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Experiential Learning in a Lecture Class Exposing Students to the Skill of Giving Useful Tax Advice

Heather M. Field

UC Hastings College of the Law, fieldh@uchastings.edu

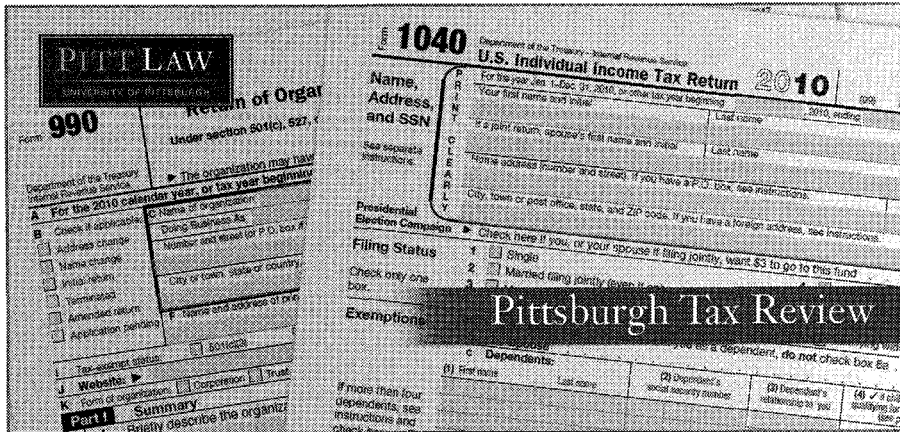
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EXPERIENTIAL LEARNING IN A LECTURE CLASS: EXPOSING STUDENTS TO THE SKILL OF GIVING USEFUL TAX ADVICE

*Heather M. Field**

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I. INTRODUCTION

Students frequently ask me what it is like to practice tax law. I practiced as a transactional tax lawyer for several years, so in response to these queries, I describe the types of things that I did in practice, and I try to provide an overview of work performed in other subspecialties within the tax field. We talk about tax practice in different settings, including large law firms, small law firms, accounting firms, government, and in-house. And we talk about how the work can change as a tax lawyer develops her substantive expertise and skill over the course of a career.

The students ask follow-up questions and seem to appreciate my input, but I suspect that they want more than my tales of practice and my explanations of different tasks that tax lawyers perform. They want to know what it means to use their growing substantive knowledge in a practice setting. They want to be able to imagine themselves as tax lawyers, so they can try on that role and consider whether they might want to pursue a career in tax. They want to know enough about the job, so that, during job interviews, they can explain why an employer should hire them over other candidates. And they want to be as prepared as possible to succeed in practice.

Especially in this uncertain legal job market, I wish I could do more for them. Perhaps this is why some of the critiques of legal education and calls for reform resonate so strongly with me. The Cramton Report,¹ the MacCrate Report,² the Carnegie Report of 2007,³ and the CLEA Report⁴ all, in different ways, call for (among other things) increased skills training so that law school graduates can be better prepared for practice.⁵ And there

¹ SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) [hereinafter CRAMTON REPORT].

² SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

³ WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT 2007].

⁴ ROY STUCKEY ET AL., CLINICAL LEGAL EDUCATION ASS'N, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter CLEA REPORT]. There is a large and long-standing literature that critiques legal education and advances various approaches to reform. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). I focus primarily on the discussions in these four reports herein, in large part, because these reports are fairly comprehensive, span multiple decades, and reflect the collective thinking of groups of scholars committed to the improvement of legal education.

⁵ CRAMTON REPORT, *supra* note 1, at 14–16 (“[L]aw schools can and should provide effective instruction in these fundamental lawyering skills [including fact gathering, oral communication, interviewing, counseling, and negotiation that are] underemphasized by traditional legal education.”); MACCRATE REPORT, *supra* note 2, at 4–7, 259–60; CARNEGIE REPORT 2007, *supra* note 3, at 12, 88

has been significant progress. Clinical programs continue to grow, and skills offerings continue to expand.⁶ Some schools have undertaken innovative curricular reform.⁷ Efforts to provide experiential opportunities increasingly serve not only students who want to be litigators, but also students who want to be business and transactional lawyers.⁸ But relatively

(asserting that legal education should “unit[e], in a single educational framework, the two sides of legal knowledge: (1) formal knowledge and (2) experience of practice” and that “[e]ducational experiences oriented toward preparation for practice can provide students with a much-needed bridge between the formal skills of legal analysis and the more fluid expertise needed in much professional work”); CLEA REPORT, *supra* note 4, at 7 (encouraging “law schools to make a commitment to improve the preparation of their students for practice,” and emphasizing experiential learning). *But see* Reginald Mombrun, *Curriculum and Teaching in America’s Law Schools: Why Federal Income Tax Courses Are More Relevant than Ever*, 17 EDUC. & L.J. 105, 138 (2007) (cautioning that “law schools must be careful not to go too far in embracing skills training”).

⁶ MACCRATE REPORT, *supra* note 2, at 6, 236–41 (providing data that documents the growth of these opportunities and commenting that “[u]nquestionably, the most significant development in legal education in the post-World War II era has been the growth of the skills training curriculum. . . . Today, clinical courses, both in a simulated and live-client setting, occupy an important place in the curriculum of virtually all ABA-approved law schools.”). In addition, ABA standards for accreditation of law schools now require that schools offer substantial opportunities for experiential learning. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, STANDARD 302(b)(1) (2011).

⁷ For example, Washington & Lee is reforming its third-year curriculum in order “to mov[e] students out of the classroom and into the real world of legal practice.” *Washington & Lee’s New Third Year Reform*, WASHINGTON & LEE UNIVERSITY SCHOOL OF LAW, <http://law.wlu.edu/thirdyear/> (last visited Feb. 18, 2011). Indiana University Bloomington recently added a required 4-credit legal professions course to the 1L curriculum. *See The Legal Profession*, INDIANA UNIVERSITY BLOOMINGTON MAURER SCHOOL OF LAW, <http://law.indiana.edu/instruction/profession/index.shtml> (last visited Feb. 4, 2012). These are just a couple of examples of recent curricular innovations. *See also*, e.g., CARNEGIE REPORT 2007, *supra* note 3, at 34–43 (describing curricular innovations at CUNY and NYU); Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 GERMAN L.J. 717, 738–47 (2009) (describing several innovative developments in experiential learning at law schools); Jessica Dopierala, Note, *Bridging the Gap Between Theory and Practice: Why Are Students Falling Off the Bridge and What Are Law Schools Doing to Catch Them?*, 85 U. DET. MERCY L. REV. 429, 445–48 (2008) (describing a program at University of Detroit Mercy that treats the third year as “transitional” by “implementing a program that will mirror the law firm atmosphere where many students will find themselves working after graduation”).

⁸ The development of transactional-oriented experiential learning opportunities has lagged behind the development of litigation oriented experiential opportunities. *See* Eric J. Gouvin, *Teaching Business Lawyering in Law Schools: A Candid Assessment of the Challenges and Some Suggestions for Moving Ahead*, 78 UMKC L. REV. 429, 433 (2009) (discussing why “the legal academy has been slow to integrate the professional skills and values of transactional lawyers into the program of legal instruction” and offering “several options for advancing the cause”). However, in what I think is a critically important development, the focus on teaching transactional lawyering skills has grown significantly. *See generally* Afra Afsharipour, *Incorporating “Business” in Business Law Classes*, 8 U.C. DAVIS BUS. L.J. 1 (2007); Rachel Arnow-Richman et al., *Teaching Transactional Skills in Upper-Level Doctrinal Courses: Three Exemplars*, 2009 TRANSACTIONS: TENN. J. BUS. L. 367 (2009); Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475; Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Material for Transaction Oriented Elective Courses*, 11 TRANSACTIONS: TENN. J. BUS. L. 9 (2009); Robert C. Illig et al., *Teaching Transactional Skills Through Simulations in Upper-Level Courses: Three Exemplars*, 2009 TRANSACTIONS: TENN. J. BUS. L. 15 (2009); Kenneth N. Klee, *Teaching Transactional Law*, 27 CAL. BANKR. J. 295 (2004); Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69 (2009); Karl S. Okamoto, *Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in*

little of the literature on practice/skills-oriented pedagogical reform focuses on tax law in particular.⁹ While transactional tax law is similar in many ways to other transactional practices,¹⁰ experiential tax pedagogy deserves special attention because tax lawyers often serve different roles on transactions than do corporate/business lawyers and because tax courses cover different substantive material than do business law courses.¹¹

Law School, 45 J. LEGAL EDUC. 498 (1995); Louis N. Schulze, Jr., *Transactional Law in the Required Legal Writing Curriculum: An Empirical Study of the Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59 (2007); Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223 (2004).

⁹ Some of the more general business transactional skills courses and/or modules contain some tax component, but the tax component is generally not the focus. See, e.g., FRANKLIN A. GEVURTZ, *BUSINESS PLANNING* xx–xxii (4th ed. 2008) (including tax units as part of the larger business planning material). Of course, there are some notable exceptions where scholars write about integrating skills-teaching into tax classes specifically. See, e.g., LEANDRA LEDERMAN & STEPHEN W. MAZZA, *TAX CONTROVERSIES: PRACTICE AND PROCEDURE* (3d ed. 2009) (incorporating several skills exercises into a tax procedure textbook); Michael A. Oberst, *Teaching Tax Law: Developing Analytical Skills*, 46 J. LEGAL EDUC. 79, 80 (1996) (encouraging the use of an “active approach” to tax teaching in order to teach statutory reading and analytical skills rigorously); Scott Schumacher, *Learning to Write in Code: The Value of Using Legal Writing Exercises to Teach Tax Law*, 4 PITT. TAX REV. 103, 132–33 (2007) (discussing the incorporation of legal writing exercises in tax classes in order to help teach skills, concentrating, at least in part, on “the tax lawyer as the giver of tax advice”); see also, e.g., STEVEN LIND ET AL., *FUNDAMENTALS OF BUSINESS ENTERPRISE TAXATION* (4th ed. 2008) (not focusing on skills per se, but teaching corporate and partnership tax using problems, some of which involve ex-ante tax planning); Frederic G. Corneel, *Tax Planning: Teaching and Practice*, 22 TAX L. REV. 221 (1966) (discussing a relatively novel seminar in tax planning); George K. Yin, *Simulating the Tax Legislative Process in the Classroom*, 47 J. LEGAL EDUC. 104 (1997) (discussing a tax-focused experiential simulation used in a seminar).

There are also some opportunities, such as tax clinics, for students to develop their advising skills outside of the traditional classroom. See, e.g., Cheri Wyron Levin, *The Doctor Is in: Prescriptions for Teaching Writing in a Live-Client In-House Clinic*, 15 CLINICAL L. REV. 157, 172–73 (2008) (describing writing exercises assigned in connection with student participation in clinics, including tax clinics); Janet Spragens & Nina E. Olson, *Tax Clinics: The New Face of Legal Services*, 88 TAX NOTES 1525, 1528 (2000) (explaining how tax clinics help students “develop[] their professional skills”); TREASURY INSPECTOR GEN. FOR TAX ADMINISTRATION, *PROGRESS HAS BEEN MADE BUT FURTHER IMPROVEMENTS ARE NEEDED IN ADMINISTRATION OF THE LOW INCOME TAXPAYER CLINIC GRANT PROGRAM*, available at 2005 TNT 197-19 (LEXIS) (noting the growth in LITCs since 1998, when Congress approved grants of matching funds to help fund the clinics); *Volunteer Income Tax Assistance*, AM. BAR ASS’N, http://www.americanbar.org/groups/law_students/initiatives_awards/vita.html (last visited Feb. 4, 2012); *ABA Section of Taxation, Law Student Tax Challenge*, AM. BAR ASS’N, http://www.americanbar.org/groups/taxation/awards/law_student_tax_challenge.html (last visited Feb. 4, 2012) (annual student competition that typically requires students to analyze facts and write advising memos both to a senior partner and a client).

In addition, there are some wonderful articles that discuss other pedagogical objectives and approaches to teaching tax. See generally Dorothy A. Brown, *Teaching Civil Rights Through the Basic Tax Course*, 54 ST. LOUIS U. L.J. 809 (2010); Ajay K. Mehrotra, *Teaching Tax Stories*, 55 J. LEGAL EDUC. 116 (2005).

¹⁰ See Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994) (arguing that tax is not a self-contained area of law, but rather “advocat[ing] a synergistic relationship between tax and nontax law through which each benefits from the insights of the other”).

¹¹ See CRAMTON REPORT, *supra* note 1, at 17 (suggesting that “law school education can do a more effective job of training competent lawyers . . . through improved and expanded training for particular fields of lawyer practice”).

So, the modest objective of this piece is to share my experience, and offer some thoughts, about developing and integrating practice-oriented¹² experiential modules into tax courses. In particular, I focus on modules that can be incorporated into lecture courses in order to help students begin to see how they can turn their growing substantive knowledge into useful tax advice. By “useful advice,” I mean informative and understandable advice that comprehensively addresses the client’s economic objectives (including, but not limited to, the client’s tax objectives) and that gives the client a clear appreciation of the benefits and risks of a tax-related business decision; as a result of this advice, the client should be able to make an educated business choice.

Part II of this article elaborates on strategies that can help students develop the skill of giving useful advice and discusses the use of the lecture class setting to impart this skill. As examples, Part III describes two experiential exercises that I have used in my tax classes. For each, I describe the specific substantive law and skill-development objectives of the exercise, and I explain how the use of the advising strategies discussed in Part II helps the students complete the exercises. Part IV reflects on the successes and challenges of bringing these experiential modules into my (medium-sized) lecture courses.¹³ Part V addresses the process of developing additional experiential modules for lecture classes, and Part VI concludes. Ultimately, by encouraging the incorporation of experiential exercises in tax lecture classes, I hope to make a small contribution, both to the ability of professors to educate future legal advisers and to the discourse about the role of law professors.

Not surprisingly, I focus on incorporating experiential opportunities into tax lecture courses because tax is my area of expertise. However, I believe (and hope) that much of this discussion, save the specific examples, is generalizable, particularly to fields of practice where specialists provide ex-ante planning advice.¹⁴

¹² While these are practice-oriented modules that grow out of my experience in practice, professors need not have much (if any) practice experience to integrate experiential modules into the classroom. See *infra* Part V (discussing, among other things, strategies for developing and implementing practice-oriented experiential modules, which may be particularly relevant for professors who have limited practice experience and/or whose practice experience has grown stale with an increasing number of years in academia).

¹³ As the number of students in the class grows, it can become increasingly difficult to run an experiential exercise in the lecture setting. Among other issues, Part IV discusses the challenge of class size and suggests ways to modify the exercises for potential use in larger classes.

¹⁴ For example, consider antitrust, intellectual property, environmental/land use, or employment, where a lawyer gives ex-ante planning advice and may be a subject-matter specialist rather than the lead deal lawyer.

One last note before moving on—I want to be clear about several things that this piece does not address. This piece is not about teaching the value of hard work, the importance of giving back to society, the methods of business development, or the essentials of the business of law practice. This piece is also not primarily about teaching professionalism and ethics. All of these are incredibly important in helping law students become lawyers, and law schools should be involved in teaching some, if not all, of these skills. I do not mean to minimize the value of these things by not focusing on them in this piece. I just have a narrower goal here; this article merely considers how a little time from lecture classes can be used to help students start to develop their abilities to give useful advice.

