

## ARTICLES

# THE GORDIAN KNOT: UNITING SKILLS AND SUBSTANCE IN EMPLOYMENT DISCRIMINATION AND FEDERAL TAXATION COURSES

BARBARA J. BUSHARIS\* & SUZANNE E. ROWE\*\*

### INTRODUCTION

What legal educators and scholars consider the most important legal abilities—problem-solving and communicating one's analysis of the problem<sup>1</sup>—are inextricably tied together<sup>2</sup> and directly related to a student's mastery of the area of law she is working in. How and where to develop these abilities is the subject of lively debate and perpetual curricular reform.<sup>3</sup> "Skills"

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\* Barbara J. Busharis is a Visiting Associate in Law at Florida State University College of Law. She received her B.A. in 1983 from Johns Hopkins University. She then earned her J.D. in 1991 from New York University.

\*\* Suzanne E. Rowe is an Assistant Professor and Director of Legal Research and Writing at the University of Oregon School of Law. From 1994 to 2000, she taught at Florida State University College of Law. She received her B.A. in 1983 from the University of North Carolina at Chapel Hill. She then earned her J.D. in 1989 from Columbia University.

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1. *Report of the Task Force On Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. OF LEGAL EDUC. & ADMISSION TO THE BAR (Legal Education and Professional Development—An Educational Continuum) 4-5 [hereinafter *MacCrate Report*] (listing fundamental skills of lawyers, including written and oral communication); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 562 (1997).

2. See Parker, *supra* note 1, at 562 ("[D]evelopment of communicative skills is inseparable from the development of analytical skills."); Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885, 885 (1991) ("Good writing results from good thinking.").

3. See, e.g., Parker, *supra* note 1, at 567-68 (arguing for writing instruction throughout the law school curriculum); see also *Legal Education:*

training has received increased attention in recent years, but is often narrowly defined and separated from "learning the law" in a particular substantive area.<sup>4</sup>

This creates a false dichotomy between "skills" and "substance."<sup>5</sup> Even calls to "integrate" skills with substance in the curriculum may be misleading if they imply that skills and substance exist separately and can be taught separately.<sup>6</sup> Treating legal skills as distinct from legal substance cedes to the bar a crucial part of the faculty's role in preparing students for their professional lives, whether as practicing attorneys, judges, or scholars.<sup>7</sup>

Time constraints and financial pressures have reduced the time practicing attorneys can spend mentoring beginning lawyers; however, members of the bar increasingly demand that students arrive for their first jobs with more than minimal competence in practical lawyering skills.<sup>8</sup> Practicing attorneys simply do not have the time to teach new attorneys how to begin solving clients'

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*What Kind of Job Are Law Schools Doing?*, FSU LAW (The Magazine of the Florida State University College of Law), Winter 1997, at 49. In a forum discussion between colleagues, one professor stated, "The place to learn skills is on the job." *Id.* at 52. Another professor, while supporting the role of abstract theory in legal education, said law schools can do more in teaching negotiation, drafting, and other lawyering skills. *Id.*

4. See Parker, *supra* note 1, at 562 (arguing that "although a consensus has emerged that analysis and communication are interrelated, within too many law schools the notion has persisted that writing is a discrete skill . . .").

5. Norman Brand, *Legal Writing, Reasoning & Research: An Introduction*, 44 ALB. L. REV. 292, 295 (1980).

6. See James Boyd White, *Law Teachers' Writing*, 91 MICH. L. REV. 1970, 1970 (1993) ("The opposition between 'theoretical' and 'practical' is . . . misleading. It is often the most theoretical work that will prove of surprising practical value, [and] often the immersion in practical particularities that will stimulate the most valuable thought of a general kind."); see also Parker, *supra* note 1, at 562-63.

7. Treating skills as though they exist apart from legal analysis also trivializes abilities fundamental to lawyers. See *MacCrate Report*, *supra* note 1, at 123-24; Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 508 (1993) (reporting findings of a survey of Chicago lawyers revealing that oral and written communication skills were more important to beginning attorneys than substantive legal knowledge).

8. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (noting that law schools are moving toward theory while law firms are moving toward commerce); Mike Jay Garcia, *Key Trends in the Legal Profession*, 71 FLA. B.J. 16, 16 (1997) (stating that "judges find themselves overbooked with less time to help teach and mold new talent, while experienced lawyers are forced to spend the majority of their time working on obtaining additional billable hours instead of mentoring"); see also Graham C. Lilly, *Essay, Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1442-49 (1995) (explaining the market forces driving law firms).

problems using doctrine learned in law school.<sup>9</sup> It is not unusual for students to obtain their practice training through unmentored, part-time employment, rather than through supervised courses that ensure the practice components complement the curriculum.<sup>10</sup> Especially for students who begin their careers in solo practice or small firms,<sup>11</sup> lawyering skills should be learned in school, where mentoring and instruction are available.<sup>12</sup>

The practicum courses at Florida State are a means of increasing practical training within the academy while rejecting the dichotomy between legal skills and legal substance.<sup>13</sup> A practicum is a one-credit course taught concurrently with a doctrinal course in the same area of law.<sup>14</sup> The students who enroll in both the doctrinal course and the practicum<sup>15</sup> receive an opportunity for practical experience and personal feedback on

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9. See Paul D. Reingold, *Harry Edwards' Nostalgia*, 91 MICH. L. REV. 1998, 2004 n.10 (1993) ("[L]aw school graduates can no longer expect on-the-job training under the watchful eyes and gentle hands of a senior mentor. If the big firm 'tutelage' system were ever a valid excuse for law schools to turn out graduates who were incapable of practicing law, in the current law firm and business climate that excuse is gone."); see also Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 707, 739, 746-87 (1998) (noting that the legal profession has abandoned mentoring and arguing that the academy has the capacity to fill that role); Andrew J. Rothman, *Preparing Law School Graduates for Practice: A Blueprint for Professional Education Following the Medical Profession Example*, 51 RUTGERS L. REV. 875, 877 (1999) (noting "little room for training programs that draw attorneys away from their productive, billable work").

10. See *MacCrate Report*, *supra* note 1, at 268-72 (discussing ways for practitioners and law faculty to work together to ensure students' employment experiences complement their law school experiences).

11. Over 35% of graduates in private practice begin work in this size environment. *Class of 1997 Employment Report and Salary Survey*, NATIONAL SUMMARY REP. (National Association for Law Placement), 1998, at 1. Of the 17,456 students in the class of 1997 who reported going into private practice, 4.9% went into solo practice, and 31.6% entered firms with between two and ten lawyers. *Id.*

12. Recently the Student Education and Admissions to the Bar Committee of the Florida Bar began considering a requirement that applicants receive clinical training before being allowed to sit for the bar exam. *Annual Report, Committees of the Florida Bar*, 71 FLA. B.J. 38, 44 (June 1997).

13. Integrating skills and substance may be becoming the norm in Australian law schools. See Penelope Pether, Book Reviews, 7 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 116, 116 (1999) (reviewing DAVID ROMANTZ & KATHLEEN ELLIOTT VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* (1998) and MARGARET Z. JOHNS, *PROFESSIONAL WRITING FOR LAWYERS: SKILLS AND RESPONSIBILITIES* (1998)).

14. While the intent is for students to take the practicum during the same semester they are enrolled in the doctrinal course, occasionally students are allowed to take the practicum in a semester subsequent to the doctrinal class, generally because of scheduling conflicts.

15. Up to 12 students may elect to take a practicum.

projects requiring writing, research, analysis, and client communication related to that substantive area of law.

The practicum model begins with the assumption that teaching legal theory, doctrine, policy, and skills must be viewed as complementary goals.<sup>16</sup> The practicum recognizes that students increase their understanding of theory and doctrine by engaging in the practical work of lawyers.<sup>17</sup> It uses activities often distinguished as “skills,” such as doing research, writing legal documents, and conducting interviews and negotiations, to teach analysis.<sup>18</sup> Its basic premise is that “thinking like a lawyer” is the essential legal “skill,”<sup>19</sup> and thus law schools should take an active role in demonstrating for students the links between theory and practice.<sup>20</sup>

Because it is offered in conjunction with a traditional doctrinal course, the practicum is distinguished from lawyering practice courses that seek to provide a broad range of practical experiences without requiring co-enrollment in a doctrinal

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16. See Barbara Bennett Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 MICH. L. REV. 1977, 1997 (1993) (proposing integration of “theory, doctrine, and practice” in a Child, Parent, and State course); Christine Corcos et al., *Teaching a Megacourse: Adventures in Environmental Policy, Team Teaching, and Group Grading*, 47 J. LEGAL EDUC. 224, 224-26, 236 (1997) (creating a course that combined state and local government, environmental law, administrative law, advanced legal research, international law, and economics to develop connections between research, writing, simulations, and substantive law); Eleanor W. Myers, *Teaching Good and Teaching Well: Integrating Values With Theory and Practice*, 47 J. LEGAL EDUC. 401, 422 (1997) (discussing Integrated Transactional Practice as a non-traditional course that teaches both theory and practical skills).

17. See James E. Moliterno, *John B. Mitchell et al., Seattle University Skills Development Series. Charlottesville: Michie Publishing Company*, 47 J. LEGAL EDUC. 280 (1997) (book review) (reviewing teaching materials designed to allow integration of skills into doctrinal classes). Professor Moliterno notes that, while students give the credit for their learning to practical activities like simulations, clinics, and job training, in fact these activities demonstrate for the students the connections between what they previously learned in the doctrinal class and the application of that material. *Id.* He states that students who apply almost immediately what they learned in class will understand and retain the material better. *Id.*

18. See RALPH L. BRILL ET AL., SOURCEBOOK ON LEGAL WRITING PROGRAMS 34-36 (1997) [hereinafter SOURCEBOOK] (explaining basic skills such as interviewing, counseling, and negotiating); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 105-06 (1996) (suggesting simulation courses that accompany doctrinal courses to teach professional ethics).

19. Some texts have explicitly begun to recognize this basic concept. See, e.g., DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* (1998).

20. Franklin M. Schultz, *Teaching “Lawyering” to First-Year Law Students: An Experiment in Constructing Legal Competence*, 52 WASH. & LEE L. REV. 1643, 1644-47 (1996).

course.<sup>21</sup> The practicum is also more intensive, both for the students and the teachers, than many large-scale simulations offered in connection with doctrinal courses.<sup>22</sup>

The practicum has its roots in two areas of educational theory, both focusing on how individual students learn. One of these areas is the Writing-Across-the-Curriculum movement. Accordingly, Part I of this Article reviews scholarship demonstrating that thinking and writing are intertwined. Students learn to think as they write; students cannot write clearly until they can think clearly. Writing also introduces students to the unique conventions and strategies of a specific area of law. Writing is only one of the ways in which students learn, however, and so Part II explores the varied and highly personal learning styles students bring to law school. Sometimes, techniques labeled as “skills” training can teach legal analysis to students for whom the usual law school “substantive” lecture presentations are unhelpful.

Part III builds on that theoretical foundation by describing the practica in Employment Discrimination and Federal Taxation offered at Florida State. This part of the Article demonstrates how the practicum combines the experiences of writing and practical training with legal doctrine and theory in specific exercises and discussions, and shows how different class activities can benefit students with different learning styles. Finally, Part IV discusses the results of the practica that we have taught and encourages other schools to adopt this model.

## I. WRITING AND THINKING

While writing was once viewed merely as a way to record thought, it now is considered a vital tool in the construction of thought. The Writing-Across-the-Curriculum (WAC) movement embraces the idea that thinking and writing are inseparable, that students must think clearly to write clearly.<sup>23</sup> Despite resistance in much of the doctrinal law curriculum, many legal writing texts and first-year writing courses have followed WAC theory and moved from focusing on the written product to the writing process

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21. *E.g.*, John Sonsteng et al., *Learning by Doing: Preparing Law Students for the Practice of Law (The Legal Practicum)*, 21 WM. MITCHELL L. REV. 111, 118 (1995). The practica discussed in this Article must also be distinguished from suggestions to involve legal writing faculty in doctrinal courses by having them lead a few class sessions on research. SOURCEBOOK, *supra* note 18, at 140-42.

22. *E.g.*, *Symposium on Simulations*, 45 J. LEGAL EDUC. 469, 470-71 (1995).

23. *See, e.g.*, Janet Emig, *Writing as a Mode of Learning*, in LANDMARK ESSAYS ON WRITING ACROSS THE CURRICULUM 89 (Charles Bazerman & David R. Russell eds., 1994) [hereinafter LANDMARK ESSAYS] (describing how “writing uniquely corresponds to certain powerful learning strategies”).

that creates knowledge.<sup>24</sup>

The process of legal writing is critical in the process by which students learn the legal profession's language and conventions, which in turn are required for full membership in the profession. When writing is understood as a key in developing legal analysis and as having unique conventions that must be passed on to novices, the skill of legal writing can no longer be distinguished from the substance of legal education. The next step is to use writing to teach analysis throughout the law school curriculum.

#### A. *Writing-Across-the-Curriculum*

The WAC movement encourages and coordinates efforts to have students write in more courses than just designated composition classes.<sup>25</sup> WAC programs generally include faculty workshops to show how to incorporate writing assignments into courses from all disciplines.<sup>26</sup>

The WAC movement is not a new trend, but the most recent manifestation of the link between writing and thinking that began to develop over a century ago. Prior to the 1870s, there was little methodical writing instruction beyond the elementary school level.<sup>27</sup> The primary mode of communication was speaking;<sup>28</sup> writing was considered a means for a speaker to remember what to say. A reader would have considered writing merely as a substitute for a speaker.<sup>29</sup> In the 1870s, however, American education began to replace oral recitation with written exams and papers.<sup>30</sup>

Over the next century, writing took on a more central role in American post-secondary education. Professionals and scholars began to produce writing that was to be valued for its own contribution, not as a substitute for speaking.<sup>31</sup> Although this writing relied heavily on the conventions of the specific discipline in which it was created, American education continued to treat writing as a simple skill, learned early in one's education, and

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24. Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719 (1997).

25. LANDMARK ESSAYS, *supra* note 23, at xiii.

26. *See id.* at xiii-xiv (discussing the development of WAC programs).

