LEARNING TO WRITING IN CODE
The Value Of Using Legal Writing Exercises To Teach Tax Law

By Scott A. Schumacher

ABSTRACT:

Traditionally, law school tax courses have been taught using a mix of problems, class discussion, the Socratic method, and one end-of-term exam. The goal of these courses is to introduce students to key concepts of tax law and to teach them the essential skill of reading and interpreting the Internal Revenue Code and Treasury Regulations. This traditional method of instruction is an efficient and cost-effective way of transmitting a great deal of complex information to a large number of students. It is also a good vehicle to teach the essential skill of reading and interpreting the Code. However, the time limitations inherent in the traditional methods of teaching do not require, or indeed permit, students to engage in the depth and quality of analysis that they will be asked to perform when they enter practice. In addition, students, while learning the Internal Revenue Code, are not instructed as to how they will use or apply the Code in their daily tax practices.

In 2002, I developed a course in the Graduate Program in Taxation at the University of Washington School of Law, now entitled *Tax Research and Writing*, that has required students to learn tax law in a manner that is different from the traditional problem-based method. Through a series of written assignments, students wrestle with complex statutory and regulatory provisions, as well as caselaw and administrative materials, and then produce written products of the type and quality they will be required to produce in practice. More than teaching the "skills" of research and writing, the *Tax Research and Writing* assignments require the students to analyze, struggle with, and resolve tax questions at a different, and I would argue higher, level.

My thesis in this article is that the traditional methods of teach tax law, standing alone, are not sufficient to properly prepare our students for the rigors of tax practice. Whenever practicable, tax professors should include writing assignments in their substantive courses that will necessitate each student to fully analyze the relevant Code provisions and create a written product that would be appropriate for their future practice. In Section I of the article, I will set forth the limitations inherent in the traditional methods of teaching tax law that prevent students from fully analyzing the Code. Section II will then set forth why I believe writing exercises are a superior way to teach legal analysis, including the analysis of tax law. My argument is that writing exercises teach legal analysis, not just some separate skill of writing, and that the analysis that students are able to perform under these conditions is superior to what they can perform in class. At the same time, writing assignments teach students the forms and norms of practice, and improve their writing, making them better prepared to be effective professionals when they enter the practice of law. In Section III of the article, I will introduce *Tax Research and Writing* course, including some of the assignments I have used and the goals of each of the assignments. Finally, in Section IV, I will provide suggestions on how legal writing assignments can be included in substantive tax courses.

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LEARNING TO WRITING IN CODE

The Value Of Using Legal Writing Exercises To Teach Tax Law

By Scott A. Schumacher[1]

A debate has waged for many years regarding the role of law schools in teaching and training lawyers. Akin to a Shakespearean blood-feud,[2] the Langdellians[3] argue that we should teach our students to "think like lawyers," while the MacCrates[4] counter that, no, the primary mission of the law school is to train law students to practice law. In my view, this is a false dichotomy. The best way to teach students to think like lawyers is to train them to write, speak, and act like lawyers.[5]

Unfortunately, the divide between theory and practice continues in the way most tax courses are taught. Traditionally, law school tax courses have been taught using a mix of problems, class discussion, the Socratic method, and one end-of-term exam.[6] The

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[2] *See, e.g.,* William Shakespeare, ROMEO & JULIET, the background for which involves a feud between two families – the Capulets and the Montagues.

[3] Langdellians profess that law should be taught as almost pure theory or as a science. *See* Lawrence M. Friedman, A History of American Law, 2d ed., 613 (New York, 1985).

[4] *See* Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, 44 J. Legal Educ. 89 (1994).

[5] *See, e.g.,* Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy In The "Casebook" Classroom (Without Grading Papers)* 10 Legal Writing: J. Legal Writing Inst. 23 (2004).

[6] Professor Michael Oberst divides the teaching of tax courses into two methods, what he refers to as the "Passive Approach" and the "Active Approach." The Passive Approach emphasizes the Socratic method and introducing students to broad concepts, while the Active Approach relies on extensive classroom questioning of students to teach the

goal of these courses is to introduce students to key concepts of tax law[7] and to teach them the essential skill of reading and interpreting the Internal Revenue Code and Treasury Regulations. This traditional method of instruction is an efficient and cost-effective way of transmitting a great deal of complex information to a large number of students. It is also a good vehicle to teach the essential skill of reading and interpreting the Code.[8] However, the time limitations inherent in the traditional methods of teaching do not require, or indeed permit, students to engage in the depth and quality of analysis that they will be asked to perform when they enter practice. In addition, students, while learning the Internal Revenue Code, are not instructed as to how they will use or apply the Code in their daily tax practices.

In 2002, I developed a course in the Graduate Program in Taxation at the University of Washington School of Law, now entitled *Tax Research and Writing*,[9] that has required students to learn tax law in a manner that is different from the traditional problem-based method. Through a series of written assignments, students wrestle with complex statutory and regulatory provisions, as well as caselaw and administrative materials, and then produce written products of the type and quality they will be required to produce in practice.[10] More than teaching the "skills" of research and writing,[11] the

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important and necessary skill of statutory and regulatory interpretation. *See* Michael A. Oberst, *Teaching Tax Law: Developing Analytical Skills*, 46 J. Legal Educ. 79 (1996).

[7] Or a subspecialty of tax law, like partnership tax, corporate tax, and estate tax.

[8] Oberst, *supra*, footnote 6.

[9] The course was initially entitle *Tax Writing.* However, I later added a tax research component to the course and changed the title accordingly.

[10] *Cf.* Dianne Molvig, *Preparing For Practice*, 74-JUL Wis. Law. 10 (2001).

[11] *See* text at notes 28-40 *infra*, for my arguments that writing is not a skill separate from the legal analysis reflected in the written product.

Tax Research and Writing assignments require the students to analyze, struggle with, and resolve tax questions at a different, and I would argue higher, level.

My thesis in this article is that the traditional methods of teach tax law, standing alone, are not sufficient to properly prepare our students for the rigors of tax practice. Whenever practicable, tax professors should include writing assignments in their substantive courses that will necessitate each student to fully analyze the relevant Code provisions and create a written product that would be appropriate for their future practice. In Section I of the article, I will set forth the limitations inherent in the traditional methods of teaching tax law that prevent students from fully analyzing the Code. Section II will then set forth why I believe writing exercises are a superior way to teach legal analysis, including the analysis of tax law. My argument is that writing exercises teach legal analysis, not just some separate skill of writing, and that the analysis that students are able to perform under these conditions is superior to what they can perform in class. At the same time, writing assignments teach students the forms and norms of practice, and improve their writing, making them better prepared to be effective professionals when they enter the practice of law. In Section III of the article, I will introduce *Tax Research and Writing* course, including some of the assignments I have used and the goals of each of the assignments. Finally, in Section IV, I will provide suggestions on how legal writing assignments can be included in substantive tax courses.

I. The Inherent Limitations of the Traditional Methods of Teaching Tax Law

Teachers of tax law, especially faculty teaching a basic tax course, are faced with a rather daunting task. They must introduce students to a hugely complex area of the law (a subject matter that has numerous terms of art), overcome students' trepidations about

the perceived difficulty and boredom of tax law, and teach students the art of statutory interpretation.[12] In addition, enrollment in basic tax courses, as well as may other JD level tax courses,[13] are generally quite high. Thus, tax teachers must find a way to impart the good news of tax law to a large audience in an effective and efficient manner.

As a result, tax professors have adopted the pedagogical methods of other law professors who teach large classes.[14] Many basic tax courses, and most basic tax course books, employ the usual mix of heavily-edited caselaw, a sprinkling of Code and Regulation provisions, and problems or talking points that will form the basis of class discussion.[15] As the subject matter of the tax courses become more specialized, and the students become more sophisticated, faculty tend to rely less on cases and casebooks, relying instead on problem method, using sets of problems composed by the text's author and/or the instructor as the basis for class discussion. These problems require the students to read and digest the Code and Regulations and to become adept at parsing complex statutory and regulatory provisions.

To help students understand this complex law and to teach students the art of statutory construction, tax faculty use some form of the Socratic method, putting one or more students through a series of questions designed to plumb the intricacies and mysteries of the Code.[16] To ensure that the students have in fact learned some of what

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[12] *See* Oberst, *supra* note 6 at 80.

[13] For example, Corporate Tax and Gift and Estate Tax are routinely offered as part of a JD tax curriculum. Those courses often have enrollments nearly as large as a basic tax course.

[14] *See* Oberst, *supra* note 6 at 80-81.

[15] *Id*.

[16] *Id*.

was covered in the course, students are usually given a time-sensitive exam, in which students are required to spot issues, demonstrate competency with the subject matter, and show that they can indeed analyze complex tax statutes.[17] Through repetition, tax students, particularly students who earn an LL.M. in taxation, become quite adept at reading, parsing, and analyzing the Code and Regulations.

But is that enough? If possible, should we not do more than just force-march our students through the Code and then subject them to an exam whose main purpose is to keep them honest and to verify that they can conjure up enough Code-speak to place themselves advantageously in the curve vis-à-vis their colleagues?[18]

No matter how adept the professor may be at the Socratic method, and regardless of how prepared the students might be, because of the constraints of time, classroom discussion simply cannot replicate the depth of analysis lawyers will be required to produce in practice.[19] Only a few students can be interrogated in a given class session,

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[17] Some courses employ a take-home exam, giving students a longer period within which to complete the exam. Other courses, such as Estate Planning, have been taught using practical exercises, including the preparation of will and trust documents, estate tax returns, etc.