II. TEACHING WHICH SKILL & IN WHICH CONTEXT?

A. Which Skill? Turning Substantive Knowledge into Useful Advice

A wide range of skills is fundamental to the effective practice of law, and among the most critical is a lawyer's ability to take her substantive knowledge and turn it into useful advice.¹⁵ In my tax practice, I quickly learned that this ability made a huge difference in how valuable I was to my colleagues and clients. In my conversations with numerous folks who receive legal advice (particularly tax advice in the planning setting), I heard tremendous frustration when the conversation turned to lawyers' talents (or lack thereof) in giving advice that the advice-recipients could actually use. And in my interactions with students, I find that even very talented students often seem quite unsure of themselves when asked to provide forward-looking advice to a hypothetical client.¹⁶

But what exactly do I mean by "giving useful advice" or "turning substantive knowledge into useful advice"? I believe that these concepts require a combination of more commonly identified categories of skills.¹⁷ To give useful tax advice, a lawyer must combine her counseling,

¹⁵ Again, this sets aside the obviously fundamental skill of learning the substantive law. However, knowledge of the substantive law is necessary for giving useful advice, but it is far from sufficient. Assuming that a lawyer understands the applicable law, she must also be able to use that knowledge in a way that helps her client.

¹⁶ Of course, students express uncertainty about many substantive topics too. For example, § 1231's characterization rules and § 751(b)'s rules regarding the tax treatment of disproportionate distributions from partnerships seem to be among the students' least favorite.

¹⁷ It is not particularly surprising that giving useful tax advice requires a combination of skills, given that "[i]ndividual skills and values cannot be neatly compartmentalized. There are numerous relationships between individual skills." MACCRATE REPORT, *supra* note 2, at 136.

communication, problem solving, fact-finding, judgment, and other abilities.¹⁸

Of course, it would be hubris to think that we, in law schools, could equip our students with the full combination of talents needed to be expert legal advisers.¹⁹ Given the other pedagogical objectives of law schools,²⁰ professors clearly lack the time to teach these skills in depth.²¹ Many full-time law professors (and you may be among them)²² have limited practice experience using these skills.²³ And, most critically, these are skills that lawyers develop with time and experience over the course of their careers.²⁴ Nevertheless, we serve our students well if we can help them begin to think about what they must do, beyond developing their substantive legal knowledge, to provide clear and comprehensive advice that enables clients to make educated decisions.

Based on my tax practice experience, my conversations with lawyers, and my discussions with people who regularly receive legal advice

¹⁸ “Problem solving,” “counseling,” “communication,” and “factual investigation” are among the fundamental skills and values articulated in the MacCrate Report. MACCRATE REPORT, *supra* note 2, at 138–39 (providing in-depth discussions of the concepts that are fundamental to these skills and the processes needed for implementing these skills). Additionally, the Carnegie Report 2007 discusses the importance of “[e]nabling students to learn to make judgments under conditions of uncertainty.” CARNegie REPORT 2007, *supra* note 3, at 22; *see also* CLEA REPORT, *supra* note 4, at 67–70 (including the development of “practical judgment” as an attribute of an effective lawyer, and discussing a variety of skills that can be included among the pedagogical objectives of law schools).

¹⁹ *Cf.* MACCRATE REPORT, *supra* note 2, at 234; Jeremiah Coder, *Conversations: USC Gould School of Law Tax LLM Program*, 125 TAX NOTES 758, 761 (2009) (quoting Professor Edward Kleinbard saying, “It would be absurd for any full-time academic to think that he or she could teach advanced tax courses addressed to how the tax law affects current commercial decisions or transactions. The only people who can teach at that level are people who work with the subject every day at the highest level, and that means top-flight practitioners.”); Mombrun, *supra* note 5, at 108 (“No law school has the expertise or sufficient resources to prepare its graduates to be effective lawyers immediately upon graduation.”). These concerns raise questions about how the responsibility for this type of skills training should be allocated between law school and legal employers. *See infra* note 34. Within law schools, these concerns may also present questions about which faculty (regular faculty, clinical faculty, or adjuncts) are best equipped to provide experiential learning opportunities.

²⁰ Teaching substantive content, theory, and “thinking like a lawyer” remain fundamental to law school education. There is great resistance to the idea of turning law schools into exclusively “trade schools.” *See* CARNegie REPORT 2007, *supra* note 3, at 7, 91–93 (noting law schools’ “fear of being dishonored as mere ‘trade schools.’”).

²¹ In addition, teaching skills in significant depth generally requires clinics or other settings with extremely low teacher to student ratios, which can be quite expensive.

²² If you are one such professor, I hope that you resist the temptation to stop reading at this point. I believe that there are ways to integrate experiential modules into the classrooms successfully, even for professors with little (or no) practice experience. This will be discussed further in Part V.

²³ *See generally* Wayne M. Gazur, *Do They Practice What We Teach? A Survey of Practitioners and Estate Planning Professors*, 19 VA. TAX REV. 1 (1999) (surveying professors of estate/gift taxation regarding their practice experience, among other things).

²⁴ *See* CARNegie REPORT 2007, *supra* note 3, at 115–16 (“[D]eveloping professional judgment takes a long time, as well as much experience. . . . [but] law school[s] can give students a solid foundation and . . . useful guidance on what they need to continue to develop. . . . [from] novice to expert.”).

(particularly in the transactional tax contexts), I focus on eight specific strategies that can help students as they begin to think about how to turn their substantive legal knowledge into effective tax advice.²⁵

1. *Understand the economics.* In addition to developing her general business acumen and learning at least a little bit about her client's business and financial position, a lawyer must understand the economics of the particular transaction on which she is advising. Which party is supposed to get (and, based on the existing transaction documents, which party is actually getting) what in exchange for what consideration? And most importantly, a lawyer should be clear about her *client's* specific business objectives in the particular transaction.
2. *Realize that tax is not the only important issue.* Many factors affect the business decisions made by clients. Tax is often one of those factors, but rarely is tax the *only* factor. As a result, a lawyer must recognize the non-tax factors relevant to a client decision and must appreciate how the tax analysis fits into the larger analysis. For example, it is not always bad to pay tax; deferring income and accelerating deductions may not be in every client's best interest; and accounting considerations (e.g., a client's desire to maximize income for financial statement purposes) may trump tax considerations (e.g., a client's desire to minimize the income on which the client must pay federal income taxes).²⁶

²⁵ The description of these eight strategies draws heavily on a companion piece that is directed at new tax lawyers. Heather M. Field, *Giving Useful Tax Planning Advice*, 134 TAX NOTES 1299 (2012). Lists in both pieces build on the robust literature reflecting various formulations of the key competencies needed by lawyers, including many of the materials cited throughout this piece. See, e.g., CLEA REPORT, *supra* note 4, at 53–55 (collecting formulations); DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 2–15 (2d ed. 2004) (discussing a number of the strategies discussed in this piece as part of the “client-centered approach” to lawyering). This literature, while useful, generally does not address the specific context of providing tax advice; actually, the best resource that I have found that discusses how lawyers should approach the provision of tax planning advice to clients is from 1966, and this piece has rarely been cited in the forty-six years since its publication. Corneel, *supra* note 9. To my knowledge, the collection of strategies discussed in this article is not co-extensive with, or substantially included in, these other formulations. Further, I believe that this collection of strategies provides a useful additional way to think about approaches to practice that can help lawyers, particularly transactional tax lawyers, succeed. That said, I do acknowledge that this article reflects a particular conception of the role of the lawyer, with which reasonable people may disagree. Also, note that, for the strategies listed herein, I reference only a few of the numerous resources that discuss these (or related) considerations in greater depth or from a different perspective.

²⁶ See generally Michelle Hanlon, *What Can We Infer About a Firm's Taxable Income from Its Financial Statements?*, 56 NAT'L TAX J. 831 (2003); Gil B. Manzon Jr. & George A. Plesko, *The Relation Between Financial and Tax Reporting Measures of Income*, 55 TAX L. REV. 175 (2002).

3. *Seek to empower, rather than impede, the client.*²⁷ Lawyers have a terrible reputation for being stumbling blocks that prevent clients from accomplishing their business objectives, but it does not have to be that way. Rather than just telling a client what the client *cannot* do for tax reasons, a lawyer who is a creative problem solver can often (though not always) find another way through which the client *can* accomplish its business objectives with less adverse tax consequences.
4. *Develop professional legal judgment about risk.*²⁸ Uncertainty abounds, both about law and facts. One reason a client engages a lawyer is to benefit from the lawyer's judgment about how to act in light of that uncertainty. A lawyer needs to be able to gauge the magnitude of the risk (determined without regard to the audit lottery), so that she can be clear with clients about the tax and non-tax tradeoffs of particular actions. This ability to assess risk, together with an understanding of the ethical standards that govern the provision of tax advice,²⁹ also helps the lawyer know when she must say "no" to a client.
5. *Respect the lawyer's role.*³⁰ The lawyer is the adviser. She explains how the law applies to the relevant facts, she advises about the costs and benefits of alternative courses of action, and she provides her legal judgment and overall guidance about the best way to proceed. But the client is the one who is responsible for taking the legal advice into account and using it as a factor in the process of making a business decision. And, for a variety of reasons, including differences in risk tolerance, the client may make a decision different than the one that the lawyer would have made if acting on her own behalf.
6. *Speak the client's language.* It is the lawyer's responsibility to present her expertise and advice in a manner that is accessible to

²⁷ This is closely related to the skill of problem solving. See Mark Neal Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1, 17–23 (2002); see also Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375, 375–80 (1998).

²⁸ See CARNEGIE REPORT 2007, *supra* note 3, at 22 (including, as a component of preparing professionals, the task of "[e]nabling students to learn to make judgments under conditions of uncertainty"). See generally Aaronson, *supra* note 27, at 30–38; Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247 (1998).

²⁹ In addition to the rules of professional conduct that apply to all lawyers, tax lawyers are subject to the standards of practice set out in Circular 230 and can be subjected to monetary penalties set out in the Code. I.R.C. § 6694(a)(1), (b)(1); 31 C.F.R. § 10 (2011).

³⁰ See, e.g., Robert Dinerstein et al., *Legal Interviewing and Counseling: An Introduction*, 10 CLINICAL L. REV. 281, 302–03 (2003) (discussing the issue of giving advice in a manner that preserves client autonomy); Aaronson, *supra* note 27, at 12–17 (discussing "role conceptualization").

her audience. Not only does this require the lawyer to translate “tax” into English, but this also demands that the lawyer learn the jargon and terminology common in the client’s business. Further, effective communication often also depends on the lawyer’s sensitivity to the ways in which social and business norms can vary by culture, socio-economic status, region, industry, etc.³¹

7. *Appreciate the relationship dynamics.* When advising clients, it is critical to remember the human component of the application of the law. Over-lawyering can create distrust and animosity among parties where none was present, but under-lawyering can leave the client unprotected if the relationship between the client and the other parties to the transaction sours over time. And there may be differences of opinions among people on the same side of a transaction. All of these relational issues and other emotions and biases of the client affect how a lawyer gives advice and how that advice is received.³²
8. *Know what you know, and know what you don’t know.* There will be situations in which even sophisticated, experienced lawyers do not know the answers to questions asked by clients or colleagues. An effective lawyer must be able to deal responsibly and confidently with these situations. That means being self-aware enough not to claim knowledge the lawyer lacks, admitting (in a reassuring way) that she does not know, and following up once she figures out the answer. That also means that the lawyer must develop her substantive expertise so that she faces these situations as infrequently as possible.

This is not an exhaustive list of important skills for lawyers in general, nor is this an exhaustive list of strategies and attitudes that help the lawyer give useful advice.³³ However, I believe that to the extent that we can help students to incorporate these approaches into their understanding of what it means to be legal advisers, the better we can provide them with a bridge to practice. Later, Part III, which discusses two experiential exercises that I have used in my business tax classes, will return to these strategies and

³¹ See generally Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

³² This is true even when the client is a business. After all, a business can only act through the people who represent the business.

³³ Also, some of these strategies are clearly interrelated. For example, a lawyer who does not understand the economics is much more likely to focus exclusively on tax issues as the determinative considerations. And a lawyer should seek to empower the client to achieve the client’s economic objectives, but it is the lawyer’s responsibility to say “no” to a client when, in the lawyer’s professional legal judgment, a proposed action crosses the line.

explain how employing each strategy helps students successfully complete the exercises.

B. Which Context? Integrating the Experiential Component into a Lecture Class

Increasingly, law schools try to teach the foregoing and various other lawyering skills.³⁴ Most of these experiential learning opportunities arise in the context of clinics, simulation classes, externships, advanced/capstone skills-oriented classes in particular subject matters, and broader innovative curricular reform.³⁵ While those opportunities are invaluable to the student experience, exposure to practice/skills-oriented instruction need not be relegated solely to the contexts where the experiential opportunity is the primary focus of the course.³⁶ Experiential opportunities can also be incorporated, as enrichment, into lecture courses that students may take relatively early in their law school careers.³⁷ The integration of experiential components, particularly planning-focused modules, into lecture classes is only one of many different approaches to experiential learning,³⁸ but this approach can be valuable for several reasons.

Experiential modules help students connect the *content* of the substantive material with the *use* of the substantive material, thereby fostering active student learning³⁹ and further developing students' abilities to be critical and creative thinkers. Also, by connecting the substantive material, taught in the lecture class, to the real world of practice, experiential modules may help motivate students to learn the substantive

³⁴ Some may wonder whether legal employers might be more efficient providers of this skill instruction. This may very well be true in various circumstances, but I believe that skills training provided by law schools is still quite valuable. This is true for many reasons, including because many law students may not practice in settings where their employers are able to or are interested in providing useful instruction, and because some students may learn better in the school setting than in the employment setting.

³⁵ See generally CLEA REPORT, *supra* note 4, at 165–206 (discussing experiential learning opportunities, including simulations, clinics, and externships); see also *supra* notes 8–9.

³⁶ See CLEA REPORT, *supra* note 4, at 146–57 (discussing options for “context-based instruction” of skills); John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 279–83 (2010) (discussing the possible integration of lawyering elements into doctrinal courses).

³⁷ See Gouvin, *supra* note 8, at 441–42 (suggesting the incorporation of transactional problems or mini-simulations into doctrinal lecture courses).

³⁸ I am not arguing that the integration of experiential components into lecture classes is the *best* way to teach skills. Rather, this approach is one of many that can be useful, and thus it remains worth discussing.

³⁹ This is particularly valuable in learning environments, like lecture classes, where the learning experience is largely passive.

material that we are trying to teach them.⁴⁰ Of course, students know that they need to study the material for the exam, but showing students how even a little of the material translates into practice may give the students another lens through which they can start to view all of the material that they are learning in the particular course and in their other lecture courses. And, given that the use of substantive expertise to help a client achieve its business objectives is one of the most exciting parts of the law (at least in my view), experiential modules can engage students in the course material and generate enthusiasm.⁴¹

Exposure to law-in-action is particularly beneficial in fields where much of the practice is planning-focused rather than litigation-focused. Much of law school is taught in the context of litigation, looking at situations *after* they occur.⁴² Legal research and writing classes “overwhelmingly focus students’ attention on litigation.”⁴³ Students study cases that discuss the legal consequences of past events,⁴⁴ and even with problem-method instruction, students are often asked to evaluate the legal consequences of a given set of facts that already occurred.⁴⁵ However, a significant amount of legal advice is given before clients act, in the context of planning, and with the hope that litigation will not ultimately ensue.⁴⁶ Experiential modules that put students in the role of the lawyer advising *ex ante*, in a planning capacity, help students think like transactional lawyers

⁴⁰ As you will see, I generally use the experiential modules at the end of each unit as a way to reinforce the material previously taught. As an alternative, professors could use short experiential modules at the beginning of units in order to introduce the topics and generate enthusiasm as students begin to dig into the material.