27. DAVID R. RUSSELL, *WRITING IN THE ACADEMIC DISCIPLINES, 1870-1990*, 3 (1991).

28. This preference for spoken communication over written communication traces back to Socrates. Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105, 107 (1998).

29. *See* RUSSELL, *supra* note 27, at 3-4.

30. *See id.*; *see also* David R. Russell, *American Origins of the Writing-across-the-Curriculum Movement*, in LANDMARK ESSAYS, *supra* note 23, at 3 [hereinafter *American Origins*].

31. RUSSELL, *supra* note 27, at 4.

applicable to all new situations and to any discipline.<sup>32</sup> In the classroom, writing was viewed as a way to judge student learning, but not as a way to enhance that learning.<sup>33</sup> The characterization now seen in many law schools, splitting “writing” from “analysis,” was born.<sup>34</sup> Despite the efforts of some progressive educators, writing was generally treated as a separate, technical “skill” until the 1960s.<sup>35</sup>

With its beginnings in the 1970s, the WAC movement rejected the misconception that content can be separated from expression.<sup>36</sup> Drawing from the work of James Britton,<sup>37</sup> Jean Piaget,<sup>38</sup> Jerome Bruner,<sup>39</sup> and John Dewey,<sup>40</sup> the WAC theorists argued that writing is critical to learning;<sup>41</sup> content cannot be distinguished from expression. Writing is thinking: “[w]e write to find out what we know and what we want to say.”<sup>42</sup> Organized programs began to encourage professors in all disciplines to incorporate writing assignments into their courses and develop writing pedagogy.<sup>43</sup> A “literacy crisis” in the mid-1970s opened the door to funding of these programs.<sup>44</sup> WAC programs exist today, usually separate from traditional academic departments, at a sizable number of colleges and universities.<sup>45</sup>

The development of legal education in the last century has been markedly different. In 1870, Christopher Columbus Langdell became dean of Harvard Law School.<sup>46</sup> He is credited with

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32. *American Origins*, *supra* note 30, at 5-6; RUSSELL, *supra* note 27, at 4-5.

33. RUSSELL, *supra* note 27, at 6.

34. *See id.* at 5 (noting the artificial distinction between content and expression).

35. *American Origins*, *supra* note 30, at 8-9.

36. LANDMARK ESSAYS, *supra* note 23, at xiii-xv.

37. JAMES BRITTON ET AL., THE DEVELOPMENT OF WRITING ABILITIES (11-18) (1975); *see also American Origins*, *supra* note 30, at 15 (placing Britton's work in the development of WAC in the United States).

38. JEAN PIAGET, THE ORIGINS OF INTELLIGENCE IN CHILDREN (trans. Margaret Cook 1963); JEAN PIAGET, THE LANGUAGE AND THOUGHT OF THE CHILD (trans. Marjorie Gabain & Ruth Gabain 3d ed. 1959); *see also* David Moshman & Bridget A. Franks, *Intellectual Development: Formal Operations and Reflective Judgment*, in ELAINE P. MAIMON ET AL., THINKING, REASONING, AND WRITING 10-16 (1989) (explaining Piaget's analysis of intelligence and development).

39. *American Origins*, *supra* note 30, at 10.

40. *Id.*; *see also* JOHN DEWEY, EXPERIENCE AND EDUCATION (1938).

41. *See* RUSSELL, *supra* note 27, at 276-79.

42. WILLIAM K. ZINSSER, WRITING TO LEARN vii-viii (1988).

43. LANDMARK ESSAYS, *supra* note 23, at xiv.

44. *Id.* at xiii.

45. RUSSELL, *supra* note 27, at 15-17; *see also* Susan H. McLeod, *Writing Across the Curriculum: The Second Stage*, in LANDMARK ESSAYS, *supra* note 23, at 79 (discussing 1988 survey of WAC programs at 1113 post-secondary institutions).

46. Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397, 410 (1998).

instituting the case method of legal study, with its emphasis on the Socratic method.<sup>47</sup> In theory, the teacher using the Socratic method conducts a dialogue with a student in the class.<sup>48</sup> The dialogue is intended to demonstrate critical principles of legal analysis, and is still ostensibly the model for many law classes today.<sup>49</sup> Notably, the emphasis in the Socratic method is on speaking, not writing. Thus, at the time post-secondary education was moving toward instruction and evaluation in writing, legal education continued to focus on education through speaking.

In recent decades, while WAC was taking hold on college and university campuses, legal education was responding to pressures for curricular reform by creating clinical experiences<sup>50</sup> and legal research and writing programs.<sup>51</sup> These changes, however, did not alter the basic curriculum at most law schools, despite repeated calls for more “skills training.”<sup>52</sup> The focus in many early writing programs was on the product of writing, or the written instrument itself.<sup>53</sup> Instrumental writing is simply recording in written form ideas that have been fully developed earlier from oral collaboration, negotiation, or argument, or in previous written documents.<sup>54</sup> The writer is assumed to have already developed and refined the thought to be recorded before beginning to write.<sup>55</sup> Under this “product” orientation, legal writing programs were supposed to address difficulties students had with basic English or composition.<sup>56</sup> Writing was principally taught by marginalized faculty, or even upper class students.<sup>57</sup> Analysis was taught by

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47. Molly Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 AM. U. L. REV. 85, 95 (1999).

48. Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 728-29 (1989).

49. *Id.* at 728-38 (explaining the Socratic dialogue and pointing out that much of what passes as Socratic teaching in law schools is not actually Socratic method).

50. Roy T. Stuckey, *Education for the Practice of Law: The Times They Are A-Changin'*, 75 NEB. L. REV. 648, 652 (1996).

51. See Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 300-03 (1980) (arguing that all law schools should have a legal writing program and most programs should be expanded); Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 552 (1973) (supporting the development of research and writing courses for first-year students).

52. Stuckey, *supra* note 50, at 653.

53. Durako et al., *supra* note 24, at 721-22.

54. Philip C. Kissam, Essay, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 136 (1987).

55. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 49-50 (1994).

56. *Id.* at 41-42.

57. *Id.* at 47-48 (discussing marginalization of writing faculty); see also Durako et al., *supra* note 24, at 722 (explaining that traditional legal writing programs were often taught by adjuncts or by law students).



professors.<sup>58</sup>

In clinging to the writing-analysis dichotomy, law schools have been slow to accept the idea that the act of writing creates understanding.<sup>59</sup> Scholarship by legal writing faculty shows that the tide is shifting and law schools, too, are accepting that writing and thinking are inextricably connected.<sup>60</sup> Especially in legal writing departments, writing is increasingly seen as a creative process, in which new ideas are constructed as the writer seeks to express his understanding of the matter at issue.<sup>61</sup> This "process view" has been influential in the legal writing classroom, with more emphasis on drafting and revising as a way of *constructing* knowledge of the law.<sup>62</sup> In some respects, then, legal writing departments have begun to realize WAC goals in the law school context.

But applying the WAC concept to legal studies would mean that students would have to write frequently in all their classes, not just in designated legal writing courses.<sup>63</sup> This does not happen for many students. Too often, doctrinal faculty still consider writing a "skill" distinguishable from legal analysis and expect the writing faculty to fix, in nine months, a lifetime of bad habits or neglect. The assumption is that only poor grammatical skill prevents students from writing good legal papers and exams.

These professors are often unconsciously distinguishing between instrumental writing and critical writing.<sup>64</sup> While instrumental writing is certainly used in legal practice, it is of limited value in legal education.<sup>65</sup> In instrumental writing, the focus is on basic English skills that enable the reader to memorialize the fully formed idea.<sup>66</sup> Critical writing, by contrast, requires original thought and encourages a dialogue between the

58. Rideout & Ramsfield, *supra* note 55, at 44-45 n.27.

59. See Kissam, *supra* note 54, at 152; see also James Fleming Hosis, *Effective Ways of Securing Co-operation of All Departments in the Teaching of English Composition*, in LANDMARK ESSAYS, *supra* note 23, at 23, 25 ("Language is almost identical with thought.").

60. E.g., Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 175-76 (1993).

61. *Id.*

62. Kearney & Beazley, *supra* note 2, at 888-89; Rideout & Ramsfield, *supra* note 55, at 51-56; Durako et al., *supra* note 24, at 722. Even with this shift, some vestiges of the product approach may remain, however. In part, this is due to students' greater interest in mastering a particular product for which a grade will be awarded than in learning the writing/thinking process itself. Students also find it easier to blame low grades on missing commas than on missing analysis, which they may not yet understand.

63. See Parker, *supra* note 1, at 597.

64. Kissam, *supra* note 54, at 136.

65. See Rideout & Ramsfield, *supra* note 55, at 62.

66. *Id.*

writer and the writing.<sup>67</sup> In the act of writing critically, the writer often sees new ideas emerging and refines the understanding of the thought to be transcribed.<sup>68</sup> Critical writing is what professors are admired for producing; it is also what most professors lament that their students cannot do.

It is surprising that many law professors do not accept the view of writing as thinking, but insist that writing is a separate skill that can be taught in a marginalized course.<sup>69</sup> The same professors will admit that their own writing and thinking are interwoven, that they refine their ideas as they write their articles, and that sophisticated writing and analysis are the cornerstones of their professional ambitions.<sup>70</sup> Despite the recognition that thinking and writing drive their own professional activities, however, few professors are willing or able (given the academy's demand for publication<sup>71</sup>) to offer students writing experiences.<sup>72</sup>

One of the key roadblocks in teaching critical legal writing is that legal analysis may have come so easily to law professors. As law students, perhaps they found legal analysis an exciting mental challenge that they quickly mastered. Most had strong writing backgrounds from their undergraduate disciplines and were able to express their legal analysis well.<sup>73</sup> Now as law teachers, they are required to break legal analysis into components that a novice can understand, which many professors find difficult to do.<sup>74</sup> It is

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67. *Id.* at 61-63 (describing how legal writing courses can enable students to appreciate that language can be generative, not just descriptive); see also Fajans & Falk, *supra* note 60, at 164-66 (advocating "close reading" as a method of teaching students to move beyond a superficial, paraphrase-driven level of analysis to achieve deeper insight, which is then reflected in more thoughtful writing).

68. Kissam, *supra* note 54, at 140.

69. Rideout & Ramsfield, *supra* note 55, at 41-43 (describing the traditional view that writing is a generic skill that can be applied easily to new settings, and explaining the negative consequences of that view).

70. See Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 FLA. ST. U. L. REV. 1067, 1073 (1999) (noting that law professors "champion the importance of their own research and writing"); Rideout & Ramsfield, *supra* note 55, at 48 (stating that legal scholars "make their livings through writing").

71. Lilly, *supra* note 8, at 1437-40.

72. *Id.*

73. See Rideout & Ramsfield, *supra* note 55, at 40 n.16 (finding that legal educators were in "the top of their law school classes"); see also DEWEY, *supra* note 40, at 44-45 (noting that traditional education suits some students, while other students just get by).

74. See Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 321 (1997) (discussing learning progressions). An easy scapegoat is the argument that students "just can't write." See Rideout & Ramsfield, *supra* note 55, at 43 (explaining that law professors who have

easier to blame poor student writing than to re-examine one's own teaching.

Another roadblock is that doctrinal faculty are not familiar with writing pedagogy and, given the reward system of the academy, are unlikely to devote professional development time to learning how to teach writing effectively. Even if they were to learn writing pedagogy, assigning papers produces papers that need to be read and critiqued, which takes time away from more well rewarded faculty activities.<sup>75</sup> The members of the faculty best situated to teach writing pedagogy are the legal writing faculty, who often do not enjoy full participation on an equal status with doctrinal faculty members.<sup>76</sup> Thus, collaboration between legal writing faculty and their doctrinal colleagues is not likely to happen beyond the most informal level.

As a consequence, WAC proposals, for all their potential for improving students' analytical abilities, are not widely implemented in many law schools.<sup>77</sup> A significant number of law students across the country are able to graduate with only limited writing experiences after the first year of law school.<sup>78</sup> Although

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difficulty teaching writing may conclude that writing is a talent that cannot be taught).

75. See Kissam, *supra* note 54, at 149 (noting that the academy rewards the production of research and scholarly work, not the production of good lawyers).

76. See Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 145-54 (1997) (surveying problems of staffing models used in some legal writing programs); see also Lilly, *supra* note 8, at 1436-37 (pointing out the split in non-writing faculty into doctrinalists and theorists, and noting that the theorists are as dismissive of the doctrinalists as the doctrinalists have been of clinicians). Moreover, if legal writing positions are "capped," legal writing faculty may not stay in the field long enough to learn the pedagogical theories necessary to be informed in teaching writing. See Rideout & Ramsfield, *supra* note 55, at 74-81 (explaining need to increase financial support for writing programs, keep class size manageable, and lift artificial caps on instructors' contracts). Change is coming, however slowly. The 1998 revisions to the A.B.A. accreditation standards will challenge law schools to increase resources for skills training, legal writing programs, and those who teach legal writing. See *Standards for Approval of Law Schools*, 1999 A.B.A. STANDARDS FOR APPROVAL OF LAW SCHOOLS ch. 3; see also Levine, *supra* note 70, at 1082 n.54 (explaining implications of these new A.B.A. standards).

77. See Parker, *supra* note 1, at 576-79 (discussing ways to incorporate writing into traditional classes).

78. See Jill J. Ramsfield & Florence Super Davis, *Survey of Legal Research and Writing Programs* (1996) (unpublished manuscript, on file with *The John Marshall Law Review*) [hereinafter LWI Survey] (noting that of 130 schools responding to question five, ninety-four require only two terms of legal writing and research, twenty-one require three terms, and eleven require four or more terms). A 1999 survey by the Association of Legal Writing Directors (ALWD) indicates that while many schools offer some writing experience after the first year, most only require it in the form of a single seminar paper, and some require nothing at all after the first year. See *Survey Results of the*

law schools and the legal profession continue to call for better writing,<sup>79</sup> the answer to the call may actually be better thinking, which requires more writing. The writing process cannot be separated from the thinking process. Writing is a thinking process that tests whether one's thoughts are clear to a reader unfamiliar with the facts, the issue, or the cited legal authority.<sup>80</sup> Legal writing cannot be isolated from other law school experiences; learning to write in the legal context is intimately related to learning to think and analyze in the legal context.<sup>81</sup> In sum, the bad writing seen in law schools is not just the result of inadequate English skills, but of undeveloped ability in legal analysis.<sup>82</sup> The remedy is not a remedial writing course, but more writing in more courses.

