

FOSTERING ETHICAL PROFESSIONAL
IDENTITY IN TAX:
USING THE TRADITIONAL TAX CLASSROOM

Heather M. Field*

Abstract

* Professor of Law & Eucalyptus Foundation Chair, University of California Hastings College of the Law. I appreciate the opportunity to present this project at the University of Washington Symposium on Protecting Taxpayer Rights, at the American Tax Association Teaching & Curriculum Conference, and at a UC Hastings Teaching Roundtable. I thank the event participants and Kate Bloch, Scott Fruehwald, Daniel Lathrope, Manoj Viswanathan, and Alina Ball for their feedback.

Will a tax lawyer in private practice help taxpayers comply or help taxpayers cheat? Will a government tax lawyer respect or abuse taxpayer rights? Answers to these questions turn, at least in large part, on the lawyer's ethical professional identity—the lawyer's philosophy of lawyering, which reflects her values, her sense of responsibility to others, and her self-concept of who she is (and wants to be) as a member of the legal profession. According to recent reports on legal education reform, commentators, and the ABA, law schools must do more to help students develop their ethical professional identities. This is particularly important in tax law, where lawyers' ethical professional identities can affect compliance and revenue collection, tax morale and taxpayer rights, and the reputation of the tax profession.

However, there is a dearth of resources for faculty members who want to leverage their traditional tax classrooms to help future tax lawyers develop their professional identities and learn to exercise professional judgment within the boundaries of the applicable ethical rules. So how can doctrinal faculty members help aspiring tax lawyers develop and implement their professional identities? This article describes exercises for the traditional tax classroom that are intended to (a) enable each student to identify and justify her developing lawyering philosophy, and (b) empower each student to implement her lawyering philosophy in her career. By empowering professors to help their students become more thoughtful, principled tax advisers, this article advances the goal of building a community of ethical tax professionals, both taxpayer-side and government-side, that serves taxpayers well.

I. INTRODUCTION.....	219
II. UNDERSTANDING PROFESSIONAL IDENTITY & ITS BENEFIT	222
A. What is Professional Identity?	222
B. Why Invest in Developing Students’ Professional Identity?	225
1. <i>Developing Good Judgment</i>	225
2. <i>Improving Law Student & Lawyer Well-Being</i>	225
3. <i>Strategizing for Meaningful Employment</i>	227
4. <i>Meeting Client Needs & Expectations</i>	227
5. <i>Being Deliberate & Explicit about Law School’s Impact on Students’ Professional Identity</i>	227
6. <i>Satisfying Accreditation Standards</i>	228
III. FOCUSING ON THE TRADITIONAL TAX CLASSROOM TO FOSTER ETHICAL PROFESSIONAL IDENTITY	228
A. What Context? Traditional Lecture/Seminar Classes.....	228
1. <i>Not Just a Topic for PR Classes or Clinics</i>	228
2. <i>The Value of Subject-Matter Specificity</i>	230
B. What Subject? Tax.....	231
1. <i>Ethical Professional Identity is Particularly Important in Tax</i>	231
2. <i>Appreciating the Range of Potential Professional Identities for Tax Lawyers</i> 236	
IV. EMPLOYING EXERCISES TO ENGAGE STUDENTS IN REFLECTION & DISCUSSION ABOUT ETHICAL PROFESSIONAL IDENTITY IN TAX PRACTICE.....	240
A. Student Learning Outcomes.....	241
B. Exercise, Part 1 – What is Your Tax Lawyering Philosophy & Why?	241
1. <i>Homework to Stimulate Self-Reflection</i>	241
2. <i>Class Discussion to Engage & Challenge</i>	244
3. <i>Substance of the Discussion</i>	246
C. Exercise, Part 2 – What Does Your Professional Identity Mean For Your Tax Career?	249
1. <i>Setting Up the Discussion</i>	249
2. <i>Substance of the Discussion</i>	250
3. <i>Wrapping Up the Exercise</i>	255
V. TACKLING SOME CHALLENGES OF THE EXERCISES	255
A. Managing Class Time	256
B. Adjusting for Class Size	256
C. Targeting the Appropriate Class Level.....	257
D. Ensuring Sufficient Background Regarding Tax-Related Ethics Rules/Standards 257	
E. Deepening & Enriching Professional Identity Development	258
1. <i>Additional Readings</i>	258

2. <i>Involving Practitioners</i>	258
3. <i>Role-Play</i>	259
4. <i>Reflection Essays</i>	260
5. <i>A Stand-Alone Course</i>	260
F. Assessing Learning & Engagement.....	260
G. Influencing Student Choices.....	261
VI. CONCLUSION.....	262
VII. APPENDIX A: SAMPLE PRACTICE SCENARIOS THAT MIGHT PRESENT PROFESSIONAL IDENTITY CHALLENGES.....	263

“The reality is that most of us practicing tax today have long since compromised our integrity. But if we care about future generations we need to face the fact that tax practice turns our best and brightest into little more than well-paid tax cheats. [I question] whether it is even possible to be a person of integrity and still engage in a lucrative tax practice.”¹

I. INTRODUCTION

Who will today’s tax law students be as legal professionals? How will they build sustainable, impactful, and ethical careers in tax law?

Students should develop an ethical professional identity, and law schools must help students in this endeavor. The Carnegie Report of 2007 argued that law schools must incorporate professional identity development into legal education.² The CLEA Report, another 2007 report on legal education reform, also highlighted professional identity formation as a core objective for legal education.³ These reports led to a flurry of academic articles and books about professional identity formation,⁴ and at least six schools have now

¹ Jeffery L. Yablon, *As Certain as Death: Quotations About Taxes (2010 Edition)*, TAX NOTES TODAY 72-9, 244 (2010) (quoting lawyer Paul Streckfus).

² WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 14 (2007), http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf [https://perma.cc/5D3R-KF8T] [hereinafter CARNEGIE REPORT] (calling this the third apprenticeship or the “third element of the framework . . . for an integrated legal education”); WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, SUMMARY: EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 6 (2007), http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf [https://perma.cc/775H-Z39F] [hereinafter CARNEGIE SUMMARY] (arguing law schools need to provide more “effective support for developing ethical and social skills. Students need opportunities to learn about, reflect on and practice the responsibility of legal professionals. . . [And law schools should do more to] engage the moral imagination of students as they move toward professional practice”).

³ ROY STUCKEY ET AL., CLINICAL LEGAL EDUCATION ASS’N, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007), http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf [https://perma.cc/GYD7-AJT4] [hereinafter CLEA REPORT].

⁴ See, e.g., E. SCOTT FRUEHWALD, DEVELOPING YOUR PROFESSIONAL IDENTITY, CREATING YOUR INNER LAWYER (2015); NEIL W. HAMILTON, ROADMAP: THE LAW STUDENT’S GUIDE TO PREPARING AND IMPLEMENTING A SUCCESSFUL PLAN FOR MEANINGFUL EMPLOYMENT (2015) [hereinafter, “HAMILTON, ROADMAP”]; E. Scott Fruehwald, *Developing Law Students’ Professional Identities*, 37 U. LA VERNE L. REV. 1 (2015); Neil Hamilton & Jerry Organ, *Thirty Reflection Questions to Help Each Student Find Meaningful Employment and Develop an Integrated Professional Identity (Professional Formation)*, 83 TENN. L. REV. 843 (2016); Martin J. Katz, *Teaching Professional Identity in Law School*, 42-OCT COLO. LAW. 45 (2013); Benjamin V. Madison III & Larry O. Natt Gantt II, *The Emperor Has No Clothes, But Does Anyone Really Care? How Law Schools Are Failing to Develop Students’ Professional Identity and Practical Judgment*, 27 REGENT U. L. REV. 339 (2014-15); Verna E. Monson & Neil W. Hamilton, *Entering Law Students’ Conceptions of an Ethical Professional Identity and the Role of the Lawyer in Society*, 35 J. LEGAL PROF. 385 (2011); Susan Swaim Daicoff, *Lawyer, Form Thyself: Professional Identity Formation Strategies in Legal Education Through “Soft Skills Training, Ethics, and Experiential Courses*, 27 REGENT U. L. REV. 205 (2014-15); David I.C. Thomson, *“Teaching” Formation of Professional Identity*, 27 REGENT U. L. REV. 303 (2014-15).

adopted student learning outcomes to the effect that “students should develop a personal code of ethics/moral core to guide discretionary professional decision-making”.⁵

The Preamble to the Model Rules of Professional Conduct echoes this effort by encouraging lawyers to develop guiding principles to help them make difficult decisions.⁶ And the increased focus on professional formation and ethical professional identity is now incorporated into the recently revised ABA accreditation standards, which require law schools to prepare students “for effective, ethical and responsible participation as members of the legal profession.”⁷

But how do law school professors actually do this? How do we help students develop their ethical professional identities? Certainly, this is part of clinical legal education, where students grapple with ethical decisions when representing real clients and reflect on who they want to be as lawyers.⁸ And professional identity is also often taught as part of professional responsibility courses.⁹

Traditional law school classrooms, however, also provide opportunities to build students’ professional identities. Integrating into the traditional law school classroom the notion of professional identity is part of teaching ethics throughout the curriculum. It reinforces concepts discussed elsewhere, it encourages students to see ethics and identity considerations as pervasive rather than sequestered in ethics courses, and it helps students appreciate ethics and identity issues in the context of the subject matters to which they might dedicate their careers. But most doctrinal textbooks focus on substance and do not emphasize professional identity.¹⁰ And thus it can be quite labor-intensive for individual

⁵ Hamilton, *supra* note 4 at 3.

⁶ Model Rules of Professional Conduct, Preamble par. 9 (8th ed., 2015) (“Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”).

⁷ American Bar Association, *ABA Standards and Rules of Procedure for Approval of Law Schools 2016-17* Section 301(a), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf [https://perma.cc/2859-UDUB] [hereinafter “ABA Standards”]; see also ABA Standards 302(c) (reflecting the third apprenticeship from the Carnegie Report and explaining that students should develop competency in the “exercise of proper professional and ethical responsibilities to clients and the legal system”). The emphasis on ethics in both Standard 301 and 302 was added in 2014. See American Bar Association, *Overview of Changes to the Standard for Approval of Law Schools*, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/overview_of_changes.authcheckdam.pdf [https://perma.cc/7JRC-P4Z4].

⁸ See CARNEGIE REPORT, *supra* note 2, at 145-47; Charlotte S. Alexander, *Learning To Be Lawyers: Professional Identity & the Law School Curriculum*, 70 MD. L. REV. 465, 466-72 (2011); Daicoff, *supra* note 4, at 217-219; Kelley S. Terry, *Externships: A Signature Pedagogy for the Development of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240 (2009).

⁹ See CARNEGIE REPORT, *supra* note 2, at 147-51; Daicoff, *supra* note 4, at 210. Schools are also increasingly developing professional development and professional formation programs. See, e.g., HAMILTON, ROADMAP, *supra* note 5 (describing such a program). However, these programs may focus more on professionalism or employment-readiness rather than on the related, but distinct and narrower, notion of ethical professional identity. See also generally LARRY O. NATT GANTT II & BENJAMIN MADISON III, *TEACHING METHODS AND EXAMPLES TO HELP STUDENTS DEVELOP A PROFESSIONAL IDENTITY* (Carolina Academic Press 2016).

¹⁰ One counter-example is the Carolina Academic Press – Context and Practice series which includes “‘professional identity reflection questions’ in the context of teaching the subject matter of the

professors to figure out how to incorporate professional identity development into their traditional classrooms.¹¹

Nevertheless, the effort is important, particularly in subject areas such as tax law where lawyers' ethical professional identities can affect compliance and revenue collection, tax morale and taxpayer rights, and the reputation of the tax profession. Moreover, investing in ethical professional identity development helps to empower lawyers to make good decisions in the most difficult circumstances,¹² such as when representing a client who wants to take aggressive tax positions. For example, a "hired gun" lawyer¹³ would assist a client with tax planning that is supported by only substantial authority (i.e., that she thinks is *not* likely to succeed), whereas a "legalist" lawyer¹⁴ would withdraw from that representation. And professional identity considerations are relevant even for lawyers at the beginning of their careers, and even in a tight job market. For example, imagine a junior tax lawyer who wants to build a career in which she takes a legalist approach to tax lawyering (i.e., helping clients take positions only if they are more likely than not to succeed on the merits). What should she do if she is working for a partner who wants her to assist with a tax strategy for which there is only "reasonable basis" (20-25% chance of success on the merits)? There are many more examples in which having a strong sense of professional identity could help the tax lawyer make these types of difficult discretionary decisions in a principled way.¹⁵

Thus, the goal of this article is to provide strategies for integrating professional identity development exercises into the traditional tax classroom.¹⁶ In doing so, this article advances our understanding of how to help students develop ethical professional identity, particularly for those students interested in pursuing a career in tax.¹⁷ And this article helps

casebook". Larry O. Natt Gantt II & Benjamin W. Madison III, *Teaching Knowledge, Skills, and Values of Professional Identity Formation*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 253-270, note 103 (Deborah Maranville et al., eds.) (2015). That series, however, does not include a tax law book. See Carolina Academic Press, Context and Practice Series Titles, <http://www.cap-press.com/books/ms/166> [https://perma.cc/8762-HJVU].

¹¹ See Paula Schaefer, *Integrating Professionalism into Doctrinally-Focused Courses*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 271-79 (Deborah Maranville et al. eds., 2015).

¹² For example, one practitioner, after hearing a presentation of this paper, commented to me that, in his almost thirty-year career as a corporate tax lawyer, the issues that implicated professional identity were harder than any substantive tax issue that he ever faced.

¹³ See *infra* Part III.B.2.a.

¹⁴ See *infra* Part II.B.2.c.

¹⁵ See *infra* Appendix A (positing several other scenarios that might pose professional identity challenges for junior tax lawyers) and Part IV.C.II.a (discussing the relevance and value of the professional identity inquiry in a market where jobs are scarce).

¹⁶ Notably, this article does not advance a normative preference for what type of ethical professional identity students should adopt. Rather, this article helps faculty members facilitate students' guided and thoughtful self-discovery, but a faculty member who wants to steer students toward a particular normative approach can easily modify the exercises described herein. See *infra* Part V.G. (discussing such modifications).

¹⁷ The textbooks on tax ethics do incorporate notions of ethical professional identity, at least to some extent. See, e.g., MICHAEL HATFIELD, *THE ETHICS OF TAX LAWYERING* (3d ed. 2015); LINDA GALLER & MICHAEL B. LANG, *REGULATION OF TAX PRACTICE* (2d ed. 2016); BERNARD WOLFMAN ET AL., *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* (5th ed. 2015); DONALD B. TOBIN ET AL., *PROBLEMS IN TAX ETHICS* (2009). However, these texts are generally intended for courses specifically on tax ethics. In contrast, this article focuses on other tax courses (e.g., corporate tax, partnership tax, tax seminars), where ethical and identity considerations are ancillary rather than central to the course's objective. It is much less common for

to answer the call for “plug and play” curriculum¹⁸ that faculty can use to advance the student learning objective of teaching ethical professional identity formation.¹⁹ In addition, given that professional identity development is equally important for practicing tax lawyers, they can use this article as a self-study tool, and the exercises herein can be used for CLE workshops.²⁰

Part II of this article provides background by elaborating on the concept of “professional identity” and explaining why this is an important part of legal education. Part III then argues for incorporating professional identity pedagogy into a specific context—the traditional tax classroom.

Part IV provides an exercise that can be used in any upper-division tax course to integrate professional identity building into the traditional tax classroom; a reader primarily interested in the specific exercises might want to skip directly to this part. Part V identifies several challenges with integrating a professional identity module into the tax classroom and discusses variations and alternatives to help professors overcome or mitigate these challenges. This enables tax professors to tailor the experience to their goals and their students’ needs.