⁴¹ See also CARNEGIE REPORT 2007, *supra* note 3, at 13 (“[T]his type of knowledge [of the formal legal doctrine] often comes most fully alive for students when the power of legal analysis is manifest in the experience of legal practice.”).

⁴² See CLEA REPORT, *supra* note 4, at 137 (citing John Elson, *The Regulation of Legal Education: The Potential for Implementing the MacCrate Report’s Recommendation for Curricular Reform*, 1 CLINICAL L. REV. 363, 384–85 (1994), for the assertion that “[t]he case method’s exclusive focus on the outcomes of litigation diverts students’ attention from the many other arenas of lawyering with which competent practitioners should be familiar”).

⁴³ Schulze, *supra* note 8, at 61.

⁴⁴ Reading cases that explain and analyze past events that have been the subject of litigation is fundamental to the case-dialogue method. See generally CARNEGIE REPORT 2007, *supra* note 3, at ch. 2 (discussing the case dialogue method as the “signature pedagogy” of law schools).

⁴⁵ See generally LIND ET AL., *supra* note 9 (using many problems, most backwards-looking and a few forward-looking, to give students opportunities to apply the course material). This comment is not at all intended to criticize this or similar texts; rather, my point is only that I hope that we can continue to build on the existing excellent pedagogical materials. So that there is no confusion, please note that this is the book that I usually use when teaching business enterprise taxation, and I think very highly of the book.

⁴⁶ This might be a surprise, particularly for anyone whose exposure to law practice is primarily from the numerous law-related shows on television. Somehow, with very limited exceptions, the practice of transactional law does not translate particularly well to the television or movie screen.

rather than litigators.⁴⁷ And for those students who do not want to be, or will not ultimately be, litigators, exposure to the roles and responsibilities of transactional lawyers can be quite valuable.⁴⁸

While the lecture class context necessarily limits the scope of any experiential opportunities, a glimpse of how law is used in practice might encourage students to seek out more comprehensive experiential opportunities.⁴⁹ Incorporating experiential modules into a lecture class is also a concrete way for faculty to acknowledge that the vast majority of the students will be lawyers rather than legal academics. It is one small way to communicate to students that we believe the connection between law school and law practice is important. Moreover, perhaps participation in an experiential module will give students one additional interesting experience to draw upon when trying to demonstrate their practice-readiness for prospective employers.

Introducing an experiential component, however small, into a lecture course is also a step in the process of better integrating different parts of the curriculum. This is a step that individual professors can take independently, within the structure of the existing course offerings,⁵⁰ without extensive faculty debate about curricular priorities and institutional identity, and without the rest of the process and time that typically precedes large-scale curricular reform.⁵¹ While some criticize the incremental nature of legal education reform,⁵² I believe that this type of incremental curricular development is better than none. Further, this is a step that may introduce an increasing number of podium faculty members to the potential benefits of greater curricular integration, thereby possibly increasing the likelihood of larger-scale reform in the future.

While law schools use a variety of pedagogical approaches, all of these approaches (integrated or not) are valuable parts of a unified curriculum

⁴⁷ See Stark, *supra* note 8, at 223 (noting that “doing deals is fundamentally different than litigating”).

⁴⁸ See generally Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984) (articulating how transactional lawyers might add value); Stephen Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486 (2007).

⁴⁹ See Lande & Sternlight, *supra* note 36, at 277 (“[I]t is important to integrate [skills] instruction throughout the curriculum because reinforcing the messages about the various competencies in multiple places is likely to increase the educational impact on students.”).

⁵⁰ For example, an alternative way to add experiential components to a lecture course could be through the addition of a 1-unit “lab” class that accompanies the lecture course, as is done in many undergraduate courses. This might be easy to accomplish at some schools, but at other schools this may require fundamental changes to the authorized course/unit structures and the allocation of classroom space.

⁵¹ CARNEGIE REPORT 2007, *supra* note 3, at 190 (quoting the ABA for the proposition that “law school curriculum reform is a tedious and often frustrating task”).

⁵² See *id.*; CLEA REPORT, *supra* note 4, at 96 (critiquing the way in which “curricular decisions are made in an incremental fashion”) (footnote omitted).

that aims to educate future lawyers. Whether faculty members teach at the podium or in the clinic, we are part of a collective enterprise. And, in addition to everything else, I hope that efforts by podium faculty to incorporate experiential modules in our lecture courses continue to affirm that we, podium faculty, respect and value our clinical/experiential colleagues and what they contribute to our shared endeavor.⁵³

Finally, experiential exercises, especially if paired with a written component,⁵⁴ give faculty an additional technique for assessing what students are actually learning. Not only can experiential exercises provide students with feedback on their progress, but these exercises can also help us assess the efficacy of our teaching. Moreover, the ABA is considering revisions to the law school accreditation standards that would increase the emphasis on assessing student learning outcomes (SLOs).⁵⁵ Using experiential modules that are coupled with individual written exercises may provide opportunities for formative course-based assessment, whereby students can receive feedback (that need not be graded) throughout the semester “to help them improve their performance”⁵⁶ and whereby faculty can assess “how well individual students are mastering the educational outcomes of the course.”⁵⁷ To the extent law schools may focus increasingly on SLOs, the incorporation of experiential exercises in lecture classes may be one way for faculty members to better meet this challenge.

III. EXPERIMENTING WITH EXPERIENTIAL MODULES FOR A LECTURE CLASS

After benefiting from being the guinea pig for a teaching workshop about how to incorporate an experiential component into a lecture class,⁵⁸ I developed a number of modules intended to help students in my tax classes begin to understand how tax lawyers use their substantive knowledge to

⁵³ I hope this goes without saying, but I worry that perhaps this does need to be emphasized. See, e.g., CARNEGIE REPORT 2007, *supra* note 4, at 87–88, 94 (discussing the perception of “lower academic status” of faculty who teach lawyering skills); Brent E. Newton, *Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 140–46 (2010) (criticizing the “second-class status of clinicians and clinical courses”).

⁵⁴ See *infra* Part IV (suggesting individual practice-oriented written exercises that complement the in-class experiential exercises).

⁵⁵ Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225, 226–29 (2011) (providing background on the ABA’s proposed changes).

⁵⁶ *Id.* at 239 (explaining formative assessment).

⁵⁷ *Id.* at 236 (explaining course-based assessment).

⁵⁸ I owe a tremendous debt to all of the workshop organizers and participants. Without their ideas and input, I doubt I would have developed, or at least developed as successfully, the exercises described herein.

advise clients in transactional settings. Two of the modules (one for corporate tax and one for partnership tax) are discussed in this part. For each module, this part provides a description of the exercise, including an explanation of the materials used and the process of administering the exercise. In addition, this part also articulates the objectives of each module; the discussion of objectives begins with a substantive analysis of the legal issues presented by the module and is followed by a description of the skills component of the module (that is, an explanation of how students' employment of the above-described advising strategies helps students complete the exercise).

A. Corporate Tax Exercise—Reorganization Qualification

1. Description

This exercise asks students to assume the role of a tax associate who is asked to help structure an acquisition that is intended to qualify as a "reorganization" within the meaning of § 368 of the Internal Revenue Code (very generally, a tax-free acquisition). Substantively, this module is intended to reinforce the students' understanding of § 368, so I distribute the problem at the end of the classes covering reorganizations. The problem consists only of an email from a tax partner, and the email provides the associate with some basic information about a new matter. The students are instructed to prepare for a meeting with the tax partner, during which the tax associate and tax partner will discuss how to gather the additional information needed in order to provide advice about the qualification of the transaction as a reorganization.

Specifically, the email reads as follows:

Tax Associate,

Thank you for agreeing to assist on Project Sandwich. This should be a fun deal, and I am looking forward to working with you.

I don't have a lot of details about the deal yet, but here is what I know so far:

- Our client, J Corp, is going to be acquired by PB Corp in a transaction that is intended to qualify as a reorganization. Both PB and J are publicly traded companies.
- The parties have tentatively been talking about structuring the deal as a direct merger of J into PB, with PB surviving. However, some alternative structures have been considered, including triangular mergers, apparently because of some concerns about PB's direct exposure to J liabilities.
- The merger consideration is anticipated to be around half PB common stock and half cash. This isn't quite set, but I am told that PB will probably want to use at least 1/3 cash because of PB's cash

position and PB's concern about control, dilution and securities regulation issues.

We are going to need to determine whether the transaction will qualify as a reorganization, so I would like you to think about what additional information we will need in order to make that determination. Next week, we can talk about what questions you think we will need to ask PB and J in order for us to obtain the information necessary for us to advise on the structuring of this transaction. Please come to our meeting prepared with your questions, and be sure to be able to articulate why we need to know each piece of information that you are requesting.

Down the line, we will probably be asked to render a tax opinion on the qualification of the transaction as a reorg, and in conjunction with that opinion, we will need to get representation letters from PB and J attesting to various facts. Please keep that in mind when thinking about our initial information gathering. I'll give you some additional insight into the rep letters and the opinion when we meet next week.

The billing number is 867530-9000.

Thanks very much.

Tax Partner

The students have a few days to think about this problem. At the beginning of the next class, students break into groups of three or four people,⁵⁹ and they have ten to fifteen minutes to discuss the substantive issues and to discuss how to approach their conversation with the tax partner.⁶⁰ When we reconvene as a class, I play the tax partner and invite them to tell me what information they think we need to gather. In an effort to provide some structure to the discussion and to help ensure that many students will have a chance to talk, I ask the first volunteer to address only one issue.⁶¹ I invite participation from all of the small groups, and in my capacity as the tax partner, I ask follow-up questions to push the students to approach information collection rigorously and to encourage them to think about how they might use the information gathered to assist the client. I also provide substantive clarifications and guidance when needed, and I provide some context about the role of tax lawyers on this type of deal

⁵⁹ Typically, students form their own groups with other students who sit nearby. Thus, students generally are in groups with their friends, and students largely stay in their seats. However, a professor may want to assign the groups if she wants to use the exercise as an opportunity to help build community in the classroom by introducing students to others they may not know and/or if she wants to use the exercise to give the students an opportunity to get up and move around the room.

⁶⁰ Alternatively, these discussions can be held outside of class time. *See infra* Part IV.B (discussing the time management challenge).

⁶¹ With my average class size (around 30), I generally let anyone volunteer. With a larger class, it may be helpful to have a single spokesperson for each small group. *See infra* Part IV.B (discussing the class-size challenge).

(including structuring and rendering opinions).⁶² The exercise concludes when the students have fleshed out the questions and analysis, and when I, in my capacity as the tax partner, feel (relatively) confident that the “tax associates” are prepared to speak with the corporate attorneys and the client. Different groups of students need different levels of “tax partner” input, but ultimately, each of my classes completed the exercise successfully.

At the very end of the corporate tax module, I take a moment to reflect with the students on this exercise. The next time that I run these modules, I plan to spend a few minutes explicitly identifying (or asking the students to identify) the strategies that the students successfully employed in the exercise.⁶³ I suspect that will reinforce the advice-giving skills that I hope the students learn from this exercise.

2. Objectives

The limited facts provided in the email do not create any clear problems for qualification of the transaction as a reorganization, but the email omits a tremendous amount of information. Thus, as a result of this module, students should develop their abilities to use their knowledge of the substantive tax law (here, the requirements for a transaction to qualify as a reorganization) in order to identify and gather facts relevant to the tax analysis and in order to give advice based on the facts gathered.

It may be useful to review the substantive tax analysis of this exercise before moving on to discuss how employing the eight strategies discussed above would help the students achieve the objectives of this exercise. Very generally, if a transaction qualifies as a reorganization under § 368, the transaction will not be a taxable event for the corporations involved,⁶⁴ and the shareholders of the target corporation who receive equity of the acquirer corporation in the transaction will be able to defer the recognition of some or all of their gain in their target corporation stock.⁶⁵ Section 368 imposes reorganization qualification requirements that vary depending on the form of the merger. The composition of the merger consideration in Project Sandwich (at least 1/3 cash) generally limits the viable structures to (i) the direct merger suggested in the email (the target merges with and into the acquirer, with the acquirer surviving),⁶⁶ (ii) a forward triangular merger (the

⁶² For students’ reference, at the end of the exercise, I also distribute the representation letters, the tax opinions, and the tax disclosure from a public deal.

⁶³ To prevent impeding the flow of the conversation, I generally do not point out the strategies during the exercise as the students are employing them.

⁶⁴ I.R.C. §§ 361, 368.

⁶⁵ See *id.* §§ 354, 356.

⁶⁶ See *id.* § 368(a)(1)(A).

acquirer corporation forms a wholly-owned corporate subsidiary, and the target corporation merges with and into the subsidiary, with the subsidiary surviving),⁶⁷ and (iii) a disregarded entity merger (the acquirer corporation forms a wholly-owned single-member limited liability company, and the target corporation merges with and into the LLC, with the LLC surviving).⁶⁸ Direct mergers and the disregarded entity mergers must meet the requirements imposed by § 368(a)(1)(A) in order to qualify as reorganizations (that is, these transactions will be tested as “A reorgs”); specifically, the transaction must be a statutory merger or consolidation.⁶⁹ Forward triangular mergers must meet the additional requirements imposed by § 368(a)(2)(D) in order to qualify (that is, these transactions will be tested as “(a)(2)(D) reorgs”); for example, in an (a)(2)(D), the merger subsidiary must hold substantially all of the target’s assets after the transaction (the “substantially all” requirement).⁷⁰

A few additional requirements must be met for any transaction, regardless of the form, to qualify as an acquisitive reorganization. Very generally, target shareholders must have a sufficient amount of continuing equity interest in the combined enterprise (the “continuity of proprietary interest” requirement),⁷¹ the combined enterprise must continue the historic business of the target or use the target corporation’s historic business assets

⁶⁷ See *id.* § 368(a)(2)(D).

⁶⁸ Treas. Reg. § 1.368-2(b)(1) (as amended in 2010). There are some additional alternatives not listed in the text. For example, the transaction could be undertaken in an integrated multi-step transaction that is ultimately tested as either an “A reorg” or an “(a)(2)(D) reorg.” See Rev. Rul. 2001-26, 2001-1 C.B. 1297; Rev. Rul. 2001-46, 2001-2 C.B. 321; Rev. Rul. 2008-25, 2008-1 C.B. 986. Additionally, the transaction could be structured as a “double dummy” or “butterfly” transaction, in which a new corporation (Newco) is formed; then, Newco forms two wholly-owned subsidiaries, one of which merges with and into the “acquirer” corporation and the other of which merges with and into the “target” corporation. See I.R.C. § 351. Technically, this is not a reorganization under § 368, but rather, it is a contribution transaction. See *id.*

However, unless the composition of the consideration changes substantially, the transaction will not be able to qualify as a reorganization if structured in certain other commonly used forms. Specifically, a stock for stock exchange (i.e., target shareholders exchange their target stock for stock in the acquirer) would not qualify because no “boot” (non-equity consideration) is allowed in a “B reorg.” See *id.* § 368(a)(1)(B). An exchange of the target’s assets for the acquirer’s stock will not qualify because the consideration in a “C reorg” cannot exceed 20% boot. See *id.* § 368(a)(1)(C), (2)(B) (assets for stock transactions). Additionally, a transaction structured as a reverse triangular merger (the acquirer forms a wholly-owned subsidiary, and the subsidiary merges with and into the target corporation, with target surviving) would not qualify because the acquirer would not be acquiring “control” (80%) of the target corporation with solely acquirer stock; a transaction where 1/3 of the target stock is being acquired for cash cannot qualify as an “(a)(2)(E) reorg.” *Id.* § 368(a)(2)(E); see *id.* § 368(c) (defining control, in this context, to mean 80% or more of the voting power and 80% or more of the number of shares of each class of nonvoting stock).