### B. *Writing in a Discourse Community*

Another view of legal writing calls for a "social perspective" that recognizes that legal writing takes place within a discourse community, a group whose members have studied similar concepts and developed their own conventions and traditions for communicating about those concepts.<sup>83</sup> This social perspective

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ALWD/Legal Writing Institute 21 (1999) (on file with *The John Marshall Law Review*). Only three responding schools indicated that assignments such as drafting litigation documents, contracts, or legislation were required for graduation. *Id.* at 20-21.

An example of a program that offers more than the norm is found at Mercer University School of Law, which offers a Certificate Program in legal writing. This program includes a coordinated program of advanced legal writing courses beyond the required writing courses in the first three semesters. Mercer University School of Law, *Setting the Standard in Legal Writing Programs* (1999) (on file with *The John Marshall Law Review*). The upper level electives, all heavily subscribed, include Advanced Research, Advanced Litigation Drafting, Advanced Transactional Drafting, Advanced Writing Groups, Pre-trial Practice, and Advanced Brief-Writing. *Id.*

79. *MacCrate Report*, *supra* note 1, at 4; Edwards, *supra* note 7, at 34-39 (arguing that law schools should provide an education that law students can use upon becoming practitioners).

We do not mean to imply that good writing does not require exacting care with grammar, punctuation, syntax, and organization. However, legal writing is much more than that. Some students who can write fine prose when describing an historical event cannot form complete sentences in a legal memorandum. See Parker, *supra* note 1, at 569 (pointing out that students can clearly report non-legal facts but write "garbled" legal analysis).

80. George D. Gopen, Essay, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 343 (1987).

81. *Id.* at 353.

82. Parker, *supra* note 1, at 568.

83. Rideout & Ramsfield, *supra* note 55, at 56-58. One scholar has argued recently, however, that the socialization process involved in law school pedagogy has a negative aspect in that it reflects historical bias in legal language and reasoning. As a result, those who have been historically marginalized by the law may be excluded from the discourse community.

builds on the "process model" that in theory and intent has replaced the product model at most American law schools.<sup>84</sup> Scholars point out that the process model may be too narrow because it focuses on an individual's own approach to writing and learning, and does not emphasize the social context in which the writing and learning is taking place.<sup>85</sup>

Under the social perspective view, one goal of education is enabling a novice to become a fluent member of a discourse community.<sup>86</sup> Learning the language of a particular discourse community is both a prerequisite to full membership in the community and part of the process by which a newcomer achieves the status of group member:

One must master the conventions of a discourse in order to be a member of that discourse community and, hence, an accomplished writer within that discourse; but those conventions are, by definition, known only to members of that discourse community. They are the linguistic and rhetorical substrata that create the group. Learning to write as a lawyer writes means, in a very real sense, becoming a lawyer. When we teach people how to write, we are teaching them not only word choice, organization, or even composing habits, we are also inevitably leading them into the strategies and conventions of a particular discourse and thus offering them membership into that discourse community.<sup>87</sup>

The social perspective has some similarities to an offshoot of WAC referred to as Writing in the Disciplines (WID).<sup>88</sup> WID seeks to explore and understand different features of written communication in specific disciplines, with the goal of transmitting those features to new writers in those disciplines.<sup>89</sup>

A college curriculum implementing WAC and WID ideals recognizes that a single course in freshman composition, especially one focusing on mechanical writing such as grammar and punctuation, cannot address the needs of students within a

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Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 9 (1999); see also Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 SAN DIEGO L. REV. 635, 645-53 (1997) (exploring the relationship between culture and law, especially regarding foreign law).

84. See Durako et al., *supra* note 24, at 720 (describing the shift from emphasizing the product of writing to emphasizing the process of writing).

85. Rideout & Ramsfield, *supra* note 55, at 60-61.

86. *Id.* at 56-57.

87. *Id.* at 58 (citation omitted).

88. LANDMARK ESSAYS, *supra* note 23, at xv (explaining that some scholars distinguish WAC as being oriented toward education in general while WID focuses on individual disciplines).

89. *E.g.*, Charles Bazerman, *What Written Knowledge Does: Three Examples of Academic Discourse*, in LANDMARK ESSAYS, *supra* note 23, at 159.

specific discipline to learn the conventions of thought and expression that are unique to that discipline.<sup>90</sup> Similarly, there are many discourse communities within the legal profession, each with its own conventions and strategies. While a strong first-year course in legal writing and analysis can begin a student's assimilation into the greater legal community, this process must continue in upper level courses in specific areas of law.<sup>91</sup> For example, research in employment discrimination and federal taxation follows the same general strategies and uses analogous sources, but typically the specific strategies and sources are known and used with facility only by those who are members of each particular discourse community. Additionally, the language of each area of law is slightly different. Thus, a law student, or even an attorney practicing in some other substantive area, would not be expected to know that experts in taxation refer to the Internal Revenue Service not as "the IRS," but as "the Service." Adding writing opportunities throughout the law school curriculum allows students to begin mastering conventions of more specific fields in connection with studying the substantive law of a given area, instead of treating the conventions as something to be "picked up" later on.

## II. LEARNING THEORY AND LEARNING STYLES

Although law students share the same goal of becoming members of the larger legal discourse community, they will gain the requisite knowledge and learn the necessary conventions in different ways. Moreover, learning law and assimilating it to the point that it can be applied to new situations occurs along a continuum, with different students advancing at different paces.<sup>92</sup>

Students bring to law school their own styles of learning.<sup>93</sup> "Learning styles" are students' unique processes of learning new and difficult material.<sup>94</sup> One recently published study tested students at St. John's University School of Law.<sup>95</sup> The study found

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90. RUSSELL, *supra* note 27, at 7.

91. See Rideout & Ramsfield, *supra* note 55, at 75-76 (explaining that the first-year legal writing and research course begins to address the students' needs for acculturation into legal discourse, but that additional instruction in later years is necessary).

92. Lustbader, *supra* note 74, at 322-23.

93. See generally Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213, 214-16 (1998) (indicating that law students, like other groups of students, bring a range of learning styles to law school); see also M.H. Sam Jacobson, *Using the Myers-Briggs Type Indicator to Assess Learning Style: Type or Stereotype?*, 33 WILLAMETTE L. REV. 261, 302 (1997) (focusing on an alternative to the Myers-Brigg Type Indicator to assess how students process information).

94. Boyle & Dunn, *supra* note 93, at 214.

95. *Id.* at 215-16.

that law students have diverse learning style preferences, and concluded that law students, like other student populations, benefit from teaching techniques that appeal to a variety of learning styles.<sup>96</sup>

Students' perceptual learning styles for absorbing and processing information may include auditory, visual, tactual, or kinesthetic preferences.<sup>97</sup> Students with a high preference for auditory learning remember much of what they hear in lectures, while students with a high preference for visual learning will remember much of what they read or see.<sup>98</sup> By contrast, tactual learners need to manipulate material in order to remember. They may learn by writing or by using charts and graphs.<sup>99</sup> Kinesthetic students learn by doing.<sup>100</sup> Role-playing and solving "real" client problems are effective techniques for teaching these students.<sup>101</sup>

The St. John's test population showed a surprisingly low percentage of law students—eight percent—who were high visual learners.<sup>102</sup> Thus, assigning case excerpts to be read at home may be ineffective pedagogy. Twenty-six percent of the students tested as high auditory learners.<sup>103</sup> Professors who only present material through lecture, however, may only be reaching the quarter of the students who are high auditory learners.<sup>104</sup> Rather large percentages of the students tested high in tactual strengths (21%) and kinesthetic strengths (16%).<sup>105</sup> Since large numbers of students learn through writing or role-playing, courses like the practicum can be very helpful in teaching students who do not learn well through the traditional law school method of lecture supplemented by reading excerpts from a casebook.

Although most students have learning style strengths on which they rely primarily, students should develop varied learning styles for perceiving their environment and constructing knowledge from it. Those who learn easily through lectures are likely to appreciate the varieties of Socratic method used in many law school classes. But these students may struggle in writing an

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96. *Id.* at 247.

97. *See id.* at 224 (listing the physiological factors used to test first-year law students at St. John's University). While many other factors were also tested, these factors are most tied to the instructor's teaching style.

98. *See id.* at 228-29 (reporting the Productivity Environmental Preference Survey (PEPS) used at St. John's). Students who scored "high" in these areas remember as much as seventy-five percent of what they learn using their preferred method. *Id.* They may have some facility with other learning styles, as well; the preferences are not exclusive. *See id.* at 228.

99. Boyle & Dunn, *supra* note 93, at 229.

100. *Id.* at 231.

101. *Id.*

102. *Id.* at 228.

103. *Id.* at 227.

104. Boyle & Dunn, *supra* note 93, at 227.

105. *Id.* at 228.

independent scholarly paper or developing a case file, where they must learn through reading, manipulating material, and solving new problems. To reach all students, and to help students develop varied learning styles, law professors should expose students to a variety of learning environments, including writing, role-playing, and hands-on activities.<sup>106</sup>

Accommodating varied learning styles requires incorporating new teaching styles into a course. The practicum addresses this by providing an opportunity to offer a small group of students varied types of exercises that may suit those students' learning styles.<sup>107</sup> Thus, the practicum cannot be dismissed as merely providing "easy" or "non-intellectual" activities.<sup>108</sup> This criticism focuses on the attention some classes in a practicum might pay to filling out forms or learning the subtleties of oral argument. But filling out forms and engaging in oral argument can be helpful in providing kinesthetic learners with unique learning opportunities. Focusing only on the class activity misses the analysis that is being conveyed in these less traditional forms of teaching.

The approach of the practicum—teaching from real life legal experiences—is seemingly simple. But education that is simple in principle is not necessarily easy. Discovering and implementing a simple philosophy of education can be extremely difficult.<sup>109</sup> The easy approach to teaching law is actually that favored by many professors: prepare lecture notes that can be recycled each semester for many years; engage in class dialogue with few students, if any; hold occasional office hours; and grade one exam

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106. See DEWEY, *supra* note 40, at 47-49 (noting that when learning takes place on an appropriate continuum, students will be able to grasp knowledge more fully, retain it, and transfer it to new situations in the future).

107. See Boyle & Dunn, *supra* note 93, at 216 (noting that if students cannot be tested, professors should use a wider variety of teaching techniques to reach students with diverse learning styles).

108. See DEWEY, *supra* note 40, at 20. Dewey would agree that classroom experiences that are merely enjoyable, or that teach only automatic skills or habits, have little educational value. *Id.* at 13-14. But experiences that connect to students' lives and goals are critical to education. *Id.* at 31; see also Rideout & Ramsfield, *supra* note 55, at 47-48 (refuting the "traditional" view that legal writing is not intellectual).

In a conversation with one of the Authors, for example, a trial lawyer, when told of the faculty's disdain for the mock trial team as being insufficiently intellectual, responded, "When did any of them last try a case?" She went on to list the doctrinal and theoretical learning the mock trial students were receiving in evidence and civil procedure, as well as the ability to think quickly in stressful situations. The mock trial students were motivated to learn the doctrine and theory because that learning related to the students' experiences in the courtroom.

109. See DEWEY, *supra* note 40, at 20. Dewey warns that experiential learning is not achieved through improvisation on the part of the teacher. *Id.* at 115.



at the end of the semester.<sup>110</sup> By eliminating interaction and feedback, the professor can assume students in a lecture course are learning during the semester, then blame poor writing for weak exams.<sup>111</sup> Even in smaller seminar classes that could incorporate alternative pedagogy to reach students with kinesthetic learning preferences, doctrinal faculty are not rewarded for veering far from the lecture format.<sup>112</sup> Smaller classes may be desirable on a number of levels, but they do not guarantee that students who are not auditory learners will be able to use their own learning style preferences.

### III. TWO PRACTICUM MODELS: LITIGATION AND TRANSACTIONAL

The practicum model at Florida State was designed in response to faculty interest both in increasing the writing opportunities available to law students and in using practical training to enhance students' understanding of substantive legal concepts.<sup>113</sup>

This Part describes in some detail two practica that implement the theories discussed in Parts I and II. As demonstrated below, in each practicum assignment students must draw on the doctrinal, theoretical, and policy arguments learned in the traditional course connected to the practicum. Further, the past experiences of students in the first-year legal writing and research program and their expected future experiences in practice form the basis for many of the practicum exercises.<sup>114</sup> The practicum setting thus allows students to learn through a variety of exercises that should appeal to a wide range of learning styles. The writing assignments implement WAC theory.

The practica described below<sup>115</sup> have each been offered

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110. See Levine, *supra* note 70, at 1071-73 (demonstrating that this simple method of instruction is not available to legal writing faculty, who must keep current with developments in the law and maintain intense contact with students through reviewing students' papers and holding individual conferences).

111. See MAIMON ET AL., *supra* note 38, at xvi (explaining that students are not always thinking when it seems that they are paying attention to a professor's lecture).

112. Kissam, *supra* note 54, at 149 (pointing out conflict between publication requirements and the time-consuming aspect of teaching writing); Rideout & Ramsfield, *supra* note 55, at 68 (arguing that a legal writing classroom should resemble a laboratory, not a lecture hall).

113. Memorandum from Ann McGinley to Curriculum Committee, the Florida State University College of Law, Jarret Oeltjen, Chair (Sept. 15, 1995) (on file with *The John Marshall Law Review*).