[18] *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich L. Rev. 34 (1992) (noting that law schools are moving toward theory while law firms are moving toward commerce); Mike Jay Garcia, *Key Trends in the Legal Profession*, 71 Fla. B.J. 16 (1997) (stating that "judges find themselves overbooked with less time to help teach and mold new talent, while experienced lawyers are forced to spend the majority of their time working on obtaining additional billable hours instead of mentoring"); *see also* Graham C. Lilly, *Essay, Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 Va. L .Rev. 1421, 1442-1449 (1995) (explaining the market forces driving law firms), *as cited in* Barbara J. Busharis and Suzanne E. Rowe, *The Gordian Knot: Uniting Skills And Substance In Employment Discrimination And Federal Taxation Courses*, 33 J. Marshall L. Rev. 303, 304 n.8 (2000).

[19] *See* Lucia Ann Silecchia, *Designing And Teaching Advanced Legal Research And Writing Courses*, 33 Duq. L. Rev. 203 (1995).

and the ones who escaped their professor's white-hot grilling, while considering themselves fortunate, in fact missed out on having to analyze the applicable Code provisions in any meaningful way.[20] Nor does the traditional bluebook, "racehorse" exam allow students the time to engage in very thorough analysis on any subject.[21]

In advocating what he refers to as the "Active Approach" to teaching tax law, Professor Oberst summed up the limitations of traditional tax courses:

> If students deal only with relatively short provisions, they are unprepared for the somewhat daunting real-life analytical task of carefully working their way through, organizing, and synthesizing lengthy and complex provisions. Students who are shielded from this task are deprived of much of the true picture of what lawyering entails.[22]

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[20] *See* Leigh Hunt Greenhaw, *"To Say What the Law Is": Learning the Practice of Legal Rhetoric*, 29 Val U. L. Rev. 861, 884-85 (1995).

> Students learn critical reading through classroom discussion and dissection of constitutions, statutes, cases, and regulations. They learn [that] these authorities are responses to situations, and learn how to use them as resources to respond to new situations, through orally responding to varied situations posed by hypotheticals and problems. Both the student orally responding in the class and the student writer make a claim concerning the meaning of legal authorities on particular facts.
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> However, composing a written response to a legal rhetorical situation affords a different learning experience than oral classroom responses. The writer commits to a claim in a more definite and enduring sense. A written argument can be more precisely phrased and is not as easily revoked or modified. The writer generally takes more time to respond, which allows greater investigation of facts and possibly applicable written authorities. Therefore, the writer is more likely to appreciate how the situation affects and defines his or her legal response. Such appreciation of the situation gives greater context and direction to the reading of legal authorities than does reading for classroom discussion.

[21] Indeed, when was the last time a lawyer was asked in practice to take a fact pattern, spot the issues, and regurgitate the law in three hours or less?

[22] Oberst, *supra*, note 6 at 85.

While Oberst was not advocating the assigning writing assignments in teaching tax law,[23] I submit that using legal writing exercises, is a way, arguably *the best way*, to pass on the knowledge, skills, formats, and functions that the graduate tax students will use in practice. Requiring *each student* to spend a week or more wrestling with a complex area of tax law and then to produce, for example, a tax opinion letter on a thorny area of the law, will better prepare our students for their careers ahead.[24] Thus, legal writing exercises teach the skills and knowledge that are the very core of the mission of law schools – legal reasoning, "thinking like a lawyer," and the professional requirements of being a lawyer.[25]

By making this assertion, I am not arguing that tax courses and LL.M. programs should abandon the problem method altogether and adopt instead a series of legal writing exercises. The problem method and case analysis are necessary first steps to learning and applying the Code.[26] However, students should be given the opportunity in every course,

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[23] Oberst does advocate the use of a method of examination that is similar to the writing exercises I assign in *Tax Writing.*

[24] Moreover, legal writing exercises can require students to have a deeper understanding of the subject matter than is necessary for an exam. For example, most students find it initially very difficult to explain complex statutory and regulatory provisions to laypersons. Thus, an assignment that requires a student to write a tax opinion letter to a client on a complex area of the tax law requires the student to articulate and explain in a clear manner the law that before they were simply trying to understand.

[25] *See* MacCrate, *supra* note 4 at 94 ("If the profession of law is to continue as a respected public calling, each generation of lawyers must earn the public's trust by acquiring the learning, the skills, and the values essential to fulfilling a lawyer's responsibilities to the justice system and to those whom the profession serves.").

[26] *See* Oberst, note 6*, supra*.

in addition to analyzing the relevant Code provisions, to apply the tax laws in a more in-depth manner than the problem and bluebook exam method permit.[27]

II. Why Use Legal Writing to Teach Tax Law?

A. Writing Exercises Teach Legal Analysis, Not Just Writing.

In order to appreciate the benefit of legal writing exercises in teaching tax law, one must first deal with the notion that legal writing is simply a "skill" that should be taught, if at all, only in the first year of law school. At the heart of this misperception is the idea that legal writing courses teach something that is separate from the legal analysis taught in more traditional courses. As Norman Brand has noted, the belief that legal writing is a skill perpetuates "the facile, but false, dichotomy between 'substantive' and 'skills' courses. The former are regarded as courses in which 'the law' is taught and 'legal analysis' is learned, while the latter are regarded as courses in which some quasi mechanical ability is practiced."[28] Brand asserts that learning legal writing is learning legal analysis, and in so doing dismisses the false dichotomy between substance and skill.[29] In short, legal writing "is thinking. Thinking on paper. Thinking made visible."[30]

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[27] Many tax faculty employ the "expert" system, in which certain named students will be responsible for answering and discussing the problems assigned for that day's class. Prior to that class session, it is always very easy to identify which students are the designated "experts" by the extent and passion of their preparation. Using legal writing exercises requires each student to be the "expert" on each assignment.

[28] Norman Brand, *Legal Writing, Reasoning & Research: An Introduction*, 44 Alb. L. Rev. 292, 295 (1980).

[29] *Id.; see also* J. Christopher Rideout and Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35, 44 (1994)

[30] *See* Joseph Kimble, *On Legal-Writing Programs,* 2 Persp. 43, 44 (1994). In the words of Lee Hunt Greenhaw, "[T]hinking like a lawyer is inseparable from speaking, acting, and writing like a lawyer." Leigh Hunt Greenhaw, *"To Say What the Law Is": Learning the Practice of Legal Rhetoric*, 29 Val. U. L. Rev. 861, 896 (1995).

Thus, first and foremost, legal writing exercises require students to actually think, and visibly so.

In order to produce an effective written product, writers must understand the substantive area of the law about which they are writing.[31] Most egregious legal writing from law students stems not from a lack of understanding of grammar and punctuation, but rather from a lack of understanding of the subject matter. The Socratic method is designed to teach students to identify relationships among ideas on multiple levels of abstraction and use this information to solve problems.[32] To construct a proof of a legal conclusion, the student must build new mental structures for the new ideas and then organize them in relation to each other.[33] Likewise, legal writing exercises require students to synthesize disparate and often contradictory legal authority and to articulate each step along the path of logic needed to reach the conclusion. However, given the time constraints inherent in classroom discussions, and the time pressures required by law school exams,[34] legal writing arguably provides a greater opportunity for students to perform the very sort of analysis that law schools hope to teach.

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[31] "Thinking, communicating and searching are inseparable processes. Thinking about a subject requires both an understanding of others' oral and written communications and the ability to articulate, and thus communicate, one's own developed understanding." Edwin H. Greenebaum, *How Professionals (Including Legal Educators) "Treat" Their Clients*, 37 J. Legal Educ. 554, 563 (1987).

[32] Carol McCrehan Parker, *Writing Throughout The Curriculum: Why Law Schools Need It And How To Achieve It*, 76 Neb. Law Rev. 561 (1997); Katherine Simmons Yagerman, *Clear Thinking for Students of Legal Writing, Second Draft* (Legal Writing Inst., Seattle, Wash.), Aug. 1988, at 9.

[33] *See* John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. Legal Educ. 275, 277-83 (1989).

[34] One of the more difficult aspects of drafting an exam in a tax law course is to ensure that the questions are demanding enough to truly test the students' knowledge, while not being too demanding. Part of this problem is attributable to the time constraints of

Good legal writing is not only inseparable from good legal analysis, the writing process itself can contribute to the understanding of the legal concepts involved. Scholarship in the legal writing arena has focused in recent years on the so-called "New Rhetoric" theory.[35] Under the New Rhetoric theory, legal writing is viewed as more than just the finished product.[36] Rather, the writing process itself creates meaning and informs the analysis of the writer.[37] Writers find what they are trying to say through the process of writing itself.[38]

Accordingly, rather than being part of a separate discipline within the law school that teaches a separate and defined "skill," advanced legal writing exercises such as those used in the *Tax Research and Writing* course can be an integral part of the curriculum

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exams. As much as we might like to include an extremely complex question in an exam, we know that students will not have the time to properly analyze and digest the law and produce an effective answer. By contrast, legal writing exercises allow students to delve more deeply into the Code and to apply the law in a more professional manner because they are given the luxury of time. Thus, faculty dreaming up problems can make the assignments more difficult, knowing that students have two weeks, rather than two hours, to complete an assignment.

[35] Phelps, *New Legal Rhetoric*, supra note 93, at 1094-95. *See also* Campbell, *supra* note 54, at 663 (describing "new rhetoric" as a school of thought, developed in the late 1970s and early 1980s, which emphasizes the process of writing rather than the product).

[36] *See* Elizabeth Fajans Mary R. Falk, *Against The Tyranny Of Paraphrase: Talking Back To Texts*, 78 Cornell Law Review 163, 174-75 (1993) (describing the shift from the current-traditional approach to the new rhetoric as one from a focus on the written product to the process of generating that product).

