taken to meetings
and closings so they could observe and learn—without billing the
client for their time. There were other opportunities to learn that are
now lost. For example, in the days before title companies did owner-
ship searches, and before there were paralegals, young lawyers would
go to the recorder’s office or the title company and look things up in
tract books. I assume that most young lawyers practicing real estate
law today do not even know what a tract book is. All deeds, ease-
ments, subdivisions, and anything else recorded against real estate
were logged by hand into large books. Anyone could check to see
knowing about, order those books, and page through them. Once the
lawyer found a document number, he or she could go to the recorder’s
office and view the copy of the document, sometimes in white print
on a black background, and at other times in old books in which the
documents were actually hand copied (in the most beautiful and flaw-
less handwriting, incidentally). Admittedly, the old system was not as
efficient as ordering an ownership search and getting copies of the
documents emailed by a title company, but the experience gave the
young lawyer something tangible, a feeling for what legal descriptions
meant, how properties were divided and conveyed, and how con-
veyances or encumbrances were recorded and indexed. We learned
what sections and ranges and meridians were and how they looked on
maps. Sometimes closings occurred in the Torrens Office, where the
county provided a form of registration of title and issued duplicate
certificates of title, just as secretaries of state issue automobile titles.
(That was an experience!) Perhaps I am just being nostalgic, but still
I sense that the fact that those hands-on experiences are no longer
available means that younger practitioners are missing something use-
ful. Certainly, it is possible to become a very able real estate lawyer
without those experiences, but I cannot help feeling that they were
valuable for me.
The practice of commercial real estate law is an extremely stimulating and rewarding career. It enables a lawyer to use his or her social and communication skills while, at the same time, benefitting from continuous intellectual stimulation. Unlike litigation, which is an adversarial practice, the real estate lawyer’s purpose is not to prevail over a client’s adversary, but to document and close a deal that, if properly done, will yield benefits to both parties. That is not to say that the negotiation of a real estate transaction is not adversarial. Just as in litigation, the real estate lawyer is obligated to represent his or her client’s interest and to obtain the most favorable result for the client, consistent with the parameters of the initial understanding of the parties and, of course, consistent with the lawyer’s ethical responsibility. Still, there is a level of satisfaction in representing a party to a real estate deal that, I assume, must be missing in a litigated matter. The clients involved usually want to make the deal, and when it is made, they are generally content with the result—sometimes even pleased with it. No client really wants to be involved in litigation. The loser is very unhappy, and the winner probably feels that the matter should have been resolved without the pain and expense of trying the case or reaching an acceptable settlement.

When I wrote the first edition of this book, I addressed it to the lawyer already practicing in the commercial real estate area, or intending to do so. However, as a member of the Task Force on Real Property Law School Curriculum, established by the Real Property, Trust and Estate Law Section of the American Bar Association, I came to recognize that the teaching of property law in law schools, and in particular, the teaching in the first year property course, generally has two major failings.

First, in many law schools, the curriculum is generally case-based, covering important principles that apply not only to property law but to other areas of the law as well. That form of instruction does not necessarily inspire the law student to pursue practicing in this area. Second, it does not teach the student what it is like to be a commercial real estate lawyer, nor does it prepare the student even to start to do so when he or she goes out into the real world of legal practice. Most law schools have moot court programs to teach students appellate advocacy. Many have mock trials to teach trial preparation, direct and cross examination, and other skills useful to the trial lawyer. Some may even have clinics
to assist people with residential real estate transactions. But very few teach the nitty gritty of the commercial real estate practice.

The purpose of this book is to fill the gaps, to some extent, and to provide a brief introduction to what commercial real estate lawyers do (and, to a degree, what they should do), and to give the reader some feeling as to how technology may be used to enhance communication. The reader can find supplemental information in the sources referred to in the footnotes, which are also listed at the end of this book. In addition, I have added quite a bit of new material since, just as in the case of drafts of agreements, rereading always presents new ideas. I realize that even this third edition may fall behind the times. However, it is my hope that this edition and those other sources will prove useful for law students and their instructors, while at the same time being no less useful for the practicing commercial real estate lawyer.

A word of caution is appropriate at this point. I practice law in Illinois and I am, of course, most familiar with the law and the customs of that state. Since both law and practice differ from jurisdiction to jurisdiction, the reader will have to endeavor to learn his or her local requirements.