Part VI concludes. Ultimately, the goal of this article is to try to empower tax faculty to help students reflect seriously on who they are and who they want to be as soon-to-be lawyers in the tax profession.

II. UNDERSTANDING PROFESSIONAL IDENTITY & ITS BENEFIT

A. What is Professional Identity?

Ethical professional identity (also referred to as “professional identity”)²¹ is part of the Carnegie Report’s third apprenticeship, in which students engage in the “exploration and assumption of the identity, values, and dispositions consonant with the fundamental purposes of the legal profession.”²² The Carnegie Report explains that, “Professional identity is, in essence, the individual’s answer to questions such as, Who am I as a member

texts for such courses to have modules focused on professional identity. Thus, this article is intended to provide such a module for use in most any upper-division tax course.

¹⁸ Hamilton & Organ, *supra* note 4, at 39.

¹⁹ Part of the reason that I wrote this up into a scholarly article rather than just pursuing these student learning objectives in my own classrooms is to share the teaching innovation, as recommended by Carnegie. CARNEGIE SUMMARY, *supra* note 2, at 11 (encouraging “substantive knowledge about teaching and learning [to] be built upon and shared publicly over time, in the fashion of traditional academic scholarship, rather than being gained and lost anew with each individual teacher.”). I was inspired to do this in response to questions that I received when presenting my recent article, *Aggressive Tax Planning & the Ethical Tax Lawyer*, in which I argue that “a lawyer seeking to pursue a career as an ethical tax planner should identify and implement her philosophy of lawyering to help her make [] difficult discretionary decisions in a principled way.” Heather M. Field, *Aggressive Tax Planning & the Ethical Tax Lawyer*, 36 VA. TAX REV. 261 (2017). People at multiple different workshops asked me how I would teach the students to do that. In response, I often described the exercises that I explain herein, and I received encouraging comments about the utility of the exercises I describe. Thus, I thank the people who inquired for inspiring this piece.

²⁰ I will be providing CLE workshops based on this article starting in spring 2017.

²¹ The terms “ethical professional identity” and “professional identity” are used interchangeably herein on the premise that “professional identity” (at least as understood herein) is developed within the boundaries of the relevant ethical rules. As discussed further in Part III.B.2, the lawyering philosophies offered herein as possible approaches to professional identity generally provide lawyers guidelines for how to exercise their discretion within the ethical constraints imposed on lawyers generally and on tax lawyers in particular.

²² CARNEGIE SUMMARY, *supra* note 2 at 8.

of this profession? What am I like, and what do I want to be like in my professional role? And what place do ethical-social values have in my core sense of professional identity?”²³

Since the publication of the Carnegie Report, scholars have tried to clarify and expand upon the definition of professional identity. For example, Professor Martin J. Katz explains that, “[p]rofessional identity is the way a lawyer understands his or her role relative to all of the stakeholders in the legal system, including clients, courts, opposing parties and counsel, the firm, and even the legal system itself (or society as a whole).”²⁴ Professor Daisy Hurst Floyd explains that, “[p]rofessional identity refers to the way that a lawyer integrates the intellectual, practical, and ethical aspects of being a lawyer and also integrates personal and professional values.”²⁵ Professor Susan Swaim Daicoff explains that, “[p]rofessional identity here is meant to encompass one’s values, preferences, passions, intrinsic satisfaction, emotional intelligence, as well as one’s preferred professional best practices.”²⁶ Scott Fruehwald explains that professional identity involves, among other things, lawyers’ ability to “reflect on their roles within social contexts and systems” and to “self-define as a professional with a moral core of responsibility and service to others.”²⁷ More broadly, he explains that “professional identity is a lawyer’s personal legal morality, values, decision-making process, and self-consciousness in relation to the practices of the legal profession (legal culture). It provides the framework that a lawyer uses to make all a lawyer’s decisions.”²⁸ And Professors Benjamin V. Madison and Larry O. Natt Gantt explain succinctly that, “professional identity . . . encompasses a person’s self-concept, values, and philosophy of lawyering.”²⁹

To understand the goal of this article, it is important to differentiate the concept of professional identity, as used herein, from the related concepts of professional formation, professionalism, and ethics.

Professional identity is part of the larger notion of “professional formation,” which is “focused on helping each law student to take ownership over her own professional development.”³⁰ Professor Neil Hamilton writes extensively regarding professional formation, including in his book, *Roadmap: The Law Student’s Guide to Preparing and Implementing a Successful Plan for Meaningful Employment*.³¹ He explains that professional formation “helps each student [and helps faculty and staff help students] . . . understand how taking ownership over her own proactive professional development toward excellence at the competencies needed to serve others well will help the student realize her goal of self-sufficiency.”³² Professor Hamilton and Professor Jerry Organ highlight two “professional formation learning outcomes”: that “each student demonstrate an understanding and integration of 1. Proactive professional development toward excellence at all the competencies needed to serve clients and the legal system well; [and] 2. An

²³ CARNEGIE REPORT, *supra* note 2, at 135.

²⁴ Katz, *supra* note 4, at 45.

²⁵ Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. ST. THOMAS L.J. 195, 201 (2012).

²⁶ Daicoff, *supra* note 4, at 206-07.

²⁷ Fruehwald, *supra* note 4, at 9-10.

²⁸ FRUEHWALD, *supra* note 4, at vii.

²⁹ Madison & Gantt, *supra* note 4, at 341.

³⁰ Neil W. Hamilton, *Professional Formation with Emerging Adult Law Students in the 21-29 Age Group: Engaging Students to Take Ownership of Their Own Professional Development Toward Both Excellence and Meaningful Employment*, 2015 J. PROF. LAW. 125, 125 (2015).

³¹ HAMILTON, *supra* note 4.

³² Hamilton, *supra* note 30, at 139.

internalized deep responsibility to clients and the legal system.”³³ Thus, professional formation incorporates concepts of self-directed learning and self-sufficiency, and not merely the sense of self and how the self relates to clients, the profession and society, which is the focus of professional identity. Of course, having a strong sense of self—who you are and want to be as a lawyer—can empower a student to become a self-directed learner who is a self-sufficient professional able to serve others. Thus, any effort to develop student’s professional identity is part of helping them with their professional formation, but professional formation is a much broader concept.

Professionalism, which is also part of professional formation, is distinct from professional identity. Professor Martin Katz explains the distinction well:

Professionalism relates to behaviors, such as timeliness, thoroughness, respect towards opposing counsel and judges, responding to clients in a timely fashion . . . *Professional identity* relates to one’s own decisions about those behaviors (which sounds like overlap, but it’s not), as well as a sense of *duty* as an officer of the court and *responsibility* as part of a system in our society that is engaged in upholding the rule of law.³⁴

Ethics is similarly distinct from professional identity. Legal ethics refers to the rules and standards that govern the behavior of lawyers, whereas professional identity refers to the way in which an individual lawyer engages with and implements those ethical rules in actual practice.³⁵ Indeed, courses on legal ethics and professional responsibility typically focus primarily on the Model Rules of Professional Conduct, as part of preparing students to pass the Multistate Professional Responsibility Exam.³⁶ But the Model Rules, and often courses focused primarily on teaching the Model Rules, focus on “minimal standards of competency” and what it takes to “avoid sanctions”.³⁷ In contrast, teaching professional identity would “explore how the values of the profession may lead lawyers through their practical judgment to resolve competing values”³⁸ and would “help students begin to develop their own philosophy of lawyering to deal with the difficult questions they will face in the practice of law.”³⁹ That said, although legal ethics and professional identity are not coextensive, an individual lawyer’s professional identity should be bounded by the ethical rules because ethical practice is not merely “a matter of individual conscience and therefore individual choice.”⁴⁰

In addition, the notions of both professionalism and ethics provide students with *external* guidelines about the right things for lawyers to do and the right way for lawyers to behave. I hope that students internalize these notions, but a student can demonstrate professionalism and ethics without doing so. But professional identity is *internal*; “professional identity engages lawyers at a deeper level because it challenges lawyers to

³³ Hamilton & Organ, *supra* note 4, at 1.

³⁴ Katz, *supra* note 4, at 45 (citing Thomson, *supra* note 4).

³⁵ See CARNEGIE REPORT, *supra* note 2, at 148-150.

³⁶ Madison & Gantt, *supra* note 4, at 374.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Nathan M. Crystal, *Using the Concept of “A Philosophy of Lawyering” in Teaching Professional Responsibility*, 51 ST. LOUIS U. L.J. 1235, 1235 (2007); see also Madison & Gantt, *supra* note 4, at 376 (endorsing an exercise based on Crystal’s work).

⁴⁰ Frederic G. Corneel, *Ethical Guidelines for Tax Practice*, 28 TAX LAW. 1, 1 (1970).

internalize principles and values such that their professional conduct flows naturally from their individual moral compasses.”⁴¹

B. Why Invest in Developing Students’ Professional Identity?

Helping students to build their professional identities produces several benefits.

1. *Developing Good Judgment*

Having a sense of professional identity helps law students and lawyers exercise good judgment so they can make difficult discretionary decisions in principled ways.⁴² If a lawyer has clear and strong notions of who she is as a lawyer and of how she balances her competing duties to clients, the legal system, society, and self, she is more able to make decisions under pressure in a way that reflects those values.⁴³ Without those internal guiding principles, the student/lawyer would “muddle through, developing an ad hoc [approach]” for discretionary decision-making.⁴⁴ And without an ethical professional identity, she may be less able to withstand pressure from clients, colleagues or others, and the lawyer may not have the tools she needs to make good judgments in difficult situations.⁴⁵

Of course, good judgment and a sense of professional identity are developed over the course of a career. No law student can graduate law school with fully formed professional identity and perfect judgment, but law schools can help students begin to build these critical characteristics for success and can help students understand how to develop these skills and attributes over the course of their careers. Developing good judgment for resolving difficult discretionary decisions is important even for junior lawyers because, for example, supervising attorneys can ask junior lawyers to do things that make the junior lawyers uncomfortable.⁴⁶ Moreover, many students will lack the mentorship during their early practice years that could help them build strong senses of professional identity. This may be because many students go into solo or very small firm practices where the students lack professional mentors to help them develop their identity as lawyers. Even larger firms, which are increasingly bottom-line driven, seem to invest less today in professional development and mentorship of junior lawyers. Thus, by doing more in law school to help students build their understandings of who they are as legal professionals and of what that identity means for their decision-making and judgment, law schools can help bridge this gap.⁴⁷

2. *Improving Law Student & Lawyer Well-Being*

For students, building their professional identity can also help counteract the adverse impact that law school has been demonstrated to have on student well-being.

⁴¹ Madison & Gantt, *supra* note 4, at 345.

⁴² See Field, *supra* note 19, at 297-99.

⁴³ See FRUEHWALD, *supra* note 4, at 36-38 (discussing the role of identity and values on the ability to exercise “practical wisdom”).

⁴⁴ Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 75, 93 (2000); see also Crystal, *supra* note 39, at 1240.

⁴⁵ Gantt & Madison, *supra* note 10, at 259 (“the exercise of [solid and prudent] wisdom emanates from a person’s character”); see also Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1157-64 (2013) (recommending that, to avoid judgments that lead to ethical lapses, lawyers should “reflect regularly on core values” and “try to anticipate ethical dilemmas and to specifically plan and rehearse our responses ahead of time”).

⁴⁶ See *infra* Part IV.C.2.b and Appendix A (presenting and discussing situations that could challenge a junior lawyer’s ability to implement her professional identity).

⁴⁷ See Madison & Gantt, *supra* note 4, at 356.

Research links this decline in law student well-being to the significant motivational shifts that law students experience during law school, going from more “intrinsic values and motivations” to more “extrinsic orientations” that value external markers of success such as grades and salaries.⁴⁸ This research echoes broader research that demonstrates that “when intrinsic values and motivation dominate a person's choices she tends to experience satisfaction and well-being, whereas when extrinsic values and motivation are most important to her she will experience angst and distress.”⁴⁹ Thus, by fostering professional identity, which, by definition, reflects an individual's internal values, motivations, and sense of self, professors can try to refocus student attention on the intrinsic motivations that brought students to law school and that can help guide students to more satisfying law school experiences.⁵⁰ In particular, this focus can help students understand the substantive material and skills learned in classes through the lens of who they are as people and who they want to be as lawyers, which could lead to a greater sense of satisfaction and engagement with law school.

This benefit may continue when the students become lawyers. Having a clear sense of professional identity can help a lawyer maintain “her personal integrity [and] inner moral compass,”⁵¹ which can lead to making judgments that better align with the lawyer's values.⁵² Research demonstrates that, for lawyers, practicing in accordance with their values and being driven in their work by internal motivations are correlated with greater happiness and well-being,⁵³ which means that lawyering grounded in one's ethical values “may ultimately make the practice of tax law a more sustainable and personally satisfying career.”⁵⁴ Moreover, greater lawyer well-being helps to create a virtuous cycle of improved productivity, ethics and professionalism.⁵⁵ Without attention to professional identity development, law schools may be “setting [young lawyers] up for dissatisfaction and soul-searching in their early practice lives.”⁵⁶ Thus, to the extent that we can help students harness their internal concepts of who they are and want to be as lawyers, we may

⁴⁸ Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425, 433 (2015) (citing Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & LAW 261 (2004)).

⁴⁹ *Id.* at 429.

⁵⁰ *Id.* at 438 (encouraging faculty to model and encourage intrinsic pursuits); see also Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 122-29 (2002).

⁵¹ Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 530 (1994); see also AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 204 (1992) (citing “a lawyer's personal sense of morality” as an important guide and identifying “promoting justice, fairness, and morality in one's own daily practice” and a fundamental value of the profession).

⁵² See *supra* Part II.B.1.

⁵³ Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 617-18 (2015).

⁵⁴ Field, *supra* note 19, at 301; see also Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999) (connecting ethical practice to health and happiness); Madison & Gantt, *supra* note 4, at 343, 348-50 (discussing the “connection between forming ethical professional identity and the degree of fulfillment a lawyer finds in practice”).

⁵⁵ Krieger & Sheldon, *supra* note 53, at 622.

⁵⁶ CARNEGIE REPORT, *supra* note 2, at 138.

help them become lawyers who are able to implement their values in practice, thereby helping them to build more fulfilling and sustainable careers in the law.

3. *Strategizing for Meaningful Employment*

Cultivating in students a sense of professional identity is also a valuable part of helping students create a roadmap for meaningful employment. Having an appreciation for the varied approaches that lawyers can take toward lawyering⁵⁷ and developing an understanding of which approach(es) resonate for him/her can help a student determine what practice specialties, what practice settings, and which employers are likely to be good fits for him/her.⁵⁸ In turn, this can contribute to a student's ability to formulate a plan for obtaining employment, articulate to a prospective employer why the student is the right hire,⁵⁹ and land a position that is more likely to empower the student to practice in accordance with her professional identity. Indeed, the broader professional formation literature encourages law schools to help students develop professional identity as a part of helping students with employment outcomes.⁶⁰

Moreover, research suggests that one reason why people leave their jobs is because of mismatches between their personal value systems and the institution's value system.⁶¹ Thus, if a student can land a job with an employer whose values match hers in the first instance, that may help her find greater job satisfaction and longevity. This could happen through luck, but a student can increase her chances of finding a good employment fit if she has thought carefully about her lawyering philosophy.