⁶⁹ I.R.C. § 368(a)(1)(A). The regulations elaborate on the definition of this concept in the context of a disregarded entity merger. See Treas. Reg. § 1.368-2(b)(1) (as amended in 2010).

⁷⁰ I.R.C. § 368(a)(2)(D); Treas. Reg. § 1.368-2(b)(2) (as amended in 2010).

⁷¹ Treas. Reg. § 1.368-1(e) (as amended in 2011).

in a business (the “continuity of business enterprise” requirement),⁷² and there must be a bona fide business purpose for the transaction (the “business purpose” requirement).⁷³ So, the students must gather the relevant facts, analyze whether the reorganization requirements are likely to be satisfied, and determine which transaction structure(s) might provide the client with the desired tax result.

Of course, as with all legal advising, the provision of advice about the qualification of the transaction as a reorganization requires more than just the ability to provide a substantive analysis of the tax treatment of the existing provisions. Thus, by employing the strategies discussed above, students can use their substantive knowledge to aid the client in this exercise. Specifically:

1. *Understand the economics.* Students must inquire about the non-tax business issues that affect the choice of structure for the acquisition. For example, how much flexibility is there in the composition of the consideration?⁷⁴ What concerns are there (if any) about protecting one party’s assets from exposure to the liabilities of the other party? After the transaction, how important will it be to be able to commingle the assets of the parties? Students should sensitize themselves to these and other business issues (e.g., limitations on the transferability of assets) that typically affect the structuring of acquisitions.⁷⁵
2. *Realize that tax is not the only important issue.* Favorable tax treatment (i.e., nonrecognition) may be critically important when structuring the acquisition,⁷⁶ but non-tax considerations may trump. And, even among possible nonrecognition structures, business (rather than tax) considerations may be determinative. So students should not be over-eager to recommend a direct merger (because of the limited tax requirements for

⁷² *Id.* § 1.368-1(d).

⁷³ *Gregory v. Helvering*, 293 U.S. 465, 469 (1935); Treas. Reg. § 1.368-1(c) (as amended in 2011), -2(g) (as amended in 2010). In addition, it would also be wise to ensure that the transaction satisfies the proposed regulations regarding the exchange of net value. *See* Transactions Involving the Transfer of No Net Value, Prop. Treas. Reg. § 1.368-1(f), 2005-1 C.B. 835, 843.

⁷⁴ Further, query how the parties anticipate setting the exchange ratio.

⁷⁵ Also, it would behoove the students to familiarize themselves, at least a little bit, with the parties. For example, consider looking at the parties’ most recent Form 10-Ks. This familiarity with the parties may prove to be helpful when fleshing out facts that could impact the qualification of the transaction as a reorganization.

⁷⁶ Indeed, perhaps a fully taxable transaction might be preferable, if for example, the price of J shares has declined significantly, almost to historically low levels, such that most of the shareholders may have loss, rather than gain, built into their shares.

reorganization qualification),⁷⁷ a reverse triangular merger (because there is only one level of tax rather than two if the transaction fails to qualify),⁷⁸ or a double dummy/butterfly (because of the huge flexibility in the permissible consideration).⁷⁹ Before recommending a specific structure, students must understand the economics of the transaction and the non-tax business objectives of the parties.⁸⁰

3. *Seek to empower, rather than impede, the client.* It is easy to identify factors that are likely to prevent a transaction from qualifying as a reorganization, but this identification, *alone*, is not particularly helpful. So if and when students discover those types of problems, students should be prepared to suggest alternative structures that accommodate those factors and effectuate the client's business and tax objectives.
4. *Develop professional legal judgment about risk.* Students need to be able to process the information that they receive in order to determine where issues might arise threatening the qualification of the reorganization. Given a relatively straightforward set of facts (as I have used in this exercise), this may not be terribly difficult. However, students will need to exercise professional judgment more frequently if and as more complicated facts are added to the exercise. More complicated facts require students to judge where they need to follow up with additional questions to flesh out potential concerns. Then, once the students have obtained the relevant information, they have to exercise their professional legal judgment to assess the risk to reorganization qualification posed by the information. For example, are two transactions likely to be "stepped" together and treated, for tax purposes, as a single integrated transaction?⁸¹ Does a particular plan for the business after the transaction constitute a "new business" or just an expansion of the target corporation's "historic business"? Is there sufficient continuity of interest if slightly less than 40% of the merger consideration is acquirer stock? And the

⁷⁷ See I.R.C. § 368(a). See generally 2 MARTIN D. GINSBURG & JACK S. LEVIN, *MERGERS, ACQUISITIONS, & BUYOUTS* ¶ 801 (Sept. 2011 ed.).

⁷⁸ See I.R.C. § 368(a)(2)(E); see generally 2 GINSBURG & LEVIN, *supra* note 77, ¶ 803.

⁷⁹ See I.R.C. § 351; see generally 2 GINSBURG & LEVIN, *supra* note 77, ¶ 904.

⁸⁰ One way to handle this would be to raise a variety of possible structures and get the client response regarding the business feasibility/desirability of each structure. With each additional piece of information, the lawyer can hone her advice and focus on the structures that are likely to be most effective.

⁸¹ See generally Stephen Bowen, *The End Result Test*, 72 TAXES 722 (1994) (providing a very useful discussion of different variations of the step transaction doctrine).

students must be prepared to deliver bad news if information is discovered that poses significant risk or is fatal to reorganization qualification.

In addition, the exercise explains that the conversation between the tax associate and the tax partner is intended to precede the preparation of representation letters and the rendering of a tax opinion by the law firm. While this is not directly part of the exercise for the students, the framework for the problem provides me, in my capacity as the tax partner, the opportunity to explain briefly the professional judgment and risk management issues that arise during the opinion process,⁸² for both the lawyer herself (e.g., standards of practice that govern the issuance of tax opinions,⁸³ and levels of confidence for tax opinions) and for the client (e.g., what types of information the client, as opposed to the other party to the transaction, can and should attest to, and how can the client use the opinion).

5. *Respect the lawyer's role.* Students should not tell the client that the transaction *must* be structured in one particular way. The students should explain the structuring alternatives and the tax/non-tax tradeoffs, but the client makes the final call because that is a business decision. A client may ultimately decide to forego tax-free treatment (or to accept an elevated risk that a transaction will not qualify as a reorganization) in order to achieve a non-tax business objective.

Similarly, where the exercise involves the tax opinion process, students should be careful not to tell the client that it *must* attest to particular facts; if the client has questions about a representation, the student should absolutely not pressure the client to attest. Rather, the student should explain the representation in a way the client can understand (see #6), explore any facts that give the client pause, assess the legal consequences of the facts, and change the representation if needed. Further, students should be reminded that, while clients can and should attest to facts, they generally should not be asked to attest to legal conclusions—that is the lawyer's responsibility.

6. *Speak the client's language.* Particularly when gathering facts to determine if the transaction will meet the reorganization

⁸² When I explain why a client might request a tax opinion, I also have an opportunity to provide students with a brief introduction to securities regulation (often a driver of the need for tax opinions in transactions involving public companies).

⁸³ 31 C.F.R. §§ 10.35–.37 (as amended in 2011).

requirements and when explaining the representation letters to the client, it is critical that students use accessible language.⁸⁴ Students should refrain from using tax terms of art (“Will there be continuity of business enterprise?” “How much continuity of interest will there be?”). Students should be able to break the tax issues down into discrete factual questions that the client is able to answer.⁸⁵ For example, in order to determine whether there is sufficient continuity of interest, students should prepare to ask PB’s representative questions including, but not limited to, the following: How much total cash and how much PB stock does PB plan to pay in the transaction? Will PB pay cash in lieu of fractional shares? If so, how much total cash in lieu of fractional shares is expected to be paid? Has PB transferred, or does PB anticipate transferring, anything else of value to any J shareholder in connection the transaction? What, if any, transaction expenses of any J shareholder will be paid by PB? Will PB assume or pay off any liability of any J shareholder? Does PB already own any J stock? If so, when and in exchange for what payment did PB acquire that J stock? After the transaction, does PB plan to redeem any PB stock (including pursuant to any regular stock repurchase plan)? Similar questions should be asked about parties related to PB (e.g., Has or will any subsidiary of PB transferred anything of value to J shareholders?). In addition, students should prepare to ask J’s representative questions that will inform the student’s analysis of whether there will be sufficient continuity of interest.

Also, it is important that students can ask the questions in different ways, particularly if the client seems unsure of the answers. And sometimes the most effective way to gather the relevant information is to ask an open-ended question and just listen to the client talk. There are downsides to this approach, but there a variety of techniques for eliciting factual information from clients.⁸⁶ Students should listen for any inconsistencies in answers; sometimes clients do not remember everything all at the

⁸⁴ See generally STEPHEN P. PARSONS, INTERVIEWING AND INVESTIGATING: ESSENTIAL SKILLS FOR THE LEGAL PROFESSIONAL 286 (4th ed. 2010) (“Avoid legal or technical jargon except as necessary.”).

⁸⁵ Then, the lawyer should synthesize and analyze those facts to reach a legal conclusion as to whether the facts affect the qualification of the reorganization.

⁸⁶ See generally G. NICHOLAS HERMAN & JEAN M. CARY, A PRACTICAL APPROACH TO CLIENT INTERVIEWING, COUNSELING, AND DECISION-MAKING: FOR CLINICAL PROGRAMS AND PRACTICAL-SKILLS COURSES ch. 4 (2009) (discussing interviewing techniques).

same time, and something said later triggers an additional recollection. If something a client says seems inconsistent with annual reports or other information that students have, they must follow up.⁸⁷ In addition, if a student does not understand terminology/lingo that the client uses, the student should ask for clarification.⁸⁸

7. *Appreciate the relationship dynamics.* If J Corp is represented by multiple people (e.g., CFO, General Counsel, Controller), the student should seek to speak with the person who is most informed about the relevant issues. Also, where internal relationships at the client are particularly contentious, students should make sure that they are getting consistent information from the various internal people, and students should make sure that they understand the hierarchy of authority within J Corp. The student should also be prepared to take account of the relationship dynamic between the parties. For example, which party has the leverage, whose business priorities are more likely to be accommodated, is the deal friendly or hostile, and which party bears how much risk if the reorganization fails to qualify?
8. *Know what you know, and know what you don't know.* Students may not know for certain whether a particular fact is going to be problematic. That is okay. The discussions that are part of this exercise occur at a relatively preliminary stage, so students should be prepared to say, confidently, that they want to follow up on particular issues.

Certain of these strategies are more important than others in this exercise, but each helps the students identify, gather, and analyze the information needed, thereby empowering the students to use their substantive tax knowledge to provide client advice.

B. Partnership Tax Exercise—Interests for Services & Allocation Provisions

1. Description

This partnership tax exercise asks students to assume, again, the role of a tax associate. Here, the associate is asked to review excerpts from a

⁸⁷ Asking follow-up questions not only helps to elicit relevant information, but it also helps the lawyer to convey interest and build rapport with the client.

⁸⁸ They may be a little embarrassed about not knowing or understanding something, but asking and being a little embarrassed is generally better than making an important substantive mistake because the lawyer misunderstands something said by the client.

limited liability company (“LLC”) agreement.⁸⁹ Substantively, this exercise is intended to reinforce the course material regarding the grant of partnership interests in exchange for services⁹⁰ and the course material regarding partnership allocations.⁹¹ Thus, at the end of the classes covering partnership allocations and the substantial economic effect regulations,⁹² I distribute the problem, which consists of an email from a corporate associate and excerpts from a draft LLC agreement. The students are instructed to be prepared to talk to the corporate associate at the beginning of the next class.

The email explains the basic economic deal that the LLC members wish to reflect in the agreement, and the email asks the tax associate to review the excerpts from the LLC agreement. Specifically, the email reads as follows:

Hi Tax Associate,

Tax Partner said that you are going to help out with the tax review of the FAQ LLC agreement. Thanks for agreeing to assist.

I worked up a draft of the agreement based on some documents that we’ve used before, and I modified the document to reflect FAQ’s deal, which is pretty simple (just a 40/40/20 straight-up split among F/A/Q, with Q getting her interest for services).

I’ve attached an excerpted version of the current draft agreement for your review. As an aside, I know you tax folks usually like to see the entire agreement, but Tax Partner told me to give you only the attached provisions, so I hope that’s okay. She said that she was going to look at the rest of the agreement herself.

Anyway, in addition to getting your general feedback on the attached, I would like your specific input on the allocation language—I noted my question for you in the draft. Otherwise, I think (hope!) this should be pretty straightforward.

Can we touch base about this first thing Wednesday morning [i.e., the day and time of the next class]? Let me know if that’s going to be a problem.

By the way, the billing number is 314159-0000.

Thanks!

Corporate Associate

⁸⁹ This exercise assumes that the LLC is treated as a partnership for tax purposes (i.e., that the multi-member LLC does not make a check-the-box election to be treated as an association taxable as a corporation). Treas. Reg. § 301.7701-3(a), (b)(1) (as amended in 2006). Thus, for purposes of this article’s discussion, the term “LLC” will be used interchangeably with the term “partnership,” and the term “member” will be used interchangeably with the term “partner.”

⁹⁰ LIND ET AL., *supra* note 9, at 61–89; 1 WILLIAM S. MCKEE ET AL., FEDERAL TAXATION OF PARTNERSHIPS & PARTNERS ch. 5 (4th ed. 2007).

⁹¹ LIND ET AL., *supra* note 9, at 131–221; 1 MCKEE ET AL., *supra* note 90, ¶ 11.02.

⁹² Partnership interests granted in exchange for services are covered earlier in the semester.

The distribution of this excerpted LLC agreement provides an opportunity to introduce students to the basic structure of a partnership agreement. For most of my students, this exercise is the first time they have seen a partnership agreement. As a result, when I distribute the problem, I take some time to explain that, while partnership agreements can vary significantly, they typically have sections that address contributions, management, allocations, and liquidation, among other things, and the agreements tend to employ a common structure.⁹³ I also make a complete sample partnership agreement available for the students to examine.

In the interest of limiting the scope, duration, and difficulty of the exercise, the excerpted LLC agreement is quite abbreviated. Specifically, the excerpted agreement reads as follows:

DRAFT

LIMITED LIABILITY COMPANY AGREEMENT

OF

FAQ, LLC

THIS LIMITED LIABILITY COMPANY AGREEMENT (the “**Agreement**”) is made and entered into as of the ___ day of _____, 20___, by and among Investor Finley, an individual (“**F**”), Investor Alex, an individual (“**A**”), and Investor Quinn, an individual (“**Q**”) (collectively, the “**Members**,” with each being referred to individually as a “**Member**”) for the purpose of setting forth the terms and conditions and providing for the management of FAQ, LLC (the “**Company**”), a limited liability company organized under the Delaware Limited Liability Company Act.

RECITALS

... the Members intend that the interest in the Company granted to Q represents a “profits interest” in the Company, as that term is defined in Revenue Procedure 93-27, 1993-2 C.B. 343. . . .

ARTICLE 1. DEFINITIONS

ARTICLE 2. CAPITAL; CAPITAL ACCOUNTS AND MEMBERS

2.1 Capital Contributions. As of the date of this Agreement, F contributed \$400,000 (four hundred thousand dollars) to the Company in exchange for an interest in Company, and A contributed \$400,000 (four hundred thousand dollars) to the Company in exchange for an interest in Company.