[37] *See* Rideout, *supra* note 28, at 55 (footnote omitted):

> The epistemic view of writing emerges from a view of language as being dynamic rather than static and from a view of knowledge as being dialectical, the product of an interaction between the writer, reader, subject, and text. Knowledge does not exist except within linguistic forms that both construct and constrain it. Every act of writing, then, is an act of construction, and the task of the writer is not only to find the right words to describe the subject, as in the [instrumental] perspective, but also to use language in such a way as to generate, and then to embody, meaning.

[38] Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. Composition & Comm. 76, 85 (1982).

designed to teach students the law and to think like a lawyer.[39] In short, if we want our students truly to be able to think like lawyers and think like tax lawyers, we must teach them to write like tax lawyers.[40]

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[39] *See* William R. Trail and William D. Underwood Essay, *The Decline Of Professional Legal Training And A Proposal For Its Revitalization In Professional Law Schools*, 48 Baylor L. Rev. 201, 235-236 (1996).

> The professional law school must make a substantial commitment to legal writing. The cornerstone of the Cramton Report's proposed program to improve skills training in law schools was its proposal that law schools do a better job of teaching effective written communication skills. The report concluded that
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> > (g)iven the central importance of effective writing to a wide range of lawyer work, the Task Force believes that too few students receive rigorous training and experience in legal writing during their three years of law study. Despite legal writing courses, seminars and other upper- class "writing" courses, and despite the growing number of courses based on real or simulated lawyer work that include an opportunity to do specialized legal writing such as pleadings, opinion letters, briefs, contracts or wills, and legislation, many students, probably most students, receive very little opportunity to write with close supervision and critique as a continuing part of their law school experience. Most of the writing that law students do is examination writing, done under extreme time pressure without either a chance for self-criticism and self-editing or constructive criticism from the instructor. It offers neither the opportunity to write to the student's own standards nor the possibility of learning much from the experience. The situation may, in fact, reinforce bad habits and poor standards rather than foster improved skills.

[40] *See Id.* at 227:

> In addition to knowing the rules in this broad sense, a lawyer must also possess the skills needed to use this knowledge to resolve client problems. Lawyers essentially do three things in representing clients: they think, they speak, and they write. Thinking like a lawyer requires accurate application of rules to resolve problems. This law application process is generally referred to as problem solving or legal analysis and reasoning. Thinking clearly and analytically is thus part of being a competent lawyer. A competent lawyer must also communicate these thoughts clearly and persuasively. Clear speaking and writing, like clear thinking, are thus core

B. Writing Exercises Teach Students the Forms and Norms of Practice

Even if the traditional methods of tax instruction could replicate the depth and quality of analysis our students will engage in after they graduate, students or new lawyers must be taught the forms, formats, and conventions of their discipline.[41] By acquainting students with the various purposes, audiences, and common formats for legal documents, legal writing programs encourage students to practice the roles of advisor and advocate, providing them with the tools they will need in practice.[42]

Even the best legal writers are not born knowing how to draft a Private Letter Ruling request. By the same token, drafting a Private Letter Ruling request to the IRS will be much easier in practice if a lawyer has drafted one in law school with the mentoring provided by a professor. Moreover, lawyers, like other writers, write within a rhetorical context. Every legal document is directed to a particular audience and is intended to accomplish a particular purpose. To create an effective document, students must understand both the purpose for which the document is written as well as the attributes of its target audience and any additional audience it is likely to reach.[43] Only by understanding the audience to which the documents is directed can a student or attorney know the style of writing, advocacy, and vocabulary they must use.

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lawyering skills. Knowing the rules and possessing these core skills are prerequisites to providing competent legal services.

[41] *See* Busharis, *supra* note 18, at 314.

[42] Parker, *supra* note 32, at 581. Learning the genres of legal writing involves becoming aware of the practical and rhetorical contexts of the communications, not simply their forms. One commentator has observed that "learning the genres of institutions and disciplines is more like learning languages than learning algorithms. It is accomplished within and through immersion in the lifeworld of the community." Kamberelis, supra note 29, at 150.

[43] Parker, *supra* note 32, at 581.

Finally, when not presented as a "closed universe" assignment, legal writing exercises will also require students to use the research tools and sources that will become their constant companions in practice.[44] Young lawyers too often complete a graduate program in taxation never having become proficient with sources like the Cumulative Bulletin, BNA Tax Management Portfolios, or the CCH and RIA looseleaf tax services. Incorporating legal writing exercises in tax courses will therefore expose students to the unique texts and authorities peculiar to tax law.

Thus, legal writing exercises have a different focus than exams. With writing exercises, we are not only testing whether the students know the law, we are testing whether they can *apply* the law, using the kinds of documents produced by lawyers. Using these exercises recognizes that simply knowing the law is not enough; it is all of the stuff after you know "the law" where the real lawyering begins.

C. We Should Teach Our Students to Write

In addition to teaching in-depth legal analysis and introducing students to the formats of practice, legal writing exercises have another advantage over classroom discussions and bluebook exams: they teach future tax lawyers the very important skill of how to write.[45]

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[44] *See* Silecchia, *supra* note 19.

[45] I use the word "skill" with mild trepidation here because, as set forth more fully above, it tends to perpetuate misperception that legal writing is a skill separate from the legal knowledge expressed within the written product. However, some aspects of legal writing are a separate skill, which can and must be separately emphasized.

Good writing and good advocacy are essential to being an effective lawyer.[46] The need for good writing, and the need to be trained how to write well, is no more evident than in tax law. Tax law is one of the most complex and highly-developed areas of the law. With a set of statutes totaling in the thousands of pages, regulations many times that long, and administrative and judicial pronouncements, tax lawyers have a dizzying array of law to master.[47] Tax lawyers must then be able to effectively communicate that complex law to clients, to other attorneys who oftentimes have no background in tax law, and to Internal Revenue Service personnel, many of whom are not lawyers. Thus, it is vital that tax lawyers possess outstanding writing skills; such skills are rarely innate.

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[46] *See* Robert MacCrate, *Preparing Lawyers To Participate Effectively In The Legal Profession*, 44 J. Legal Educ. 89 (1994):

> We [the ABA Task Force on Law Schools and the Profession] proffered this statement of skills and values as a work in progress to promote discussion and reflection both in the academy and in the profession at large. It first analyzes, in 65 pages of text and commentary, ten generic skills that the task force concluded were fundamental to competent performance by lawyers: problem solving, legal analysis and reasoning, legal research, factual investigation, oral and written communication, counseling, negotiation, understanding of the procedures of litigation and alternative dispute resolution, organizing and managing legal work, and recognizing and resolving ethical dilemmas.

See also Michael Norwood, Scenes from the Continuum: *Sustaining the MacCrate Report's Vision of Law School Education into the Twenty-First Century*, 30 Wake Forest L. Rev. 293, 295 (1995). ("The SSV is the centerpiece of the MacCrate Report's vision .... The SSV is ... the Task Force's most important contribution to the advancement of lawyers' professional development."); Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. Legal Educ. 469, 508 (1993) ("Oral and written communication skills are deemed to be the very most important skills necessary for beginning lawyers. They outrank other practical skills and more specifically legal skills such as substantive legal knowledge, legal reasoning, and legal research.").

[47] Because of the hugely complex subject matter, tax law is one of the few specialties that law students routinely spend a year or more of concentrated study in an LL.M. program. As a result, tax law is one of the few areas where a course devoted solely to the kinds of writing tax lawyers do is even practical.

The writing of lawyers has been lamented for centuries.[48] In truth, lawyers are probably no worse, and may indeed be far better, writers than other professionals. However, because lawyers' work revolves so much around their use of language,[49] their ability to write and write well is much more important, and visible, than in other professions.[50]

There are many reasons for poor writing.[51] Some commentators have suggested that lawyers intentionally write poorly to serve their own economic interests. These theories include the "economic stronghold,"[52] "losing cause,"[53] and "hostile audience"[54]

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[48] *See* John D. Feerick, *Writing Like A Lawyer*, 21 Fordham Urban Law Journal 381 (1994): "The problem of poor legal writing is not unique to our generation, as we know from the reflections of such literary giants as William Shakespeare and Charles Dickens. Thomas Jefferson complained that 'statutes . . . from their verbosity, their endless tautologies, their involutions of case within case and parenthesis within parenthesis are rendered more perplexed and incomprehensible not only to common readers, but to the lawyers themselves.'" quoting Thomas Jefferson, Autobiography (Paul L. Ford, ed. 1892); *see also* Will Rogers: "The minute you read something you can't understand, you can almost be sure it was drawn up by a lawyer."

[49] Glanville Williams, *Language and the Law*, 61 Law Q. Rev. 71, 71 (1946)("[W]ords are of central importance to the lawyer because they are, in a very particular way, the tools of his trade.").

[50] Many have noted that lawyers are "professional writers." *See, e.g.*, Parker, *supra* note 34. Indeed, as matter of sheer volume, lawyers produce more written material than any other profession or occupation.

[51] For an excellent summary of the root causes of poor legal writing, *see* Matthew J. Arnold, *The Lack Of Basic Writing Skills And Its Impact On The Legal Profession*, 24 Capital University Law Review 227 (1995).