4. *Meeting Client Needs & Expectations*

Further, a lawyer with a strong sense of professional identity is better able to serve her clients. This is for several reasons, one of which being that she can articulate and explain how she approaches her role as a lawyer.⁶² Having a clear professional identity and an articulable lawyering philosophy will make the lawyer better able to identify both the clients whose needs she is likely (and unlikely) to be able to meet. This can help her determine which clients to represent and which representations to decline. Moreover, by discussing her lawyering approach with a prospective client, a lawyer can "help set client expectations for the representation and can help the client understand how to be a better consumer of her legal services."⁶³ This, "in turn increases the likelihood that the client will be satisfied with the advice provided"⁶⁴ and with the nature of the lawyer/client relationship and interaction throughout the course of the representation.⁶⁵

5. *Being Deliberate & Explicit about Law School's Impact on Students' Professional Identity*

In addition, as the Carnegie Report explains, "law schools play an important role in shaping their students' values . . . as well as their understanding of their roles and

⁵⁷ *Id.* at 131-32.

⁵⁸ *See, e.g., infra* Part IV.C.2.a.

⁵⁹ HAMILTON, ROADMAP, *supra* note 4, at 53 (articulating your "value proposition").

⁶⁰ *See, e.g., id.*; Hamilton & Organ, *supra* note 4, at 35-36 (posing several professional identity-related questions as part of the "reflection questions to help each student find meaningful employment").

⁶¹ Kazi Firoz Alam, *Ethics in New Zealand Organizations*, 12 J. BUS. ETHICS 430, 438 (1993).

⁶² *See* Crystal, *supra* note 44, at 93.

⁶³ Field, *supra* note 19, at 299.

⁶⁴ *Id.*

⁶⁵ *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1601-07 (1995) [hereinafter, "Pepper, *Counseling*"] (explaining how the client experience can differ with lawyers who have different approaches to lawyering).

responsibilities as lawyers”.⁶⁶ The law school experience affects students’ senses of their professional selves regardless of whether professors are deliberately trying to affect students’ professional identity.⁶⁷ But if law schools are not deliberate and thoughtful about how they want to impact students’ professional identity, “legal education may inadvertently contribute to the demoralization of the legal profession and the its loss of a moral compass.”⁶⁸ Thus, a better approach is to acknowledge that law school can have a significant impact on students’ professional identities and then to take that into account when designing curriculum and teaching classes.⁶⁹ By being deliberate and explicit about law schools’ impact on professional identity, law professors and law schools can at least attempt to foster the development of students’ professional identity in a way that will serve students well.

6. *Satisfying Accreditation Standards*

Lastly, investing in the development of students’ professional identities can and should be part of a law school’s efforts to meet the ABA’s Accreditation Standards.⁷⁰ Coursework focused on professional identity formation is particularly relevant to ABA Standard 301, which requires that schools prepare students “for effective, ethical, and responsible participation as members of the legal profession” and ABA Standard 302, which requires, among other things, that schools advance student competency in the “exercise of proper professional and ethical responsibilities to clients and the legal system.”⁷¹ Both of those ABA standards were revised in 2014 to reflect a stronger emphasis on ethics and on the three apprenticeships discussed in the Carnegie Report.⁷² These revisions call for increased emphasis on ethics and professional development, and one way that law schools can be responsive to these recent changes is to dedicate more time to helping students develop their ethical professional identities.

III. FOCUSING ON THE TRADITIONAL TAX CLASSROOM TO FOSTER ETHICAL PROFESSIONAL IDENTITY

A. What Context? Traditional Lecture/Seminar Classes.

Law schools often try to foster professional identity through experiential courses and courses on professional responsibility. Although these opportunities are critical to the development of students’ professional identity, traditional classrooms also present opportunities to help students develop practice-area specific notions of professional identity.

1. *Not Just a Topic for PR Classes or Clinics*

Although professional identity may be taught as part of a professional responsibility course, integrating professional identity development into traditional lecture

⁶⁶ CARNEGIE REPORT, *supra* note 2, at 139.

⁶⁷ Daicoff, *supra* note 4, at 220; *see also* CARNEGIE REPORT, *supra* note 2, at 139.

⁶⁸ CARNEGIE REPORT, *supra* note 2, at 140.

⁶⁹ *Id.* at 30, 131-32.

⁷⁰ Of course, it is preferable for law professors to be internally motivated to take on the task of aiding students with their professional identity development. *See infra* Part II.B.2. (discussing internal versus external motivation). I hope that this article helps to articulate the value proposition for such an effort. However, the external motivation provided by the ABA standards also provides a reason to invest in helping students develop their professional identities.

⁷¹ ABA Standards, *supra* note 7.

⁷² ABA, *Overview of Changes*, *supra* note 7, at paragraph 5.

and seminar classes⁷³ is part of teaching ethics pervasively across the curriculum.⁷⁴ This is necessary because professional responsibility courses may not comprehensively teach the ethical rules and fully foster the development of professional identity.⁷⁵ A 2 or 3 unit ethics course provides only a limited amount of time, and most courses in professional responsibility focus on the ethical rules, which are the minimum standards to which legal professionals must adhere, and not on professional identity, which is critical for the exercise of discretionary decision-making within the boundaries of what the ethical rules allow.⁷⁶

Similarly, although professional identity formation is often an important part of experiential education,⁷⁷ clinics and externships are trying to teach multiple important practice skills. Although students will now be required to take at least six units of experiential courses⁷⁸ and although that addition will increase students' exposure to a variety of practice skills, ethical professional identity is only part of what clinics, externships and simulations teach. The responsibility for professional identity development is something that all faculty, not just clinical faculty, can and should bear.

Moreover, learning is generally more effective if reinforced multiple times, and this is equally true with respect to professional identity development.⁷⁹ Thus, even if professional responsibility courses and clinics/externships do spend some time on professional identity development, reinforcing these concepts in lecture/seminar classes provides students with the opportunity to revisit and deepen their understandings of what it means to operationalize the rules of ethics in a way that aligns with their values.⁸⁰ Professional identity, values and judgment are developed over the course of a lawyer's career, and thus, encouraging students to revisit these notions more than once in a law school career helps to start students on a path of iterative lifetime learning and reflection about who they are as legal professionals.⁸¹

In addition, allocating time in a lecture or seminar course to the development of ethical professional identity communicates a statement of value to students. Specifically, the fact that ethics and professional identity formation are valuable enough to merit time and attention even beyond the traditional course on professional responsibility and even beyond experiential courses demonstrates that these concepts are important to legal studies generally and ought not be cabined to clinical or ethics-specific education. Moreover, devoting time to professional identity in lecture and seminar courses signals that these concepts are important to doctrinal professors (and not merely clinical or ethics-specific

⁷³ By "traditional classes" or "doctrinal classes," I refer to subject-matter specific lecture or seminar classes that are intended to impart particular substantive information. This contrasts with clinics, externships, or other skills classes that are explicitly intended to teach lawyering skills.

⁷⁴ CARNEGIE REPORT, *supra* note 2, at 151-52.

⁷⁵ Daicoff, *supra* note 4, at 210.

⁷⁶ See CARNEGIE REPORT, *supra* note 2, at 147-51.

⁷⁷ See *supra* note 8.

⁷⁸ ABA Standard 303(a)(3).

⁷⁹ See HAMILTON, ROADMAP, *supra* note 4, at 208 (citing studies supporting use of "repeated opportunities throughout the curriculum with respect to professional formation").

⁸⁰ See *id.*; Gantt & Madison, *supra* note 10, at 255.

⁸¹ See Madison & Gantt, *supra* note 4, at 355 (the habit of self-reflection is important for "ongoing growth in a lawyer's professionalism").

professors) and that the doctrinal professors believe that these concepts should be similarly important to students.

2. *The Value of Subject-Matter Specificity*

Incorporating ethical professional identity development into lecture/seminar courses also provides subject-matter specific context for the ethical dilemmas and decision-making. Both the Carnegie Report and the CLEA Report emphasize the value of “context-based education”⁸² that “weave[s] together disparate kinds of knowledge and skill”⁸³ and encourage “courses that directly explore the identity and roles of lawyers, the difficulties of adhering to larger purposes amid the press of practice, and the way professional ideals become manifest in legal careers.”⁸⁴ Commentators similarly advocate for the incorporation of professional identity development into “subject-matter focused doctrinal courses”⁸⁵.

This is, in part, because lawyers in different practice areas can face different types of ethical dilemmas, although there may be some common dilemmas within a particular field. Situating ethical dilemmas in the context of a student’s practice area of interest makes the challenge more concrete, and thus more personal and relevant, for students.⁸⁶ “Including specific exercises in doctrinal courses beyond the course in professional responsibility encourages students to see the professional values at issue in different doctrinal areas and how as lawyers they will be called upon in various settings to make decisions in the face of competing values.”⁸⁷

Further, the value of context-specific professional identity development is an additional reason why this type of education cannot be relegated to clinics. Although clinics and externships play an important role in professional formation, schools cannot have clinical opportunities in every subject matter. In particular, most schools do not have tax clinics (i.e., the particular doctrinal focus of this article), and even among schools that do have tax clinics, only a limited number of students can participate. Thus, tax clinics and externships cannot generally be depended upon to provide all tax-interested students with opportunities to develop their context-specific ethical professional identities. Doctrinal tax classes, whether in lecture or seminar format, have a much broader reach.

Incorporating professional identity considerations into subject-matter specific classes can also enhance student learning in those classes. In addition to helping students shift toward the mindset of an aspiring practitioner, incorporating professional identity considerations into a doctrinal course can “enhance [students’] understanding . . . of the law of the course” and “keep them fully engaged in the doctrinal subject matter.”⁸⁸

Some doctrinal textbooks adopt these insights and include reflection questions or other problems that are intended to engage students on professional identity questions in

⁸² CLEA REPORT, *supra* note 3.

⁸³ CARNEGIE SUMMARY, *supra* note 2, at 9 (noting that “demands of an integrative approach require both attention to how fully ethical-social issues pervade the doctrinal and lawyering curricula and the provision of educational experiences directly concerned with the values and situation of the law and the legal profession.”).

⁸⁴ CARNEGIE REPORT, *supra* note 2, at 147.

⁸⁵ *See, e.g.*, Thomson, *supra* note 4, at 326; Madison & Gantt, *supra* note 4, at 397.

⁸⁶ Thomson, *supra* note 4, at 323-26.

⁸⁷ Gantt & Madison, *supra* note 10, at 267.

⁸⁸ Schaefer, *supra* note 11, at 271.

the particular doctrinal context.⁸⁹ However, this is still relatively uncommon among doctrinal textbooks.⁹⁰ Particularly where the textbooks do not include professional identity modules, it can require significant “additional preparation and thought to introduce professionalism [and professional identity development] issues into [doctrinal] courses.”⁹¹ Thus, the goal of this article is to make that process easier for professors who want to add a professional identity component to their tax courses.

B. What Subject? Tax.

This article focuses on helping students develop their professional identity as aspiring tax lawyers. Thus, this section will explain why this task is particularly valuable in the tax area, and then will articulate several different potential lawyering philosophies that students or practitioners could adopt as foundational for their ethical professional identity in tax practice.

1. *Ethical Professional Identity is Particularly Important in Tax*

The development of ethical professional identity is particularly important for future tax lawyers.⁹² This is for several reasons including the impact of each practitioner’s professional identity on (a) compliance and revenue collection, (b) tax morale and taxpayer rights, (c) the reputation of the tax profession, and (d) how she operationalizes the tax-specific rules of ethics and standards of practice.

i. Compliance & Revenue Collection

The manner in which a tax adviser approaches her role can have an important impact on compliance and revenue collection. The resource constraints of the IRS⁹³ lead to a relatively weak enforcement mechanism,⁹⁴ meaning that compliance and revenue collection depend heavily on taxpayer self-assessment,⁹⁵ which in turn depends on tax

⁸⁹ See Gantt & Madison, *supra* note 10, at 267 note 103 (listing particular text series that tend to incorporate professional identity considerations).

⁹⁰ Note that this is not a serious criticism of the many excellent textbooks available today. Textbook authors have the challenging task of presenting complex material for student learning, so they understandably focus primarily on teaching the relevant substantive law.

⁹¹ Schaefer, *supra* note 11, at 271-79

⁹² See, e.g., John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 FORDHAM L. REV. 2721, 2747 (2016) (arguing for “increased emphasis on ethics in training tax professionals”).

⁹³ National Taxpayer Advocate, Annual Report to Congress 2014, at 12-15, available at <http://taxpayeradvocate.irs.gov/Media/Default/Documents/2014-Annual-Report/Volume-One.pdf> [<https://perma.cc/73Y3-QCE4>] [hereinafter, NTA Report 2014] (discussing declining IRS resources in comparison to the IRS workload).

⁹⁴ For example, only approximately 0.7 percent of all 2014 tax returns were audited by the IRS. IRS 2015 Data Book, at 21, available at <https://www.irs.gov/pub/irs-soi/15datbk.pdf> [<https://perma.cc/8CVJ-YZYT>]. In addition, private rights of action are generally not available to supplement government enforcement in the tax area.

⁹⁵ See Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111, 142-44 (2009) (discussing the self-assessment system).

advice provided by tax professionals.⁹⁶ A tax practitioner's professional identity can affect whether she is willing to assist clients in particular transactions.⁹⁷

For example, when advising a client who wants to take an aggressive position (e.g., one for which there is only substantial authority or reasonable basis), a "hired gun" tax adviser (i.e., who views herself as someone who implements the action directed by the client)⁹⁸ is likely to help the client take the aggressive position, whereas a "legalist" tax adviser (i.e., who believes it is her responsibility to help clients take only those positions that are more likely than not to be correct)⁹⁹ will try to dissuade the client from taking that aggressive position. The advice from the lawyer may change the way the client reports, thereby affecting compliance and revenue collection.¹⁰⁰

The lawyer's approach matters even if you assume perfect enforcement (i.e., assuming that, if the client takes the more aggressive approach, the IRS audits the client and wins). This is because, even if, after audit, the correct amount of tax is ultimately collected with interest, the aggressive reporting that was supported by the hired gun tax adviser required that the IRS expend resources on the enforcement action. Had the tax adviser's guidance led the client to report in a more conservative/compliant way in the first instance (and assuming that the more conservative reporting approach reflected more indicia of honesty and/or compliance such that the IRS opted not to audit the taxpayer), the IRS could have used those enforcement resources elsewhere.¹⁰¹ And given that there are finite enforcement resources and given that the Treasury estimates that each additional \$1 available for enforcement would result in the collection of \$4 of revenue,¹⁰² more compliance by taxpayers puts fewer demands on those finite enforcement resources, enables more efficient deployment of those resources, and leads to more aggregate revenue collected.¹⁰³

Another example involves the tax shelter industry. Tax professionals who were more willing to be aggressive played an important role in tax shelters. These tax lawyers wrote opinions and otherwise assisted in the planning and marketing of products that turned

⁹⁶ See, e.g., Dzienkowski & Peroni, *supra* note 92, at 2733 (discussing the impact of tax advisers on taxpayers' use of tax shelters in the self-assessment environment).

⁹⁷ See Victor Fleischer, *Options Backdating, Tax Shelters, and Corporate Culture*, 26 VA. TAX REV. 1031, 1061 (2007); see also Field, *supra* note 19, at 280-96 (illustrating how tax practitioners with different lawyering philosophies might handle the same matters in very different ways).

⁹⁸ See *infra* Part III.B.2.a.

⁹⁹ See *infra* Part III.B.2.c.

¹⁰⁰ See, e.g., Ken Devos, *An Investigation into the Ethical Views and Opinions of Australian Tax Practitioners of Different Affiliations*, 20 N.Z. J. TAX LAW & POL'Y 169 (2014) (tax adviser's advice has a strong influence on taxpayer behavior).

¹⁰¹ Of course, not every audit is triggered based on red flags; some audits are random. Even if the taxpayer is chosen for a random audit, the enforcement expenses will be lower if the taxpayer took a more conservative position because there would be less to fight about and because the audit would be likely to be resolved more quickly and with less time/effort from the IRS. Thus, even taking into account the possibility of a random audit (or an audit based on a red herring), a taxpayer who takes a more conservative position most likely requires fewer enforcement resources than a taxpayer who takes a more aggressive position.