⁹³ See generally JOHN M. CUNNINGHAM & VERNON R. PROCTOR, DRAFTING DELAWARE LLC AGREEMENTS: FORMS AND PRACTICE MANUAL (2010).

Q has not made and shall not be required to make any contribution of cash or property to the Company in exchange for the interest in the Company that has been granted to Q pursuant to the employment agreement between the Company and Investor Quinn.

- 2.2. **Additional Capital Contributions by Members.** No Member shall be required to make any additional Capital Contributions to the Company.
- 2.3. **Capital Accounts.** A capital account shall be established and maintained for each Member on the Company's books and records in accordance with Treasury Regulation Sections 1.704-1(b) and 1.704-2 (each such account, a "Capital Account").

ARTICLE 3. ALLOCATIONS OF NET PROFITS AND NET LOSSES

- 3.1. **General Allocation of Net Income and Losses.** Except as otherwise provided in this Article 3, Net Income and Net Losses for any fiscal period shall be allocated 40% (forty percent) to F, 40% (forty percent) to A, and 20% (twenty percent) to Q; provided, however, that the 40% of Net Income allocated to F pursuant to this section shall be comprised of as much Capital Gain Income as possible and as little Ordinary Income as possible.

[TAX ASSOCIATE: Would it be better to use the following "targeted" allocation provision?

Except as otherwise provided in this Article 3, Net Income and Net Losses for any fiscal period shall be allocated so as to cause the balance in each Member's Capital Account to equal, as nearly as possible, the amount such Member would receive in a distribution, if the Company sold all of its assets (if any) for their book values and the Company liquidated, making distributions in accordance with Section 7.3; provided, however, that the Net Income allocated to F pursuant to this section shall be comprised of as much Capital Gain Income as possible and as little Ordinary Income as possible.]

- 3.2. **Regulatory and Tax Allocations.** Notwithstanding the foregoing provisions of this Article 3, the following special allocations shall be made:

ARTICLE 4. Operating DISTRIBUTIONS

ARTICLE 5. Management

ARTICLE 6. INTERESTS AND TRANSFERS OF INTERESTS

ARTICLE 7. DISSOLUTION, LIQUIDATION, AND TERMINATION OF THE COMPANY

- 7.1. **Dissolution Events**

- 7.2. **No Capital Contribution Upon Dissolution.** If any Member has a deficit balance in its Capital Account (after giving effect to all contributions, distributions and allocations for all taxable years, including the year during which the liquidation occurs), then such Member shall have no obligation to make any Capital Contribution with respect to such deficit, and such deficit shall not be considered a debt owed to the Company or to any other person for any purpose whatsoever.
- 7.3. **Liquidation.** Upon dissolution of the Company, the Company shall liquidate the assets of the Company and after allocating (pursuant to Article 3 of this Agreement) all income, gain, loss and deductions resulting therefrom, shall apply and distribute the proceeds as follows:
- (a) First, to the creditors of the Company in satisfaction of liabilities of the Company.
 - (b) Thereafter, 40% (forty percent) to F, 40% (forty percent) to A, and 20% (twenty percent) to Q.

ARTICLE 8. MISCELLANEOUS

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first above written.

MEMBERS:

Investor Finley

Investor Alex

Investor Quinn

The process of running this module is quite similar to the process described above for the corporate tax module. Specifically, students have a few days to think about this problem. At the beginning of the next class, the students break into groups, and they discuss the issues and how to approach the conversation. When we reconvene as a class, I play the role of the corporate associate and invite them to tell me what they think I need to know. We, again, try to proceed issue-by-issue.⁹⁴ I invite participation from all of the small groups, and in my capacity as the corporate associate, I ask follow-up questions and use body language⁹⁵ to push the students to hone

⁹⁴ The issues are interconnected, but we try to address them one at a time in order to minimize confusion.

⁹⁵ This usually begins with me acting confused and a little annoyed, but as the students refine their advice throughout the exercise, I find more and more opportunities to nod my head and otherwise act like I understand. Admittedly, this does push the limits of my acting ability. Alternatively, perhaps a

their advice-giving skills. Occasionally, the students face a substantive, rather than skill-related, problem. In those circumstances, I also play the role of the tax partner,⁹⁶ and I provide substantive clarifications and guidance. The exercise concludes when the students have provided advice about all of the issues raised by the draft LLC agreement, and I, in my capacity as the corporate associate, understand what information we need from the client in order to proceed. Again, different groups of students need different levels of “tax partner” support and “corporate associate” questions in order to complete the exercise, but ultimately, each of my classes has been able to complete the exercise successfully. And, again, at the end of this module, I suspect that it would be valuable to recap the advice-giving strategies that students successfully employed in the exercise.

2. Objectives

This LLC agreement is drafted to raise two substantive tax issues—one regarding the tax treatment of a partnership interest granted in exchange for services and the other regarding whether the allocations will be respected for tax purposes (i.e., whether they have substantial economic effect). Thus, as a result of this module, students should develop their abilities to use their understanding of these two substantive issues to provide to the corporate associate (and ultimately to the client) useful advice about the substance of the business deal and about the language used in the deal documents. Additionally, this module is intended to increase students’ abilities to read agreements, without which a student cannot provide effective advice.⁹⁷ In order to successfully complete this exercise, students must, at least to some degree, employ each of the above-listed strategies for giving useful advice.

For each substantive issue, the below explains the substantive analysis and explains how employing the eight strategies discussed above would help the students give useful advice about the particular substantive issue. Not surprisingly, the strategies vary in importance depending on the particular issue.

corporate colleague would be willing to come in and play the role of the corporate associate who lacks tax expertise.

⁹⁶ To distinguish my multiple roles, I stand in different places when assuming these different roles; typically, as the corporate associate, I sit on the table in the front of the room, and as the tax partner, I stand off to the side of the room. I have also considered actually bringing in a sign or hat to wear that explicitly states my role, but I have not yet found this to be necessary.

⁹⁷ The abilities to read agreements and to understand the substantive rights and responsibilities created by the language in the agreement are critical if a student ever wants to be involved in the drafting of an agreement.

a. Grant of a Partnership Interest in Exchange for Services

A partnership interest can be granted to a partner as compensation for services. If the interest entitles the service partner to share *only* in future profits of the partnership, the grant can be treated as a non-taxable event for the service partner, assuming certain additional requirements are met (a “profits interest”).⁹⁸ If the interest entitles the service partner to share not only in future profits of the partnership, but *also* in the partnership’s underlying assets as of the time of the grant, the grant of this “capital interest” will generally be a taxable event. The tax consequences of profits interests and capital interests differ, but it is important to remember that the economics differ too; a 20% capital interest in a partnership with valuable assets is worth more than a 20% profits interest in the same partnership because the former grants to the partner an interest in the partnership’s assets as of the time of the grant, but the latter does not.

As drafted, the interest granted to Q will not qualify as a “profits interest” within the meaning of Revenue Procedure 93-27⁹⁹ because, if the LLC were to liquidate immediately after the partnership interest is granted to Q, Q would receive \$160,000¹⁰⁰ in the liquidating distribution.¹⁰¹ By entitling Q to share in the LLC’s assets that exist as of the time of the grant of the compensatory interest, the language in the LLC agreement effectively grants to Q a capital interest in the LLC.¹⁰² The receipt of this interest would be taxable to Q,¹⁰³ and the grant of the interest could give rise to a deduction for F and A.¹⁰⁴

⁹⁸ Rev. Proc. 93-27, 1993-2 C.B. 343.

⁹⁹ *Id.* The analysis herein treats Revenue Procedure 93-27 as the primary authority governing the tax treatment of the grant of partnership interests for services. That is, the analysis assumes that both the proposed regulations and the proposed revenue procedure regarding the grant of partnership interests in exchange for services remain in proposed form. Partnership Interest Transferred in Connection with the Performance of Services, Prop. Treas. Reg. §§ 1.721-1(b), 1.83-3(l); I.R.S. Notice 2005-43, 2005-1 C.B. 1221 (providing that, when the proposed revenue procedure in Notice 2005-43 is finalized, Rev. Proc. 93-27 will become obsolete, but that, in the interim, taxpayers can still rely upon Rev. Proc. 93-27). Further, the analysis provided herein also assumes either (1) that Congress does not enact any of the proposals to tax certain profits interests as ordinary income, or (2) that, if enacted, such provisions would not apply to the interest granted to Q. *See, e.g.*, Job Creation and Tax Cuts Act of 2010, S. 3793 111th Cong., (2010) (proposing to tax a portion of the value of certain profits interests as ordinary income).

¹⁰⁰ This is 20% of the total value of the assets of the LLC (\$400,000 cash contributed by F plus \$400,000 cash contributed by A).

¹⁰¹ By definition, in order for an interest granted on account of services to qualify as a “profits interest,” the interest must *not* entitle the holder to receive any proceeds if, immediately after the grant of the interest, the partnership were to sell all of its assets for fair market value and then liquidate. Rev. Proc. 93-27, § 2, 1993-2 C.B. 343.

¹⁰² *See id.* § 2.01.

¹⁰³ *See* Treas. Reg. § 1.721-1(b) (as amended in 2011).

¹⁰⁴ *See* I.R.C. § 162(a)(1).

If the parties would rather grant to Q a profits interest within the meaning of Revenue Procedure 93-27 so that Q's receipt of the interest will not be treated as a taxable event for Q, Section 7.3 of the agreement would need to be revised either (1) so that the LLC liquidates in accordance with the members' positive capital account balances, or (2) so that F and A receive a liquidating distribution of amounts equal to their respective capital contributions, and only thereafter, does Q receive 20% of liquidating distributions.¹⁰⁵ This result assumes that all of the other requirements of Revenue Procedure 93-27 are satisfied.¹⁰⁶

Of course, providing advice about the grant of a partnership interest in exchange for services requires more than just the ability to provide a substantive analysis of the tax treatment of the existing provisions. Thus, the skill objective of this part of the exercise—for students to use their understanding of the tax treatment of compensatory partnership interests in order to provide advice about the structure of the deal and about the agreement language used in the deal documents—involves, to a greater or lesser degree, the strategies for giving useful tax advice articulated above. Specifically:

1. *Understand the economics.* The documents are intentionally ambiguous and possibly contradictory as to the economics of the interest that Q will receive in exchange for services. The recital indicates that Q will be granted a *profits* interest, but as drafted, the operative provisions of the LLC agreement result in Q receiving a *capital* interest. And the corporate associate's cover e-mail provides little clarification; "a 40/40/20 straight-up split among F/A/Q, with Q getting her interest for services" could mean a profits interest or a capital interest. So a critical first step is that students must understand how the parties want Q to be compensated—should Q only be entitled to share in *future* profits, or should Q also be entitled to share in the initial capital contributed to the LLC by F and A?

¹⁰⁵ In either situation, a liquidation of the LLC immediately after the grant of the interest to Q would not entitle Q to proceeds. Thus, the interest would be a "profits interest" within the meaning of Revenue Procedure 93-27. See Rev. Proc. 93-27, § 2, 1993-2 C.B. 343.

¹⁰⁶ The LLC is not a publicly traded partnership (as defined in § 7704) as the LLC only has three members, and the LLC, with its newly formed business, will not have "a substantially certain and predictable stream of income from partnership assets." Rev. Proc. 93-27, § 4.02, 1993-2 C.B. 343 (providing that, in order for the favorable tax treatment of the grant of partnership equity in exchange for services to apply, the partnership cannot be a publicly traded partnership and cannot have a "substantially certain and predictable stream of income from the partnership assets"). In addition, Q must receive the interest on account of services provided to or for the benefit of the partnership in Q's capacity as a partner (or in anticipation of becoming a partner), and Q must not dispose of the partnership interest within two years from grant. *Id.* § 4.

2. *Realize that tax is not the only important issue.* The parties may want Q to receive a profits interest in order to avoid current taxation, but the parties may want Q to receive a capital interest because the capital interest is actually *worth* more.¹⁰⁷ The tax issue may be determinative, but students should not assume that it is. Students must inquire about the details of the economic relationship the members hope to create. Once the students successfully make this inquiry, I (in my capacity as the corporate associate) tell them that I know¹⁰⁸ (a) that the parties anticipated that Q would be entitled to 20% of future profits, and (b) that it was absolutely critical to the deal that Q not have any tax liability upon the receipt of the interest. This response is intended to make it clear to the students that Q should be granted a profits interest, thereby providing the students with the business information they need in order to provide the tax advice.¹⁰⁹
3. *Seek to empower, rather than impede, the client.* Students err if they only tell the corporate associate that the existing provisions “cause tax problems” or “don’t work.”¹¹⁰ In addition, students must explain possible modifications to the liquidation provisions of the agreement that would better achieve the client’s economic and tax objectives.¹¹¹ Students should acknowledge potential

¹⁰⁷ If the parties indeed want to grant Q an interest having the value of the capital interest (i.e., a value greater than the value of just 20% of future profits), there may be more tax-efficient ways to do this, including by granting to Q a larger profits interest. Alternatives here would depend on the business objectives of the parties. However, students do not need to go down this road because I give them enough information to conclude that the parties do indeed want Q to receive a 20% profits interest.

¹⁰⁸ However, some lawyers fail to “know what they know, and know what they don’t know” (see #8), and they provide unequivocal responses even when they do not know the answer. In this exercise, I, in my role as a corporate associate, am supplying information about the client’s business objectives. While students do (and should) rely on this information for the rest of the exercise, it is wise for them to question whether, and to what extent, the corporate associate really knows the answers to the business questions posed.

¹⁰⁹ Of course, there are different ways to respond here. This is a bit like a choose-your-own-adventure experience; the tax advice is likely to be quite different if the corporate associate, on behalf of the client, supplies a different response here and/or in response to various other queries.

¹¹⁰ An additional challenge is ensuring that the tax advice is delivered appropriately to the ultimate decision-maker and that the tax input is correctly reflected in the relevant transaction documents. For example, it is easy for a colleague to listen to a nuanced answer about the risk associated with a particular tax position and then turn it into a short sound bite that fails to capture the nuance, which could adversely affect the client and could reflect poorly on the tax lawyer. As a result, a tax lawyer can simultaneously have a cooperative and adversarial relationship with her corporate colleagues, which can be difficult to handle. See also *supra* note 108. This is a slightly different issue than the one discussed in the text; this issue is about ensuring that the advice is heard and understood, whereas the discussion in the text focuses on a student’s ability to determine what advice to give. Both are critical to giving effective advice and to building a successful career. See also *infra* notes 133–34.

¹¹¹ Specifically, students should explain that Q can receive a profits interest (nontaxable at grant) either if the LLC liquidates in accordance with capital accounts or if F’s and A’s capital contributions

alternative ways to draft the agreement to ensure that Q receives a profits interest, so that students can simultaneously (a) help ensure that Q's interest will be a profits interest (nontaxable upon grant), and (b) be responsive to the business concerns that may be raised later during the discussion of whether the allocations will have substantial economic effect.