114. See DEWEY, *supra* note 40, at 31. Dewey's philosophy begins with the student's desire to learn. By providing continuity in learning experiences and interaction with the material, schools can use the student's own desire as a motivation and an instrument for learning. *Id.*

115. Over the past four years, the Florida State University College of Law

multiple times over the past four years. The first practicum described is offered in connection with Employment Discrimination and is litigation-oriented. This course was co-taught for two semesters, but more recently Barbara Busharis has been the sole teacher of this course.<sup>116</sup> The second is offered in connection with Federal Taxation and is transaction-oriented. Suzanne Rowe teaches this Tax Practicum.<sup>117</sup>

The syllabus for each practicum has varied slightly from semester to semester. To explain the full range of possibilities for a practicum, the following discussions cover most of the assignments that have been included in the practica. Thus, we describe below more material than could reasonably be covered in a one-credit, pass/fail course. If a practicum were offered for two or three credits and graded, all of these assignments might be included. Otherwise, one would need to select portions of this material or combine several segments to reflect the professor's preferences and to account for the previous doctrinal and writing experiences of the students in the practicum.

#### A. *Employment Discrimination Practicum*

The Employment Discrimination Practicum combines class discussion with a series of exercises designed to raise typical pre-trial legal and ethical issues in the context of a hostile environment case. As a one-credit course with a focus on employment law, the practicum cannot, and should not, attempt to duplicate a pre-trial practice course. This litigation approach, however, offers many possibilities for combining discrete assignments that enhance the students' understanding of employment discrimination law, policy, and theory. Assignments can be varied from one semester to the next. In one year, for example, time spent discussing discovery tactics and common discovery violations required skipping a negotiation exercise.

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curriculum has included practica in Employment Discrimination, Federal Taxation, Family Law, Business Associations, and Real Estate Transactions.

116. Professor Ann C. McGinley taught the doctrinal Employment Discrimination course connected to this practicum. She also co-taught the first two offerings of the practicum in the Spring of 1996 and the Spring of 1997. As Director of Skills Training at Florida State University from 1995 to 1999, she proposed the practicum concept to the faculty.

117. Professor Mary LaFrance taught the doctrinal tax course in the Spring and Fall of 1997 and contributed significantly to the development of the practicum. She co-taught the practicum class on secondary sources in tax research. One of her articles formed the basis for the major writing assignment. See *infra* note 162 and accompanying text. Professor Jarret Oeltjen taught the doctrinal course in the Spring of 1998, and participated in a number of the practicum classes. For the next two semesters, new professors taught the doctrinal course, and the practicum was loosely coordinated with their syllabi.

Segments that have remained constant are drafting pleadings, conducting a deposition, and drafting and arguing a motion for summary judgment.

The fact pattern has varied during the four offerings of the practicum. In part, these changes have reflected the progress of a significant Title VII hostile environment case that arose in southern Florida and was resolved by the U.S. Supreme Court at the end of its 1998 term.<sup>118</sup> Some elements have remained constant, however. The fictitious plaintiff is a woman in her twenties who was terminated after reporting a pattern of offensive conduct by a co-worker. The defense witness is the plaintiff's supervisor, who had a social as well as professional relationship with the plaintiff. The fact pattern allows students to work with factual issues such as whether the conduct alleged was unwelcome to the plaintiff,<sup>119</sup> and whether the company took prompt remedial action once it had knowledge of the offending conduct.<sup>120</sup>

Practicum students initially receive a packet of Eleventh

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118. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-89 (1998). The plaintiff in *Faragher* was a former lifeguard who sued the City of Boca Raton and her immediate supervisors for gender discrimination under Title VII, alleging the supervisors had created a hostile work environment through uninvited touching and lewd remarks. *Id.* at 781-83. After a federal district court held the city liable, the Eleventh Circuit reversed (during the first offering of the practicum), holding that the supervisors had not been acting within the scope of their employment. 111 F.3d 1530, 1537 (11th Cir. 1996). The Supreme Court's decision settles the issue that an employer can be vicariously liable for a hostile environment, even when the employee has not suffered discharge, reassignment, or some other employment consequence. *Faragher*, 524 U.S. at 802-03. It also creates an affirmative defense for the employer, who can avoid liability by showing that the employer took reasonable steps to prevent or address discrimination in the workplace and that the employee "unreasonably" failed to take steps to minimize her injury. *Id.* at 805.

119. "Unwelcome" in this context means that the employee subjectively perceived the conduct as unwanted, and that the employee's conduct somehow manifested this perception. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986); see also *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (describing "unwelcome" conduct as conduct the employee did not solicit or incite, and regarded as "undesirable and offensive"). A finding of unwelcomeness must be coupled with a finding that the conduct was objectively offensive to impose liability. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Courts have granted summary judgment for defendants in hostile environment cases where the plaintiffs' actions included using crude language or engaging in office humor, reasoning that one who participates in lewd or vulgar behavior does not subjectively perceive it as unwelcome. *E.g.*, *Balletti v. Sun-Sentinel Co.*, 909 F. Supp. 1539, 1547-48 (S.D. Fla. 1995).

120. Even before *Faragher*, corporate defendants in hostile environment cases could use "prompt remedial action" as a defense: a company was only liable for a supervisor's creation of a hostile environment if the company had knowledge of the environment and failed to take remedial action against the supervisor. See *Splunge v. Shoney's, Inc.*, 97 F.2d 488, 490 (11th Cir. 1996) (imposing liability on a corporate defendant with constructive knowledge).

Circuit and Florida appellate cases to supplement their textbook reading on hostile environment claims. Because the doctrinal class focuses on theory, textbook cases are drawn from many jurisdictions. The practicum material, in contrast, is limited geographically to provide a more realistic experience. Most law students at Florida State will practice law in Florida, or at least in a state within the Eleventh Circuit. Moreover, while the practicum focuses on issues arising under federal law, working with Eleventh Circuit and Florida cases helps students see the relationship between federal and state claims arising from the same facts. The case packet is supplemented throughout the semester with handouts, cites to materials available on line, and reading from texts on reserve. The reading varies from year to year, depending in part on the assignments chosen.<sup>121</sup>

An early class meeting of the practicum focuses on the elements of, and potential defenses to, a sexual harassment claim. In addition to reading the case packet, the students conduct research into state law causes of action that often accompany sexual harassment claims and prepare class handouts summarizing their findings. A discussion of their research and the applicable federal cases precedes the first client interview. As the practicum progresses, the students learn to use specialized tools and research sources that an employment lawyer would use in practice, but which the students have typically not used in their previous law school courses.

More recently, some of the exercises have been based on a second fact pattern involving a hostile environment claim brought under the Americans with Disabilities Act (ADA).<sup>122</sup> In this fact

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121. We have assigned portions of various pretrial practice texts, including ROGER S. HAYDOCK ET AL., *LAWYERING PRACTICE AND PLANNING* (1996); THOMAS A. MAUET, *PRETRIAL* (3d ed. 1995); ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION* (3d ed. 1994); MARILYN J. BERGER ET AL., *PRETRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY* (1988). While all these texts contain good materials on different aspects of pretrial litigation, and are especially helpful for giving the students an overview of case planning and case management, no one text has proven ideal for the practicum. In addition to these texts, we refer the students to recent articles addressing practice issues from Florida bar publications and other periodicals. *E.g.*, Robert E. Taylor, Jr., *Depositions, Errata Sheets, Reopening, and Termination*, 70 FLA. B.J. 46, 46-48 (1996). For purposes of the practicum, the source of the "practical" reading does not seem to matter as much as simply having something to which the students can refer for security when attempting for the first time assignments such as depositions.

122. Several factors went into the choice of an ADA problem. We wanted to experiment with transferring the theory the students were learning in the doctrinal class to an area that class did not have time to cover. A disability rights course to be taught by Professor McGinley was in the development stage, but not scheduled to be added to the curriculum until the Spring of 1999. Also, in the Spring of 1998 the College of Law co-sponsored a disability rights conference with the Advocacy Center for Persons with Disabilities.

pattern the plaintiff is an employee with a chronic condition who claims he was made the target of office humor by a supervisor. Recovering damages under the ADA on a theory of hostile work environment has been discussed in several jurisdictions;<sup>123</sup> to date, most reported cases have resulted in summary judgment for the employer. The Title VII hostile environment claim served as the basis for initial discussion of hostile environment theory, as well as pleadings and discovery exercises. The students then worked with the ADA claim for the remainder of the semester.

### 1. Initial Interview

An initial interview takes place after students read and discuss several major sexual harassment cases and materials describing interviewing skills. We have experimented with dividing the students into plaintiff and defendant groups at different times in the semester. The initial interview and pleading exercises work well with all students "representing" the potential plaintiff, as long as the witness is instructed to avoid revealing certain information that will later be crucial to a motion for summary judgment. In practice, this limitation has not been a problem. If all students are starting out as plaintiff's attorneys, they simply interview the prospective plaintiff.<sup>124</sup> If the students are divided into plaintiff and defendant groups, they interview their client/witness: either the plaintiff or an employer's representative.

The practicum requires the involvement of several witnesses to play the roles of a plaintiff and representatives of the employer. The witnesses are students not simultaneously enrolled in either the practicum or the doctrinal course. Witnesses are provided with a detailed factual history and are allowed to add information that does not conflict with the legally significant facts. For example, witnesses are free to add facts about their personal

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Finally, with the *Faragher* case scheduled for oral argument before the Supreme Court in March 1998, it did not seem prudent to base a summary judgment exercise too closely on the facts and issues that had worked so well in the first two practicum offerings.

123. See, e.g., *Rodriguez v. Loctite Puerto Rico, Inc.*, 967 F. Supp. 653, 659-65 (D.P.R. 1997) (requiring medical exams for employee with lupus is not violative of the ADA); *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1111-12 (S.D. Ga. 1995) (denying employer's motion for summary judgment against employee who alleged harassment based on disability).

124. Having all the students begin as plaintiffs' attorneys is helpful in the complaint drafting exercise, discussed below. As drafting the complaint often involves more creativity than merely answering it, and hostile environment cases do not typically involve counterclaims, having all of the students draft a complaint also gives all of the practicum students a comparable experience with pleadings. Of course, a problem based on different facts could raise issues that would require more creative defense pleading as well, which would also achieve the goal of balancing the workload.

background and education.<sup>125</sup>

Students videotape their witness interviews, which are limited to thirty minutes. Selected excerpts from the videotapes provide the basis for fruitful class discussions and compensate for any variation in coverage between interviewers. Videotapes allow the class to compare the range of responses that witness gave and spotlight some of the ethical issues that arise when interviewing and working with employees of corporate defendants. A memorable experience for several students occurred one year when one witness playing the role of a defendant's employee asked questions regarding the existence of an attorney-client privilege between that individual and the students who were representing the corporate defendant. The students had prepared to answer questions about the requirements for bringing suit under Title VII, but were not prepared to answer questions about attorney-client privilege. Several were unsure of how to resolve the tension between their client's desire for information and the employee's desire to keep his communications with the attorney confidential.<sup>126</sup>

To minimize the time and scheduling difficulties involved, the interview can also be conducted as a group exercise. A group interview offers the advantage of allowing each student to benefit from hearing questions asked in a different way. The individual approach is preferable, however, because in a larger group a handful of students tends to ask most of the questions. A group interview also accentuates a hesitancy on the part of some students to go beyond merely asking "who, what, when and how" questions: students are initially more comfortable with their role as information-gatherers than as potential counselors or advisors.

Regardless of the format chosen for the interview, the student interviewers benefit from post-interview feedback from their client or witness. Witnesses are encouraged to note their personal reactions to certain questions, the interviewer's body language, and other aspects of the interview, and to share those with either the interviewers or the faculty member teaching the practicum.

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125. The second and third times the practicum was offered, the witnesses were former practicum students. Their familiarity with the facts necessary to prove the plaintiff's claim proved to be both an advantage and a disadvantage. More knowledgeable witnesses sometimes require guidance or limitations that would not be necessary for a less knowledgeable witness. Knowing more about the law, in short, made the witnesses more comfortable adding to the facts, though sometimes with unexpected results. In general the advantages outweighed the disadvantages, but not so strongly that having experienced witnesses will be a priority in the future.

126. This experience also highlighted one of the secondary but important benefits of the practicum: it reinforces not only the substantive course to which it is linked, but other courses such as, in this case, professional responsibility and civil procedure.

Finally, comparing the information gathered in the interviews with the substantive law the students have already discussed demonstrates a concrete link between the substantive law and the practice exercises, and reinforces the discussion of the elements necessary to recover damages using hostile environment theory.

## 2. *Drafting Pleadings*

Before the students draft pleadings, a class segment reviews legal and procedural issues the students should consider. These issues include jurisdiction, venue, pre-filing requirements, and applicable statutes of limitation.<sup>127</sup> Class discussion also addresses some of the factors Florida practitioners take into account when deciding whether to bring suit in state or federal court. Students representing the plaintiff then draft a complaint based on the facts learned from their client. They are encouraged to contact the client for additional information.

The complaints must include hostile environment claims under federal and state law; specific tort claims based on state law are left to the students' discretion. Variations between students, depending in part on information elicited during the interview, are allowed. For example, the facts outlined above can support claims of assault, battery, and false imprisonment. Some students have made good arguments in support of including claims for invasion of privacy, as well. Other potential claims, such as intentional infliction of emotional distress, are generally rejected after class discussion because of their low likelihood of success under Florida law.<sup>128</sup> Students also consider other statutory claims under federal and state law.<sup>129</sup>

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127. The practicum does not simulate the administrative filing required before plaintiffs can sue under Title VII, but class discussion covers this procedure before students draft their complaints. The plaintiff comes to the initial interview with a form called a "right-to-sue letter," documenting that the plaintiff filed a claim with either the EEOC or the Florida Commission on Human Relations within the time period prescribed by statute. If enrollment permits, one or two students can be asked to research the procedure for filing a claim with the appropriate administrative body while the others are researching potential state law claims; otherwise, materials can be provided in handout form.

128. See *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573, 1575 n.7 (11th Cir. 1993) (affirming dismissal of state law claim for intentional infliction of emotional distress in racial harassment claim and citing Florida state cases dismissing similar claims in employment discrimination cases).

129. For example, some fact patterns could support a claim under the Civil Rights Remedies for Gender-Motivated Violence Act, 42 U.S.C. § 13981 (1995). Claims brought in state court under § 13981 are not removable to federal court. 28 U.S.C.A. § 1445(d) (West 1998 & Supp. 1999). Thus, in addition to raising the merits of a claim for gender-motivated violence, the claim raises procedural issues about the possibility and basis for removal, and practical issues about the choice of forum. See *Newton v. Coca-Cola Bottling Co.*, 958 F.