¹⁰² IRS, *Prepared Remarks of Commissioner Koskinen before the AICPA* (Nov. 3, 2015) available at <https://www.irs.gov/uac/Prepared-Remarks-of-Commissioner-Koskinen-before-the-AICPA> [<https://perma.cc/4SF8-BNL8>].

¹⁰³ This example assumes that the aggressive position was not so aggressive so as to merit penalties. Thus, no additional resources are recouped through penalty assessment. The resource analysis would be somewhat different if penalties are collected, but even when penalties are collected, they are often not sufficient to compensate the government for the cost of the enforcement action.

out to be non-compliant.¹⁰⁴ Had these professionals conceived of their roles as tax lawyers differently (e.g., as including a stronger duty to the system), they might not have become involved with these matters. Indeed, a large segment of the tax bar did not assist with tax shelters.¹⁰⁵ Perhaps this is just because their clients were not interested in shelters, but perhaps this is at least in part because of these lawyers' professional identities—for example, as advisers who celebrate compliance more than they celebrate innovative tax minimization strategies.¹⁰⁶

ii. Tax Morale & Taxpayer Rights

Not only does the tax lawyer's approach to lawyering affect compliance and collections, but it also affects a taxpayer's experience of the tax system. This, in turn, impacts the taxpayer's belief in the integrity of the tax system, and the taxpayer's compliance behavior going forward. The ethical professional identities of both the taxpayer's lawyer and any government lawyer with whom the taxpayer interacts can affect tax morale and taxpayer rights.

Impact of the Taxpayer's Lawyer

The professional identity of the taxpayer's lawyer is informed by the lawyer's beliefs about her duty to the revenue system, and over the course of representing her client, the lawyer is likely to communicate those beliefs, in some way, to her client. This communication can occur if and when a lawyer counsels the client about whether to proceed with (and whether the lawyer will help the client proceed with) an aggressive tax strategy. This communication can occur in the way that the lawyer frames the taxes (e.g., as a civic duty from which the taxpayer gains or as an economic loss).¹⁰⁷ And this communication can occur through conversations about issues such as the client's obligation to pay taxes, the client's obligation to disclose positions, the client's ability to minimize taxes due, and how the client's situation compares to others. The way in which the lawyer approaches these issues can affect the client's perception of social norms of taxpaying.¹⁰⁸

All of these client conversations, which can impact the client's tax morale, are informed by and reveal the lawyer's philosophy of lawyering. These communications are likely to be quite different depending on the lawyer's lawyering philosophy. For example, the client of a lawyer who believes in advancing client autonomy and is quite comfortable helping clients take aggressive positions will receive very different messages than will the client of a lawyer who believes in only helping clients take actions and positions that are more likely than not to comply with the letter and spirit of the law. These messages could have very different impacts on the tax morale of the clients going forward.

Indeed, Professor Marjorie Kornhauser has explained that “[s]trengthening the identification of tax professionals with the integrity of the tax system can improve their willingness to cooperate with the IRS. . . . This would also signal to clients a tax compliance

¹⁰⁴ TANINA ROSTAIN & MILTON C. REGAN, JR., *CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY* (2014) (recounting how tax professionals enabled the tax shelter industry).

¹⁰⁵ See, e.g., Peter C. Canellos, *A Tax Practitioner's Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters*, 54 SMU L. REV. 47, 55-57 (2001) (discussing the regular tax bar versus the tax shelter bar); ROSTAIN & REGAN, *supra* note 104, at 63-72.

¹⁰⁶ Cf. Linda M. Beale, *Tax Advice Before the Return: The Case for Raising Standards and Denying Evidentiary Privileges*, 25 VA. TAX REV. 583, 595-99 (2006) (describing practitioner cultures that celebrate innovative tax reduction strategies).

¹⁰⁷ Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599, 607-09 (2007).

¹⁰⁸ *Id.* at 612-13.

norm that could have a ripple effect on their clients, who respect and identify with these professionals.”¹⁰⁹ That is, the tax lawyer’s professional identity can affect the tax morale of the lawyer’s clients.

Impact of the Government Lawyer

The ethical professional identities of government lawyers can also affect taxpayer morale and respect for taxpayer rights. This is because a government lawyer’s professional identity can impact how she approaches an enforcement action. For example, does she conceive of her role as one where she should represent the government as aggressively as possible so that she can collect as much revenue as possible from each particular taxpayer? Does she view her role as one where she should only try to collect that amount of money that is clearly owed to the government? Or does she conceive of her role as one where a key part of the purpose of the enforcement action is to help taxpayers understand what it means to comply with the law?

There are many other possible approaches, but each could lead to potentially very different interactions with taxpayers, which could affect taxpayer rights. For example, a lawyer who believes that her role requires that she represent her client as aggressively as possible (thereby collecting the most amount of money possible on behalf of the government) might take an overly aggressive approach to an audit or to collections, which could impinge on taxpayer rights, including “the right to pay no more than the correct amount of tax” and the “right to a fair and just tax system”.¹¹⁰

Further, the government lawyer’s approach to her role in the enforcement proceeding could influence whether the taxpayer perceives there to be “procedural fairness” and whether the taxpayer feels that she is “being treated with respect, politeness and dignity by tax authorities,” both of which are important factors in tax morale.¹¹¹ “[I]ndividuals’ direct contacts with the tax authority greatly influence their perception of whether an authority is legitimate and procedurally fair”, which affects tax morale.¹¹² A government lawyer’s philosophy of lawyering affects how she approaches her interactions with taxpayers. And although any audit is inherently adversarial, the government lawyer’s approach can make a difference in the experience that the taxpayer has throughout the audit.¹¹³

In addition, a government lawyer’s approach to her role can affect the tax morale of taxpayers beyond just the one(s) with whom the lawyer has direct contact. This is because “[w]hen there are accusations of bias or heavy-handed actions by the tax agency, these reinforce the already deep concerns the U.S. taxpayer bears toward taxes, such concerns going back to the nation’s founding.”¹¹⁴ Although some accusations of bias or heavy-handedness are misplaced, other such accusations may be caused by government

¹⁰⁹ *Id.* at 614.

¹¹⁰ IRS Publication 1, <https://www.irs.gov/pub/irs-pdf/p1.pdf> [https://perma.cc/68EY-MYFV].

¹¹¹ Kornhauser, *supra* note 107, at 614.

¹¹² *Id.* at 615.

¹¹³ Of course, the taxpayer’s experience of the government lawyer’s behavior may be filtered through the lens of the taxpayer’s lawyer. Thus, the taxpayer’s tax morale may be more affected by how her lawyer explains what is likely to happen to her upon audit or by how her lawyer describes the behavior of the government lawyer, than by the government lawyer’s actual actions. But this still, at least in part, comes back to professional identity, albeit of the taxpayer’s lawyer and not of the government’s lawyer.

¹¹⁴ NTA Report 2014, *supra* note 93, at xii.

lawyers who have overly aggressive concepts of their roles.¹¹⁵ Thus, the actions of a particular government lawyer, which are necessarily informed by her professional identity, can have reverberating effects.

iii. Reputation of the Tax Profession

The reputation of the tax law profession, as a whole, depends on the behavior of the individual lawyers within the industry, which is informed by each lawyer's professional identity. Lawyers, as a group, do not enjoy a particularly good ethical reputation or public image,¹¹⁶ and tax lawyers are no exception. Commentators have lamented the decline in professionalism and ethics of the tax bar.¹¹⁷ Tax shelters, while certainly not the only cause of this negative reputation, have also "provided grounds to distrust [tax] lawyers and the organizations in which they practice."¹¹⁸ And media portrayals of tax lawyers reinforce the notion that tax professionals help clients cheat on their taxes.¹¹⁹

But the ethics of the profession is just an aggregate of the ethics of the individual practitioners.¹²⁰ Thus, the way in which each individual tax practitioner operationalizes the rules of ethics and standards of practice, particularly when dealing with difficult discretionary decisions, can matter both for the individual practitioner's reputation and for the reputation of the profession. For example, Professor Rostain argued that a shift in how CPAs perceived their professional duties contributed to the rise of the tax shelter industry,¹²¹ which has diminished the tax profession's reputation for ethics and trustworthiness.

Just as the behavior of individual practitioners can harm the reputation of the tax profession, so too can individual actions (including through the organizations for which they work) contribute to the rehabilitation of the profession's reputation for ethics.¹²² "A significant factor in tax professional conduct involves the way [] highly educated individuals embrace a professional identity that ties their obligations to the integrity of the tax system."¹²³ Having a strong sense of professional identity and understanding what is

¹¹⁵ The use of private debt collection services, which the IRS will resume in spring of 2017, may exacerbate this problem. See David Van den Berg, *IRS Will Resume Private Debt Collection Next Spring*, 2016 TAX NOTES TODAY 187-7 (Sept. 27, 2016). In part, this could be because the private collection agencies have collection as their core mission. This business identity likely diverges from the approach that the IRS would embrace, and PCAs may be more aggressive and less responsive to taxpayer concerns as a result. National Taxpayer Advocate, Objectives Report to Congress 2017, at 85, available at http://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-JRC/Area_of_Focus_2.pdf [https://perma.cc/95JK-V33Y].

¹¹⁶ See, e.g., ABA SECTION ON LIT., PUBLIC PERCEPTIONS OF LAWYERS CONSUMER RESEARCH FINDINGS (April 2002); Deborah Rhode, *Expanding the Role of Ethics in Legal Education and the Legal Profession* (2000) available at <https://www.scu.edu/ethics/focus-areas/more/resources/expanding-the-role-of-ethics-in-legal-education/> [https://perma.cc/9L6M-AJGD].

¹¹⁷ See, e.g., Sheldon Pollack, *Tax Professionals Behaving Badly*, 105 TAX NOTES 201 (Oct. 11, 2004); Anthony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 VA. TAX REV. 589 (2003) (ably "providing concrete evidence of an erosion in the professionalism of the tax bar"); Dzienkowski & Peroni, *supra* note 92.

¹¹⁸ ROSTAIN & REGAN, *supra* note 104, at 6.

¹¹⁹ See, e.g., Adam Davidson et al., *What's the Easiest Way to Cheat on Your Taxes?* N.Y. TIMES MAGAZINE (Apr. 3, 2012).

¹²⁰ See ROSTAIN & REGAN, *supra* note 104, at 6-7.

¹²¹ Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 89 (2006).

¹²² ROSTAIN & REGAN, *supra* note 104, at 7.

¹²³ Dzienkowski & Peroni, *supra* note 92, at 2738.

required to implement that professional identity can help practitioners navigate difficult discretionary decisions such as whether to assist with a potentially aggressive tax strategy. Thus, by helping students to develop a strong sense of ethical professional identity, law schools help those students in their individual careers, and law schools can also help contribute to rebuilding the ethics and reputation of the profession.

iv. Tax-Specific Ethics Rules & Standards

Another reason why ethical professional identity is particularly important in tax practice is that tax lawyers are subject to tax-specific ethical rules and standards beyond the general rules of professional responsibility that apply to all lawyers. These additional rules include, among other things, the penalty provisions in the Code¹²⁴ and standards articulated in Circular 230.

The tax advising framework created by these tax-specific ethics rules and standards elevates the importance of each tax lawyer's ethical professional identity. In part, this is because these rules explicitly allow tax lawyers to advise clients to take positions that the tax lawyer believes are likely to be incorrect under the law. Generally, the lawyer is allowed to do this without risking a penalty as long as the position meets a minimum level of strength, such as "substantial authority" or "reasonable basis" (with disclosure).¹²⁵

Thus, it is important that a tax practitioner determine whether and to what extent she is willing to advise taxpayers on those types of aggressive positions. For example, perhaps she does not want to be the type of lawyer who advises on particularly aggressive approaches. She might decide that she will not do everything that the tax-specific ethics rules and standards allow her to do. Perhaps she prefers to help only clients who are taking positions that she believes are more likely than not to succeed on the merits, and she will decline to represent clients who want to be more aggressive.

If, on the other hand, she is willing to advise on matters that are less likely than not to succeed, she must determine how aggressive she is willing to be, and she must determine how she views the penalty provisions. For example, does she view the penalty provisions as outer boundaries beyond which she will not go? Or does she view the penalty provisions as provisions that could trigger the imposition of an additional cost that would need to be taken into account in any cost/benefit analysis when a client is determining whether to proceed with a particular strategy?

The lawyer's determination of how she wants to proceed within the discretion afforded by the tax-specific ethics rules should be informed by the tax lawyer's philosophy of lawyering—her understanding of who she is and wants to be as a tax lawyer. And so that she can increase the likelihood that she will stay true to her vision of lawyering, she must consider these issues outside of the context of immediate client pressure and business exigencies.¹²⁶ That is, she should reflect upon and develop a strong sense of her ethical professional identity as a tax lawyer.

2. *Appreciating the Range of Potential Professional Identities for Tax Lawyers*

A tax lawyer can adopt one (or more) of several different philosophies of lawyering as the basis of her ethical professional identity. A brief summary of lawyering

¹²⁴ See, e.g., IRC §§6694, 6700, 6701, 6707A.

¹²⁵ See, e.g., IRC §6694; Treasury Dept. Circular 230 §10.34.

¹²⁶ Field, *supra* note 19, at 297-98.

philosophies, as relevant in the tax field, is as follows. This summary is based on very thoughtful and voluminous literature on lawyering and professionalism,¹²⁷ and thus, the below admittedly sacrifices nuance for brevity.¹²⁸

i. Hired Gun

The “hired gun” tax lawyer takes a “client-centered approach” in which the lawyer “seeks to effectuate the client’s goals, whatever those goals are.”¹²⁹ The lawyer will take whatever actions are necessary to advance those goals, as long as “the action does not clearly violate a rule or ethics or other law.”¹³⁰ A hired gun approach does not necessarily mean that the lawyer will facilitate aggressive tax strategies (or, if working on behalf of the government, take a particularly aggressive approach to enforcement), but this approach does “reflect[] a willingness to empower even aggressive [clients].”¹³¹

ii. Moralist

Alternatively, a lawyer’s sense of morality may be her guiding principle. Under this approach, the “client defers to the lawyer, and the lawyer takes what he believes to be the right direction: the lawyer is concerned with others and is concerned that the client do the right thing. The lawyer acts as guru, making the moral choices for the client.”¹³² The lawyer will only help clients take positions that the lawyer believes are morally just. “In tax [practice], a philosophy of morality would likely reflect a strong ideological component. . . . Of course, there is a continuum of ideologies, both with respect to specific issues and with respect to our taxing system in general, and a tax [practitioner’s] personal

¹²⁷ See, e.g., GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* (4th ed., 2016); *THE GOOD LAWYER: LAWYERS’ ROLES & LAWYERS’ ETHICS* (David Luban ed. 1983); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (2d ed., 2009); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998); W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 26-30 (1988); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 11 AM. B. FOUND. RES. J. 637 (1986); Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439 (1990); Daniel T. Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 AM. BUS. L.J. 487, 488 (2009); Pepper, *Counseling*, *supra* note 65; Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 11 AM. B. FOUND. RES. J. 613 (1986) [hereinafter, “Pepper, *Amoral*”]; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) [hereinafter, “Simon, *Ethical Discretion*”]; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975); W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004); Margaret Ann Wilkinson et al., *Mentor, Mercenary or Melding: An Empirical Inquiry into the Role of the Lawyer*, 28 LOY. U. CHI. L.J. 373 (1996).

¹²⁸ For a more detailed discussion of these different lawyering philosophies and how they would be applied in the tax advising context, see Field, *supra* note 19, at 280-96.

¹²⁹ Field, *supra* note 19, at 282; see also SHAFFER & COCHRAN, *supra* note 127; Pepper, *Amoral*, *supra* note 127.