4. *Develop professional legal judgment about risk.* The analysis of the tax treatment of the interest granted in exchange for services has proceeded under the existing law, including Revenue Procedure 93-27. But there are proposed regulations regarding the transfer of interests in exchange for services, and profits interests have been the subject of recent bills introduced in Congress. So the students should assess whether to advise that the LLC agreement include language that would enable the grant of Q's interest to qualify as a non-taxable event under the proposed regulations.¹¹² Students should also evaluate the risk that the proposed legislation regarding carried interests¹¹³ could affect Q's tax treatment.
5. *Respect the lawyer's role.* If, before inquiring about the business expectations for Q's interest, the students begin to provide advice about how to ensure that the interest is a profits interest, not only have the students assumed that tax is the determinative issue (see #2 above), but the students also have, perhaps inadvertently, usurped the client's power to make the business decision about the intended economics of Q's interests. It is the client's place, not the lawyer's, to make the business decisions about the economics of the partnership interest granted to Q in exchange for services.

are returned before Q shares in any liquidating distributions. Sometimes, it takes a little bit of prodding to get the students to see the second alternative. Students also need to remember to confirm the relatively straightforward issues. For example, in an effort to ensure that the profits interest is likely to fall within the protection of Revenue Procedure 93-27, students generally (1) acknowledge that, given that there are only three members in the LLC, the LLC will not be a publicly traded partnership; (2) inquire as to the type of income that the LLC expects to earn; and (3) ask enough about Q's involvement in the LLC's business. See *supra* note 106.

¹¹² Partnership Interest Transferred in Connection with the Performance of Services, Prop. Treas. Reg. §§ 1.721-1(b), 1.83-3(l); I.R.S. Notice 2005-43, 2005-1 C.B. 1221.

¹¹³ See, e.g., American Jobs Act of 2011, H.R. 12, 112th Cong. § 412 (2011) (reflecting President Obama's proposal to tax 100% of carried interest allocations as ordinary income); American Jobs and Closing Tax Loopholes Act of 2010, H.R. 4213, 111th Cong., 2d. Sess. § 412 (as passed by House, May 28, 2010) (provision passed by the House to tax 50% to 75% of carried interest allocations as ordinary income, but excluded from the final legislation). A "carried interest" is merely a specific type of profits interest granted to asset managers in private equity or hedge funds. See Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1, 3 (2008).

6. *Speak the client's language.* When making the business inquiry about the terms for compensating Q, the students need to use accessible language to explain the difference, both from a business and tax perspective, between a profits interest and a capital interest.
7. *Appreciate the relationship dynamics.* One of the first questions that students should ask in this exercise is, "Who is the client"? The problem leaves this intentionally ambiguous—does the tax associate represent F, A, Q, some combination of the three, or the business entity? Different answers to this question can lead to very different advising dynamics. When running this exercise, I tell the students that they represent the business entity, and not any individual member. This puts the students in a somewhat sensitive position because the partners may have different economic goals or expectations. In particular, F's/A's interests may be adverse to Q's interest with respect to the economics of the interest that is being granted to Q in exchange for services, in which case, a lawyer who represents "the partnership" may face a dicey situation. Mercifully, this issue is largely avoided when I provide sufficient information for the students to conclude that F, A, and Q agree about all of the business issues and have identical tolerances for risk.¹¹⁴ However, the students should still be sensitive to the fact that the partners' relationship may change over time, so the students ought to ensure that the partners really are clear, and in agreement, about the economics, and the students ought to ensure that the language in the agreement achieves the economics that the partners want.
8. *Know what you know, and know what you don't know.* During the exercise, students regularly find themselves in situations where they do not know the substantive answer to a question posed by the corporate associate. They need to be able to identify those situations, and graciously defer to a "colleague" or indicate that they need to consult with the tax partner on that issue. Also, in an effort to model "knowing what you know" (both factually and tax-wise), I, as the corporate associate, try to find an opportunity to not know something that the students ask. This opportunity typically presents itself when students ask whether Q's interest is

¹¹⁴ Even so, the parties may need to execute a waiver of the potential conflict and an acknowledgement that they, in their individual capacity, are not the clients. The exercise can be modified to raise more significant ethics/conflicts issues if the members differ in any of their objectives.

transferable.¹¹⁵ I generally respond by indicating that I do not know whether the parties have discussed this issue, and by asking whether the issue matters.¹¹⁶ We agree to follow up with the client.

While certain strategies may be more important than others in advancing students' abilities to give useful tax advice about the grant of the partnership interest to Q in exchange for services, all play a role.

b. Partnership Allocation Provisions

Another substantive issue raised by the LLC agreement involves the special allocations in the partnership agreement. While partners have a tremendous amount of flexibility to allocate income and losses among themselves, those allocations will only be respected for tax purposes if they have "substantial economic effect."¹¹⁷ Conceptually, the requirement that allocations have substantial economic effect helps to match the tax consequences of the partners' arrangement with the economics of the partners' arrangement.

The FAQ LLC allocations, as set forth in the draft agreement, lack substantial economic effect.¹¹⁸ As a result, the allocations are likely to be disregarded, and income and loss is likely to be reallocated in accordance with the partners' interests in the partnership.¹¹⁹

The FAQ LLC allocations lack substantial economic effect because the attempted allocations may lack "economic effect," and even if the

¹¹⁵ In addition, students sometimes ask whether the interest is subject to any vesting requirements. Of course, this is a good question, but in the interest of simplicity, I indicate that the parties do not intend to subject the interest to forfeiture. Similarly, when students ask to see Q's employment agreement, I indicate that it is being drafted concurrently with the LLC agreement, so they should mention if they have any suggestions for provisions that should be included in that agreement.

¹¹⁶ Students should respond by explaining that, in order to avoid adverse tax consequences and assuming that it is acceptable from a business perspective, Q should be precluded from disposing of his LLC interest within two years of grant, lest the grant of the interest fail to meet the requirements for tax-favorable treatment under Revenue Procedure 93-27. See Rev. Proc. 93-27, § 4.02(2), 1993-2 C.B. 343. A savvy student may also recommend that Q make a protective § 83(b) election.

¹¹⁷ I.R.C. § 704(a)-(b).

¹¹⁸ See *id.* § 704(b)(2).

¹¹⁹ See *id.* § 704(b). It is possible that the allocations provided in the agreement could, in some circumstances, actually be equal to the allocations that would be made in accordance with partners' interest in the partnership ("PIP"). However, the determination of PIP can be subject to some uncertainty. See generally Bradley T. Borden, *The Allure and Illusion of Partners' Interests in a Partnership*, 79 U. CIN. L. REV. 1077 (2011) (arguing that the concept of PIP is illusory). Thus, even where the allocations in the agreement are likely to be equal to PIP (assuming PIP is determinable), it is generally a better practice to try to draft the agreement so that the partnership allocations have substantial economic effect within the safe harbor. I MCKEE ET AL., *supra* note 90, ¶ 11.02[3], at 11-81 to -82 ("[D]rafters of partnership agreements who stray from the safe harbor do so at their peril. Moreover, it is far from clear that the courts will reach the correct result if left to glean the appropriate allocation scheme from the economics of the transaction.").

allocations have economic effect, the attempted special allocation of capital gain income to F will not be “substantial.”¹²⁰ In particular as to the issue of substantiality, the attempted allocation of capital gain income rather than ordinary income to F likely reduces the partners’ aggregate tax burden while not changing the members’ capital accounts. Thus, this proposed allocation will be a “shifting” allocation that lacks substantiality, and it will not be respected.¹²¹

As to economic effect, the allocation provisions, as drafted, may not satisfy any of the three alternative tests for economic effect.¹²² The primary test for economic effect is not met because the members do not have an unlimited unconditional deficit restoration obligation and because the LLC liquidates in accordance with a specific economic “waterfall”¹²³ instead of in accordance with capital accounts.¹²⁴ The alternate test for economic effect is also not satisfied, but it could be satisfied if a qualified income offset (QIO) provision is added and if the LLC liquidates in accordance with capital accounts rather than the specific economic waterfall.¹²⁵ For both the primary test and the alternate test, it may be possible to argue that the liquidation in accordance with the economic waterfall satisfies the requirement that the LLC liquidates “in accordance with capital accounts,” *if* the economic waterfall will indeed result in liquidating distributions to the members that are equal in amount to the members’ respective positive capital account balances.¹²⁶ This is a better argument if the agreement uses the targeted allocation provision rather than the direct allocation provision. Even if the alternate test for economic effect is not satisfied,¹²⁷ the

¹²⁰ See Treas. Reg. § 1.704-1(b)(2)(i) (as amended in 2012) (explaining that the substantial economic effect test has two parts—economic effect and substantiality).

¹²¹ See *id.* § 1.704-1(b)(2)(iii)(b). See generally Gregg D. Polsky, *Deterring Tax-Driven Partnership Allocations*, 64 TAX LAW. 97 (2010) (providing a thoughtful analysis of the regulations’ definition of “substantiality”).

¹²² See Treas. Reg. § 1.704-1(b)(2)(ii).

¹²³ A distribution “waterfall” occurs when there are series of distribution provisions, pursuant to which any funds available are first distributed in accordance with the first provision up to the limit set out in that provision. Then, to the extent that additional funds remain, they “pour” over into the next agreement provision, which directs how those funds will be distributed, up to the limit set out in that second provision. Thereafter, to the extent additional funds remain after funds are distributed pursuant to the first and second provisions, remaining funds again “pour” over into the third agreement provision, and so on. Essentially, the funds “cascade” down over several tiers in the agreement.

¹²⁴ See Treas. Reg. § 1.704-1(b)(2)(ii)(b).

¹²⁵ See *id.* § 1.704-1(b)(2)(ii)(d). If the alternate test is satisfied, then allocations would have economic effect to the extent that the allocations do not create or increase a deficit capital account.

¹²⁶ See *id.* § 1.704-1(b)(2)(ii)(b)(2). See generally Terence Floyd Cuff, *Working with Target Allocations—Idiot-Proof or Drafting for Idiots?*, 35 REAL ESTATE TAX’N 116 (2008); Brian J. O’Connor & Steven R. Schneider, *Capital Account Based Liquidations: Gone with the Wind or Here to Stay?*, 102 J. TAX’N 21 (2005).

¹²⁷ This could be (a) because the parties do not want to add a QIO to the agreement, (b) because the parties do not want to change the liquidation provision to explicitly follow capital accounts, or (c)

allocations, in this very simple partnership agreement, seem likely to have economic effect under the economic effect equivalence test.¹²⁸

As with the first partnership agreement issue, the provision of advice about this second partnership issue requires more than just the ability to provide a substantive analysis of the tax treatment of the existing provisions. Thus, the skill objective of this part of the exercise—for students to use their understanding of the tax rules governing allocations of partnership income and loss in order to provide advice about the structure of the deal and about the agreement language used in the deal documents— involves, again, each of the strategies for giving useful tax advice articulated above. The applications of strategies 7 and 8 (“appreciate the relationship dynamics,” and “know what you know, and know what you don’t know”) are largely the same as in the first partnership issue. As to the application of the other six strategies in the context of this partnership allocation issue:

1. *Understand the economics.* In order to provide advice about the allocations, students must understand the overall economic deal that the parties wish to strike. For example, while students should inquire as to whether the members would be willing to agree to an unlimited deficit restoration obligation (instead of the existing provision 7.2), students must appreciate that the members are likely to reject this request, given that members in an LLC typically want to limit their economic exposure.
2. *Realize that tax is not the only important issue.* Meeting the primary test for economic effect is unlikely to be the members’ top priority. Rather, members likely care more about limiting their non-tax economic exposure. Thus, the members here will likely want to retain provision 7.2, in which case, the primary test for economic effect cannot be satisfied. Similarly, students need to understand and respect the fact that members may care more about ensuring that they each receive the agreed-upon dollar amount in any liquidation,¹²⁹ than they care about ensuring that the allocations will be respected for tax purposes. Thus, members may resist changing the liquidation provision to explicitly provide

because of the risk that liquidating distributions that follow an economic waterfall may not, even if they match up with the distributions that would be made if the distributions were explicitly made in accordance with capital accounts, technically constitute “liquidation in accordance with capital accounts.” See Cuff, *supra* note 126, at 119–21; O’Connor & Schneider, *supra* note 126, at 22–23.

¹²⁸ See Treas. Reg. § 1.704-1(b)(2)(ii)(i).

¹²⁹ This reflects the “cash is king” perspective on business.

for liquidation in accordance with capital accounts,¹³⁰ even if failure to change the liquidation provision increases tax risk.

3. *Seek to empower, rather than impede, the client.* Rather than just saying that the existing allocation provisions may lack economic effect, students should be able to articulate the various ways to alter the agreement in order to enable the partnership allocations to have economic effect. Students should listen to the corporate associate's (and ultimately the client's) responses to questions about the client's business objectives and offer the alternatives that best effectuate those objectives while simultaneously meeting the economic effect requirements.
4. *Develop professional legal judgment about risk.* Students need to be able to gauge the likelihood of success of the "economic effect" argument that the LLC "liquidates in accordance with capital accounts" if the liquidation provisions do not explicitly use capital accounts as the metric for determining the members' liquidating distributions (i.e., instead, if the LLC liquidates in accordance with an economic waterfall, but the agreement is drafted to ensure, as best as possible, that the economic waterfall matches the capital accounts, in particular, by using a targeted allocation provision).¹³¹ There is a risk that argument might fail, so students also need to be able to gauge the likelihood that the economic equivalence test will be satisfied. Further, students need to be able to determine the members' likely tax and economic consequences if the allocations are determined to lack economic effect.

In addition, and very importantly, students need to be able to identify that the attempt to direct more capital gain and less ordinary income to F will lack substantiality. On this issue, students must say "no." Students should tell the client that the proviso needs to be removed, unless the members are willing to make significant changes to the partners' agreed-upon economic entitlements.

¹³⁰ Whether the partnership will liquidate in accordance with capital accounts is one issue on which the two parts of the partnership exercise overlap. Here, the liquidation provisions are relevant to determining whether the allocations have substantial economic effect, and earlier, the liquidation provisions were relevant to determining whether Q's interest was properly treated as a profits interest or a capital interest. Thus, the discussion of the two partnership issues tends to overlap at this point, and students sometimes struggle to separate the issues. To the extent that students learn information about the client's preferences from one part of the conversation, the students should remember to draw on that information in the other part of the conversation.

¹³¹ I think this is a reasonable argument, particularly if the agreement employs the targeted allocation provision. However, reasonable advisers may differ. See Cuff, *supra* note 126, at 116.

5. *Respect the lawyer's role.* Students should not tell the corporate associate (or the client) that an unlimited deficit restoration obligation provision *must* be added to the agreement or that the liquidation provisions *must* be changed so that the liquidation explicitly follows capital accounts. While students should be able to explain the alternative ways in which the allocations can satisfy the economic effect requirements, and while the students can provide guidance and suggestions as to the approach they recommend, students must remember that the client must decide whether it is willing to agree to economic terms that decrease tax risk.
6. *Speak the client's language.* When doing all of the foregoing, the students must be able to make their advice understood.¹³² They should refrain from just relying on tax terms of art (QIO, substantiality, economic effect). Rather, they should be able to ask questions that will be understood by the listener and that will reveal the business information that the students need in order to be able to recommend an approach to the allocation provisions. Similarly, they should be able to explain tax terms in English (e.g., what is a QIO?) and be able to articulate what impact such terms would have on the members' economic entitlements and responsibilities. This can be particularly challenging for students. Further, in recognition that this problem is set up so that the tax associate speaks with the corporate associate (rather than directly with the client), the students should determine how the tax advice can most effectively be passed along to the client—to what extent does the tax associate trust the corporate associate to relay the advice?¹³³ Does the tax associate want to participate in the

¹³² For simplicity, in this exercise, we assumed that the corporate associate had approximately the same level of tax sophistication as the client. However, this is often not true, in which case the tax lawyer will need to tailor the communication to the level of sophistication of the audience. An alternative approach to this exercise would be to give students the opportunity to have successive conversations with people of differing levels of sophistication. For example, the tax associate could start by meeting with the tax partner to discuss the advice, then the tax associate could talk to the corporate associate (assuming that this attorney has some familiarity with the tax issues in partnerships), and then the tax associate could talk to the client (assuming the client has the least amount of tax sophistication).