The class debate regarding the legal and strategic merits of various causes of action is always animated and productive. At the end, however, we reject so-called "shotgun pleading," using excerpts from cases discouraging the practice.<sup>130</sup> The goal of the discussion is for the students to internalize a view of drafting pleadings as an exercise in analysis and in learning the substantive law, rather than as an opportunity for creative use of a form book.

In the class immediately after the students turn in their complaints, they critique a sample complaint and compare it with their own. This exercise leads naturally into a discussion of various approaches to answering complaints, following a brief review of preliminary defense motions that might be available. If the students have all drafted complaints, an answer can also be drafted in class, using an LCD panel.<sup>131</sup> Alternatively, if only half of the students have drafted complaints, the complaints can be "served" on their opponents for individual answers.

The exercise has revealed that, by their second year of law school, some students have already absorbed a boilerplate approach to pleading through their part-time or summer employment. The main value of the pleadings exercise is to demonstrate that preparing effective pleadings should be much more than using boilerplate. The exercise gives students the opportunity to compare several variations on a theme, to decide what language is clearest, and to see for themselves how different advocates can develop different theories based on similar facts. The pleadings exercise also encourages discussion of ethical considerations for attorneys drafting complaints and answers. Sanctions for frivolous pleading under the federal rules<sup>132</sup> and state law<sup>133</sup> are highlighted.

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Supp. 248, 250-51 (W.D.N.C. 1997) (finding prohibition against removal contained in § 1445(d) does not preclude removal under 28 U.S.C. § 1441(a)). The constitutionality of § 13981 has been challenged, with varying results. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 844-45 (4th Cir. 1999), *petition for cert. granted sub nom United States v. Morrison* 120 S. Ct. 11 (1999); see also Marcia Coyle, *High Court to Decide Key Powers Case: Violence Against Women Act Case Raises a Divisive State-Federal Question*, NAT'L L.J., Mar. 22, 1999, at A7. The class also discusses whether state statutes other than the Florida Civil Rights Act of 1992 apply to the alleged conduct. For example, some local practitioners specializing in sexual harassment cases have brought claims based on a statute prohibiting the coercion of prostitution. FLA. STAT. § 796.09 (West 1999).

130. See, e.g., *Cramer v. State*, 117 F.3d 1258, 1263 (11th Cir. 1997) (noting the "intolerable role that shotgun pleadings place on courts").

131. A "Liquid Crystal Display" panel provides an overhead projection of a personal computer screen.

132. FED. R. CIV. P. 11.

133. 35 FLA. STAT. ANN. Rule 4-3.1 (Bar and Judiciary Rules) (West 1994); see also FLA. STAT. ch. 57.105 (1999) (imposing sanctions for unsupported



### 3. *Disclosure Requirements and Written Discovery*

Designing a discovery exercise within the constraints of a one-credit course can be challenging. One possible approach is to focus on the necessity of learning local federal rules requiring initial disclosure requirements.<sup>134</sup> After each side receives a packet of client information, the students meet in two groups, as either counsel for plaintiff or counsel for defendant, to decide collectively whether any or all of the information is subject to mandatory disclosure to the other side. Following these discussions, a second packet of client information is produced to the other side, so that all plaintiffs and all defendants have the same information.

Including a unit on drafting discovery that goes beyond the initial disclosure requirements met with mixed results during the second offering of the practicum. Although the class discussion following students' attempts to respond (or avoid responding) to their opponents' requests was lively, the students ultimately found the exercise frustrating because it resulted in discovery requests not addressed in their packet of materials.<sup>135</sup> Another way to introduce discovery issues, and add more writing experience at the same time, would be to turn the discovery exercise into a short motion to compel discovery. Thus, in the practicum offered in the spring of 1998, students drafted a short motion to compel based on an assertion of privilege for documents collected by a corporate ombudsman.<sup>136</sup>

At a minimum, devoting a class segment to discussing different discovery options provides an opportunity to raise ethical issues related to the disclosure of information and proper objections to discovery. The students have been receptive to information about the strategy involved in choosing among document requests, interrogatories, and requests for admission, even in the years when they did not draft their own written discovery documents.

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claims).

134. In Florida, for example, attorneys practicing in different federal districts need to be familiar with different local rules and obligations. In the Northern District, attorneys must make the initial disclosures required by Federal Rule of Civil Procedure 26. N.D. FLA. L.R. 26.1. The Southern District has opted out of these disclosure requirements in favor of more limited discovery obligations imposed by Southern District Local Rule 16.1. See S.D. FLA. L.R. 26.1A.

135. The level of information provided to both sides, which at first seemed appropriate for a one-credit course, proved to be insufficient for responding to some of the more aggressive discovery requests.

136. See *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794-95 (8th Cir. 1997) (rejecting creation of evidentiary privilege to protect corporate ombudsman from disclosing employee communications in civil suits).

#### 4. Depositions

In the deposition exercise students conduct a time-limited examination of their opponent's main witness. Defense counsel depose the plaintiff; plaintiff's counsel depose the plaintiff's former supervisor. Because the depositions also serve as a foundation for dispositive motions later in the practicum, the scope of the deposition is limited to facts that will support the defendant's choice of theories for the summary judgment motion. For example, if the employer's motion for summary judgment will be based on the theory that the employer took prompt remedial action, defense counsel will use the deposition to adduce facts relating to the employer's response, not whether the conduct complained of was unwelcome.<sup>137</sup> Students are also instructed to omit matters, such as preliminary instructions to the witness,<sup>138</sup> that can adequately be reviewed as a group.

The deposition is the most successful and most popular exercise of the semester. It serves as a basis for class discussion of questioning techniques, aggressive tactics, the responsibilities of the attorney who defends a deposition, and the link between analysis and information-gathering. All students videotape their depositions, then the class reviews excerpts of the tapes and discusses them. Although it is time-consuming to review all of the videos and select portions for class discussion, the results are overwhelmingly positive.

#### 5. Motion Practice

A memorandum in support of a motion for summary judgment serves as the major writing project for this practicum.<sup>139</sup> The choice of a motion for summary judgment was determined by two considerations. First, because summary judgment is typically perceived as harder to obtain in Florida state courts, the exercise provides a concrete way of illustrating a major difference between state and federal motion practice in Florida.<sup>140</sup> Second, it emphasizes the crucial link between developing legal theories and structuring discovery, in particular deposition testimony, to lay the groundwork for a dispositive motion. Students draft motions

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137. See *supra* notes 118-120 for examples of the judicial standard applied to sexual harassment cases.

138. For example, witnesses are routinely instructed to answer questions verbally, rather than by nods or gestures, and to ask for clarification of questions the witness may not understand.

139. In addition, the class discusses the wide range of motions that typically arise in employment discrimination cases, such as motions based on improper venue, motions to dismiss, motions to compel discovery, and evidentiary motions. Any of these could be added or substituted as the major writing assignment.

140. Compare FED. R. CIV. P. 56, with FLA. R. CIV. P. 1.150.

and supporting memoranda after each side has conducted the depositions discussed above. Given the time constraints, we supplement the deposition tapes with an additional "transcript" from a third witness to give the students sufficient material for their summary judgment motions.

Although plaintiffs and defendants begin drafting their memoranda more or less simultaneously, each defendant serves her motion and memorandum to her opponent two to three days before the plaintiff's response is due; the plaintiff can then tailor her response to the defendant's argument. When the practicum was co-taught, both instructors reviewed and commented on the memoranda. A class discussion covers general errors and substantive analysis, and individual conferences focus on writing and organizational problems.<sup>141</sup>

### 6. *Negotiation and Settlement*

As time permits, conducting settlement negotiations provides an additional opportunity for integrating the students' analysis of the strengths and weaknesses of their substantive claims with an exercise involving client interaction.

The negotiation takes place after students have filed their motions and responses. Both sides receive memos with instructions that their respective client wants to try to settle the case; the memos set out several competing parameters for settlement. For example, the plaintiff may want reinstatement to her previous position, while the defendant is willing to offer a monetary settlement but is absolutely opposed to reinstatement. Even with limited time, the exercise provides a valuable springboard for a final discussion of ethical issues centering around communication with one's client and responsibility for decision-making.<sup>142</sup> It also forces the students to evaluate the client's likelihood of success and communicate the strengths and weaknesses of the legal argument.

### 7. *Oral Argument*

The final practicum exercise is a series of oral arguments on the motions for summary judgment. Because the first-year legal writing and research course at Florida State invests considerable time in preparing students for oral arguments on an appellate brief, class discussion before the arguments emphasizes the differences between appellate and trial-level arguments.

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141. If the practicum is co-taught, either faculty member could hold the conferences, or the students could be divided between the two.

142. In the negotiation exercise that was included in the first offering of this practicum, a number of students were able to reach agreement with their opponents, but did not adequately consult with their clients before settling the case.

Arguments are typically limited to ten minutes per side. The judges are usually students from the doctrinal course, who are required to read a bench brief prepared by those teaching the course and to submit questions in advance. The organization of the judges' panels has varied depending on the relative enrollment in the two courses. In the first year, students from the doctrinal course sat in three or four-judge panels to hear arguments from the practicum participants. In the second year, because of increased enrollment in the doctrinal course, some of the practicum students argued their motions twice on the same day, but before separate panels. This was quite successful and gave the practicum students a chance to correct any initial mistakes. In both years the students' participation as judges was scored as a minor part of their grade in the doctrinal course,<sup>143</sup> giving the entire class the opportunity to benefit from a core group of "experts" in hostile environment claims. In recent years, the doctrinal course has had too many students for all of them to serve as judges.<sup>144</sup>

Critiquing each plaintiff-defendant pair immediately after the arguments is invaluable, even when there is no time for a final class meeting to review the outcome of the arguments. Typically, the panel has an opportunity to tell the practicum students what was most or least compelling about their arguments, and then the professors provide additional feedback directly to the practicum students. After the deposition, the oral argument is probably the most popular exercise of the semester. It also demonstrates concretely the link between thorough analysis and practical skills.

### *B. Federal Taxation Practicum*<sup>145</sup>

The Tax Practicum has a transactional orientation, in that students research and write about problems in an advisory role outside the litigation context. Students are assigned multiple clients in a variety of situations that model experiences they may encounter at a law firm. The classes at the beginning of the semester enhance the students' understanding of the sources of tax law, expose the students to tax research materials, and review effective writing style. In the later classes, building on the

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143. This grade was based primarily on the quality of questions posed by the student judges.

144. Instead of sitting on panels, students in the larger class were asked to turn in questions for the argument. Although this arrangement was less than optimal, the students in the larger class still benefited from their preparation for and observation of the arguments.

145. This practicum has been offered five times; four different professors have taught the concurrent doctrinal course, using three different casebooks. These professors have been involved to varying degrees. The key is that the practicum model discussed below proved sufficiently flexible to accommodate various professors, textbooks, and syllabi.

students' foundation in tax concepts from the doctrinal course, the focus shifts to independent research and more complex analysis and writing.

### 1. *Introduction to Resources*

Tax work requires an understanding of sources of law that few students have previously encountered and proficiency with new research tools. For example, students must become familiar with Treasury regulations and with rulings published by the Internal Revenue Service (the Service); they also need to know where to find these authorities. Because of the importance of looseleaf services in tax research, students must know how to use resources like the CCH Standard Federal Tax Reporter.<sup>146</sup>

During the first class, the students discuss the various sources of tax law and note the relative authority of law proceeding from Congress, various courts, and administrative departments. For the second meeting, the class reviews the Standard Federal Tax Reporter, Cumulative Bulletin,<sup>147</sup> Tax Court Reports,<sup>148</sup> and United States Tax Cases,<sup>149</sup> and we work through a simple research exercise together.<sup>150</sup> Ideally, the research exercise is drawn from assigned reading and problems in the doctrinal class, reinforcing tax concepts the students are learning there.<sup>151</sup> Because students are already familiar with the tax concepts in the research exercise, they understand the research strategy better

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146. CHRISTINA L. KUNZ ET AL., *THE PROCESS OF LEGAL RESEARCH* 303-19 (4th ed. 1996); see SUZANNE E. ROWE ET AL., *FLORIDA LEGAL RESEARCH: SOURCES, PROCESS, AND ANALYSIS* 173-79 (1998) (providing an overview of looseleaf services).

147. The Cumulative Bulletin compiles substantive and procedural rulings of the Internal Revenue Service. GAIL LEVIN RICHMOND, *FEDERAL TAX RESEARCH: GUIDE TO MATERIALS AND TECHNIQUES* 191-92 (5th ed. 1997).

148. The Tax Court is a trial level court that hears only tax cases. RICHMOND, *supra* note 147, at 120-21.

149. USTC publishes tax cases from federal courts, including the United States Supreme Court, and federal circuit, district and bankruptcy courts. RICHMOND, *supra* note 147, at 125-27.

150. If multiple copies of each of these books are not available, copies of key pages should be distributed in class.

151. A simple fact pattern involving income from the discharge of indebtedness has been successful; a problem from the casebook the students are using in the doctrinal class is optimal. See, e.g., SANFORD M. GUERIN & PHILIP F. POSTLEWAITE, *PROBLEMS AND MATERIALS IN FEDERAL INCOME TAXATION* 67 (4th ed. 1994). Even if the doctrinal class does not specifically cover discharge of indebtedness, most will begin with detailed coverage of income. A short discussion in the practicum of key concepts regarding discharge of indebtedness income will enable students to follow the research exercise. See I.R.C. § 61(a)(12) (1999) (defining gross income to include income from discharge of indebtedness); I.R.C. § 108 (1999) (discussing income from discharge of indebtedness). Assignments in following weeks draw from this research and analysis.

than if the exercise were in a new area of tax law.