¹³⁰ Crystal, *supra* note 39, at 1241; see also, e.g., Pepper, *Amoral*, *supra* note 127, at 626 (“And if ‘the law’ is manipulable and without clear limits on client conduct, that aspect of the law should be available to the client.”); Schwartz, *supra* note 127 (arguing that lawyers should act as “zealous partisans” on behalf of their clients).

¹³¹ Field, *supra* note 19, at 282.

¹³² SHAFFER & COCHRAN, *supra* note 127, at 3, 30-41; see also *THE GOOD LAWYER*, *supra* note 127, at 118.

morality could lead her to be conservative or aggressive, depending on the particular issue.”¹³³

iii. Legalist

The “legalist” approach to tax lawyering demands that the lawyer “adopt the perspective of an unbiased, well-informed judge” and act in accordance with “what a good-faith interpretation of the legal rule would require in an ideal world without problems of proof, political bias, or unequal wealth.”¹³⁴ “Under this approach, a tax [practitioner] should only assist the client in taking actions that the tax [practitioner] believes are allowed under the best interpretation of the law and are more likely than not to succeed on the merits if challenged.”¹³⁵

iv. “Authority Conception of the Law”

Under the approach referred to as the “authority conception of the law,” the lawyer “treat[s] [the law] as an inherently valuable achievement of a pluralistic democracy.”¹³⁶ The lawyer accepts and seeks to apply the law as society has agreed upon because this approach treats the law, as enacted, as embodying society’s collective moral judgment.¹³⁷ In the tax context, “the authority conception of the law would arguably conceive of both the substantive tax law and the Circular 230 regulations reflecting standards of practice to reflect the collective moral judgment of society. That is, tax law contains substantive rules and meta-rules about how to comply with the substantive rules.”¹³⁸ As a result, she would view the “threshold at which the law imposes penalties . . . to be the outer limit of society’s collective moral judgment about what interpretations of the law are within the range of plausibility and are thus ethical.”¹³⁹ Thus, the tax lawyer who adopts the authority conception of the law would be willing to help a client be more aggressive than the legalist tax lawyer, but she would not be willing to assist with any matter that is likely to result in penalties.

v. Friend/Counselor

“Under the friend/counselor approach, the lawyer collaborates with the client and provides in-depth counseling in an effort to help the client make a well-considered decision, taking into account all relevant factors, including moral considerations.”¹⁴⁰ The friend/counselor will encourage the client to take into account a wide variety of considerations, including third party interests, even if the client had not originally expressed interest in such matters; the friend/counselor “raises any other considerations

¹³³ Field, *supra* note 19, at 286.

¹³⁴ Ostas, *supra* note 127, at 516-18; Simon, *Ethical Discretion*, *supra* note 127, at 1090, 1096-98 (the lawyer should advance internal legal merit and take responsibility for the “substantive validity of the decision”).

¹³⁵ Field, *supra* note 19, at 289 (citing Wendel, *supra* note 127, at 396-98; and citing Beale, *supra* note 106, at 593).

¹³⁶ Wendel, *supra* note 127, at 366.

¹³⁷ *Id.* at 382-85.

¹³⁸ Field, *supra* note 19, at 291 (citing Wendel, *supra* note 127).

¹³⁹ *Id.* at 292 (citing Michael C. Durst, *The Tax Lawyer’s Professional Responsibility*, 39 U. FLA. L. REV. 1027, 1059-64 (1987)).

¹⁴⁰ Field, *supra* note 19, at 293; *see also* Morgan, *supra* note 127; Wilkinson, *supra* note 127, at 376-78; SHAFER & COCHRAN, *supra* note 127, at 46-50.

that the [practitioner] thinks ought to be part of the analysis.”¹⁴¹ In the tax context, this would include advising the client to take into account the client’s impact “on the fisc and on the overall taxing system (e.g., tax morale)” and to take into account “non-tax consequences, including things like adverse public relations or business reputation damage that could befall the client as a result of the tax choice.”¹⁴² Ultimately, this approach reflects a collaborative process, in which the lawyer helps the client make a good decision, taking a wide variety of considerations into account.

vi. Self-Interest

A self-interested lawyer gives advice and takes actions “that minimize the risk that the lawyer would be subject to professional discipline, liability for malpractice, loss of fee or other economic loss, or damage to reputation.”¹⁴³ In the tax context, the self-interested lawyer would be conservative or aggressive depending on the personal interests that she is trying to maximize. For example, she might approach advising to avoid being subjected to penalties or she might approach her role aggressively if she thinks that will maximize her revenue stream by attracting more business. “Ultimately, this approach focuses on the lawyer’s level of risk aversion or risk seeking, and this puts the interests of the lawyer ahead of the interests of the client, which is problematic under the general ethics rules applicable to all lawyers.”¹⁴⁴

vii. Other Approaches & Combinations

There are other possible approaches as well, and different approaches can be combined. For example:

The friend/counselor approach, in particular, is easily combinable with the hired gun, legalist, and authority conception approaches. With any of these combinations, the lawyer would take the friend/counselor approach as a primary guideline and then use the other approach to provide the outer limit on how aggressive the lawyer is willing to be (and why). Thus, if a client, after discussions with the friend/counselor wants to pursue a strategy for which there is only substantial authority, the lawyer who uses a combination of the friend/counselor and hired gun approaches would likely assist, but the lawyer who uses a combination of the friend/counselor and legalist approaches would not.¹⁴⁵

viii. The “Right” Approach

The foregoing lawyering philosophies reflect different possible professional identities for tax lawyers. There is no consensus in the literature about which approach is the one “right” approach for lawyers, in general or in tax in particular.¹⁴⁶ Each of the foregoing approaches (except the purely self-interested approach) reflects a reasonable guideline for ethical practice. Until a consensus is reached regarding the “right” approach

¹⁴¹ Field, *supra* note 19, at 293.

¹⁴² *Id.* at 293-94.

¹⁴³ Crystal, *supra* note 39, at 1244-45, 1254.

¹⁴⁴ Field, *supra* note 19, at 295.

¹⁴⁵ *Id.* at 296.

¹⁴⁶ See, e.g., SHAFFER & COCHRAN, *supra* note 127 (presenting very different possible lawyering approaches); Crystal, *Philosophy*, *supra* note 44, at 76 (explaining that “[t]he discretionary nature of practice demands that lawyers adopt a philosophy of lawyering[, y]et the lack of professional consensus means that lawyers receive little guidance about how to go about developing such a philosophy.”).

to ethical professional identity (something that is quite unlikely to occur), lawyering philosophy and professional identity remain deeply personal matters on which practitioners will understandably differ.

IV. EMPLOYING EXERCISES TO ENGAGE STUDENTS IN REFLECTION & DISCUSSION ABOUT ETHICAL PROFESSIONAL IDENTITY IN TAX PRACTICE

For a professor who is persuaded that (a) helping students develop their individual professional identities is a valuable endeavor, (b) doing so is of particular importance in tax law, and (c) the traditional tax classroom should be leveraged as part of this effort, the next question is, “How?”

Unfortunately, existing resources are limited.¹⁴⁷ There are good materials for teaching tax ethics, but those materials generally focus on teaching the tax rules and standards of practice; to the extent that these materials implicate professional identity issues, the materials are designed for tax ethics courses and are generally not designed to be excerpted and used in other tax courses.¹⁴⁸ Further, textbooks for traditional substantive tax courses generally focus (understandably so) on teaching the substantive law rather than on helping students determine how to handle difficult discretionary decisions that may arise when using that substantive law to advise clients.

Thus, this section tries to fill the resource gap by describing exercises that I developed and used for my upper-division tax classes¹⁴⁹ in an effort to help students answer the very personal questions of, “Who am I as a member of [the tax] profession? . . . [W]hat do I want to be like in my professional role [as a tax lawyer]? And what place do ethical-social values have in my core sense of [tax] professional identity?”¹⁵⁰ The pedagogical approach described in this section is certainly not the only approach to fostering ethical professional identity in the traditional tax classroom, and it may not necessarily be the “right” or “best” approach. But these exercises are grounded in the research about professional formation, draw on the lessons from learning theory,¹⁵¹ and have worked well with my students.¹⁵² Thus, my modest goal is to contribute to our collective ability to help our tax students with the challenge of professional identity development. I encourage tax

¹⁴⁷ *But see, e.g.*, Thomas J. Purcell III, *Integrating Tax Ethics Into the First Tax Course*, THE TAX ADVISER (Nov. 1, 2013).

¹⁴⁸ *See supra* note 17.

¹⁴⁹ I have used a version of this exercise each of the past six times I have taught my upper-division tax seminar, and I have twice used a shortened approach to this exercise in my business (combined corporate and partnership) tax class. Specifically, in my business tax course, I only run the first part of the exercise, and I use only a subset of the statements. *See infra* Part V.A. (discussing how to shorten the exercise). In my business tax class, I engaged this discussion immediately after I ran one of the experiential practice-simulation exercises that I use in that class. *See* Heather M. Field, *Experiential Learning in a Lecture Class: Exposing Students to the Skill of Giving Useful Tax Advice*, 9 PITT. TAX REV. 43 (2012) (describing the experiential exercises that I use in my business tax course). The experiential exercise for the partnership portion of the course usually causes some students to make an ethical error (such as advising the client to take a position on the hope that the client will not get audited), which easily connects to a discussion of the ethics rules and of ethical professional identity.

¹⁵⁰ CARNEGIE REPORT, *supra* note 2, at 135 (raising these questions in a general context). I place these questions into the tax-specific context.

¹⁵¹ *See infra* Part IV.B.2.b.

¹⁵² *See supra* note 17 (providing additional context for the inspiration for this piece).

professors to adapt the below as they believe will best advance their pedagogical goals and best fit with their courses.

A practitioner who wants to invest in her own professional identity development can self-administer the exercises, engaging in self-reflection and discussion with colleagues, and the exercises can also be used as the basis for CLE workshops.

A. Student Learning Outcomes

As a result of these exercises, each student will be able to identify and justify her developing lawyering philosophy, and each student will be able to appreciate what it means to implement her lawyering philosophy in her career.

More specifically, the first part of the exercise will enable students to (a) articulate a philosophy of tax lawyering that reflects both her personal values and her concept of the role she wants to fill as a tax lawyer, and (b) demonstrate an understanding of how her ethical professional identity balances her duty to clients with her duty to the system. The second part of the exercise will enable each student to develop an appreciation for what it means to operationalize her professional identity in tax practice, and will enable each student to develop strategies to overcome challenges that might test her ability to implement and stay true to her lawyering philosophy.

As explained below, these objectives are accomplished through individual student reflection and professor-facilitated class discussion. As discussed later in Part V, the student learning objectives can be furthered by supplementing the reflection and discussion with readings, reflection papers, and other exercises.

B. Exercise, Part 1 – What is Your Tax Lawyering Philosophy & Why?

The first part of the exercise consists of homework to stimulate self-reflection about tax lawyering values and philosophies, followed by professor-facilitated class discussion. This section describes the homework, explains how I set up the class discussion, and provides an overview of the substantive discussion/analysis that the exercise is intended to produce.

1. *Homework to Stimulate Self-Reflection*

The homework assigned in advance of the relevant class session provides students with a list of statements about tax lawyering values and approaches. Each student is instructed to think carefully about the statements, reflect on who she is as an individual and as a member of the legal profession, determine the degree to which she agrees or disagrees with the statements, and prepare to explain the reasons behind her response (considering issues like which values are implicated by the statements and what impact the statements could have on a wide variety of stakeholders).¹⁵³ As part of the reflection process, I encourage students to listen to their gut reaction to each statement and then think about both why they had that gut reaction and whether that gut reaction reflects who they really

¹⁵³ Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325, 350-53 (2011) (part of ethical decision-making is identifying all potential approaches to a problem and considering all stakeholders who would be affected by each approach).

want to be.¹⁵⁴ The homework also asks students to describe their philosophy of tax lawyering.

The statements are as follows:¹⁵⁵

1. I would be willing to assist a client with a position that is more aggressive than a position that I would be willing to take on my own tax return (with respect to the same issue).
2. I would be willing to take a position on my own tax return that is more aggressive than a position with which I would be willing to assist a client (with respect to the same issue).
3. I believe that it is my responsibility to ensure that my clients comply with the tax law (at least with respect to matters on which I am advising them).
4. I believe that my duty as a tax practitioner is to my client, limited only by a duty to uphold the *letter* of the law.¹⁵⁶
5. Generally speaking, my loyalties are first to the tax system and then to the taxpayer.¹⁵⁷
6. I believe in resolving ambiguities in the law in my client's favor.¹⁵⁸
7. I believe in only advising my client to take tax positions that I think are the "correct answers" under the law (i.e., that are more likely than not to be sustained on the merits if challenged).
8. I believe in only advising my client to take tax positions that I think are the "right things to do" (i.e., that reflect my sense of morality and justice).
9. I believe in advising my client to take any tax positions that are not frivolous.
10. I believe that tax is like golf. In golf, almost any rule infraction is cause for disqualification of the golfer. In tax, if I advise in a way that causes me to be (or causes my client to be) penalized by a tax authority (i.e., a serious infraction), I have failed to ethically discharge my responsibilities as a tax lawyer.¹⁵⁹

The last part of the homework is open-ended, and it asks students to fill in the blank in a statement that says, "I would describe my tax lawyering philosophy as

¹⁵⁴ Cf. DANIEL KAHNEMAN, THINKING FAST & SLOW (2011).

¹⁵⁵ There are several surveys that different researchers have used to assess the ethical perspectives of practitioners. Several of the questions listed here are based, in part, on these instruments.

¹⁵⁶ This statement is derived from Rex L. Marshall et al., *The Ethical Environment of Tax Practitioners: Western Australian Evidence*, 17 J. BUS. ETHICS 1265, 1272 (1998) (mean 5.17, just over "slightly agree" on a 7 point Likert scale).

¹⁵⁷ This statement is based on the test statements in (a) Brian Spilker et al., *Client Advocacy in the Global Economy: A Comparison of U.S. and Indian Tax Professionals*, available at <http://ssrn.com/abstract=1908959> [<https://perma.cc/SX67-V9B4>], and (b) Internal Revenue Service, Survey of Tax Practitioners and Advisors, 1986 (questions 10(a) and 10(b)), available at <https://catalog.archives.gov/id/1135749> [<https://perma.cc/WM55-NT5E>].

¹⁵⁸ This statement is based on (a) Spilker et al., *supra* note 155, (b) IRS Survey, *supra* note 155 (question 12(a), statement 14); and (c) Devos, *supra* note 98 (question 10(a)).

¹⁵⁹ The opposite framing of this question is, "I believe that tax is like basketball. In basketball, if you never get a foul called on you then you aren't playing aggressively enough. In tax, I believe that if my clients and I don't occasionally get penalized by the tax authorities then I haven't been representing my clients aggressively enough." More students may be familiar with basketball than with golf, and I used to use the basketball analogy as the statement for students to evaluate. However, the golf analogy matches up better with a lawyering philosophy, and I support (and hope my students will support) the golf analogy more than the basketball analogy. Thus, framing the question using the golf analogy is more instructive for students in

_____.” As background for this part of the task, I typically assign all or part of my article, *Aggressive Tax Planning & the Ethical Tax Lawyer*, which describes several different tax lawyering philosophies.¹⁶⁰ For purposes of this last part of the homework, students are invited to select among the various lawyering philosophies described in the reading, to identify a combination of those options, or to articulate a different approach that resonates with them.