¹³³ There is also a question as to how well the corporate associate can answer business questions on behalf of the client. For purposes of this exercise, we assumed, in class, that the corporate associate had full knowledge regarding any information she provided, but it is often preferable to pose the business questions directly to the client rather than through the corporate associate acting as a middleman. That said, often, the questions are posed preliminarily to the corporate attorney in order to preview the tax advice and benefit from the corporate attorney's likely better knowledge of the client's particular economic objectives, prior to having a joint conversation with the client.

conversation with the client when the advice is relayed?¹³⁴ Would the tax associate prefer to memorialize the advice in an email?¹³⁵

Again, while certain strategies may be more important than others in advancing students' abilities to give useful tax advance about the allocation provisions in this agreement, all strategies are relevant in this partnership tax exercise.¹³⁶

IV. SAVORING SUCCESSES & CONFRONTING CHALLENGES

On balance, incorporating these experiential modules into my business tax classes has been beneficial, but the process has not been without challenges.

A. What Worked?

Students generally seemed quite engaged in the exercises. The vast majority of students volunteered and contributed to the conversation. In contrast, during regular class sessions, I typically call on many students, but only a few students volunteer.¹³⁷ In addition, the students seemed to embrace their roles as "lawyers;" this was reflected in some students' oral communication,¹³⁸ their professionalism,¹³⁹ and even, for some students, their physicality.¹⁴⁰

I also received very positive feedback from the students about their experience with these modules.¹⁴¹ In particular, in response to my request

¹³⁴ This was generally my preference when I was in practice.

¹³⁵ I raise these questions despite the tremendous respect that I have for corporate lawyers in general and for my former corporate law colleagues in particular. The questions raised here merely reflect that different people have different areas of expertise and core competencies; corporate lawyers are not tax lawyers, and vice versa.

¹³⁶ This list ends at strategy 6, but recall that strategies 7 and 8 (appreciate the relationship dynamics, and know what you know) apply to this issue in largely the same way that they apply to the analysis of the first partnership issue. See *supra* Part III.A.2.a.

¹³⁷ Perhaps this is my failure to be engaging enough during regular class sessions.

¹³⁸ This includes improvements in students' tone, clarity and confidence in their oral communication.

¹³⁹ For example, the students were typically particularly respectful and complimentary of their classmates, often starting comments by saying things like, "Building on the insightful comments made by my colleagues [Alison] and [Bobby], . . ."

¹⁴⁰ A few students carried themselves a bit differently, including sitting with better posture.

¹⁴¹ Of course, this feedback is entirely anecdotal. I have only used these modules three times each, and the sample size was limited to the students who self-selected into the business tax courses. Further, despite the fact that all of the *written* feedback provided to me (both mid-semester and end-of-semester) was anonymous, any students who did not enjoy the modules or find them to be particularly useful or enriching may have been disinclined to share that feedback with me. Additionally, many students spoke with me about the modules, and those conversations, almost uniformly, provided positive feedback, but again, I suspect that any students with negative reactions may not have wanted to share these reactions.

for mid-semester feedback,¹⁴² many students specifically asked that we do another “practice” exercise in the second half of the semester. A number of students said that the exercises helped them understand the substantive material better and gave them a better appreciation for what tax lawyers actually do with the course material. Students also indicated that they appreciated the opportunity to see sample business transaction documents, generally for the first time. Also, after completing one or both exercises, some students indicated that they were more inclined to enroll in additional business law classes, like securities regulation.¹⁴³ In addition, after each module, some of the students came to my office hours wanting to talk more about what it is like to practice tax and inquiring about possible tax-related externships or clinical opportunities.

In addition, I believe that the students’ skills developed as a result of the exercises. Students typically began the first exercise¹⁴⁴ by making some key mistakes—they jumped directly into giving tax advice without obtaining relevant business information; they assumed that the tax issues were determinative; they spoke in “tax-ese”; and they told the listener what to do, rather than advising the listener. However, given my responses and after hearing classmates approach the issues, students quickly started to figure out which approaches were effective and which approaches were not.¹⁴⁵ As a result, student performance improved over the course of each module. And I generally found that performance also improved between the two modules. The improvement was particularly apparent with respect to students’ ability to use language that can be understood by the non-tax audience and with respect to students’ sensitivities to non-tax business issues that are likely to affect the tax analysis. Next time I run these modules in class, I plan to spend a few minutes at the end of the first module to discuss the advice-giving strategies explicitly; I harbor some

¹⁴² Halfway through each of my lecture classes, I ask students to answer the following three questions anonymously: (1) What is working for you in this class? (2) What suggestions do you have for improving the course? (3) Complete the following sentence: I am still confused about . . . I began this practice at the suggestion of one of my colleagues, and I have found this to be very helpful as I continue to refine my teaching.

¹⁴³ Only two students had taken or were concurrently taking a course in securities regulation. And many students even lacked exposure to basic corporate law; approximately half of the students who participated in the exercises had taken or were concurrently taking a course in business associations.

¹⁴⁴ I actually administer the partnership tax module first because, in my business course, I generally cover Subchapter K before Subchapter C. Nevertheless, on the suggestions of multiple colleagues, this article presents the corporate tax module before the partnership tax module because the corporate tax module may be more accessible for readers.

¹⁴⁵ Given this rapid learning curve, particularly in the first module, I have considered the possibility of giving students another ten minutes to confer with each other, part of the way through the first module. The idea is that, once the students start to get a better sense of what they need to do in order to provide advice, they might benefit from the opportunity to regroup and reconsider their approach to the exercise.

hope that this discussion will contribute further to students' growth between the first and second modules.

The exercises also gave me a better opportunity to assess the level of my students' financial literacy and business acumen.¹⁴⁶ I found that students really ranged in their financial and business skills, and this insight continues to inform how I teach and what material I teach, both in my business tax courses and my basic tax courses.¹⁴⁷ I hope that the exercises also provided the students with an opportunity to reflect on their strengths and weaknesses and on the skills that they ought to work to develop in order to transition from a law student to a lawyer.¹⁴⁸

B. What Needs Work?

Not surprisingly, I encountered a number of challenges in designing and implementing these experiential modules.

1. Managing Class Time

Most obviously, these experiential exercises consume class time, so time management is an issue. Running each exercise in class used approximately 75 minutes.¹⁴⁹ So in a 4-unit course on the taxation of business entities, where every minute is precious,¹⁵⁰ running these exercises

¹⁴⁶ I subsequently compiled a 40-question financial literacy survey to try to get a better assessment of the students' financial literacy and business skills. I asked a subgroup of my tax students to take the survey anonymously, without the use of outside resources. The survey instructions also asked students to leave blank those questions where they had no idea about the answers, to indicate if they guessed on a question, to highlight any words in the questions that they did not know, and to share any other comments or questions that the survey raised for them. Student performance on this survey confirmed the wide variation in financial and business knowledge possessed even by students who had completed at least one (and often more than one) tax course. This result is not particularly surprising given that students come to law school with a variety of different personal, professional, and educational backgrounds. After I reviewed the completed surveys, I went over the answers and discussed related financial/business questions with the group of students who completed the surveys.

¹⁴⁷ Regardless of the background with which students come to law school, I believe that we should try to ensure that our graduates have at least a basic level of business and financial literacy. These skills are valuable when lawyers, in a wide variety of specialties (from tax and business law to civil litigation and family law), serve their clients. To this end, UC Hastings recently added a course entitled *Financial Basics for Lawyers* to the curriculum, and I taught it for the first time in Fall 2011. I know that a number of other schools have, or are in the process of developing, similar courses.

¹⁴⁸ To reinforce these self-reflection and skill-development objectives of the exercises, I have considered requiring the students to write a short response paper or to prepare a short audio podcast response to each module. I have not yet asked students to do this.

¹⁴⁹ The partnership tax exercises usually lasted slightly longer than the corporate tax exercises. The shortest exercises lasted 60 minutes and the longest lasted 90 minutes, though this is likely to vary significantly depending on the professor, the students, and the details of the exercise.

¹⁵⁰ As I tell my students on the first day of class, taxation of business entities is an "aggressive" 4-unit course. I am regularly told that the course is amongst the most difficult in the curriculum, for a variety of reasons, including the sheer volume of material covered.

meant that I had approximately 2 1/2 hours less time available for substantive coverage. It was not easy for me to reallocate these minutes away from substantive coverage and over to experiential learning, but I think the tradeoff¹⁵¹ was worthwhile given the above-described successes and given that I believe that the experiential exercises helped students gain a stronger grasp of the substantive topics that were the subjects of the exercises. This is tough to balance, and others may analyze the tradeoffs differently. Several factors impact the amount of time that the experiential modules require, including the difficulty of the exercise, students' mastery of the substantive material, and the size of the class, among other issues.

The class time required for the modules can be shortened, for example, by decreasing the difficulty, by narrowing the substantive scope of the exercise, or by requiring that students meet in their small groups outside of class, prior to the class session. Moving the small group discussions outside of class time may also give students more time to discuss the exercise with their small group; for example, rather than having ten to fifteen minutes in-class for discussion, each small group could be expected to spend an hour outside of class discussing the exercise.¹⁵² The trade-off is the professor's ability to intervene in the small group discussions to help focus students' attention on key issues; I have found this valuable, which makes me reluctant to remove the small group discussions from class time, but I may try the out-of-class small group discussions next time I run an experiential module. Alternatively, a professor may be able to add a 1-unit "lab" component to her lecture class; if the experiential modules are run during the lab class, the professor need not forego any of her "regular" class time.

¹⁵¹ In order to find time for these exercises, I omitted some topics and some depth from the course coverage. Specifically, I made the following changes to my prior syllabus in order to find the time for the corporate tax exercise: I limited the coverage of §§ 304 and 306 to a very cursory summary provided in lecture format, I covered only the basics of acquisitive reorganizations (e.g., omitting multi-step structures, omitting contingent consideration), and I abbreviated the discussion about corporate integration alternatives. Note that there are several topics (e.g., D, E, F and G reorganizations, § 355) that I generally did not cover, even before adding the experiential corporate tax module. In partnership tax, I made the following changes to my prior syllabus in order to find the time for the partnership tax exercise: my coverage of § 751(b) was conceptual rather than technical; I did not cover inside basis adjustments where there is contributed property; and, while I covered the liquidation of a partnership interest, I did not cover the liquidation of the partnership. Note that there are several topics (e.g., death of a partner, most of the material regarding allocations attributable to nonrecourse debt) that I generally did not cover, even before adding the experiential partnership tax module.

¹⁵² This is relatively easy to require if most students live on or near campus. In contrast, this can impose a bigger burden at schools where many students commute long distances to school; nevertheless, technological developments, like Skype, may be able to help lower this burden.

2. Setting the Level of Difficulty

It is critical to set the exercise at the appropriate level of difficulty,¹⁵³ as the difficulty level affects both the time consumed by the exercise and the overall student experience. The modules discussed in this essay can be modified easily to make them easier or harder, as appropriate for the level of the class (J.D. or LL.M.), the number of units for the class (a 4-unit combined corporate/partnership tax class vs. separate 3- or 4-unit corporate tax and 2- or 3-unit partnership tax classes), the strengths of the particular group of students, and the emphasis (and amount of time) that the instructor wants to place on the skills component. Major potential modifications that I considered for each of the modules are as follows:

- Corporate Tax Module
 - Decreasing the level of difficulty
 - The tax opinion and representation letter components of the exercise could be eliminated so that this exercise focuses exclusively on fact gathering and tax analysis.
 - The scope of the problem could be narrowed even further by asking the students to prepare only the questions that will elicit information needed to determine whether *one* reorganization issue (e.g., continuity of interest or continuity of business enterprise) is satisfied.
 - Alternatively, the students could be provided with draft tax representations and merely asked to prepare to walk the client through the representations to see if the client can make them. With this approach, students do not have to identify all of the issues that must be analyzed; rather, they are provided with the desired representations, and the students can focus on making the material accessible to the client.
 - Increasing the level of difficulty
 - After (or in lieu of) the “tax associate’s” conversation with the “tax partner,” the tax associate can be asked to talk directly to the client. By talking to the client, the students will get answers to many of their questions,¹⁵⁴ and they will need to analyze the tax consequences of

¹⁵³ I say “appropriate” (and not “right”) level of difficulty because there is no absolute “right” or “wrong” level of difficulty. Every class is different. I think that I have set the exercises at the “appropriate” level of difficulty for my classes. But I am not sure, and I continue to assess this.

¹⁵⁴ The “tax partner” can provide a little bit of this, by articulating what she thinks the client will say and asking the “tax associate” how he/she would respond.

those facts and determine where they need to follow up with additional questions. At the discretion of the professor, the facts provided by the client can be either relatively simple or incredibly complicated (potentially raising continuity of interest and continuity of business enterprise issues, among others), and the client can provide the facts either in a clear and correct manner or in a haphazard and piecemeal (and possibly contradictory) manner.

- Students could be asked to create their own exercises. Specifically, students, individually or in groups, could be asked to submit a set of “facts” that a client might provide. The professor could use one of the student-generated fact sets when playing the client in this exercise, or students could run several different exercises using each of the different student-generated fact sets.
- A subsequent exercise could be added in which students are asked to draft tax representations, a tax opinion (and/or a back-up memo for the opinion), and/or a tax disclosure (and/or back-up memo for the tax disclosure).
- The exercise could be expanded to include a discussion of the acquisition agreement and the tax provisions therein. To enhance this discussion, the exercise could be set in the private company context rather than in the public company context. In the private company context, the discussion of the tax provisions in the agreement are likely to include not just tax representations and reorganization-related covenants, but also additional tax covenants, indemnity provisions, and/or escrows/holdbacks.
- Partnership Tax Module
 - Decreasing the level of difficulty
 - The issues relating to the grant of a partnership interest in exchange for services could be eliminated by either eliminating Q (the service partner) entirely or by having Q just make a fair market value capital contribution in exchange for her interest.
 - The exercise could focus only on the direct allocation provisions. The option of using a targeted allocation provision complicates the analysis and could be eliminated.

- The students could explicitly be assigned to represent one individual partner, which reduces potential conflicts issues.
 - Increasing the level of difficulty¹⁵⁵
 - The tax and economic deal among the members could be much more complicated.¹⁵⁶ Plus, for a contract drafting exercise, students could be given a qualitative description of the economic deal and could be asked to draft the allocation or distribution provisions.
 - The excerpted LLC agreement, as provided, does not include any regulatory allocation provisions, nor does it include the definitions of any of the defined terms. The draft LLC agreement could be modified to include these provisions (with or without language problems), or the students could be provided with the complete draft LLC agreement, in which case they would need to read the entire agreement and figure out which provisions raise potential tax issues.¹⁵⁷
 - The exercise could be modified to introduce explicit business objective conflicts among the members.

3. Weaving Together Substantive & Skills Learning

Students' mastery of the substantive material also impacts both the time consumed by the exercises and the effectiveness of the skill component of the exercise. These modules are intended to reinforce substantive material while simultaneously developing students' abilities to use that substantive knowledge to give useful advice. However, weaving these two components together can be difficult if the students are not reasonably sure of the substantive material. Substantive errors, unless they are immediately corrected by a classmate, generally require the professor to pause the exercise and explain the substantive issue before asking the

¹⁵⁵ There are almost an infinite number of ways to make this module and the corporate tax module more complicated, and I list only a few here.