[52] *See* Steven Stark, *Comment, Why Lawyers Can't Write*, 97 Harv. L. Rev. 1389 (1984); George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 Mich. L. Rev. 333, 343-346 (1987). The economic stronghold rationale is the most cynical of the proffered reasons for poor writing. The argument made is that lawyers intentionally employ arcane language, legalese, and unwieldy style to convince non-lawyers of their importance. Thus, since lawyers are needed to write and to interpret bad writing, members of the profession can justify the exorbitant fees for their services. If this is a true cause for poor writing (which I doubt it is), no amount of legal writing training will overcome this problem.

rationales. In each of these theories, there is a perception that it is necessary for lawyers to obfuscate in their writing and to rely excessively on jargon and legalese.[55]

While there may be some basis to each of these root causes, in my opinion, the prevalence of bad writing in the legal profession is, as discussed above, caused in part by a lack of clear thinking and analysis.[56] But it is also the unfortunate and unintended byproduct of the training law students receive from their first day of class in law school.[57] Students enter law school with a certain world view and manner of speaking. Then, through reading case law and the Socratic method, they are trained to "think like

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[53] Stark, *supra* note 52, at 1392 ("if lawyers know they have a losing case - and half the time they should - confusing the court may be the best they can do for their clients. Indeed, attorneys may be our most respected con artists; after all, their job in many cases is to try to make something out of nothing. Again, there is nothing necessarily wrong with that: lawyers may simply be victims of the role society has created for them. But lawyers recognize their role as deceivers and understand that language is the means by which they work their magic").

[54] Gopen, *supra* note 52, at 340:

> The lawyer's rhetorical task is arguably among the most difficult because, unlike other professionals, lawyers are constantly writing for hostile audiences. When a doctor writes an article for a journal or a report on a patient, the audience tends to spare no pains in trying to interpret the prose as the author intended. But when a lawyer writes, who is the audience?--a senior partner, who will play the devil's advocate in order to ensure its combat readiness; a judge, who will subject it to comparisons with the brief on the other side; or, worst of all, an opposing counsel who, fully cognizant of what the author intended, will spare no pains to demonstrate that it might not, indeed cannot, mean that very thing. This is a great problem, not to be underestimated. No wonder lawyers are so willing to repeat themselves, to plug small holes that might not even exist, to pile on much more information than the argument requires, and in general to use a shotgun approach (instead of a crossbow approach) to rhetoric.

[55] Arnold, *supra* note 51 at 232.

[56] *See* text at notes 32-34.

[57] Gopen's article, *The State Of Legal Writing: Res Ipsa Loquitur*, *supra* note 52, covers many of the reasons for the continuous state of poor legal writing. *See also* Stark, *supra* note 52; Arnold, *supra*, note 51.

lawyers" and to speak a new language. The first weeks of law school is a baffling introduction to the law. Students read cases about complex legal issues and are grilled about that subject in front of their classmates. Slowly, in order to survive the Socratic onslaught, students adopt and become fluent in the language of the profession. By the end of the first term, first year law students would not think it unusual to read the a factual recitation such as this:

> The declaration stated, that the plaintiff theretofore, and at the time of the committing of the grievance thereinafter mentioned, to wit, on, etc., was lawfully possessed of a certain donkey, which said donkey of the plaintiff was then lawfully in a certain highway, and the defendant was then possessed of a certain waggon and certain horses drawing the same, which said waggon and horses of the defendant were then under the care, government, and direction of a certain then servant of the defendant, in and along the said highway; nevertheless the defendant, by his said servant, so carelessly, negligently, unskilfully, and improperly governed and directed his said waggon and horses, that by and through the carelessness, negligence, unskilfulness, and improper conduct of the defendant, by his said servant, the said waggon and horses of the defendant then ran and struck with great violence against the said donkey of the plaintiff, and thereby then wounded, crushed, and killed the same, etc.[58]

The wealth of centuries-worth of accumulated bad writing inflicts itself on every unsuspecting first-year law student.[59] Thus, law students and lawyers write poorly because they routinely read bad writing of the past. Just as only those who were raised in Paris allegedly speak "proper" (i.e., Parisian) French, law students and lawyers write poorly because bad legal writing is often the only legal writing to which they have been exposed.[60]

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[58] *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (1842), quoted in Bryan A. Garner, Legal Writing in Plain English,University of Chicago Press (2001) at 516.

[59] *See* Gopen, *supra* note 52**,** at 335-336.

[60] For example, Theresa Godwin Phelps recognizes the need to initiate first-year students into a new discourse community and to find "their legal personalities by mastering a new

This exposure to bad writing is not limited to the first year. Indeed, law students continue to read bad writing throughout law school. It is naive to think that one legal writing course in the first year of law school can counteract all of the bad writing to which law students are exposed.[61] Thus, one of the reasons for an upper division, or in our case, a graduate level course, in legal writing is to provide continuous reinforcement on the merits of good writing, and every substantive course should include a writing component.[62]

'tribal speech'." Theresa G. Phelps, *The New Legal Rhetoric*, 40 S.W. L.J. 1089, 1091 (1986).

[61] Silecchia, *supra* note 19, at 215:

> Just as an advanced course is useful for developing research skills, it is also needed to further cultivate sound writing skills in upper-level law students. Most fundamentally, legal writing is an acquired skill for which the old cliche "practice makes perfect" has some truth. If nothing else, an advanced research and writing course provides students with another opportunity to have a supervised writing experience which gives them additional practice in legal writing. Beyond that, however, such a course also gives law students an opportunity to learn more from and build upon their experiences in first-year courses, at summer jobs, and at externships and clinicals. By the time they enter an advanced course, students will have a better sense of which aspects of their writing skills require attention and can benefit more from the guidance that such a course can provide."

[62] Another reason to put more emphasis on writing an skills training generally comes from the mandate from the American Bar Association. The American Bar Association recently amended its standards for law school accreditation to include the following language: "The law school shall offer to all of its students . . . an educational program designed to provide that its graduates possess basic competence in legal analysis and reasoning, oral communication, legal research, problem-solving and written communication." Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, Standards for Approval of Law Schools and Interpretations Standard 302(a)(ii) (as amended Aug. 1996). According to Professor Parker, "The new standard recognizes that competence in written communication is an integral component of the repertoire of professional skills in which lawyers should be competent; it mandates that law schools design programs that will enable students to develop the basic competencies that are a lawyer's essential tools." *See* Parker *supra* at note 32.

Moreover, it must be recognized that good legal writing is difficult. Law, and in particular highly-developed specialties like tax law, are incredibly complex, with numerous defined terms. Lawyers are required to explain that complex area of the law to people who for the most part are not familiar with the subject (i.e., non-lawyers). And they are required to explain that subject ideally without the jargon that is the staple of their profession. Being able speak and write, and to do it well, without the crutch of the jargon is not something that engineers or computer experts are routinely asked to do. Added to this is the problem that lawyers must work under immense time pressures, billing by the hour, and they do not have the luxury, oftentimes, of refining and developing their written products.[63] Finally, unlike other professionals, a lawyer's writing is, almost by definition, subject to continual attack by known opponents and unknown future attackers. Hence, lawyers' writing must be inordinately precise.[64]

Therefore, the proper training of any lawyer must include an exposure to, and the emphasis of, good legal writing. We simply cannot expect our colleagues in first year writing courses to bear the entire load. Writing exercises should be used, and writing should be stressed throughout the curriculum, even in tax courses.[65]

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[63] Gopen, *supra* note 62, at 341.

[64] *Id*.

[65] It can also be argued that legal writing is more appropriate for an upper division course than a first year course, simply because students have a better mastery of the subject matter and are therefore better able to concentrate on the skills of writing, research, and advocacy. Part of the difficulty in teaching reading and writing is the apparent chicken-egg nature of the enterprise. "[S]tudents must know the 'meaning' of what they read in order to develop the reading 'skills"' they need to interpret or write the "meanings" of what they read. In other words, a reader's ability to make sense of a new text depends not only on the knowledge presented in the text but also on a reader's prior knowledge and the "level of inference that can be reasonably expected of her." Readers need, for example, to learn how to brief a case before they can apply or evaluate a decision. Elizabeth Fajans Mary R. Falk, *supra* note 36 at 171 (footnotes omitted).

E. Giving Students a Taste of Law Practice in Law School

Another reason to adopt an upper division legal writing course like *Tax Research and Writing* or to include legal writing exercises in tax courses is to promote the students' commitment to the legal profession by showing them what the practice of law will be like and what skills they will use. One of the main complaints of law students is the shear boredom of it all. After two or more years of the case method in law school, third-year students are starved for something different.[66] Likewise, many tax LL.M. students can

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[66] *See, e.g.*, Walter Gellhorn, *The Second and Third Years of Law Study*, 17 J. Legal Educ. 1, 5 (1964) (case method is boring and inadequate when repeated over and over again); Harrop Freeman, *Legal Education: Some Farther-out Proposals*, 17 J. Legal Educ. 272, 273 (1965) (third year useless, boring); Kenneth Culp Davis, *The Text-Problem Form of the Case Method as a Means of Mind Training for Advanced Law Students*, 12 J. Legal Educ. 543, 546 (1960) (upper-class boring, time would be better spent on "what lawyer should do"). Cf. Harry G. Henn & Robert C. Platt, *Computer-assisted Law Instruction: Clinical Education's Bionic Sibling,* 28 J. Legal Educ. 423, 423 (1977) (computers can help alleviate the boredom in the upper level). *See also* Peter W. Gross, *On Rescuing the Three Year Generalist Program,* 28 J. Legal Educ. 249, 266 (1977):

> The first criticism, then, and a point which has been sounded with vehemence for over three decades, is that the upper curriculum is excessively information-oriented; that it imparts details of no apparent relevance to an overall process of student development; and that at the same time it fails to impart a set of skills significantly broader than those "case analysis" skills purportedly taught in the first year. A second, related, problem with the upper curriculum is that it lacks coherence. The student is confronted with an array of individual courses which defy the constructing of a coherent sequential program of skills and knowledge development. A study done of entering students at the University of New Mexico Law School in 1967 revealed that "[g]enerally, the students are optimistic, even idealistic, about their future profession and its role in society. Furthermore, most of the students seem to have brought with them basic attitudes of honesty and respect for the law." Cleopatria Campbell, The Attitudes of First Year Law Students at the University of New Mexico, 20 J. Legal Educ. 71, 81 (1967). These days, however, are not the early '60s. The job market is tight and student debt is high. Watergate is part of the culture and lawyer jokes are as close as the nearest party. Nevertheless, our first year students seem little different than these. By the time they leave, however, much of the optimism, idealism, and respect is dissipated. Something isn't right.

become disenchanted with their tax courses when all of the courses follow the same formats.