Note that this assignment assumes that students have sufficient background about the tax-specific ethics rules and standards reflected in the penalty provisions of the Code and in Circular 230. It is also helpful if students have taken or are concurrently taking the general course in professional responsibility. To the extent students lack either of these pieces of background, supplemental reading or lectures can be provided to fill the gap.¹⁶¹

When distributing the homework, it is important to explain to students the objective of the assignment and class session because these are quite different from most of their law studies, which focus on building substantive knowledge or legal skills. Thus, when distributing the homework, I explain that the assignment and the next class are intended to enable them to begin to discover and to articulate their professional identity as tax lawyers—that is, who do they want to be as tax lawyers? I also articulate what I believe to be the exercise’s value to students. Specifically, if a student develops a strong sense of her professional identity, she can (a) better understand what practice setting is likely to be a good fit for her (and better make the case to her desired employer as to why she would be a good hire); (b) increase the likelihood that she will behave ethically as a tax practitioner because she will have a framework to help her exercise good judgment when faced with difficult discretionary decisions in practice; and (c) improve her ability to discharge her duties to her clients while maintaining her own well-being and building a sustainable tax career. The last caveat that I give when assigning the homework is to remind students that there are generally not objectively “right” or “wrong” answers to the

their professional identity development. Thanks to Nathan Fox, a student who worked with me on an independent study project several years ago, for the ideas for both the golf and basketball statements.

¹⁶⁰ Field, *supra* note 19. The first few times I did a version of the exercise described herein, I gave only excerpts because I was still developing the project. That approach may actually be better than assigning the full article, which is, admittedly, on the long side. I also plan to write a shorter practitioner-oriented summary of the different tax lawyering philosophies and the arguments that might lead a practitioner to adopt one over another. Once written, that might serve as a useful, shorter reading assignment to prepare students to engage in a conversation about lawyering philosophy. One could also assign the text from Part III.b.2 *infra*, which provides brief summaries of different lawyering philosophies.

¹⁶¹ See *infra* Parts V.B.1. & V.D.

questions that we will discuss and that what matters is what is “right” to each of them as individuals.¹⁶²

2. *Class Discussion to Engage & Challenge*

i. Structuring the Discussion

At the beginning of the class session, I distribute a paper survey that asks the students (i) to rate the degree to which they agree or disagree with the statements and (ii) to briefly describe what they believe is their philosophy of tax lawyering.¹⁶³

For purposes of rating the degree to which they agree or disagree with the statements, the survey provides a 6-point Likert scale. Using this scale achieves two goals. First, it demands that students take a position because the survey does not offer a “neutral” or “neither agree nor disagree” option. Second, it differentiates students based on the intensity of the agreement or disagreement because students have the option to choose from “strongly agree”, “agree”, and “slightly agree” (or disagree).

Students are then divided, based on their viewpoints, into small groups for discussion. Students can be divided based on their responses to any of the statements or based on their choice of lawyering philosophy. I generally look for issues that have the greatest divergence of views in order to stimulate the most robust discussion.¹⁶⁴ An instructor can also divide students into groups using students’ responses to the question/statement that the professor believes is most important to students’ professional identity development. Regardless of the specific questions used to divide the students, the key is to group students with similar perspectives together.

Each small group should discuss the reasons for their answers, and the students are advised that, after the small group discussions, the entire class will discuss. Thus, students should be prepared to articulate the reasons for their approach, and students should anticipate counter-arguments and reasons that others might have different views. To help focus the small-group discussions, I typically highlight for the students the question(s) that I used for purposes of grouping the students.

After the small group discussions, I facilitate a discussion among all of the students about the particular statement or choice of lawyering philosophy. This discussion asks students to articulate their views, to consider the points made by others, to reflect on the extent to which those points resonate with them, and to explain why points made by others do or do not resonate strongly. Before embarking on the large group discussion, I reiterate the professional identity development goal of the exercise, the benefits of developing professional identity, and my belief that lawyering philosophy/professional identity is a

¹⁶² One exception may be statement #9. With respect to the other statements, some professors might believe that certain answers are better than others. I have my own answers to the questions posed, and I do have particular hopes about how the students will respond. But I believe that these questions are intended to facilitate a process of self-discovery, rather than being intended to produce students with particular perspectives with which I agree. See *infra* Part V.G. (discussing the challenge of balancing students’ self-discovery with the professor’s desire to encourage students to adopt a particular approach to tax lawyering).

¹⁶³ If there is a large class, the survey could be part of the homework, and it could be required to be submitted 24 hours before the start of the class session. This would enable the professor to group students by viewpoints before the class session.

¹⁶⁴ This is one reason why I ask students to respond to all ten statements. With so many statements, there is quite likely to be at least a few on which student opinions diverge significantly.

very personal matter for which there is no objectively “right” answer.¹⁶⁵ I also remind students that, as they figure out who they want to be as lawyers, they should reflect on the discussion and that it is okay to be affected by, and adopt a different approach because of, the discussion.

I typically allocate one hour to this discussion. However, this often means that I have to cut off robust discussion because of time.

ii. Key Pedagogical Techniques

The structure of this reflection and discussion exercise employs a few key pedagogical techniques that contribute to learning and personal growth.

First is individual reflection; reflection contributes to self-awareness, which is particularly important for professional formation.¹⁶⁶ In particular, getting students to reflect on the values and people affected by decisions is an important part of ethical decision-making.¹⁶⁷ Thus, the professor should do whatever she can to encourage each student to take the exercise seriously and to invest in the personal process of asking tough and probing questions about herself.

Second is active engagement. In this exercise, the active engagement is the in-class small-group and large-group discussions.¹⁶⁸ “When students actively engage . . . and reflect on that process, they develop personal understanding” and “those personal understandings, having been entirely generated within the student’s mind, become a part of who the students are.”¹⁶⁹ Active engagement through professor-facilitated peer-based discussions pushes students to “negotiate[e] meaning with their peers[, which] produces learning. . . . [This] expose[s] students to multiple perspectives and, as a result, students develop complex approaches and understandings.”¹⁷⁰ The professor-facilitation of this process helps to ensure that students stay within ethical boundaries and that students consider various dimensions of the ethical decision-making process when discussing how to make discretionary decisions within those boundaries.¹⁷¹ Given the importance of active engagement, professors should try to ensure that each student participates in the discussion.

Third is “fostering each student’s habit of actively seeking feedback, dialogue with others about the tough calls, and reflection.”¹⁷² Professional identity development requires

¹⁶⁵ Even as students are encouraged to articulate opposing views, it is critical to ensure classroom feels safe and non-judgmental to “foster open but respectful dialogue.” Gantt & Madison, *supra* note 10, at 266.

¹⁶⁶ FRUEHWALD, *supra* note 4, at 1 (emphasizing the need for students working on professional identity development to reflect and “think hard about yourself”); Gantt & Madison, *supra* note 10, at 263; HAMILTON, ROADMAP, *supra* note 4, at 203-04 (citing Neil W. Hamilton, *Fostering Professional Formation (Professionalism): Lessons from the Carnegie Foundation’s Five Studies on Educating Professionals*, 45 Creighton L. Rev. 763, 783-85 (2012) (discussing Carnegie reports on pedagogy)).

¹⁶⁷ Gantt & Madison, *supra* note 10, at 266-67; *see also* Hamilton & Monson, *supra* note 151, at 350-53.

¹⁶⁸ Writing assignments also provide valuable opportunities for active engagement. *See infra* Part V.E.3 & 4.

¹⁶⁹ Michael Hunter Schwartz, *A Review of Teaching and Learning Theory* in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 67-72, at 69 (Deborah Maranville et al., eds.) (2015) (citing MICHAEL HUNTER SCHWARTZ, ET AL., TEACHING LAW BY DESIGN (2009)).

¹⁷⁰ *Id.*

¹⁷¹ HAMILTON, ROADMAP, *supra* note 4, at 203-04 (emphasizing professor-facilitation).

¹⁷² *Id.*

an iterative process of reflection and refinement. Although a class session can do much to foster the development of students' ethical professional identities, it is useful to help students see that this is an issue to which they will need to return again and again. One small way to do that is to ask students, at the end of the discussion, how their thinking about their lawyering philosophy has changed as a result of the discussion.¹⁷³ Another way is to try to return to these concepts throughout the semester by reintegrating them into the class discussion later in the semester if and when the application of a substantive tax rule to a hypothetical situation is ambiguous.

3. *Substance of the Discussion*

Substantively, the goal of the exercise is to help students discover, build, and justify their professional identities as tax lawyers.

Each of the reflection statements push students to think about a particular aspect of their personal and lawyering values. Specifically, statements 1 and 2 require students to understand their baseline assumptions about their personal risk appetite and that of their clients, statements 3-6 provide different models for balancing a lawyer's competing duties, and statements 7-10 gauge a student's willingness to be aggressive and, more broadly, help students frame their roles as tax lawyers. All of these statements are part of an individual's lawyering philosophy. Thus, the larger question about lawyering philosophy integrates the issues highlighted by the individual statements. Ultimately, reflection on each of the statements should enable students to articulate their personal lawyering philosophy and reasons for adopting it.

i. Risk Tolerance – Clients vs. Self

Statements 1 and 2 push students to reflect on how aggressively they approach their own personal taxes and to understand that their clients might have very different tolerances and appetites for risk.¹⁷⁴ Whether a student is very conservative, relatively aggressive, or somewhere in between when preparing her own tax returns, she should acknowledge her personal bias about how to deal with uncertain tax positions, be able to explain why she takes that approach,¹⁷⁵ and think about how she would deal with a client who has a very different approach to risk.¹⁷⁶

For example, does a student who is very conservative in her own tax life feel comfortable representing a client who wants to be somewhat aggressive? If so, how does the student reconcile that difference? Or does the student with little personal tolerance for tax risk prefer to represent clients with a similar approach to risk? If so, what does that mean for the type of tax law she ought to practice and for the practice setting in which she

¹⁷³ See *infra* Part V.E.4.

¹⁷⁴ When I refer to "risk", I mean the chance that an uncertain position might or might not be sustained on the merits if challenged. I am not referring to audit risk or the risk of non-detection.

¹⁷⁵ Interestingly, students often come to the same answer about their personal risk appetite, but for very different reasons. For example, both (i) a student who is highly risk averse and (ii) a student who views paying her rightful share of taxes (without efforts to minimize this burden or get around the law) as part of the collective social contract, are likely to be conservative on their own tax returns, but for very different reasons. And they are quite likely to differ as to whether they would be willing to assist more aggressive clients. Indeed, they may be well-advised to take different career paths in order to enable each to practice in accordance with her values. See *infra* Part IV.C.2.a.

¹⁷⁶ This is an important part to giving useful tax advice. Heather M. Field, *Giving Useful Tax Planning Advice*, 134 TAX NOTES 1299 (Mar. 5, 2012).

would be most comfortable? And how will she handle (or avoid representing) more aggressive clients?

A brief discussion about potential differences between a client's and a lawyer's personal risk tolerance can often be a relatively easy way to get students talking.

ii. Balancing Competing Duties

Statements 3 through 6 articulate a few ways that students might consider balancing their duties to clients and the tax system. These statements are intended to provoke thought and discussion about alternative ways to strike this balance and about the rationale for taking different approaches.

All of the statements challenge students to grapple with the questions of (i) whether they, as future tax lawyers, owe any special duty to the revenue system, (ii) if so, why, and (iii) if so, how they should balance that duty with their duty to their clients. On one hand, students may argue that tax lawyers have a “duty to protect the revenue”¹⁷⁷ and that their duty to their clients must be balanced against “the public's interest in a sound tax system.”¹⁷⁸ Students taking this position may argue for this duty to the system (i) because the government lacks sufficient resources to enforce the tax laws comprehensively and, thus, cannot be assumed to be a reliable adversary;¹⁷⁹ (ii) because revenue collection in the U.S. relies heavily on self-assessment, and taxpayer compliance in this self-assessment system relies heavily on advice provided by tax advisers;¹⁸⁰ (iii) because tax lawyers, by helping to ensure compliance with the tax laws, “play an important role in helping to pay for a civilized society and in upholding the democratic social consensus embodied in the tax system;”¹⁸¹ and (iv) because a well-functioning tax system is the source of the tax adviser's livelihood,¹⁸² among other reasons. On the other hand, students may argue that tax lawyers do not have a special duty to the revenue system and that they only need to adhere to the rules of ethics and to “obey and uphold the law,” just like any other lawyers.¹⁸³ These students might argue that any special duty to the tax system could also adversely affect their ability to be loyal to their clients.¹⁸⁴

Each of the statements provides a different vision of what that balance would entail. While statements 3 and 5 reflect a strong sense of duty to the system,¹⁸⁵ statements

¹⁷⁷ Durst, *supra* note 139, at 1047-48.

¹⁷⁸ Linda Galler, *The Tax Lawyer's Duty to the System*, 16 VA. TAX REV. 681, 688, 693 (1997); *see also, e.g.*, Beale, *supra* note 104, at 639.

¹⁷⁹ *See, e.g.*, Crystal, *Teaching, supra* note 37, at 1243 (citing William Simon's work)

¹⁸⁰ *See supra* Part III.B.1.

¹⁸¹ Dzienkowski & Peroni, *supra* note 92, at 2722-23

¹⁸² *See, e.g.*, William H. Simon, *After Confidentiality: Rethinking the Professional Responsibility of the Business Lawyer*, 75 FORDHAM L. REV. 1453 (2007).

¹⁸³ Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 U. KAN. L. REV. 847, 850 (1999).

¹⁸⁴ *See, e.g., id.*; David J. Moraine, *Loyalty Divided: Duties to Clients and Duties to Others—The Civil Liability of Tax Attorneys Made Possible by the Acceptance of a Duty to the System*, 63 TAX LAW. 169 (2009).

¹⁸⁵ Statement 3 sometimes provokes a discussion about what it means to “comply” with the law. Students understanding “comply” to mean “take the position that is more likely than not to be correct” balance competing duties differently than students who understand the term “comply” to mean “follow the rules about when disclosure of a position is required” (e.g., disclose if the position has only reasonable basis). In my experience, students generally understand “comply” in the former sense, as in “take the position that is the “right” answer under the law”, which reflects a reasonably strong sense of duty to the system.

4 and 6 both reflect a strong client-advocacy approach¹⁸⁶ regarding “gray area” issues (e.g., where the spirit and letter of the law conflict or where the law is ambiguous). There are certainly many other ways to frame the balance between duty to clients and duty to the system and/or to the rule of law, and students can develop their own articulation of how they, in principle, would balance competing duties. A different way to frame the question for students is to ask each student to complete the following exercise:

“When dealing in grey areas of the tax laws, where on this scale do you think your loyalties are?”¹⁸⁷ Please make an “x” on the scale to indicate where you believe your loyalties are.

“Completely with the tax authorities	_____	Completely with your clients”
--	-------	-------------------------------------

Ultimately, whether students believe that they owe a special duty to the revenue system or whether they conclude that their duty to the “system,” as a tax lawyer, is no greater than any other lawyer’s duty to the rule of law, students should be able to articulate why they reach that conclusion. They should discuss what it means to discharge that duty (whether to the tax system in particular, or to the rule of law in general) while also discharging their duty to their client.

iii. The Bigger Picture – Who Are You as a Tax Lawyer?

Statements 7-10 reflect different models of lawyering. These statements help students move from their analysis of how to balance competing duties (discussed above) to a broader articulation of their over-arching lawyering philosophy. Statement 7 reflects a legalist approach, statement 8 reflects a moralist approach, statement 9 reflects a very aggressive hired gun approach,¹⁸⁸ and statement 10 reflects an “authority conception of the law” approach.¹⁸⁹ The last part of the homework provides students with a more open-ended opportunity to articulate their lawyering philosophies.