## 2. *Review of Effective Legal Analysis and Writing*

As an initial writing project, students read a poorly drafted "memorandum to file" addressing the issue from the class research exercise. The memorandum contains numerous writing problems and conclusory analysis, but omits key cases the class found in its research exercise. Before critiquing the technical writing, the class discusses the overall failure of the analysis in the memorandum. This discussion highlights the link between careful research, rigorous analysis, and good writing.<sup>152</sup>

Each student edits the memorandum for analysis, writing style, and citation. The memorandum then serves as the basis of a class discussion on effective legal writing. This exercise provides a review of concepts learned in first-year legal writing classes, within the context of a tax problem. After class the students revise and complete the draft, incorporating analysis from sources they found in the research exercise.<sup>153</sup>

Unlike the situation in most law school classes where the specific grades students receive on their papers are part of their final grade, students in the pass/fail practicum are encouraged to review and critique each other's written work before submission. Each student is responsible for deciding whether the comments of a classmate are helpful and how to incorporate them into the finished product.<sup>154</sup> Students seem to appreciate this policy and feel comfortable discussing their work with classmates.<sup>155</sup>

One way to ensure peer feedback is to have students bring copies of draft documents to class, exchange drafts, and spend part of the class period critiquing each other's papers. Students need instructions for critiquing classmates' work. At a minimum, students should be reminded to (1) edit for analysis, organization, and clarity of writing, not just superficial problems like typographical errors; (2) give line by line comments as well as a summary paragraph noting the strengths and weaknesses of the paper; (3) always comment on something positive about the paper; and (4) never use sarcasm.<sup>156</sup>

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152. See Edwards, *supra* note 8, at 64 ("The more serious problem in legal writing . . . is . . . a lack of depth and precision in legal analysis.")

153. Students could also be required to review a writing text for specific writing problems that surfaced during the discussion. See, e.g., TERRI LECLERCQ, *GUIDE TO LEGAL WRITING STYLE* (2d ed. 2000); RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (4th ed. 1998).

154. These ideas were presented by Stacia Williams at the 1994 conference of the Legal Writing Institute at Chicago-Kent College of Law.

155. In practice, however, students tend not to complete projects in time to receive peer comments on written work.

156. See Jo Anne Durako, *Peer Editing: It's Worth the Effort*, 7 *PERSP.* 73 (1999) (providing additional discussion of peer review).

All students benefit from this exercise because they learn to appreciate the perspective of the audience for whom they were writing.<sup>157</sup> Often students can identify weaknesses in another student's analysis and writing that they could not see in their own. Upon reviewing these critiques, I generally find the stronger students make insightful comments on their classmates' papers. Frequently, these comments are expressed in unusual terms, but terms that are helpful to the student writer. The weaker students also tend to gain valuable insights into writing and analysis by carefully reading a classmate's document. In reviewing a strong draft, these students may understand the analysis for the first time and see how to express that analysis for a reader.

### 3. *Partner Memorandum*

The first major assignment involves role-playing, group research, basic legal analysis, and writing. About one month into the semester, the students come to my office in groups of two or three. I describe our client's fact pattern as though I am a partner assigning a matter to junior associates. The students take notes and have an opportunity to ask questions.

Switching back into the role of teacher, I ask the students to sift through the information they have heard and identify the key facts and legal issues. After brain-storming for possible solutions to the client's problem, the students go to the library together to begin their research.<sup>158</sup>

Because the students have so little exposure to the resources and know relatively little tax law this early in the semester, I am available during their research to answer questions both about the resources and about new tax concepts.<sup>159</sup> For example, I may offer guidance about research tactics or steer them away from a time-consuming dead end. After one hour of group research, I ensure that the students have found the critical authority and have leads to follow for additional authority.

Each group reports its findings at a "tax department meeting" the following week. At the meeting, each group describes its

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157. See, e.g., LINDA HOLDEMAN EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 155-60, 253-55 (2d ed. 1999) (discussing the importance of an author's communication to the reader).

158. This activity specifically requires cooperative learning. See KENNETH A. BRUFFEE, *COLLABORATIVE LEARNING: HIGHER EDUCATION, INTERDEPENDENCE, AND THE AUTHORITY OF KNOWLEDGE* 246-57 (2d ed. 1999); DAVID W. JOHNSON ET AL., *THE NEW CIRCLES OF LEARNING: COOPERATION IN THE CLASSROOM AND SCHOOL* (1994).

159. To ensure my availability and ease the strain on key library resources, I schedule these interviews thirty minutes apart. I also give each group a different research assignment. Because students share their research and analysis at a later class meeting, this approach is effective in exposing the students to a variety of tax concepts and research sources.

client's problem and shares its research results, analysis, and conclusions. The class members who were not part of that group ask questions about the group's research process and analysis. The class decides collectively what advice to give to the client or what issues should be pursued.<sup>160</sup>

The exercise provides learning opportunities in both research and analysis. Regarding research, the exercise requires students to review research strategies they developed during the first year of law school or in summer jobs, incorporate new tax research sources, and discuss their research with others. As to analysis, the exercise encourages discussion of tax issues and promotes collaborative problem solving.<sup>161</sup> The department meeting portion of the exercise requires students to answer questions in an environment similar to what they will likely experience in practice.

The written assignment I use with this exercise is a short memorandum to the partner, with each student writing about his group's research problem. Because all the students are familiar with the office memorandum format from their first-year writing courses, they are able to focus on analysis, organization, and writing style. I mark these drafts extensively and require most students to rewrite the memorandum, incorporating my comments. I am available to discuss the drafts with students in individual conferences. The rewritten memoranda show impressive progress in the depth of analysis and the quality of writing.

#### 4. *Client Interview and Opinion Letter*

The second major assignment incorporates role-playing, individual research, complex analysis, and writing in a new setting. The problem I used for several years concerns the possible tax advantages of a professional athlete forming a personal service corporation (PSC) to contract with her team on her behalf.<sup>162</sup> The

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160. A short role-playing exercise can encourage a quiet class to participate. Pretend to pick up a phone and call one of the other students, saying "The attorneys working for Ms. Washington are out of the office, and she insists on talking to someone about her tax problem. Can you see her immediately?" This has never failed to spark discussion as later groups present their client matters and analysis.

161. See BRUFFEE, *supra* note 158, at 246-57; JOHNSON ET AL., *supra* note 158, at 25-35; see also Corcos et al., *supra* note 16, at 231 ("Law students need much more practice in the analysis of research questions to make the most effective use of research time.").

162. Among other benefits, corporations can take greater deductions for business and medical expenses than individuals can. Mary LaFrance, *The Separate Tax Status of Loan-Out Corporations*, 48 VAND. L. REV. 879, 886-92 (1995). The class briefly reviews the nontax benefits of incorporation, such as limited liability. *Id.* at 884.



problem is most effective when assigned soon after the students have learned about assignment of income in the doctrinal class.<sup>163</sup>

The assignment begins with a client interview. The students do background reading on client interviews;<sup>164</sup> in class we discuss experiences that some of the students have already had in dealing with clients through part-time or summer work.<sup>165</sup> Depending on the size of the practicum, students may choose partners with whom they prepare questions and discuss interview techniques. In smaller classes, students interview the client individually rather than in pairs. Some students hold their interviews in small conference rooms in the law school; others I allow to use my office.

A colleague on the faculty or a student plays the role of the client. Although the client has a detailed fact sheet for important tax information, she has wide latitude in personal facts and in her demeanor with each set of interviewers. With one set she may be talkative and focused on the issues. With another, she may be reserved and uncertain. The benefit of having someone not in the class and unfamiliar with tax law act as the client is that the interviewer students cannot count on a sympathetic classmate to divulge important facts. On the other hand, an advantage to having a student in the practicum play the client role is that the rest of the class benefits from that student's perspective during class discussion of interview techniques.

After the students have all interviewed the client, the class meets to discuss interviewing techniques and the information they learned. The students are often surprised at the different level of information each pair received. Usually the students who more clearly understand the analysis of the client's issues are able to obtain better information from the client, regardless of the client's demeanor. Those interviewers who have been more successful at

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163. Two of the casebooks used in the doctrinal class associated with the tax practicum include helpful excerpts from *Johnson v. Commissioner*, 78 T.C. 882 (1982). See GUERIN & POSTLEWAITE, *supra* note 151, at 255-58; JAMES T. FREELAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION 318-21 (9th ed. 1996) (reprinting the *Johnson* case in full). Even if PSCs are not covered specifically in the doctrinal tax class, the students have learned tax concepts that enable them to analyze the issue effectively.

One advantage of this problem is that it can be analyzed under several sections of the Internal Revenue Code. See LaFrance, *supra* note 162, at 905-28. The class initially focuses on the assignment of income analysis; later individual students may pursue other lines of analysis as they are able.

164. See, e.g., STEFAN H. KRIEGER ET AL., ESSENTIAL LAWYERING SKILLS 63-88 (1999); MARK K. SCHOENFIELD & BARBARA SCHOENFIELD, INTERVIEWING AND COUNSELING 47-77 (1981).

To ensure a productive client interview, the students should also read an article or case on point if they have not discussed PSCs in the doctrinal tax class.

165. These experiences form the basis of interesting discussions of ethics and professionalism. See *infra* Part III.B.8.

obtaining information share their interview tactics and additional facts with the group. I distribute the client's fact sheet to the class to level the playing field. Then we analyze the problem and outline the legal issues that need to be resolved before offering advice. Because the students have discussed assignment of income in their doctrinal tax course shortly before the client interview in the practicum, they are more likely to spot the key issues during the interview and begin their analysis with confidence.

The students research the matter independently<sup>166</sup> and review techniques for writing effective opinion letters.<sup>167</sup> Then they write a letter to the client advising her how to take advantage of the tax benefits of forming a PSC and notifying her of possible grounds for challenge by the Service.<sup>168</sup> Again I mark these drafts heavily and require most students to rewrite the letter, focusing on a few key comments.

##### 5. Negotiation and Oral Advocacy

To include oral advocacy, the next step in the client representation exercise assumes that the athlete formed a PSC, regardless of the students' advice, and the Service disputed deductions taken in that position. Some students play the role of the Service attorneys, and some act as counsel for the athlete. Following a class discussion of negotiation goals, tactics, and preparation, the two sides meet to try to resolve the dispute.

Oral presentations are extremely effective at teaching analysis of tax problems. Students do not want to appear to lag

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166. In a class preceding this assignment, I bring to the classroom research materials students need to be familiar with in order to do their independent research. I pass these books out randomly and have students explain to the class what is contained in the book, when and how to use it, and how authoritative it is. This is an excellent, quick review and shows how well the students are learning the research material. Although students tend to fumble in their early explanations, the review receives favorable marks on course evaluations as a technique for mastering research sources.

The students have generally had computer training before this assignment is given, which decreases the strain on library resources. See *infra* Part III.B.7. for a discussion of the importance of computer training for tax research.

167. See, e.g., MARY BARNARD RAY & BARBARA J. COX, *BEYOND THE BASICS: A TEXT FOR ADVANCED LEGAL WRITING* 357-68 (1991); Raymond L. Ocampo, Jr., *Writing It Right: The Opinion Letter*, 3 CAL. LAW., Jan. 1983, at 28-29, 57 (providing an outline and example language of an opinion letter).

168. While the Eighth Circuit upheld hockey players' use of PSCs in *Sargent v. Commissioner*, 929 F.2d 1252, 1261 (8th Cir. 1991), *rev'g* 93 T.C. 572 (1989), the Service continues to challenge PSCs in other circuits. See *Leavell v. Commissioner*, 104 T.C. 140, 155-59 (1995) (refusing to recognize the PSC of basketball player and following the Tax Court ruling in *Sargent*). Because the *Leavell* case was appealable from the Tax Court to the Fifth Circuit, the *Sargent* case from the Eighth Circuit was not controlling.

behind their peers in understanding or preparation. Although I first scheduled the negotiation for a few minutes at the end of a class, I now devote an entire class period to it. Students meet together in teams before class to refine their strategy. I often receive phone calls or e-mail messages asking if the students can write supporting documents, such as the contracts between the athlete and the PSC and between the PSC and the team. One negotiation became so intense that I called a short recess for the sides to reconsider their stances.

In some semesters students have written "protests" to the Service instead of opinion letters to the client. If the tax practicum were offered in a litigation context, this problem could extend naturally into representation in either the Tax Court or a United States District Court.

#### 6. *Discussion of Secondary Sources*

One of the most productive classes is an introduction to secondary sources in tax research. For this class, I gather books from the library so that the students can see and ask questions about each resource. This approach works much better than a mass tour through library in which only a few students can see the books or hear the descriptions.<sup>169</sup> In some semesters, the professor teaching the doctrinal course has joined me in presenting the material in a tag-team manner. Offering our different perspectives on each resource is both more helpful and more interesting than a monologue.

To provide students with experience using secondary sources, including legislative history, I assign particular aspects of a recent tax law to each student. The Taxpayer Relief Act of 1997<sup>170</sup> addressed a number of issues that are appropriate for this assignment; for example, the treatment of proceeds from the sale of a principal residence was fundamentally changed.<sup>171</sup> Each student researches the law and prepares an oral presentation for the class covering the prior law, the reasons for the change, and the implications of the new law. This class offers many opportunities for discussion of tax policy. In discussing taxation of proceeds from the sale of a principal residence, for example, the class considers why the government encourages home ownership and which taxpayers are likely to benefit most from a provision that excludes up to \$500,000 of *profit* on the sale of a home. The exercise also allows me to compare and contrast the resources so the students understand which resources or approaches are better

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169. To familiarize the students with the library, I ask them to reshelve the books after class. To protect library sources, this class should be held in a room in the library, if possible.

170. Pub. L. No. 105-34, 111 Stat. 788 (1997).

171. I.R.C. § 121 (1999).

sued to varying research problems.<sup>172</sup>

### 7. *Computer Training*

Computer training plays an important role in tax research and is a key component of the tax practicum. The most effective computer class quickly summarizes basic material and techniques for beginning researchers, then focuses on specific research problems. Thus, computer research training should be done in conjunction with a writing assignment. Tying the training to a writing assignment requires students to evaluate the results of each search to determine whether the search was successful. This approach increases students' interest in the training because they know they will need to use the results of their searches in their written work. The students thus learn more substantive law than when "canned" searches are used in areas of law unrelated to class assignments.