Students who have taken my *Tax Research and Writing* course have at least professed to enjoy the course in part because it allows them to learn and apply the Code in a new and different way.[67] Courses such as *Tax Research and Writing* will hopefully reconfirm the students' desire to practice law, and to allow the student to begin "practicing" law, at least hypothetically, while they are still in law school.[68]

Finally, part of the joy in lawyering is using the ability to weave together complex legal doctrines and ideas into a seamless argument that is convincing. Advocacy at its highest level is the hallmark of our profession. Allowing students to experience this while in law school will go a long way to dispel the malaise that is far too common in upper-division law school courses.[69] At the same time, students must learn the

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[67] Legal writing exercises in tax courses also give students the opportunity to produce a written product in the field of taxation, which they can use as a writing sample. While this is not a sufficient reason to assign writing exercises in tax courses, it is nevertheless a benefit to our students. Many students have asked me to re-edit one of their writing exercises after the course is over so that they can use them for writing sample. While I am generally happy to help my students, it does increase the amount of editing I am required to do each year.

[68] Deborah Maranville, *Passion, Context, And Lawyering Skills: Choosing Among Simulated And Real Clinical Experiences*, 7 Clinical L. Rev. 123 (2000): "[M]any of our students enter law school with positive motivations for a career in law--they arrive with a passion for people, craft, justice, or public service, not merely the desire for wealth or status. Clinical education [as well as other experiential learning] has a unique ability to nourish those passions by connecting students with clients, the craft of lawyering, and the satisfaction of public service."

[69] For a contrary view of the importance of lawyer as advocate, *see* Roger C. Crampton, *The Ordinary Religion of the Law School Classroom*, 29 J. Legal Educ. 247, 248 (1978). "In addition to teaching "how to think like a lawyer," law schools teach the ideology of being a lawyer and "how to feel like a lawyer." Karl E. Klare, *The Law-School Curriculum in the 1980s: What's Left?,* 32 J. Legal Educ. 336, 339 (1982) (describing an impoverished ideology of "moderate conservatism or liberal reformism"); Michael Meltsner, *Feeling Like a Lawyer*, 33 J. Legal Educ. 624 (1983) (criticizing legal

boundaries of effective advocacy.[70] They must know that all attorneys have a limited amount of credibility, that it is a precious commodity, and that they cannot waste it.[71]

III. The *Tax Research And Writing* Course at the University of Washington

The *Tax Research and Writing* course consists of a series of written assignments,[72] each of which are designed to introduce the students to the kinds of documents and analysis they will produce in their tax practice.[73] This is not a tax drafting

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education for teaching that it is right to be "controlling, cool, dispassionate, unfeeling, arrogant.").

[70] *See* text at notes 98-105 *infra*.

[71] *See* Herbert J. Stern, TRYING CASES TO WIN, PSI Legal Pub., (1991).

[72] I generally assign five written projects over the course of a eleven-week academic quarter. In the past, I have assigned only the type of written projects outlined below. In other years, I have assigned at least one project that is targeted more to develop research skills and to introduce students to the numerous sources available to tax lawyers. These projects require less writing by the students.

[73] Parker, *supra* note 32, advocates for these practical choices for any legal writing course:

> Teachers can enhance students' understanding of the rhetorical contexts for legal writing by structuring exercises in which students are asked to use the sorts of documents they are learning to prepare for the purposes those documents are intended to serve. This exercise gives students the experience of reading the documents from the standpoint of their intended audiences. For example, first-year students who are learning how to write an office memorandum could be cast in the role of "assigning attorneys," given a memorandum prepared for them by a law clerk, and asked to advise the client based on the memorandum. Students learning to write briefs to be filed in court could be asked to assume the role of judges and to decide a case based only on the parties' briefs. These exercises provide students with simulated experiential bases from which to understand the purposes and audiences for their documents and to make choices that will help them craft effective documents in practice. More elaborate simulations and live client clinical experiences provide even more guidance.
>
> Assigning writing problems that require students to create documents they will later prepare in practice provides students with an experiential base upon which they may build in summer clerkships and when they

course.[74] Thus, students are not asked to prepare wills, trusts, or tax returns, or to organize business entities. Rather, the writing assignments concentrate on the tax lawyer as the giver of tax advice, and not tax lawyer as business or estate planner.

Each assignment is accompanied by a hypothetical fact pattern and at least one legal issue.[75] I select the facts and legal issues to cover an area of the Code that is not emphasized in the required curriculum of the LL.M. program.[76] Thus, students are exposed to a new area of the Code and are required to research and analyze an area of the law that will be unfamiliar to them.[77]

I also select facts and issues specifically to make it difficult for the students to advocate on behalf of their hypothetical client. Students struggle with the gray areas of the law and in arguing a position that they could well lose. Many students are shocked to find out that they will only be hired to pursue the difficult cases or cases they might lose.

> begin to practice. In addition, as students work through problems, they learn specific practical lessons--lessons they should learn before they practice--about hierarchy of authority, settled versus unsettled issues, and avoiding "overkill." [Footnotes omitted.]

[74] The planning-type writing projects are also extremely valuable pedagogical tools and are routinely used in other courses in our Graduate Program in Taxation.

[75] Fact patterns are sometimes used for more than one assignment. In that way, the students can focus more on the legal analysis and mastering the format of the assignment document, rather than researching a completely new area of the law.

[76] Selecting an area of the Code not generally covered by traditional graduate tax curricula makes this stand-alone research and writing course more valuable for students. This suggestion would obviously not apply where the professor were incorporating legal writing exercises into a traditional tax course.

[77] Since tax courses in general, and LL.M. programs in particular, are extensively “Code” courses, students spend the vast majority of their time buried in the Internal Revenue Code and Treasury Regulations. The skill of reading, digesting, and interpreting Code provisions is one of the central matters that LL.M. programs seek to teach. However, there are a host of other authorities in the tax arena that students must become familiar with to be effective tax attorneys. Courses like *Tax Research and Writing* are an excellent means of introducing students to those secondary authorities.

They seek the comfort of a case that is "on all fours" that they can cite, or the one authority that will ensure a clear victory.

However, straight-forward clear winners for the taxpayer obviously rarely make it into the hands of a tax attorney. Either the taxpayer, the taxpayer's in-house professional staff, or outside accountant resolve the easy cases. Moreover, tax attorneys are usually asked to opine on a tax issue where the outcome is seriously in doubt, and the parties wish the comfort a tax opinion will bring them. Thus, students must become accustomed to the uneasy feeling of arguing a case that they may in fact lose.

Selecting facts and issues that require students to struggle against the holdings of published opinions necessitates them to (1) develop creative legal arguments; (2) think in a more abstract and complex manner; and (3) come to terms with the ethical dilemmas inherent in legal practice. To strike the right balance, assignments should raise difficult legal as well as complex factual and ethical issues, yet be limited in scope so that students can realistically manage the material and produce an effective product.

A. Memorandum To Senior Partner

The first assignment in the *Tax Research and Writing* course is not unique to tax law and, indeed, is the staple of every legal writing course. However, it is also one of the documents junior attorneys are most likely to use no matter what their specialty. In addition, the traditional law firm memo allows students to begin the writing process with a format with which they are familiar, and it calls for a writing style with which students are most comfortable. Memoranda call upon the writer to set forth, in a fairly regimented

fashion, the facts, legal issue, analysis and conclusion. The I.R.A.C. method is very familiar and comfortable to students.[78]

Legal memoranda also require a full analysis of all sides of an issue. Since the memo will only go to a lawyer in the same law firm, and it is protected by the attorney work-product privilege, the writer can fully discuss the issues involved. This writing process assists the writer in developing analysis.[79] This kind of warts-and-all analysis, whether done in the form of a memo to a senior partner, a memo to file, or in the lawyer's head, is essential to a full analysis of any legal issue. Lawyers who fail to fully analyze their case are often unable to recognize the complexity of their case and to deal with the weaknesses in their case.

Potential topics or issues are limited only by the professor's imagination.[80] In the *Tax Research and Writing* course, I have used several fact patterns and issues. One assignment is based on the Supreme Court case of *Gitlitz v. Commissioner*:[81] Two equal shareholders of an S corporation have losses that were suspended due to lack of basis. The S corporation then receives discharge of indebtedness income. The question the senior partner to whom the memorandum is addressed has asked is whether the shareholders may use the COD income to increase the basis in their S corporation stock, thereby freeing up suspended losses.

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[78] The I.R.A.C. method requires the author to state the Issue, the Rule of law, then engage in legal Analysis, and finally state a Conclusion. The I.R.A.C. method is the cornerstone of most elementary legal writing instruction.

[79] *See* text at notes 35-38, *supra*.

[80] Indeed, given the comparatively neutral stance that must be taken in a legal memorandum, the memo assignment could be substituted for any problem the professor would otherwise use on an exam.

[81] 531 U.S. 206, 121 S.Ct. 701, 148 L.Ed.2d 613 (2001).

Of course, given the amendments to section 108 in 2001, the answer is no, the shareholders may not increase the basis in their stock. However, it takes a bit of work to get to that answer. First, the assignment requires the students to read, interpret, and reconcile several rather complicated sections of the Code, sections 108, 1366, and 1367. Thus, this issue requires the students to engage in precisely the kinds of statutory analysis that is at the heart of traditional tax pedagogy, and students are given the time[82] to adequately and fully analyze the Code.