Regardless of which statement(s) (if any) resonate with students and regardless of how a student ultimately describes her approach to tax lawyering, students should be able to explain why they gravitate toward their particular approach. This explanation is likely to draw heavily on the factors relevant to the student’s assessment of how to balance the duty to clients and the duty to the system.¹⁹⁰ This discussion is also likely to take into account the government/taxpayer resource imbalance, the operation of our self-assessment system, and the role of tax advisers in compliance.¹⁹¹ The discussion may also reflect students’ concerns about the reputation of the profession¹⁹² and how they will be perceived

¹⁸⁶ See J. David Mason & Linda Garrett Levy, *The Use of the Latent Constructs Method in Behavioral Accounting Research: The Measurement of Client Advocacy*, 13 *ADVANCES IN TAX* 123 (2001).

¹⁸⁷ IRS Survey, *supra* note 157 (question 10(a), which gave a scale of 1-6).

¹⁸⁸ Notably, if taken to the extreme, this approach could subject both the client and the adviser to penalties, and could constitute a violation of the Circular 230 rules.

¹⁸⁹ Depending on how one interprets the term “infraction”, this statement could alternatively be understood to reflect a legalist approach.

¹⁹⁰ See *infra* Part IV.B.3.b.

¹⁹¹ See *infra* Part III.B.1.a.

¹⁹² See *infra* Part III.B.1.c.

(and how they will perceive themselves)¹⁹³ as part of the tax profession. Further, the discussion will be informed by students' views about the fairness and complexity of the tax system, and about how well government uses the tax dollars collected, among other considerations.

As part of this larger discussion, I encourage students to articulate and challenge their assumptions about the role they envision. For example, most students approach the analysis from the perspective of being a lawyer in private practice. How might a student's approach change if the government was her client? In addition, many students assume that they are advising in a prospective planning context. How might a student's approach change if the student was advising in a retrospective controversy context or in a pure compliance context where the facts have already occurred and the only question is about how to report them? And many students assume that their clients have bona fide business reasons for the matter with which they are seeking assistance. How might a student's approach change if the client's primary motivation for seeking advice is clearly tax reduction?

Ultimately, discussions of the various statements and of student's lawyering philosophies all bleed together. This is by design because the specific statements about lawyering values and approaches are intended to help students discover who they are and want to be as lawyers. The hope is that, at the end of the discussion, students will be better able to articulate a vision for who they want to be as a tax lawyer, and students will be able to articulate why that guiding principle reflects their values and the values of the profession.

C. Exercise, Part 2 – What Does Your Professional Identity Mean For Your Tax Career?

Once each student can articulate her tax lawyering philosophy, she should begin to think about what that professional identity means for her career. The second part of the exercise is intended to help students operationalize their vision of tax lawyering. Again, this goal is achieved through a series of reflection questions and professor-facilitated discussions in which students should actively engage.¹⁹⁴

1. *Setting Up the Discussion*

Two key questions engage students on these issues. First, I ask what a student's professional identity means for the type of job she wants to pursue. Second, I ask students to envision ways in which their tax practice could test their ability to adhere to their professional identity, and I ask students how they would respond in those situations.

I typically spend one hour on this discussion, and I engage in this discussion with students immediately after the discussion from the first part of the exercise. The two parts of the exercise could, however, be separated in time; they need not occur in the same 2-hour class session. However, Part 1 (in which students work to figure out their lawyering

¹⁹³ I have had a number of students express to me concern about joining a profession that helps people reduce their taxes. Some of these students came to law school because of their interest in social justice and public good, and they wonder whether they are "selling out" and whether it is possible to "still be a good person" if they do tax work. In response, I try to encourage students to consider carefully the sector and practice area in which they choose to work; perhaps students with these concerns should consider working for the government. See *infra* Part IV.C.2.a. I also encourage students to try to articulate (and then implement) a statement of professional identity and purpose that resonates with them. For example, a student who cares about social justice seemed more able to accept her interest in a tax career when she viewed her potential role as one in which she "helps taxpayers to comply with the law and pay their fair share."

¹⁹⁴ See *supra* Part IV.B.2.b. (discussing key pedagogical techniques). These pedagogical approaches are equally applicable to the second part of the exercise.

philosophies and reasons for adopting their approach) must occur before Part 2 of the exercise, which focuses on operationalizing the professional identity they developed in Part 1.

The second part of this exercise technically contains two distinct parts—using professional identity to find the “right” job and implementing professional identity in practice in the face of challenges. The remainder of this section elaborates on both in order to help each student explore what it would mean for her to practice in accordance with her ethical professional identity.

2. *Substance of the Discussion*

i. Using Professional Identity to Find a Job/Employer that is a “Good Fit”

The question presented to students in this part of the exercise is, “What does your professional identity mean for what type of career you would like to pursue? Consider practice sector (e.g., private practice vs. government), practice area (e.g., business tax planning, estate tax planning, controversy), and particular employer within a sector and practice area.” Students are, again, divided into small groups and asked to reflect upon and discuss the question within their groups. Then, the students reconvene as a group and engage in a professor-led discussion. The professor might want to invite a representative from the Career Office to join the large-group discussion in order to provide resources and suggestions in response to student questions and comments.

Students should discuss the wide range of practice sectors and practice areas for tax lawyers. Practice settings can include law firms (large, medium, and small), accounting firms (again ranging in size), government (federal, state, local), non-profits, in-house settings, academia, the judiciary, and more.¹⁹⁵ Practice areas can include planning (business, estate, international, etc.), compliance, controversy (on behalf of taxpayers or on behalf of the government; at the administrative level or at the court level), policy/drafting (legislation or regulations), and more.¹⁹⁶

Some students might conclude that their lawyering philosophies and specific lawyering values lead them to particular options. For example, a student who feels an overriding sense of duty to the tax system might want to pursue a career in government. And a student who adopts a moralist approach might be particularly interested in a career in academia, with a non-profit or in-house with a business that shares her values, in government where she can help with the creation of legislation and regulations, or doing lobbying to bring about changes to the law.

For many students, however, their lawyering philosophies will fit reasonably well with a variety of practice areas and practice settings. For these students, the harder question will be identifying which employers within particular practice settings/areas are “good fits” for the type of tax lawyer that the student wants to be.

Students should brainstorm about how a student might ascertain whether a particular employer is likely to share the student’s approach to tax lawyering. Students are likely to come up with a wide variety of strategies, including (i) studying the employer’s

¹⁹⁵ AMERICAN BAR ASSOCIATION SECTION OF TAXATION, CAREERS IN TAX LAW: PERSPECTIVES ON THE TAX PROFESSION AND WHAT IT HOLDS FOR YOU (John Gamino et al., eds.) (2009).

¹⁹⁶ *Id.*

website to learn about how the employer perceives its role;¹⁹⁷ (ii) asking others in the industry (e.g., alumni mentors) about the reputation of the particular employer; and (iii) researching whether the employer (if a law firm or accounting firm) has been involved in tax shelter-related litigation. Students are also likely to want to ask questions of the people who work at the employer. Questions could include, among others, asking (i) about the lawyers' lawyering philosophies; (ii) about the type of work they do and the type of clients they represent; (iii) if they ever faced an ethical dilemma with a client and how they handled it; (iv) if they ever advised on a matter with only substantial authority or reasonable basis; (v) about the procedures within the firm for making difficult decisions (e.g., about opinions); and (vi) about which traits and achievements are valued at the firm and lead to advancement. Students may also discuss when in the process they should bring up these questions; many will argue for waiting until after they receive an offer.

Of course, one challenge for students is that the job market remains lackluster, so many students do not have the luxury of choosing among multiple job offers. Thus, some students take whatever job offer they get. As a result, students may question whether there is real value to an inquiry about how a student's lawyering philosophy matches up with that of a prospective employer.

There are several reasons why I think professional identity still matters in the job search process even if jobs are scarce. Hopefully, a professor-facilitated discussion about the utility of professional identity in the job search process can elicit these reasons, and others, from the students.

First, if a student has an understanding of her lawyering philosophy by the beginning of her 2L or 3L job search process, she can try to target practice sectors and particular employers that she perceives might be good fits for her. Second, professional identity can be relevant to the interview process because understanding a prospective employer's approach to tax lawyering can help the student present herself in a way that would be most attractive to the employer (assuming, of course, that the employer's approach to lawyering matches the student's). By understanding an employer's needs and values and by understanding the student's own strengths and values, the student will be better able to articulate the "value proposition" that the student provides to the employer.¹⁹⁸ Further, the student can use the insights gleaned from her professional identity inquiry to help demonstrate that she has thought carefully about what it means to be an ethical practitioner, which is a competency valued by employers.¹⁹⁹

Third, even if the student does not have her choice of jobs, the student's lawyering philosophy can help guide the student in building her career in the long-term. If she understands what her professional identity means for the type of job she wants to have in the long run, she can strategize about how to leverage the first opportunity (i.e., to learn as much as she can in the first job while navigating potential professional identity challenges that might arise) in order to make herself as marketable as possible for the position that she

¹⁹⁷ For example, a website that says, "you'll pay less taxes with us" reflects a very different lawyering philosophy than a website that says "we will help you get your taxes right". Websites are often not so explicit and dramatically different, but there is still information to be gleaned from how a firm presents itself.

¹⁹⁸ HAMILTON, ROADMAP, *supra* note 4, at 54, 178-79 (important to be able to "effectively communicat[e] one's] value" to a prospective employer").

¹⁹⁹ See Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620 (2011) (including "integrity/honesty" and "self-development" as important competencies for lawyers).

believes will be a better fit. Further, she can use her understanding of her professional identity to help her identify, and position herself well for, those longer-term opportunities. Fourth, even if a student accepts a job with an employer that approaches lawyering differently than the student does, understanding her future employer's approach will give the student information about what her experience is likely to be with the particular employer. To the extent that the employer's approach is quite different from the student's, the student can invest more in developing strategies for coping with potential challenges to her ability to implement her lawyering philosophy.

ii. **Imagining Being Tested & Strategizing to Successfully Navigate Ethical Professional Identity Challenges**

The question presented to students in this part of the exercise is, "What situations in practice could test your ability to implement your approach to ethical tax lawyering, and what strategies might you employ in order to navigate those challenges?" More broadly, the issue for this part of the discussion is what a student should do if she discovers, after working for an employer, that her approach to lawyering and her employer's approach to lawyering (or at least her supervisor's approach to lawyering) are in conflict. This is important, not only for the lawyer's own values and sense of well-being,²⁰⁰ but also because even junior lawyers must take personal responsibility for practicing in an ethical manner; they cannot abdicate responsibility for their own ethics by merely deferring to the judgment of supervisors.²⁰¹

Navigating ethical professional identity challenges in practice can be quite difficult. Thus, "[l]aw teachers who want to help students develop ethical decision-making must also teach students how to develop the courage and motivation needed to follow through with their decisions."²⁰² Indeed, in order to try to avoid ethical lapses, lawyers should "try to anticipate ethical dilemmas and to specifically plan and rehearse [their] responses ahead of time."²⁰³ Thus, this part of the exercise focuses on these objectives.

Explicit Challenges to Professional Identity

To explore these issues, students are, once more, divided into small groups and asked to try to envision a professional scenario that would test a junior lawyer's ability to practice in accordance with her professional identity. Students should also brainstorm about how they might respond to such a scenario. To the extent that students struggle to come up with scenarios that present professional identity challenges, the professor can provide sample hypothetical scenarios. Appendix A provides some sample scenarios that can serve as the basis for discussion.²⁰⁴

Students should be able to articulate why a particular scenario might test a lawyer's ability to continue to practice in accordance with her professional identity. Indeed, some

²⁰⁰ See *supra* Part II.B.2.

²⁰¹ See HAZARD, *supra* note 127, at ch. 46 (responsibilities of a subordinate lawyer).

²⁰² Gantt & Madison, *supra* note 10, at 268 (citing THOMAS LICKONA, EDUCATING FOR CHARACTER 57-58 (1991)).

²⁰³ Robbennolt & Sternlight, *supra* note 45, at 1157-42.

²⁰⁴ Alternatively, the professor could assign reading that relays the story of Mike Hammersley, who became a whistleblower in connection with tax shelter transactions. See Tanina Rostain, *Travails in Tax*, in LEGAL ETHICS: LAW STORIES 108-117 (story of Hammersley); see also *infra* Part V.E.1.

scenarios might challenge certain lawyers but not others depending on the individual lawyer's approach to tax lawyering.

Once students identify the challenge, each student should refer back to her lawyering philosophy and to her reasons for wanting to pursue a career that adhered to that particular guiding principle. Reflecting back on those values and on how her actions could affect all relevant stakeholders should give her guidance about what her professional identity would lead her to do in the particular scenario.²⁰⁵ This is the process of using one's professional identity as a framework for principled decision-making.²⁰⁶

Of course, the reality of practice is not so easy, so a key part of the ethical challenge is about how to honor that professional identity (and the values motivating the professional identity) in the particular employment setting, with all that the lawyer's practice and personal realities entail. Thus, students should discuss various strategies they might employ in the particular setting. Although the scenarios may vary, the skills and strategies needed to respond effectively are often quite similar regardless of the specific scenario.

Students are generally predisposed to trying to find a way to navigate the scenario while staying employed and continuing with career advancement at the particular employer. This is completely understandable given the challenging job market, given the amount of student debt that most junior lawyers have, and given the family and other personal responsibilities that they may bear. Thus, the focus of the conversation is generally on how to navigate the professional identity *within* the existing work environment. That said, changing jobs is always an option if a lawyer cannot make the existing situation work, and it is important for students to be willing and able to make the tough decision to leave an employer if necessary. Even in that situation, most lawyers will want to try to keep their current jobs until they find a new job. This means that even a lawyer who is trying to change jobs will need to have strategies to navigate the current challenge in the existing work environment.

When considering strategies that would enable the student to navigate the challenge within the work setting, students often suggest reaching out to mentors, both inside and outside of the employer, to get advice. When seeking advice from mentors who work for the same employer, students are generally more comfortable seeking advice from someone who is not involved in the particular matter. Students also often suggest having an open conversation with their supervisor, but this requires quite a bit of tact in order to push back against a supervisor in a way that does not seem insubordinate. For example, students suggest asking open-ended questions to elicit more information, in an effort to try to understand the reasons behind the supervisor's instruction.

Often, open communication, guided by good advice from mentors, will help resolve the issue. To the extent that challenges remain, a junior lawyer may reach out to her firm's ethics committee (if there is one) to get advice. If the ethical challenge comes from a structural or institutional issue within the employer, the lawyer might try to bring about change within the employer. For example, she could have a conversation with her supervisor about the rationale behind the employer's policies and procedures with her supervisor. She could also raise these questions with the ethics or opinion committees at the firm (if there are such committees), and she could try to get herself appointed to such committees. She could also volunteer to help prepare or lead a workshop for her

²⁰⁵ Recall that a key part of ethical decision-making involves reflecting on values and on the impact the decision may have on others. Gantt & Madison, *supra* note 10, at 266-67.

²⁰⁶ Field, *supra* note 19, at 297-99.

department or group to discuss the procedures or approaches that concern her and that she hopes to help change.²⁰⁷

As to her day-to-day work, the lawyer could try to get more assignments from other supervisors whose lawyering approaches (or in other practice areas where the lawyers' lawyering approaches) might more closely match hers. Alternatively, she might try to get assigned to client work for clients who have goals that are more aligned with hers. For example, if she takes a legalist approach, she might try to do more work for clients that are seeking conservative advice. These strategies for navigating the day-to-day work might be effective for a while, but if there are several lawyers at the employer who continue to practice in a way that is not in accord with the lawyer's lawyering philosophy, she should consider carefully whether she wants to remain at the employer for a significant part of her career. For example, she may be content to stay for a period of years, but she might not want to become a partner with these other lawyers. In that case, she should think carefully about the 5 to 10 year trajectory for her career.