¹⁵⁶ For an example that is actually not terribly complex, income could be allocated to F until F receives an 8% return on F's capital contribution, then income could be allocated to A until A receives an 8% return on A's capital contribution, then income could be allocated to Q until Q is allocated an amount equal to 20% of the aggregate amount allocated to F, A, and Q in the first three steps, and thereafter, income could be allocated 40% to F, 40% to A, and 20% to Q; losses could be allocated in reverse.

¹⁵⁷ For a great resource breaking down the tax provisions of partnership agreements, see Steven R. Schneider & Brian J. O'Connor, *Partnership and LLC Agreements: Learning to Read and Write Again*, 125 TAX NOTES 1323 (2009).

students to continue; this can interrupt the flow of the exercise.¹⁵⁸ This has not been terribly problematic in my experience using these exercises, but I have considered taking a few minutes before the exercise to go over the substantive tax analysis of the problem. This could help to make sure that the students are well grounded in the substance, thereby allowing them to focus primarily on the skills aspect of the exercise.

4. Tailoring Exercises for Class Size & Class Level

The size of the class is an additional factor that can affect the amount of time that the exercises take and the quality of the student experience. I used these modules in classes of approximately 30 students, but running the exercises surely gets harder and more time-consuming as the class gets bigger, especially if the professor wants to make sure that as many students as possible have a chance to participate. There are several ways to deal with this issue. The class can be divided into small groups (five to eight people) for discussion of substance and strategy, and then each group can nominate one spokesperson to participate in the exercise.¹⁵⁹ The exercise could also be run in each of the small groups simultaneously; this can be accomplished by having one of the members of the group play the corporate associate/client, or by bringing in a handful of outside students (ideally with business/business law experience, but not necessarily business tax experience) to play the corporate associate/client.¹⁶⁰ Alternatively, each of the small groups could be required to meet with the professor at a designated time outside of regular class hours to run the exercise; this might provide a high quality experience for each individual student, and it could provide an effective collective learning opportunity, especially if some in-class time is spent with all of the students reflecting on their individual experiences. However, this can be extremely time-consuming for the professor, especially if there are many groups.¹⁶¹ Further, as with any small group approach, the professor would need to be careful to ensure that each of the groups gets approximately the same experience. One additional

¹⁵⁸ When the professor is acting as the “tax partner,” she can try to make these substantive corrections within the context of the role play. This is much more difficult when the professor is playing the role of the corporate associate or the client. So, particularly in these situations, it is important to pause the exercise lest the substantive misunderstanding derail the entire class’s experience.

¹⁵⁹ So, for example, if a class of 80 students is divided into groups of five students each, then only sixteen students actually speak during the conversation with the “tax partner” or “corporate associate.”

¹⁶⁰ This small group approach will be less effective when this would require one of the students to play the role of “tax partner.”

¹⁶¹ I know that at least one of my colleagues, to her credit, has taken this approach to an experiential exercise in a large first-year class.

alternative¹⁶² would be to assign one small group to run the exercise in front of the class; the other students could watch the interaction and possibly provide feedback. This is more manageable and less time-consuming, but it only affords a small number of the students the opportunity to engage directly in the experiential exercise. Even in this situation, the experiential opportunity could be expanded to include all students if the other small groups were required to run the exercise outside of class, videotape the interaction (with one of the students playing the client), and post the videotape to the class's webpage.¹⁶³ The students could be asked to view each videotape and provide feedback on the interaction.

A consideration related to class-size is class-level. The modules discussed here are designed for upper-level tax classes, which generally means that the students already have some exposure to the field of tax, have self-identified as wanting to pursue advanced study in the field, and may be more open to creative pedagogical approaches to exploring the material. The self-selection process explains why I have generally only had approximately 30 students in each class. In comparison, my basic tax classes typically have more than 90 students, and many of those students take tax because they think they should, but not because they are particularly interested in the subject-matter (or in a possible career in the tax field).¹⁶⁴ As a result, I suspect that it might be somewhat more difficult to implement an experiential exercise regarding ex-ante planning advice in a basic tax course.¹⁶⁵ In addition to the class-size issue, students may be less willing to participate in an exercise that asks them to assume a role (tax lawyer) in which they have very little actual interest.¹⁶⁶ Nevertheless, many students who will not be tax lawyers may need to collaborate with tax

¹⁶² I know that another of my colleagues takes this approach, and she runs enough exercises over the course of the semester so that every student has an opportunity to participate in at least one such exercise.

¹⁶³ Thanks to Laurie Zimet for this creative idea.

¹⁶⁴ At the beginning of each semester, I ask students to answer a few questions, one of which is an inquiry into why the student decided to take the class. One of my favorite responses from a student in one of my basic tax classes was that, "Tax courses are like vegetables—they taste bad, but they're good for you."

¹⁶⁵ I have run exercises where I divide the students into representatives of a taxpayer and representatives of the IRS, they debate whether the taxpayer can take a particular deduction, and then they act as the court and vote how to decide the case. For example, one exercise that students seem to like involves the question whether the music artist Nelly (who has a song entitled "Grillz") can take a business expense deduction for the cost of a cap/fitting for his teeth that encrusts his teeth in precious metals and jewels (i.e., his grillz). However, these types of exercises—where students act as advocates and then judges—generally involve ex-post analysis rather than ex-ante advice. Possibilities for ex-ante planning advice modules for basic tax could include providing tax advice to a divorcing couple regarding the division of property (thanks to Dorothy Brown for this idea) or providing advice to a prospective tax whistleblower.

¹⁶⁶ On the other hand, incorporating an experiential exercise might be an effective way to engage especially those students who otherwise do not feel connected to the course.

lawyers, and I believe that these students can be more prepared to solicit and use tax input if they have an opportunity to think about giving advice from the perspective of the tax adviser.

5. Making the Exercise Realistic

As with any simulation, it is a challenge to make the exercise as realistic as possible. The limited players (and personalities)¹⁶⁷ and the above-described limitations of time, substantive expertise, and class size, among other issues¹⁶⁸ prevent the exercises from being reflective of real practice. Nevertheless, I hope that some exposure to a practice problem (however artificial) helps students to understand the process of advising clients. I tried to explain how my actual experience deviated from the module, but this can be difficult to convey. Plus, the more years I spend in academia, the farther I am away from practice and the staler my experience is. Alumni, adjuncts, or other practitioners may be able to provide ideas for exercises or may be willing to spend a little time with the class to provide their real world perspectives.

6. Assessing Learning Outcomes

One additional challenge associated with these experiential modules involves assessment, both summative (i.e., graded feedback evaluating student performance) and formative (i.e., feedback provided to students to help them improve their performance).¹⁶⁹

For summative assessment, I try to make my final exams reflective of the course, so I want to test the skills that the modules are intended to develop, in addition to the course's substantive material. Essay questions often just ask students to explain the tax consequences of a long fact pattern. While this tests students' knowledge and ability to apply the substantive material, this generally does not provide the students with an opportunity to demonstrate the *advising* skills they have started to develop. So far, I have tried to test these advising skills two different ways.¹⁷⁰ First,

¹⁶⁷ Students must use their imaginations when I play two very different roles (tax partner and corporate associate) at the same time.

¹⁶⁸ One other issue that invariably arises highlights the fictional nature of the exercise. Students ask questions about factual issues that I have not thought about in advance of the exercise. I try to prepare as comprehensive of a back-story as possible, but in any fictional scenario, there will be details that are omitted. Since I worry about derailing the exercise with an answer if I have not had the chance to think it through fully, I typically respond in this situation by indicating that I do not know and then asking the student to explain why he/she thinks the issue may be important. Then, I am usually able to respond to the student's question in a way that addresses the underlying substantive concern.

¹⁶⁹ See Fisher, *supra* note 55, at 238–41 (discussing the design and use of assessment measures).

¹⁷⁰ It is much easier to test the key skill component that I emphasize in my basic tax class—statutory reading and analysis. I test this by including an essay question on the exam that requires students to analyze and apply statutory language that they have never seen before.

as part of an essay question that asks students to explain the tax consequences of a fact pattern, I ask the students to recommend whether the taxpayer in the fact pattern should take one of two or three different actions, and I instruct the students to explain the tax rationale for their recommendation.¹⁷¹ Second, one semester, when I shortened the in-class corporate tax module to focus only on the continuity of interest issue, I included a short answer question on the exam asking students to list questions that they would ask corporate representatives in order to determine whether the continuity of business enterprise requirement would be satisfied in the transaction.

The experiential exercises may also serve as an opportunity for formative assessment. In addition to the possible modifications discussed above in Part IV.B.2, I have considered requiring students to complete one or more short written exercises during the semester, on which I could provide feedback.¹⁷² For example, after the corporate tax module, the students could be asked to write an email to the client seeking to schedule a phone call; students could be asked to include in the email a brief preview of the topics for discussion so that the client can be as prepared as possible for the discussion. After the partnership tax module, students could be asked to write a follow-up email to the corporate associate to memorialize the substance and outcome of the conversation. Further, students could be asked to mark up the FAQ LLC agreement to reflect the precise language changes that the student recommends. Short written exercises during the course of the semester might be a useful way to measure student learning outcomes more concretely than they can be measured based on student participation during the in-class module.

I continue to work on the assessment challenge.

V. DEVELOPING ADDITIONAL EXPERIENTIAL MODULES FOR LECTURE CLASSES

Developing and implementing the exercises described herein has helped me better appreciate both the merits and the difficulties of introducing experiential modules into lecture classes. Convinced of the net benefit, I reflected on what guidance might help me (and others who want to add an experiential module to their lecture classes) better meet the

¹⁷¹ This is similar to the approach typically used in the ABA Tax Section student competition, where students are generally asked to write a letter to the client explaining the analysis and the alternatives.

¹⁷² This is a variation on an approach used by Professor Michael Oberst, who gives the students nearly a month to work on a single take-home graded exercise that serves as the entire final exam. See Oberst, *supra* note 9, at 88.

challenges of this process. I was fortunate enough to have the support and input of my clinical colleagues when I began this endeavor. This may be rare, but I think that there is no better way to start developing an experiential exercise to integrate into a lecture class, than to benefit from the talents of expert experiential teachers. I would strongly encourage taking advantage of the generosity of any colleague (clinical or otherwise) who is willing to help brainstorm about possible experiential exercises.¹⁷³

With or without that support, the key issues in developing any experiential module are identifying the particular skill the exercise is intended to teach and identifying the substantive context for teaching that skill. One way to get at these questions¹⁷⁴ is to think about what types of things practitioners typically do with the types of substantive information taught in the class and then to ask what skill or skills the practitioner needs in order to accomplish those tasks.¹⁷⁵ Also, non-tax faculty in related areas (e.g., business law for corporate tax and partnership tax; community property or family law for divorce-related tax issues in basic tax; wills and trusts for estate and gift tax)¹⁷⁶ might be able to provide insight into situations around which an experiential tax exercise could be developed.¹⁷⁷ Alternatively (or in addition), particularly for faculty with limited practice experience, there may be significant value in engaging the practitioner community, including adjuncts and former students, in this inquiry—what tasks do they (or relatively junior lawyers) commonly perform in practice, focusing on tasks that involve the substantive material covered in the

¹⁷³ Also, a clinical professor may be willing to join the lecture class to help administer (or to take the lead in administering) a clinical module. *See, e.g.*, Aaronson, *supra* note 27, at 40–42 (describing clinical modules for Torts and Civil Procedure introduced by clinical faculty at UC Hastings). This may be particularly valuable for professors with limited practice experience. Regardless of the professor's practice experience, having a clinical professor run an experiential module can be a fantastic learning experience, both for the students who benefit from the talented experiential teaching of these professors, and for the podium faculty member herself, who gets to observe the clinical professor in action, running an experiential module that the professor may run herself in subsequent years.

¹⁷⁴ This is the approach that my clinical colleagues took with me during the workshop for which my class was a guinea pig.

¹⁷⁵ These can vary among practice settings. The modules herein largely assume a big firm work environment, but experiential modules can be tailored to other practice settings in which students might ultimately work. For example, lawyers working as solo practitioners or in very small firms may advise different types of clients (e.g., small businesspeople rather than public company CEOs/CFOs), may deal with different substantive issues (e.g., a small businessperson may need advice about S corporations, but is less likely to need advice about structuring public company mergers), and may need slightly different skills for interacting with clients (e.g., interacting with an at-risk individual who needs legal advice for herself can be different than interacting with a sophisticated wealthy businessperson seeking legal advice on behalf of her company or employer).

¹⁷⁶ I am fortunate to have generous colleagues who have been willing to assist me. I understand that institutional cultures vary, so this type of collaboration may be more feasible at some schools than at others.

¹⁷⁷ These colleagues might even be willing to assist in the administration of the experiential exercise.

course? What skills do they draw upon when using their substantive knowledge to perform those tasks? What skills do they think are most needed by new lawyers in the field? And might they be interested in joining the class for one session to help run the exercise?¹⁷⁸

After identifying the skill(s) and substantive context(s) for the exercise, the challenge becomes developing a discrete exercise that furthers those objectives. The professor must determine whether she wants to introduce a single module, multiple separate modules, or a series of interconnected modules;¹⁷⁹ how much time she wants to spend on the exercise(s); how broad/narrow the exercise must be in order to provide the desired student experience and to be completed in the desired time period; how to present the exercise(s) in the most realistic way possible; how she wants to handle the class size and dynamic; and how she wants to assess student learning.¹⁸⁰ I learned that a well-drafted exercise should clearly identify the student's role, the party with whom the student will be communicating, the form of that communication, and the goal(s) of that communication. These things may seem obvious, but I think they are important enough to mention. Also, as with exam drafting, I find it to be incredibly helpful if someone else is willing to read and vet an exercise before I administer it to the class. This certainly helped me to prevent some misunderstandings. And probably the thing that was most useful for me when developing the experiential modules was the feedback that I received from my students about their experience with the early modules that I implemented. Student comments encouraged me to develop additional modules, refine existing modules for subsequent classes, and think about how I might bring experiential modules into my other courses.

VI. CONCLUSION

Surely, the designs of my experiential modules are flawed, and my implementation of the exercises is far from perfect. I continue to refine the problems and the way in which I run the exercises. Yet, despite these deficiencies, I am convinced that it has been worthwhile to incorporate these experiential modules into my tax classes.

As our students continue to enter a legal profession that is changing and as the models for the delivery of legal services continue to evolve, so

¹⁷⁸ Practitioners may be valuable resources in the development and administration of experiential modules, particularly for faculty members who have limited practice experience or who have spent many years in academia and away from the practice environment.

¹⁷⁹ That is, modules that build on the same basic set of facts and that involve different substantive issues that are covered as the course progresses.

¹⁸⁰ See *supra* Part IV.B (discussing these exercise design and implementation issues).

should our pedagogy and so should we. Calls for increased skills training, for greater integration of the different aspects of the curriculum, and for better preparing our students for practice have not gone, and should not go, unheeded. I join many more talented professors across the country in trying to respond to these calls. I hope that others can use, and hopefully improve upon, these modules in their classes. Moreover, I hope that others are encouraged to incorporate experiential exercises in their own classes (whether for tax or for other subjects) and that, when developing and implementing such exercises, others can use my reflections to avoid my mistakes and build on my successes. And, in this time of change in the legal services market, I ultimately hope that I can make even a small contribution to the development of the professoriate and to our collective endeavor of helping our law students become lawyers.