In addition, the assignment teaches students several other important legal and practical matters in addition to the substantive tax issue raised The students are given as a starting point in the assignment the Tax Court's decision in *Nelson v. Commissioner*[83] from which they must derive the current state of the law, providing the students with excellent practical experience. First, they must research the law following *Nelson*. As anyone familiar with the tortured history of this case knows, *Nelson* was affirmed by the 10th Circuit, along with the companion case of *Gitlitz*.[84] Meanwhile, numerous other courts of appeals were deciding similar cases.[85] The Supreme Court ultimately resolved the circuit split when it decided that shareholders *could* increase the basis in their stock

[82] Students are given a week to research and prepare the memorandum assignment.

[83] 110 T.C. 114 (1998).

[84] 182 F.3d 1143 (C.A.10 1999).

[85] *See, e.g., Gaudiano v. Commissioner,* 216 F.3d 524, 535 (6th Cir.2000); *Witzel v. Commissioner,* 200 F.3d 496, 498 (7th Cir. 2000); *United States v. Farley,* 202 F.3d 198, 206 (3d Cir. 2000); *Pugh v. Commissioner,* 213 F.3d 1324, 1330 (11th 2000).

by the amount of COD income.[86] However, that decision was promptly overruled by Congress.[87]

Thus, even before addressing the substantive tax issue, the students are required to become familiar with the United States Tax Court, the organization of the federal courts of appeals, and their role in reviewing cases from the Tax Court. In addition, in answering this problem, the students will learn the limits of computerized research. Computerized legal research services do not generally alert researchers that a case has been overruled by statute.[88] Thus, the fact that *Gitlitz* was overruled by Congress is *not* reflected in Westlaw's or Lexis' automated alerts, and any student who relies solely on Westlaw or Lexis in researching the post-*Nelson* state of the law will not get the right answer. I continue to use this assignment, therefore, in part to teach the students the valuable lesson of the need for thorough research.[89] The facts and issue also require the students to deal with a fairly intricate set of Code sections, specifically, the interrelation of sections 108(d), 1366, and 1367. The 2001 amendments to section 108(d) further forces the students to engage in rather close reading of that section to fully understand the significance of the legislative overruling of *Gitlitz*.

Page limits for the memo assignment are set at five double-spaced pages.[90] Limiting the number of pages, as well as fixing it at a relatively short five pages, requires

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[86] *Gitlitz*, *supra,* note 81.

[87] Pub. L. No. 107-147, § 402, 116 Stat. 21. (2002)

[88] Cases overruled by statute are noted by Westlaw and Lexis only if a subsequent case has mentioned that the prior case has in fact been overruled by statute.

[89] Students are allowed to make this rather large mistake, and learn a very important lesson, before they get into practice and face the specter of malpractice.

[90] The number of pages will obvious vary with the nature and complexity of the topic assigned. That said, I try to select issues that can be addressed in five pages.

the students to think and write with precision, to learn to edit their own work, and to learn the importance of brevity.[91]

B. Tax Opinion Letter

As experts in tax law, tax lawyers are called upon to research and give their opinion on highly complicated areas of tax law. Professionals and clients rely on the attorney's interpretation of the tax law in structuring transactions. Opinion letters are something that many tax attorneys will draft throughout their career.

Drafting a well-written and effective tax opinion is arguably the most difficult type of writing in the tax field. Tax opinions require an attorney to fully explain complex tax and legal doctrine to a layperson. In so doing, the lawyer must avoid jargon and the standard language we tax lawyers rely upon in speaking to each other on a daily basis. Thus, even if the issue is whether a taxpayer's section 212 non-employee business expenses must be added back into the modified adjusted gross income of the taxpayer for purposes of the alternative minimum tax, the tax lawyer must explain that issue, the law, and the reasons behind all of it, in a manner that is both accurate and understandable to the client.

That task is difficult enough for most lawyers. However, a well-written tax opinion must do more than just explain the law to the client and make a recommendation. Rather, one of the main reasons for giving a tax opinion at all is to insulate the client from potential penalties, should the IRS disagree with position taken in the opinion.[92]

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[91] I also remind my students that it takes time and effort to draft a short, concise memo, by quoting Mark Twain, "If I'd had more time, I would made it shorter."

[92] Section 6662 of the Internal Revenue Code imposes a 20 percent penalty for negligence or disregard of rules and regulations. 26 U.S.C. § 6662(a). However, §6664 and the regulations under that section provide: "No penalty may be imposed under

Thus, tax attorneys render opinions not only to tell their clients what the law is, but also to provide the client and their accountant with insulation from penalties.[93]

As discussed above, in the real world, opinions are generally only commissioned by clients or accountants on difficult and complex issues. Likewise, the client will already have a business deal in mind, and the client want an opinion that the already-structured deal will be okay for tax purposes. Thus, tax lawyers constantly skirt the fine line between what they may advise their clients to do and what they may not.

That, in turn, implicates the rules governing the Practice before the IRS. Practice before the Service is governed by four main bodies of law: Treasury Circular 230,[94] State ethics rules and opinions, ABA Rules and opinions, and court cases. Generally, each of these authorities allow an attorney to render an opinion on a tax issues if there is a realistic possibility of success on the merits, or that the position is not frivolous *and* the

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section 6662 with respect to any portion of an underpayment upon a showing by the taxpayer that there was cause for, and the taxpayer acted in good faith with respect to, such portion." 26 U.S.C. § 6664. The regulations further provide that reliance on the advice of a professional, who is knowledgeable about tax law, will generally demonstrate that the taxpayer acted with reasonable cause and in good faith. 26 C.F.R. § 1.6664-4. Thus, a client will not only want to know what the law is, but they will also want to rely in good faith on the opinion of the professional as protection from potential penalties.

[93] The recent amendments to Circular 230, 31 C.F.R. Part 10, specifically the covered opinion rules of new § 10.35, have changed at least somewhat the willingness of many tax lawyers to provide tax opinions that will provide penalty protection. However, despite the countless trees that have been sacrificed in writing about the significance, or lack thereof, of the covered opinion rules, as well as the now ubiquitous disclaimers on every email and written product by tax lawyers, tax lawyers are nevertheless able to provide tax opinions that will insulate clients from penalties if the opinion does not fall within the covered opinion rules. *See* Jonathan Blattmachr, Mitchell M. Gans, Diana S.C. Zeydel, and Tracy L. Bentley, *Circular 230 Redux: Questions of Validity and Compliance Strategies*, 107 Tax Notes 1533, 1534 (2005).

[94] 31 C.F.R. Part 10.

position is disclosed.[95] Realistic possibility of success is defined as a one-in-three chance of succeeding on the merits.[96] Thus, attorneys may generally give an opinion that a transaction is acceptable for tax purposes, even though it has a two-thirds chance of failing on the merits should it be challenged.

Whether a position has a one-in-three chance of success is difficult to quantify. And for students who are struggling just to determine what the law is, thinking in terms of "chance of success" can be unnerving. However, it is important that they begin to consider the ethical issues surrounding their future practice. Therefore, I choose areas of the law for the opinion letter assignment that requires students to wrestle with the realistic possibility of success standard of Circular 230.

The final purpose of a tax opinion is to advocate the client's position should the taxpayer ever be audited. The premise of giving an opinion is that the position taken in the opinion letter may be challenged. If that ever becomes the case, the client will then present the opinion letter to the IRS auditor. The idea is, if possible, to have the IRS Agent who reads the opinion to be completely convinced of the merit of the position taken and drop the issue from the audit.

Thus, an opinion letter must (at the same time) tell the client what the law is, give the client sufficient insulation from penalties, tell the client where the line is (approximately), and advocate the client's position to an unknown future auditor. This is very sophisticated writing indeed, and goes well beyond the basic goals of "good writing."

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[95] 31 C.F.R. § 10.34. If an opinion or issue comes within the definition of a "covered opinion," the tax lawyer must prepare a more extensive long-form opinion as set forth in § 10.35 of Circular 230.

[96] *Id*.

In order choosing likely Code provisions for the opinion letter assignment, the issues should be fairly discrete, providing the students with a manageable area of law to master. In addition, the issue should be one in which the student will have difficulty reaching the result sought by the hypothetical client. Thus, the optimum issue is on in which there is some contrary authority, but enough "wiggle room" for the student to nevertheless give an opinion that there is at least a one-in-three chance of success on the merits. Opinion letters, because they can be fairly brief, are ideally-suited for incorporation into a traditional tax course. I limit the opinion letters to 10 pages, double spaced, and I try to allow the students two weeks in which to complete this assignment.

Prior to the Supreme Court's decision in *Commissioner v. Banks*,[97] I assigned the following issue for the tax opinion assignment: the client has received a jury award in a wrongful termination lawsuit. The client was required to pay 40 percent of the settlement to his attorney pursuant to a contingent fee agreement. The client would like to exclude from gross income the portion of the award that was paid to the attorney. Like the *Gitlitz* issue discussed above, this assignment accomplishes several goals beyond merely teaching the students the relevant Code provisions.

First, students are required to apply important tax principles like the assignment of income doctrine and to wrestle with tax policy questions of who should be taxed on income and why. Second, like the *Gitlitz* problem, in answering this assignment students are required to read numerous cases from various jurisdictions to fully understand the

[97] *Commissioner v. Banks*, 543 U.S. 426, 125 S.Ct. 826, 160 L.Ed.2d 859 (2005).

pre-*Banks* state of the law, thereby introducing the students to the federal courts' jurisdiction over tax cases and the *Golsen* rule.[98]

More importantly, this assignment requires the students to get a sense of the ethical questions that continually face tax lawyers in practice and to begin to develop their own ethical compass. When students are faced with the rather simple question of whether a client should be taxed on income that is paid directly to the client's attorney pursuant to a contingent fee agreement, and the students see that the courts have come to diametrically opposed answers to this question, they begin to learn and internalize the problems they will face in advising their clients on more complicated tax matters.[99] When the students are then forced to write an opinion supporting their client's position, even though the Tax Court and several courts of appeals have reached contrary results, they appreciate the importance of the doctrines they are learning in their other tax courses and, more importantly, they learn – and hopefully appreciate – the power they will have as lawyers.