I prefer to have a reference librarian lead the training, primarily because Florida State University is fortunate to have a reference librarian with background in tax law. Though representatives of Westlaw and Lexis have been willing to assist, the professor teaching the practicum should ensure that these representatives have tax law experience or should plan to team-teach the computer training session. Because effective research requires an understanding of the substantive law, a representative who only knows databases and search techniques, but not tax law, would be an undesirable instructor unless accompanied by the practicum professor. Another potential danger in using these representatives is that their presentations may become sales pitches.<sup>173</sup> Regardless of who leads the training, the practicum professor should work with that person and provide examples or sample searches that complement the related writing assignments.

In some semesters, the students have conducted basic tax research using Lexis, Westlaw, and Internet sources before the computer training session. This preparation raised the level of instruction offered and increased student involvement because

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172. To include another written assignment, the students can be asked to prepare a research log recording their research methodology. Non-legal documents like research logs are helpful for identifying writing problems that are distinct from trouble the student may be having with analysis of tax matters. Alternatively, the students could write a letter summarizing the analysis behind recommendations to a client who may be affected by the change in the law.

173. For the practicum offered in the fall of 1998, I added an introductory training session led by a Lexis representative. This session was effective in helping students become familiar with basic search techniques, the new Lexis interface, and tax databases. This session was followed by the substantive training session described above.

they came to the session with questions from their assignment. Alternatively, the students could be required after the training session to complete a short research worksheet that would reinforce the concepts covered in training and allow them to do additional computer research at home.

### 8. *Ethics*

Ethics and professionalism are discussed throughout the practicum.<sup>174</sup> Because students are actively advising clients, the professional quandaries of each situation seem more real than if presented in sketches taken from a textbook.<sup>175</sup> For example, in the PSC fact pattern, the students are faced with an athlete in the middle of contract negotiations. The need to timely address the client's problem is an elementary component of professionalism and is built into the fact pattern. I briefly note the negative impact on client relations, and the possibility of a malpractice suit, if the answer is not available before the client signs the contract. I also mention the ethical considerations that could arise if the client were to sign the contract, then ask the lawyer to set up the PSC using prior dates on incorporation documents.

One particularly interesting aspect of the students' representation stems from each client's tendency to be aggressive or conservative in pursuing an advantageous tax position. The students have to consider which positions are legally sound and which serve the client's desire either (a) to be aggressive in minimizing tax liability at the risk of confrontation with the Service, or (b) to avoid conflict with the Service, even if taking this conservative position means paying higher taxes.

## IV. RESULTS AND ADVANTAGES OF THE PRACTICUM MODEL

After several years of offering practica, we are pleased with how well they are meeting the goal of teaching substantive law and theory through writing and other exercises. The practica have successfully introduced students to the conventions and tools of a specific area of law in which those students may practice. The students learn the lingo of experts in their fields and learn to perform the work of those experts. In becoming members of these discourse communities, the students learn the importance of and interrelation between sophisticated legal analysis and practical lawyering skills.

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174. Reading assignments focus students on the ethical considerations of representation. *See, e.g.*, PAUL J. ZWIER, *ETHICS IN LITIGATION* (1995); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS AND MORAL RESPONSIBILITY* (1994).

175. The value of discussing ethics in the context of "real" situations is well documented. *See, e.g.*, Symposium, *1997 W.M. Keck Foundation Forum on the Teaching of Legal Ethics*, 39 WM. & MARY L. REV. 283 (1998).

Additional benefits include increasing doctrinal faculty involvement in student writing and taking advantage of the expertise legal writing faculty bring to doctrinal areas in which they have experience. We have also found that the practicum is a vehicle for increasing interaction between doctrinal and writing colleagues and between the law school and the local bar.

The practica are popular with students, as well. The practica are frequently filled to capacity and often have waiting lists. We believe that students who are attracted to the practica may be those who find learning in traditional lecture classrooms difficult. For us, the emphasis on individual critique and feedback is an advantage of the practicum that outweighs the fact that each practicum is available to a limited number of students enrolled in the doctrinal class. Due to the success of the practica, most practica are now offered every semester the substantive course is offered. Other faculty seem interested in adding practica to their courses.<sup>176</sup>

#### A. Meeting Faculty Goals

The practica in employment discrimination and federal taxation seem to be meeting the faculty's goal of increasing students' understanding of the substantive material,<sup>177</sup> although results are difficult to quantify. Employment discrimination students report that the practicum increases their understanding of both substantive and procedural issues discussed in the doctrinal class. In their evaluations, students in the Tax Practicum strongly agree that their understanding of tax issues as well as their writing and research skills improved because of the practicum.<sup>178</sup>

In fact, some concern has been expressed about practicum students having an advantage over their classmates in the doctrinal course. While it may be generally true that practicum

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176. A practicum in Constitutional Criminal Procedure was offered for the first time during the 1999-2000 school year. Professors teaching Health Law and Administrative Law have expressed interest in adding a practicum to their courses.

177. This conclusion is supported by other efforts to integrate practical skills with doctrinal classes. See Joseph W. Glannon et al., *Coordinating Civil Procedure With Legal Research and Writing: A Field Experiment*, 47 J. LEGAL EDUC. 246, 253-55 (1997) (mentioning student evaluations where students commented that coordination between civil procedure and legal writing courses aided the students in understanding civil procedure concepts).

178. A one-hour review of the practicum at the end of the semester is valuable both for consolidating key ideas for the class and for receiving feedback on the assignments. The review simply follows the syllabus point by point, with the instructors reminding the students of the goals of each exercise. The students then comment on how well the exercise met its goals. The suggestions gathered in this way have always exceeded in scope and helpfulness the students' written evaluations.

students perform better, we have observed that when a practicum contains unmotivated students they perform no better in the doctrinal course than do their classmates who are not enrolled in the practicum. Thus, the practicum seems to provide motivated students an opportunity to excel without giving an unmotivated student enrolled in the practicum an unfair advantage.

Moreover, having practicum students in the substantive class can raise the level of discussion when law used in the practicum is addressed by the larger class. This heightened discussion may help all students understand the material better, not just the students taking the practicum. For example, in the doctrinal Employment Discrimination class, all students consistently perform better on the exam question on sexual harassment than on any other questions. One explanation is that having practicum students in the doctrinal class raises the discussion to a higher level. Another possibility is that when the students in the doctrinal class serve as judges for the practicum oral arguments, the student judges refine their analytical skill and increase their understanding of hostile environment case law. A related advantage is that the students who typically register for a practicum are a self-selected, highly motivated group. Because the practicum is not a required part of the doctrinal course to which it is attached, like some simulations, it generally attracts a higher percentage of students whose career goals include practicing in that substantive area.

The practica are effective at meeting the goal of improving students' lawyering skills as they improve the students' analytical ability. Few courses in the curriculum offer students any instruction in conducting negotiations, depositions, or interviews. Practicum students frequently express their appreciation for learning these critical skills. The practica are also demonstrably successful in enhancing research skills. Students become more proficient with sophisticated legal research techniques and are exposed to looseleaf services, treatises, advanced computer assisted legal research, and other resources that are not covered in the first-year research and writing course. While the practica focus on research in specific areas of law, students are able to see how these skills can be transferred to other substantive areas. For students who learn by doing, the practicum is a crucial addition to the usual law school fare of lecture courses.

### *B. Reinforcing Standards for Students*

One of the negative consequences of perpetuating the artificial "skills/theory" dichotomy is that the dichotomy affects students' understanding of the professional standard under which they will operate when they leave the academy. We have found that students often view the standards to which they are held in

law school as not attainable or unrealistic in the practice of law. This leaves a vacuum that is too often filled by habits developed in haste. The practicum has proven particularly effective in reinforcing standards for students' written work at the same time that it reinforces what they have learned in Professional Responsibility.

In teaching both practica, we have found that by the second or third year of law school students have either forgotten some of the analytical and writing concepts they learned in their first-year courses or have adopted bad habits in their first legal jobs. A few of the best students in the first-year legal writing and research classes sometimes appear in the practica with poor writing styles that they have copied from partners or formbooks. Even when most of the practicum participants are demonstrating a high level of motivation, the quality of the written work product is sometimes below what we expect. Their memoranda are conclusory and overly argumentative, and contain writing errors that were addressed in the first-year legal writing course.<sup>179</sup> The two practica described here allocate time differently, with proportionately more time spent on role-playing and less on writing in the Employment Discrimination Practicum than in the Tax Practicum. To some extent this difference appears to affect the quality of students' writing in the practica.

In individual conferences, the Employment Discrimination Practicum students have offered two principal explanations for work that was not of the expected quality. The first, and more disturbing, was that their employers had approved of or even encouraged the abbreviated analysis and weak writing style we were criticizing. The ability to refute this assertion with practical experience is one of the reasons that practicum teachers should have actually practiced law. The students' reports also confirmed our initial premise that law schools should not be ceding the responsibility for inculcating professional standards to practitioners who lack time and training to mentor students effectively.<sup>180</sup>

The students' second explanation was that time constraints had affected the quality of their memos. This explanation provided an opportunity to discuss the time constraints the students will face in practice and to discourage them from viewing time constraints as a justification for hasty advocacy.

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179. Our experience does not appear to be unique. See Corcos et al., *supra* note 16, at 238 n.29 (noting the authors' surprise at the poor quality of written work in a year-long, six-credit course arranged around large-scale simulations).

180. Cf. Rideout & Ramsfield, *supra* note 55, at 43 (arguing that holders of the traditional view that writing is simply a talent that cannot be taught are abdicating responsibility and ignoring proven pedagogy).



Subsequently, the Employment Discrimination Practicum included additional time in the syllabus for the memoranda, and added a review of some first-year organizational concepts. Although we elected not to sacrifice other units in favor of mandatory drafts and rewrites on all written work, we have added partial rewrites for some papers. Rewriting the discussion of a single issue to meet a standard discussed in class helps the students focus on the quality of their analysis, instead of on technical details like whether they captioned the case correctly.

Because the syllabus for the Tax Practicum has included more time to review writing concepts before students receive writing assignments, those students have not shown quite as much back-sliding from the first-year standard. Tax practicum students have fewer opportunities for role playing than the employment discrimination students, but have several written assignments due in draft and revised versions. After these writing assignments, with emphasis on clear analysis and precise writing, students improve their writing beyond the progress made in the first year. Even in the Employment Discrimination Practicum, with less emphasis on writing, the students receive more feedback on writing and organization of a legal argument than they have typically received since they left the first-year writing program.

Different professors will choose to allocate time differently, and in a one-credit course, it is unlikely that any professor can spend as much time on every aspect of the course as she would prefer. One solution is a two-credit course that includes the greater variety of learning exercises available in the Employment Discrimination Practicum and the emphasis on writing in the Tax Practicum. Another, more long-term solution is to include enough practica in the curriculum, along with other skills offerings, so that students can choose the type of practicum that most closely fits their needs and learning styles.

These practica also reinforce ethical standards for students. Leaving professional training to the bar not only undermines the standards for writing and research that are conveyed in the first-year program, but also leaves students unprepared to confront specific ethical questions in context. A single course in professional responsibility cannot adequately instill ethical standards, in part because students do no "real" work in those courses.<sup>181</sup> The law firms left with the task of teaching ethics may not have the time to commit to mentoring young lawyers<sup>182</sup> and, due to the stress of practice and desire to please senior attorneys,

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181. Robert P. Burns, *The Purposes of Legal Ethics and the Primacy of Practice*, 39 WM. & MARY L. REV. 327, 350-53 (1998).

182. Reingold, *supra* note 9, at 2004 n.10; Schiltz, *supra* note 9, at 740-46 (arguing that "increasing materialism" in the legal profession, such as pressure to bill hours and generate business, has destroyed mentoring).

the new lawyers may feel pressure to ignore ethical standards.<sup>183</sup> The practica address this situation by raising ethical questions in specific contexts. For students who will not have supervised clinical or externship experiences before graduating, a practicum provides a crucial opportunity for the students to learn from their first mistakes.

C. *Increasing Doctrinal Faculty Involvement with Writing and Expanding Pedagogical Techniques*

Doctrinal faculty generally recognize the value of their contributions to students' development of writing, even if they consider writing a skill distinct from analysis. The demands of teaching, publishing, and administration, however, may make faculty reluctant to include writing components in their doctrinal courses.<sup>184</sup> After the first-year research and writing program, many students complete the final two years of law school without additional writing or skills courses.<sup>185</sup> At Florida State, as at many law schools, the opportunities for faculty feedback on second and third-year students' writing center around seminar papers and fulfilling an upper-level writing requirement.<sup>186</sup>

The practicum model allows faculty to increase writing instruction and to use practical training within a substantive legal

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183. See Edwards, *supra* note 8, at 38, 67-69 (arguing new lawyers need to learn about ethical practice before beginning full-time employment, given the increasingly materialistic goals of law firms); see also Schiltz, *supra* note 9, at 729-31 (noting that the current trend to make attorneys separate their personal and professional lives makes younger attorneys particularly vulnerable to unethical behavior).

184. See Edwards *supra* note 8, at 65 (recognizing both the "real burden associated with grading student papers" and the need to improve writing skills).

185. According to the Legal Writing Institute 1996 Survey of Legal Research and Writing Programs, approximately two-thirds of law schools do not require their second and third-year students to take courses through legal research and writing programs. See LWI Survey, *supra* note 78, at 7 (noting that of the 112 law schools responding to question 40, 76 required no second or third-year courses in legal research and writing departments). Some schools, however, require seminars or other courses containing legal writing and research components. See *id.* at 8 (noting 21 of 106 law schools require second and third-year legal research and writing courses not taught within LRW departments); see also Lissa Griffin, *Teaching Upperclass Writing: Everything You Always Wanted to Know But Were Afraid to Ask*, 34 GONZ. L. REV. 45, 50 (1999) (discussing results of 1995 AALS survey showing that in most law schools, upperclass writing consists of a single writing experience supervised by faculty members who do not teach writing).