With the Supreme Court's decision in *Banks*,[100] this fact pattern has lost much of its appeal, although interesting issues remain. Since that decision, I have used a problem that examines whether a covenant not to compete is a "section 197 intangible." The facts for the assignment are loosely based on the Ninth Circuit's opinion in *Frontier*

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[98] *Golsen v. Commissioner,* 54 T.C. 742 (1970), aff'd, 445 F.2d 985 (CA10 1971).

[99] *See, e.g.*, *Cotnam v. Commissioner,* 263 F.2d 119, 125-126 (5th Cir. 1959); *Srivastava v. Commissioner,* 220 F.3d 353, 363-365 (5ht Cir. 2000); *Foster v. United States,* 249 F.3d 1275, 1279-1280 (11th Cir. 2001); *Raymond v. United States,* 355 F.3d 107, 113-116 (2d Cir. 2004); *Kenseth v. Commissioner,* 259 F.3d 881, 883-884 (7th Cir. 2001); *Baylin v. United States,* 43 F.3d 1451, 1454-1455 (Fed. Cir. 1995).

[100] *Banks, supra* note 97.

Chevrolet.[101] Under the facts of the assignment a key employee, who is also a minority shareholder, is leaving his job, and he enters into a covenant not to compete with the corporation that employed him. The covenant, which was for three years, was entered into at the same time the employee sold his minority interest in the corporation to the only remaining shareholder. Thus, the facts require the students to deal with the gray area of section 197(d), which provides that a covenant not to compete is a section 197 intangible, and therefore amortizable over a 15-year period, rather than the three-year term of the covenant, only if the covenant is "entered into in connection with an acquisition (directly or indirectly) of an interest in a trade or business or substantial portion thereof."[102]

As with the contingent fee problem, the section 197 intangible problem is designed to make the students take a position with which they are initially uncomfortable. It seems obvious to many students at first blush that the purchase of a minority interest in a corporation must be within the definition of "an interest in a trade or business or substantial portion thereof." But is it? An essential part of the assignment is dicta from the Ninth Circuit's opinion in *Frontier Chevrolet*, [103] where the court stated: "the only issue we address is whether a redemption of 75% of a taxpayer's stock constitutes an indirect acquisition of an interest in a trade or business for purposes of § 197. We need not and do not decide whether all stock redemptions made in connection with an execution of a covenant not to compete constitute an acquisition of an interest in a trade

[101] *Frontier Chevrolet Co. v. Commissioner,* 329 F.3d 1131 (9th Cir. 2003)

[102] 26 U.S.C. § 197(d)(1)(E).

[103] *See Frontier Chevrolet Co, supra* note 101.

or business within the meaning of §197."[104] Thus, the Ninth Circuit's opinion in effect creates a gray area (or at least highlights the gray area), and the students are tasked with exploring this ambiguity in the statutory language and coming to a resolution. The students are then asked to dig deeper and to defend a position that a minority interest does not constitute an interest in a trade or business, or at least it or substantial portion thereof.

An important point must be emphasized here. I choose these gray-area fact patterns to underscore, in what are hopefully real-life situations, the ethical quandaries that are a fact of life in tax practice. By doing so, I am not seeking to add to what appears to be a growing segment of our profession that will provide a positive tax opinion on any subject, as long as the price is right.[105] Rather, my hope is that using difficult issues on which students will actually have to draft an opinion will bring those ethical quandaries into much sharper focus, thereby creating more ethical lawyers.

C. Private Letter Ruling Request

Tax law is often the "tail that wags the dog" in many business transactions. Deals are struck, and consideration is negotiated based upon the likely tax consequences to the parties. By the same token, tax consequences that are contrary to the anticipated result will make the structured transaction completely untenable. As set forth above, often a tax

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[104] *Id.* at 1134 n.2.

[105] For an interesting take on this issue, *see* James S. Eustice, *Abusive Corporate Tax Shelters: Old "Brine" In New Bottles,* 55 Tax L. Rev. 135, 140-141 (2002):

> Few would disagree that the Code as it currently exists is a complex, bloated, incoherent mess, and getting worse with nearly each session of Congress. It therefore should come as no surprise that a statute such as the one we currently are burdened with is riddled with possibilities for manipulation and exploitation. One of the many costs of excessive statutory complexity is the attitude that since the "law" is frequently unknowable (or nearly so), almost any transaction, however outlandish, has a more-than-likely chance for success, and at least, a near immunity from penalty imposition if it turns out not to work as planned.

opinion will be sufficient.[106] However, there are many transactions for which insulation from penalties and a thorough rendering the applicable law is simply not enough.

To provide much needed certainty, the IRS issues Private Letter Rulings.[107] These rulings are rendered by the IRS Chief Counsel's office and are generally binding upon the Service.[108] Thus, if a proposed deal is blessed by the IRS via a Private Letter Ruling, the IRS generally will not later challenge the structure of the deal and assert an alternate tax consequence.

Requests for Private Letter Rulings are thus an important part of a tax lawyer's practice. While these requests are not technically difficult to draft, new tax lawyers must nevertheless learn the requirements. Those requirements are set forth by the IRS in the first Revenue Procedure promulgated each year.[109] This writing assignment exposes the students to one of the forms of tax practice, and it acquaints students with the process of dealing with a large federal bureaucracy. The writing style is not terribly difficult – the student is writing to another tax lawyer (as opposed to a layperson) and the format is fairly straightforward. Nevertheless, with instructions exceeding 80 pages[110] and requirements that must be followed to the letter, learning the format and uses of a Private Letter Ruling is important to the development of a tax attorney.

This is not an assignment I would generally recommend for use in a traditional tax course. The value in the exercise is learning one of the common formats used in tax

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[106] *See* text at notes 92 through 99, *supra.*

[107] *See, e.g.,* Rev. Proc. 2006-1.

[108] *Id.*

[109] *Id.*

[110] *Id.*

practice. However, simply figuring out how to write a traditional letter ruling request can take an inordinately long time, and the rewards probably do not outweigh the time commitment. That said, an assignment such as this might fit well in an advanced corporate tax problems course, where the students would be required to explain and advocate a complicated merger or acquisition. A review of recently-released Private Letter Rulings can provide ready ideas for facts and issues.[111] I generally limit this assignment to 10 to 15 double spaced pages.

D. Tax Lawyer as Advocate: Protest to IRS Appeals, and Tax Court Brief

Another form of writing, distinct from the kind of writing used in memoranda, opinion letters, and administrative requests, is pure advocacy.[112] In this style of writing, the attorney is not solely focused on what the law is or where "the line" is. Rather, the attorney is concerned with representing his or her client and asserting that client's position in as convincing a manner as possible.[113] The students in the *Tax Research and Writing* course may draft one of two advocacy pieces: a protest to IRS Appeals or a brief to the United States Tax Court.

1. Protest to IRS Appeals

[111] With this assignment, I have used the issue of whether taxpayer may include under section 104 of the Code all or a portion of the settlement proceeds from battery, sexual harassment, and emotional distress case. The facts and issue are based upon PLR 200041022.

[112] However, as explained above, good lawyering requires the lawyer to always be an advocate. The writing discussed in this section is "pure" advocacy.

[113] Obviously, the lawyer cannot *only* be concerned with arguing the client's case. The attorney is bound by ethical rules and duties. Moreover, an effective advocate recognizes the limits of credibility and that making arguments that are either untenable or internally inconsistent will hurt the client's case.

The mission and role of Appeals Division is to settle cases without litigation.[114] Cases that are not resolved at the audit level are generally forwarded on to the Appeals Division for an independent review and possible settlement. Appeals officers are, by and large, former auditors. They are generally not trained as lawyers, however they do have significant knowledge and experience in tax law. Matters are presented to Appeals by taxpayers by way of the "Protest." A protest is essentially a letter brief, in a format dictated by the IRS.[115]

Like all advocacy work, Protests require strong advocacy skills, as well as good organization and writing. However, Protests are unique. Since most Appeals Officers are not lawyers, the kind of writing and vocabulary used in a protest will be different from what would be written to lawyers. More significantly, the Appeals Officers, while nominally independent, are nevertheless employees of the opposition. The Protest, thus is at the same time a letter brief and a settlement document. In addition, lawyers have a different ethical duty to the IRS, which is an adversary, than they do to a court, which is an adjudicative body.[116] Accordingly, the Protest is an ideal document to train students to focus on their audience, the kinds of language they should use, and ethical issues. Students are generally given 15 double-spaced pages to complete the Protest.

2. Tax Court Brief

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[114] The "mission statement" of Appeals provides: "Mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the IRS and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service."

[115] *See* IRS Publication 5.

[116] *See, e.g.*, ABA Formal Op. 314, Model Rules 3.3 and 4.1.

The other advocacy assignment used in *Tax Research and Writing* is a brief to the United State Tax Court. The Tax Court, an Article I court with national jurisdiction, is comprised of 19 active judges[117] based in Washington, D.C., who "ride circuit" throughout the country in weekly trial sessions in various cities. Tax Court judges are experts in tax law, with the vast majority of the judges having spent their careers as members of the tax bar prior to appointment to the bench.

Unlike most litigation, briefs are filed in the Tax Court *after* trial.[118] In addition, the Tax Court's rules encourage, indeed mandate, that the parties stipulate to as many facts and issues as possible, thereby limiting substantially the number and length of trials.[119] As a result, the focus of a Tax Court dispute is the brief. By the time of briefing, most of the facts are no longer in dispute. In fact, many cases are submitted to the court for decision with all of the facts stipulated, and thus, only legal issues remain.[120] Accordingly, the Tax Court brief is ideal for a legal writing course, since the fact pattern for the brief becomes the stipulation of facts.

In drafting a Tax Court brief, students must learn the rather stilted style of presenting proposed findings of fact to the court where each proposed finding of fact must be presented in a separately-numbered paragraph with citations to the record.[121]

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[117] In addition to the Congressionally mandated 19 active judges, the Tax Court also has Senior Judges and Special Trial Judges that hear and decide tax cases.

[118] Tax Court Rules of Practice and Procedure 151.

[119] *See Branerton v. Commissioner,* 61 T.C. 691 (1974).

[120] *See* Tax Court Rules of Practice and Procedure, Rule 122

[121] *See* Tax Court Rule 151(e)(3):

> Proposed findings of fact (in the opening brief or briefs), based on the evidence, in the form of numbered statements, each of which shall be complete and shall consist of a concise statement of essential fact and not a recital of testimony nor a

This requirement of the Rules makes it a challenge to present the facts of a case in a compelling and readable manner. In addition, students are given the opportunity to write to an audience of lawyers,[122] thereby permitting them to write at perhaps the most sophisticated level, knowing their audience will be able to understand the points being made. The Tax Court brief is limited to 20 pages, double spaced.

3. Fact Patterns.

As with the other assignments described above, the choices of possible fact patterns are nearly endless. Current case law, especially ones in which there is a split amongst the courts of appeals, are ideal sources of fact patterns for the advocacy assignments.[123] However, one fact pattern that I have used in the past, involving the taxation of a non-qualified stock options under section 83 of the Code, has almost no decided cases on the issue. Section 83 is often taught only in compensation and benefits courses, but it is a rich area for statutory and regulatory interpretation.

In the assignment I have used, the hypothetical client is the CEO and sole shareholder of a successful corporation. He later decides to offer stock options to his employees. The stock issued pursuant to this option program is non-voting preferred stock, which will not dilute the client's voting power. Under the terms of the option, the employee is fully-vested in the option immediately upon the granting of the option, but the option, and any stock obtained pursuant to the option, are subject to a strict sellback

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discussion or argument relating to the evidence or the law. In each such numbered statement, there shall be inserted references to the pages of the transcript or the exhibits or other sources relied upon to support the statement.

[122] Including judges and law clerks.

[123] If I assign both the Protest to IRS and the Tax Court brief, I use the same issue and fact pattern for both assignments.

provision for three years. Any restriction on the options and stock can be waived by the company (which is controlled by our client). The client receives an option in his capacity as an employee and later sells the option to an unrelated third party and claims capital gains treatment on the sale prior to the expiration of the three-year sellback period.

The IRS, after a hypothetical audit, takes the position that, pursuant to section 83 and the regulations thereunder, the options were subject to a "substantial risk of forfeiture" and they did not have a "readily ascertainable fair market value."[124] Accordingly, the IRS determines that the sale does not qualify for capital gain treatment, but should be treated as compensation received from the company under Treas. Reg. § 1.83-1(b). The job of the student is to file either a Protest or Tax Court brief asserting that the option has a readily ascertainable fair market value and that there is a substantial risk of forfeiture.

This assignment requires the students to wrestle with and understand rather complicated interrelated tests that are set out in both the Code and Regulations.[125] Students initially have a difficult time keeping their eye on the ball and all of the various tests straight.[126] But the students must not only understand and recite the rules of section 83, they have to learn to advocate a position using those rules.

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[124] In my fact pattern, the taxpayer neglected to make a section 83(b) election.

[125] Indeed, § 83 uses the term "substantial risk of forfeiture," while the Regulations use the term "substantially non-vested property," which term is defined as having a substantial risk of forfeiture. *Compare* 26 U.S.C. § 83(a) and (c) *with* Treas. Reg. § 1.83-1(b).

[126] The assignment requires the students deal with substantial risk of forfeiture (or substantially non-vested) test; whether the option is considered "transferable" within the meaning of the Code and Regulations; and whether the option had a readily ascertainable fair market value, which in turn implicates the factors of whether the option is transferable, exercisable immediately and in full, is not subject to any restriction or

IV. Incorporating Legal Writing in Tax Course

By now, I have hopefully made the case for the benefits of using legal writing exercises in teaching tax law. If possible, adding a course like *Tax Research and Writing* to a graduate tax curriculum would shower students with the optimal level of benefits. But not every school will want to do this. Indeed, legal writing exercises are both time-consuming for the professor and they limit (at least to some degree) the amount of the Code that can be covered. The areas of the Code that can be covered in a whole course dedicated to writing for tax lawyers is even more limited. However, I believe the benefits of such a course (or exercises within a traditional course) far outweigh any drawbacks. With the premise that there is interest in adapting the *Tax Research and Writing* course in some fashion, the following are some suggestions for incorporating legal writing exercises in a doctrinal tax course.

A. Choosing Assignments

Any of the assignments discussed above could be incorporated into a doctrinal tax course. Which of the assignment that would the most appropriate would depend upon numerous factors, including the audience to which the project will be written, the format the professor would like to emphasize, and the kind of issue to be discussed. For example, if an instructor wishes to encourage students to be able to analyze and explain complex tax issues to a layperson, the tax opinion letter would be appropriate. On the other hand, the professor may wish students to analyze all sides of an issue, which would make a memorandum to a senior partner the more appropriate assignment. Whatever assignment is chosen, it is essential that the instructor pick the type of assignment that

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condition that has a significant effect upon the fair market value of the option, and the fair market value of the option privilege is readily ascertainable.

will be best suited for the fact pattern and issue involved. Moreover, emphasizing real-world fact patterns with up-to-the-date legal issues will help ensure that the students are more engaged in completing the project.

B. Choosing Topics

As discussed more fully above, the issues and fact patterns available for legal writing assignments are limited only by the imagination of the tax professor. Any fact pattern and issue that is suitable for a final essay exam would also be appropriate for a legal writing assignment. Indeed, one of the benefits of using legal writing exercises as opposed to in class or take-home exams is that the students will have one to two weeks to complete the assignment, and the issues assigned can therefore be much more complicated. I have found many of my issues and fact patterns from recent case law, including issues were there is a split amongst the circuits or where I believe the case has been poorly decided. Relatively new and/or ambiguously worded statutes can also be an excellent source for assignments, especially tax opinion assignments, where the students will be asked to opine on unresolved ambiguities in the Code.

C. Allow Students Sufficient Time to Prepare the Assignment

As discussed above, one of the reasons for using legal writing exercises in tax courses is that students are given sufficient time to delve deeply into the Code and to apply the tax laws in a sophisticated manner.[127] Thus, it is imperative that students be given sufficient time to prepare their projects, particularly if the instructor will expect a professional-quality product,[128] Unless the issue is very straight forward, allowing at

[127] *See* text at notes 12-27, *supra*.

[128] And if one is going to go through the trouble of devising and grading a legal writing exercise so as to give students more of a real-world professional experience, it makes

least a week, if not two, to complete the assignment would be optimal. If class time permits, setting aside time for peer review of the students' works in progress will add to the learning experience.

D. Closed Universe vs. Legal Research

The final matter to consider is whether the assignment should be a closed-universe assignment or whether the students should be allowed to engage in supplemental research. Allowing students to do their own research has the obvious benefit of acquainting students with the myriad sources they will be using in practice.[129] It also reinforces the important skill of legal research.[130] However, if we assume that the time allotted to prepare an assignment is a zero-sum game, time spent researching will be time away from analyzing and writing. Neither answer is correct, and it will be up to instructors to determine which best fits their pedagogical priorities. I attempt to find a fairly discrete area of the law with a limited number of cases, which allows the students to engage in some amount of research, but does not require them to spend an inordinate amount of time researching.

E. Burdens On Faculty

The 800 pound gorilla that this article has heretofore ignored is the burden that writing assignments will place on the faculty members who incorporate these exercises in their curriculum. Reviewing and grading papers can be onerous, and I wish that I had

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little sense to allow students to hand in a product that would not meet professional standards.

[129] *See* text at notes 44, *supra*.

[130] As with writing, students are not given the opportunity to engage in sufficient legal research while in law school. As a result, they must also play catch-up with their legal research skills when they enter practice.

some secret that would make it less so. I don't. In addition to reading and grading each assignment, I make line-edits and I provide written comments on each paper. That said, I try to limit enrollment to 15 students, which makes such editing possible. When I use writing assignments in substantive courses, I do not provide line edits or comments. Limiting the number of pages to five or ten pages will make the job less burdensome, but using writing assignments will simply require a commitment of time from the instructor.

V. CONCLUSION

The problem method will always be the backbone of a graduate tax program. Without a full understanding of the entire Code, as well as an ability to analyze these statutory provisions, tax lawyers cannot adequately advise their clients on the possible tax ramifications of a given transaction. The problem method allows instructors to cover a vast amount of the Code, while at the same time emphasizing the skill of statutory interpretation. However, with the decline in professional mentoring at many law firms, as well as the large initial salaries paid to many new tax associates, law firms increasingly expect their newly-hired attorneys to be able to produce professional-quality work as soon as they begin practicing. Students must be equipped, at the time they enter practice, to analyze the Code in an in-depth and creative manner and to apply that analysis using the forms and formats of tax practice. New attorneys must also be able to use and manipulate the tax laws, rather than just understand them. By employing legal writing exercises in the study of taxation, we not only teach tax law in a new and more in-depth manner, we better equip our students to be productive and professional tax attorneys when they enter practice.