186. See Rideout & Ramsfield, *supra* note 55, at 37 (pointing out that in the second and third years of law school, students write only exams and seminar papers, receiving little expert instruction); Corcos et al., *supra* note 16, at 237, 238 n.29 (noting the disappointing scholarly papers received and the enormous faculty time involved, and wondering whether other writing experiences might be more valuable).

area without burdening the faculty member unduly. Because each practicum focuses on substantive law, the faculty member teaching the doctrinal course can be involved in all aspects of developing the related practicum's syllabus and assignments. The practicum concept recognizes, though, that the doctrinal professor may not have time to devote to or expertise in developing writing assignments and detailed exercise problems. That professor's teaching load and research obligations may not permit participation in instruction at the level of leading weekly classes, marking student papers, or critiquing role-playing exercises. Thus, the professor may choose to co-teach the practicum with faculty from the legal writing program or with an adjunct professor. Alternatively, the legal writing or adjunct professor may assume primary teaching responsibility for the practicum. The doctrinal professor and practicum professor ideally should work closely together regardless of the doctrinal professor's level of involvement in the actual teaching of the practicum. This cooperation ensures that practicum assignments will complement the substantive curriculum and enhance the students' understanding of the material they are learning in the doctrinal course.

This high level of cooperation must be grounded in the belief that the two instructors are equals. We have been fortunate that the doctrinal professors involved in our practica considered us colleagues. While other schools have had similar successful collaborations between tenured, doctrinal faculty and non-tenured, legal writing faculty,<sup>187</sup> the situation does have the potential to exacerbate status differences.<sup>188</sup> The consequence of bringing status issues into the classroom would be a less productive experience for the doctrinal professor, the legal writing teacher, and the students. If the doctrinal faculty treat the legal writing faculty as teaching assistants, students will notice the tension and will have more difficulty learning the law from the legal writing teachers.

Moreover, in this collaboration, it is critical that the practicum professors see themselves as teaching analysis, rather than merely supplementing the doctrinal course.<sup>189</sup> Students benefit from writing and role-playing not because students like these exercises, but because those activities generate knowledge

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187. See, e.g., Glannon et al., *supra* note 177, at 259 (emphasizing peer relationship in collaborative teaching in which no one "pulled rank").

188. See Arrigo, *supra* note 76, at 143-51 (noting LRW professors typically receive lower pay and fewer privileges, and are viewed as less than "full-fledged members of the law school faculty").

189. Rideout & Ramsfield, *supra* note 55, at 44-46 (refuting the traditional view that writing is an ancillary skill, not real law).

and understanding.<sup>190</sup> But if the doctrinal professor or practicum professor works from the premise that the doctrinal course is primary and the practicum is non-essential fluff, the experience is unlikely to be productive for the faculty or the students.

Thus, for the collaboration to be successful, roles of participating faculty must be defined and the substance of both courses must be respected. Our experience has been that the team-teaching portions of our practica have worked well in large part because both the doctrinal professor and the writing instructor respected each other's contributions.

#### D. Utilizing Writing Faculty Expertise

The practicum concept was proposed by a faculty member with a legal writing background,<sup>191</sup> and the first practica at Florida State were all taught or co-taught by legal writing faculty. Experienced legal writing instructors are able to combine practice experience with knowledge of teaching methods, especially methods of reviewing and critiquing writing.

Almost all legal writing faculty practiced law before choosing to teach.<sup>192</sup> They bring with them years of experience analyzing, researching, and writing about specific areas of the law. Moreover, experienced writing teachers who are familiar with current scholarship on learning theories and teaching methods are able to bring that familiarity to their collaboration with doctrinal faculty in a way that benefits both faculty members, as well as the students. As artificial caps on legal writing positions fall and writing faculty gain respect within the academy, schools should be willing to draw on this unique combination of talents.<sup>193</sup>

Additionally, by using legal writing faculty to teach the

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190. See *id.* at 72-73; see also DEWEY, *supra* note 40, at 13-14 (noting that activities that are enjoyable but disconnected to other knowledge-generating activities are to be avoided).

191. See David Morrill, *Finding the Right Career Balance*, FSU LAW (The Magazine of the Florida State University College of Law), Summer 1998, at 20-21 (describing the contributions of Professor Ann C. McGinley).

192. See LWI Survey, *supra* note 78, at 9 (noting that of 112 schools responding, only two noted entry level legal writing instructors; over half of legal writing faculty practiced law for four years or more before entering teaching). Cf. Schlitz, *supra* note 9, at 759 (discussing a 1991 study revealing that over twenty percent of law professors had no practice experience and only one quarter had practiced law for more than five years).

193. Nothing precludes a doctrinal professor from offering a practicum. We believe the students' experience is maximized when whoever teaching the practicum (singly or collectively) can draw on a combination of practical experience, substantive expertise, and writing pedagogy. Because the practicum draws on all of these areas, combined with the instructor's extensive use of research tools and techniques, writing instructors who are third-year students or recent graduates should not be expected to teach practica.

practicum, the school takes advantage of their understanding of the analysis and writing students have already learned in the first year, enabling the practicum to draw directly from that experience. Practica reinforce the standards set out in the first-year legal writing and research program and help convey the message that those standards are not artificially created for the legal writing course, but are essential for the skillful practice of law.<sup>194</sup>

Avoiding overload is important. A school relying on writing faculty to teach practica as a way of enhancing writing opportunities for upper-level students will need to pay close attention to first-year writing class sizes. Maintaining reasonable class sizes in the first-year program<sup>195</sup> only to add twelve students in a practicum writing on more complex legal issues could lead to overload or burnout.

### *E. Creating Links to the Bench and Bar*

The practicum offers a unique opportunity to have members of the bench or bar speak to a small group of students with interest in a specific area of law.<sup>196</sup> A judge's or practitioner's experience can be used in a way that goes beyond war stories without burdening that individual with preparing a lecture, developing course materials, or giving feedback. Because the practitioner can assume the students have been exposed to particular doctrines, moreover, the practitioner can make her remarks more specific than she might when speaking to a wider audience or a larger class.

A local attorney has talked to the Employment Discrimination Practicum students about case preparation and drafting pleadings from a plaintiff's point of view. He was able to offer practical insights that applied to the students' work and point out issues that had not been developed fully in the practicum

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194. See *MacCrate Report*, *supra* note 1, at 138-140 (listing fundamental lawyering skills including legal analysis and reasoning, legal research, and communication), 151-157 (describing legal analysis and reasoning), 157-163 (describing legal research), 172-176 (describing communication, including written communication).

195. See SOURCEBOOK, *supra* note 18, at 61-62, 66 (explaining that the maximum size of a legal writing workload should never exceed 45 students per professor; when professors teach more than legal writing, the class size in legal writing should decrease); see also Jan M. Levine, *Response: "You Can't Please Everyone, So You'd Better Please Yourself": Directing (Or Teaching In) a First-Year Legal Writing Program*, 29 VAL. U. L. REV. 611, 619 (1995) (explaining that in order to avoid overload, law schools must offer more sections of legal writing than other courses).

196. See Donald J. Weidner, *Law School Engagement in Professionalism and Improved Bar Relations*, FLA. B.J., Jul.-Aug. 1998, at 40, 44.

because of time constraints.<sup>197</sup> Another year two practitioners, one a plaintiff's attorney and the other primarily a defense attorney, visited the Employment Discrimination Practicum specifically to address practical and ethical issues involved in drafting and responding to discovery. Both visits were carefully scheduled to reinforce the concepts in the exercises the practicum students were working on at the time. The practitioners discussed discovery rules we had covered in class, added illustrations from their own cases, and offered personal and very different perspectives on the proper role of discovery. The students had the benefit of hearing the vocabulary used in this area of practice and witnessing for themselves some of the disagreements within the profession regarding an attorney's ethical obligations in a specific social context.

In the Tax Practicum local attorneys have visited to discuss the range of legal issues facing tax attorneys, explain the differences between the work of tax attorneys and the work of accountants, and describe the job opportunities available to students with a special interest in tax law. Students not enrolled in Federal Taxation and the Tax Practicum would likely be unable to follow the depth of the resulting discussion.

For some students this will be their first direct contact with someone practicing in the area the student hopes to enter—the discourse community. Even students with some part-time or summer experience in their chosen area of practice have had only a limited exposure to that community. Thus, the practicum experience provides an important step in the students' acculturation in their specialty.<sup>198</sup>

#### *F. Advantages of the Practicum Model*

The practicum is a different approach to teaching and offers unique advantages to schools adopting it. Although it has similarities to other courses that use writing, research, and role-playing to reinforce substance, and has the same advantages of those courses (such as providing opportunities for students with

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197. For example, different treatment of medical and psychiatric records under state and federal discovery rules could provide the basis for an exercise, but so far exposure to that rule has been limited to class discussion. Hearing a practitioner describe a real case involving these rules, at a point where the students are reading about discovery, personalizes the discussion and increases the students' interest.

198. Of course, judges and practitioners are potential practicum instructors as well. We believe, however, that the practicum fulfills its goals best when it is taught or co-taught by someone with experience in critiquing and reviewing student work, and in particular, experience in working with students' writing. A non-writing faculty member or member of the bar without that type of teaching experience would optimally co-teach a practicum with another faculty member.

different learning styles to internalize substantive material), the practicum's small size and close link to a doctrinal course set it apart.

Including practica in the curriculum gives students an opportunity to improve their writing and practice skills, and thus improve analytical skills, while supporting the core of curricular offerings. By contrast, traditional skills courses, such as clinical programs, externships, or trial and appellate advocacy courses, require large investments of student time. Taking advantage of those offerings sometimes presents a scheduling challenge for a second or third-year student with other curricular requirements to fulfill.

Flexibility is an important asset to the practicum concept. Although labor intensive to develop, as any new course is, a practicum can be offered in one year but not the next, depending on faculty interest and other commitments. By contrast, clinics cannot be started one year and put on hiatus the next.<sup>199</sup> In addition, the practicum can be modified to suit changes in the faculty teaching the doctrinal course or the textbook used in that course.<sup>200</sup>

The faculty members involved have been able to schedule the practicum to fit individual teaching preferences. Some practica meet weekly throughout the semester, focusing first on research and editing skills and later on legal analysis and writing. Some practica meet bi-weekly, allowing time for out-of-class exercises such as taping depositions. Other practica meet for only portions of the semester, providing intensive study over a limited period of time.<sup>201</sup>

Practica also offer flexibility in the focus of the assignments selected for a substantive area. As illustrated in the employment discrimination and taxation courses described above, a practicum can work well in either a litigation or a transactional setting.

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199. Even integrating courses on a larger scale, which certainly has many advantages for the school ready to make the commitment, comes with administrative burdens that prevent the flexibility achieved by the practicum. See Myers, *supra* note 16, at 406-07 (requiring a team of two full-time faculty members plus a team of adjuncts and student assistants); Corcos et al., *supra* note 16, at 224, 237 (explaining the temporary retirement of a "megacourse" taught by four professors after one left the school and another received a reduced load).

200. See *supra* notes 117, 145. The tax practicum has been taught five times, coordinated with four doctrinal professors, using three different casebooks. While moderate changes to the syllabus were needed to ensure coordination, the basic outline of the practicum and the assignments used have been maintained.

201. For example, if legal writing faculty are teaching practica in the spring semester, when the legal writing program is typically front-loaded with an appellate brief assignment, the practicum could meet for eight two-hour sessions at the end of the semester.

Moreover, the same doctrinal course can be linked to either a litigation or a transactional practicum. In the area of employment law, for example, a practicum could be created to emphasize negotiation, counseling, and drafting instead of litigation. Students could draft employment agreements, create guidelines or policy statements for corporate clients, counsel an employer faced with a discrimination claim, and then negotiate a severance agreement instead of following the litigation outline summarized above. Similarly, a tax practicum could trace a controversy with the Internal Revenue Service through litigation, including briefs and oral arguments, instead of following the transactional model.

Optimally, the doctrinal course could serve as the "hub of [a] wheel" of practicum offerings.<sup>202</sup> For example, the Employment Discrimination course could offer several practica simultaneously, each with a different focus: drafting employment contracts, negotiating employment disputes, and preparing for litigation. These practica could be tailored to fit the experience of the available faculty and the interests of small groups of students. When all the students met for the hub class, the doctrinal course in Employment Discrimination, they would bring greater knowledge on a variety of aspects of employment law.<sup>203</sup> Over time, the variety of course offerings would also tend to mitigate the time constraints imposed on a one-credit course.

The practicum's flexibility also makes it a cost efficient supplement to expensive externships or clinical programs. Large-scale courses that combine doctrinal lectures with research and simulations can require the involvement of more faculty time than many administrations will find economically feasible.<sup>204</sup> A one-credit course for a smaller number of students is easier to fit into student and faculty schedules, and therefore does not create a prohibitive drain on faculty resources.

Compensation for teaching a practicum could take one of several forms. Initially, practicum instructors at Florida State were compensated on an adjunct basis, with an extra stipend for developing the course in the first year it was offered. When the three-year cap on writing positions was lifted, the faculty expressed the expectation that writing instructors would increase their teaching and service to the College of Law over time. Teaching practica is one way for instructors to do this after their

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202. See Morrill, *supra* note 191, at 21. Professor Ann C. McGinley explained that the "hub of the wheel" approach is one in which a single doctrinal course "could support practicums in litigation, settlement, and client problem solving." *Id.*

203. *Id.*

204. See Corcos et al., *supra* note 16, at 237. A "megacourse" taught by four faculty members to twenty students could not be offered annually because of the significant commitment of resources required. *Id.*



first year. Similarly, in schools where legal writing faculty have long-term contracts or are on tenure track, or where a tenure-track faculty member teaches the practicum (either alone or as part of a team), the practicum should be credited as part of the faculty member's teaching load for the semester.

#### CONCLUSION

The practicum expands writing opportunities in the law school curriculum and gives students with varied learning styles an opportunity to reinforce the theory and doctrine they are learning in their traditional classes. It is more flexible than large-scale simulations and does not require the time commitment from teachers or students of an externship or semester-long clinical course. The practicum can be designed and revised from year to year to take advantage of the expertise of the individuals who teach it. While it does not replace larger-scale opportunities for skills training, the practicum complements those opportunities at the same time that it fosters collaboration between faculty members with shared substantive interests. Schools that are seeking to expand course offerings both to emphasize legal analysis and to prepare graduates to practice law should consider the many benefits of the practicum model.