The foregoing are not the only strategies available to help a junior lawyer navigate a situation that challenges her sense of ethical professional identity. However, explicitly identifying several different strategies can help empower a student to become a lawyer who has the courage to try to make principled ethical decisions.²⁰⁸

Subtler Challenges to Effective Implementation of Professional Identity

Students should also be reminded that not all tests to one's professional identity are as explicit as those in Appendix A. Sometimes, a lawyer's professional identity or her ability to implement her professional identity can be adversely affected in small increments that can add up over time. These more subtle influences can include (a) norms from the lawyer's employer, broader professional community, or social community; (b) client influences, including the mere desire to please a client and the lawyer's possible increasing identification with the client over time; and (c) cognitive biases.²⁰⁹ These factors can lead to flawed decision-making, where lawyers inadvertently fail to live up to their own professional identities and where they "end[] up — perhaps unwittingly — crossing lines that they did not want to cross."²¹⁰ Acknowledging these risks is an important first step in counter-acting them.²¹¹

Thus, it can be useful to engage students in a discussion about strategies that can help them stay grounded in their professional identity over time despite these subtle influences. Ideas might include (i) posting a clear statement of professional identity at

²⁰⁷ She need not explain that her concerns motivate her offer to assist with such matters. It is okay to merely explain that she cares about ethics or about understanding how the firm handles the particular policy/procedure, and that she wants to make a contribution to the firm on such matters. Often, engaging the discussion within the group will elicit comments from others, possibly more senior and more well-established people, who share her same concerns. This is one technique for a junior person to jumpstart a potentially tricky conversation without putting herself on the line as the first objector.

²⁰⁸ In addition, it is possible that a lawyer will be unable to reconcile successfully her ethical professional identity with what her employer and client are asking her to do. She may choose to leave her job as a result. But she may also choose to stay and compromise her values, if even for a short time. That can be an incredibly painful and difficult experience, but it is better to make an intentional decision to compromise oneself, taking into account the costs and benefits of doing so, rather than inadvertently taking preventable actions that lead to regret.

²⁰⁹ *Id.* at 310-17.

²¹⁰ *Id.* at 310.

²¹¹ Robbennolt & Sternlight, *supra* note 45, at 1156-57.

one's workstation as a regular reminder of one's core tax lawyering values;²¹² (ii) being explicit with colleagues and clients about one's lawyering philosophy;²¹³ (iii) always asking oneself what could go wrong or be wrong with the particular analysis/approach (i.e., as if the lawyer worked for the IRS or as if the lawyer was a newspaper journalist);²¹⁴ and (iv) becoming engaged with professional organizations whose lawyering approaches resonate with the lawyer (thereby reinforcing, rather than skewing, the lawyer's sense of professional identity). Further, the lawyer should be wary of red flags, including phrases such as "just this once," "the [other] firm did it" and "it's so close, maybe it doesn't make a difference," which could suggest she is compromising on her professional identity.²¹⁵

In addition, students should be encouraged to reflect regularly on their professional identities and on how they have implemented their lawyering philosophy. Regular reflection can help students stay true to their preferred lawyering approaches and can empower them make different decisions in the future in order to practice more closely in accordance with their values (that is, if they realize that they should have done something differently). Moreover, the student "should also reflect on whether her experiences change her perspective on the type of tax adviser she wants to be. Lawyering philosophies may evolve over time, so it is important to continue to reflect on whether a choice made in the past about guiding principles for practice continue to reflect the lawyer's vision of the ethical tax planner she wants to be."²¹⁶

3. *Wrapping Up the Exercise*

Ultimately, these exercises are intended to enable each student to (a) identify and justify her tax lawyering philosophy and (b) appreciate how her lawyering philosophy can help her to navigate ethical decision-making challenges throughout her career.

Of course, a two-hour workshop cannot result in a fully formed professional identity, nor can it ensure that students have comprehensively considered the full range of potential discretionary decision-making situations that might test her sense of ethical professional identity. But these exercises can give students a much greater appreciation for how they might approach a tax law career in a way that reflects their values. And these exercises can give each student a foundation in her own ethical professional identity, on which the student can reflect as her law school education and professional career progress. The hope is to give each student the tools to "build a defensible, morally-coherent tax [] career of which she can be proud."²¹⁷

V. TACKLING SOME CHALLENGES OF THE EXERCISES

Incorporating the above exercises into my classrooms does present challenges, and I expect that others may have similar experiences. Some challenges are primarily

²¹² *Id.* at 1158-59.

²¹³ Field, *supra* note 19, at 318; *see also, e.g.*, Frederic G. Corneel, *Guidelines to Tax Practice Second*, 43 TAX LAW 297 (1990) (providing a sample statement of a firm's guidelines to practice, which reflect a firm-level lawyering philosophy); Robbenolt & Sternlight, *supra* note 45, at 1168-71; Linda K. Trevino et al., *Behavioral Ethics in Organizations: A Review*, 32 J. MGMT. 951, 967 (2006).

²¹⁴ *See, e.g.*, Gary Klein, *Performing a Project Premortem*, HARV. BUS. REV. (Sept. 2007) available at <https://hbr.org/2007/09/performing-a-project-premortem>.

²¹⁵ Field, *supra* note 19, at 319-20 ("These red flags do not mean that a lawyer is doing (or about to do) something unethical, but each should heighten the lawyer's awareness of the risk that she could be crossing the line into an action that violates her lawyering philosophy. By using these red flags as triggers to reconsider the analysis before proceeding, she may be able to avoid unintentional lapses in judgment.").

²¹⁶ *Id.* at 320.

²¹⁷ *Id.* at 321.

logistical: class time, class size, class level, and background regarding the tax ethics rules. Other challenges go to the core of the learning objectives: deepening and enriching professional identity development, assessing student progress, and influencing student choices. This section will discuss these challenges and will provide variations and alternatives to help faculty members proceed with fostering ethical professional identity despite the challenges.

A. Managing Class Time

Instructional minutes in any course are precious, and the professional identity exercises consume class time. As described above, the exercises take approximately two full hours, with one hour devoted to each part of the exercise. The discussions could easily fill more time if available.

Allocating two hours to this activity does take time away from substantive instruction, but I believe that the tradeoff is worthwhile because ethical professional identity goes to the heart of who each student will be as a practitioner. This is about the principles that will guide how students use the substantive law over the course of their careers and about how students will operationalize their values in practice. I believe that developing this skill is worth sacrificing an hour or two of substantive coverage, but others may disagree.

To minimize class time, a professor could run only the first part of the exercise in the class and either omit the second part or offer the second part as an optional extra-curricular class meeting (e.g., as a brown-bag lunch after class one day). To minimize the use of class time even further, both parts of the exercise could be done outside of regular class time, possibly as optional enrichment in connection with the course.

Alternatively, the exercises could be separated from the traditional classes and run as a purely voluntary professional development workshop (or series of workshops), possibly offered in collaboration with the school's Career Office. I think that this is less effective because, if the programming is optional, it has much narrower reach, and it likely attracts only those students who have already been thinking about their professional identities and not the students who are in most need of some guidance about professional identity. That said, some opportunity to develop ethical professional identity is better than none.

B. Adjusting for Class Size

These exercises are clearly easier to administer in smaller class settings. I used these modules in classes of no more than 30 students, and I think that 10-20 is probably the ideal size. For professional formation, reflection and active engagement in discussion are critical to the learning process, and with a larger the class, it is harder to get all students to engage actively.²¹⁸

There are several ways to deal with the challenge posed by larger classes. One is to have all students participate in the small group discussions, but ask only 1/3 of the students to participate in each of the three major "whole-class" discussions (identifying/justifying professional identity, using professional identity to find an employer that is a "good fit", and implementing professional identity in the face of challenging ethical situations). Then, each student will have participated in at least one of the three "whole-class" discussions, but each such "whole-class" discussion will be more

²¹⁸ See also *supra* note 163 (suggesting that, for a large class, the students submit the survey in advance so that the professor can assign small-groups for discussion before class).

manageable because it will only involve 1/3 of the class. A second approach is to recruit additional facilitators for the “whole class” discussion and to break the class up into multiple groups in order to run multiple simultaneous “large-group” (no longer “whole class”) discussions, each with its own facilitator. Perhaps another tax faculty member, a student who participated in the exercise in a prior year, and/or an alum who practices tax could serve as a co-facilitator. A third approach is to add a requirement that each student write a reflection paper after the class session. With this approach, all students will actively engage with the learning process at least in written form, even if they did not each participate actively in the class discussion. A fourth approach is to divide the large class into 3-5 manageable sized groups and require each such group meet with the professor outside of class to engage in the discussions. This is much more time-intensive for the instructor, but it can provide a high quality personalized experience for each student.

C. Targeting the Appropriate Class Level

Class level and interest in tax are also very important. Students need meaningful tax background in order to engage effectively with these exercises, and these exercises are most likely to resonate with students who have at least considered the possibility of pursuing a career in tax law. Thus, I have only used these exercises in upper-division advanced tax courses.²¹⁹ I do not use any version of these exercises in Tax 1.²²⁰ In particular, I have used these exercises most frequently in an advanced tax seminar consisting of 3Ls who have taken multiple tax classes, but I have also employed versions of these exercises in my corporate and partnership tax classes.

Tax-interested students may take multiple advanced tax classes. Thus, if professors are enthusiastic about incorporating professional identity exercises into tax classes, students may encounter the exercises multiple times. That can be useful because learning, particularly for any type of professional formation, is an iterative process.²²¹ It would be helpful, however, to coordinate coverage so that student learning will be reinforced rather than repeated. For example, coordination could mean that certain reflection statements are used in one such class and other reflection statements are used in the other class. Or perhaps the conversation focuses on different statements in the different courses. Similarly, coordination could ensure that different challenging scenarios are discussed in the different courses.

D. Ensuring Sufficient Background Regarding Tax-Related Ethics Rules/Standards

These exercises assume that students have a basic understanding of the tax-specific rules of ethics, including the basic penalty provisions and at least an introduction to Circular 230. Many students will have had some introduction to these rules in Tax 1, which is another reason to run these exercises in advanced tax classes rather than in Tax 1.

This background is important for multiple reasons. First, students must be able to distinguish between things that are prohibited under the ethics rules from things that are

²¹⁹ This implements a Carnegie recommendation that professors use the 2L and 3L years more effectively to help students with practice-oriented learning and to enable students to “work with faculty and peers in serious, comprehensive reflection on their educational experience and their strategies for career and future professional growth.” CARNEGIE SUMMARY, *supra* note 2, at 8-9.

²²⁰ It might be interesting, however, to integrate part of the first half of the exercise into a Tax 1 class to get students thinking about what it might mean to translate the Tax 1 content into actual practice. That said, the exercises discussed herein are designed primarily for upper-division tax classes.

²²¹ Thomson, *supra* note 4, at 323 (arguing this learning needs to be “regular and repeated”).

allowed but that require difficult discretionary decisions (i.e., for which ethical professional identity would be helpful). Second, students need this background in order to understand the different lawyering philosophies as relevant in tax practice (e.g., so that they appreciate the concept of “substantial authority” for understanding the “authority conception of law” approach).

If students do not have the relevant background, the professor can add another 1-2 hour session on these topics before engaging with the professional identity exercises. In order to convey this background information without allocating another 1-2 hours of class time, the professor could prepare a flipped classroom-style video lecture that students would watch as homework in advance of the class session in which the professional identity exercises will occur. In order to make sure that students actually watch the video and internalize at least the basics of the rules, a short multiple-choice quiz could be administered via the class webpage at the end of the tax ethics video lecture.

E. Deepening & Enriching Professional Identity Development

Although the exercises described herein can contribute meaningfully to a students’ development of their ethical professional identities as tax lawyers, there is a limit to how much can be accomplished in two hours. If an instructor is willing to allocate more instructional and/or out-of-class time, there are many opportunities to deepen students’ learning and further build both their ethical professional identities and their abilities to abide by those identities in practice. This section describes a few such ideas.

1. *Additional Readings*

Students could be assigned additional reading in preparation for the first part of the exercise. This reading could include various articles that argue for different perspectives on lawyering in general²²² or tax lawyering in particular.²²³ Insights gleaned from these readings could meaningfully inform the discussions.

Alternatively, the additional reading assigned could constitute stories illustrating real ethical dilemmas faced by tax lawyers in practice.²²⁴ One great example is Tanina Rostain’s *Travails in Tax*, in *Legal Ethics: Law Stories*, which, as part of a larger discussion about tax shelters, tells the story of Mike Hammersley who faced difficult ethical challenges in practice and ultimately became a whistleblower.²²⁵ These stories could enrich both the discussion about discovering one’s ethical professional identity and the discussion about the challenges of adhering to one’s professional identity in the face of tremendous pressure.

2. *Involving Practitioners*

Practitioners could provide additional insight for students. A professor could invite selected practitioners to speak on a panel in class, and the professor could pose to the practitioners a series of questions intended to enable the practitioners to discuss their

²²² See, e.g., *supra* note 127 (citing several possible resources); Crystal, *supra* note 44.

²²³ George Cooper’s article, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 COLUM. L. REV. 1553 (1980), provides a wonderful illustration about how different philosophies of lawyering can result in different approaches to the same situation. See also, e.g., Corneel, *supra* note 213 (discussing guidelines for implementing the ethical rules); Durst, *supra* note 139.

²²⁴ Gantt & Madison, *supra* note 10, at 268 (encouraging the use of stories to illustrate ethical decision-making in action).

²²⁵ Rostain, *supra* note 204, at 108-117 (story of Hammersley). Alternatively, a professor could assign one or more chapters from Rostain and Regan’s book *CONFIDENCE GAMES. ROSTAIN & REGAN*, *supra* note 104.

approaches to lawyering, the reasons for those approaches, and challenges to those approaches that they have experienced in practice. Incorporating practitioners into the discussion of ethical professional identity can help make these issues more concrete for students and can help students see, even more clearly, the relevance of the inquiry to their future practices. Of course, the professor would need to select the practitioners carefully in order to make sure that they represent a range of views, to make sure that they can clearly articulate the rationale for their perspectives, and to ensure that they have compelling and instructive stories to share.

Another approach would be to require that students interview one or two practitioners about their lawyering philosophies, about the rationale for their particular approaches, and about ethical challenges they have experienced in practice.²²⁶ Students could be asked to write up a brief summary of the interviews. One benefit of this approach is that it is self-directed, meaning that students take responsibility for their own learning, which is a valuable skill in and of itself. Again, incorporating practitioners could help students more clearly see the relevance of the exercise to their future practices. However, there are risks because students might interview practitioners whose approaches to lawyering dramatically diverge from the approaches that the professor hopes the students will adopt. And to the extent that the relevant practitioners have not spent much, if any, time thinking about how they approach lawyering, that could suggest to the students that the goal of the exercise lacks value. That said, if there is class discussion after the students engage in practitioner interviews, students can share their experiences, which are likely to be very diverse, and the professor can reframe the inquiry in light of the experiences that the students shared.

3. *Role-Play*

Various role-play situations could be created in order to push students to articulate what they have learned.²²⁷

For example, students could role-play scenarios in which the student is asked, in an interview, to describe the type of lawyer she is or to describe how she approaches her role as a lawyer. This interview could be with a prospective employer, with a client, or with the media (e.g., a bar journal writer doing a profile on the lawyer). The professor or another student can serve as the interviewer, asking follow-up questions where appropriate.

In addition, students could role-play in a scenario that tests a lawyer's ability to implement her ethical professional identity.²²⁸ The more realistic the professor can make the role-play scenario, the more powerful the experience is likely to be for the student and for any other students who are watching. An alternate approach would be to ask students to write a script for the particular scenario in which the junior lawyer interacts with the client or a senior lawyer.²²⁹ The students could be encouraged to make the scenario as

²²⁶ Crystal, *supra* note 39, at 1248.

²²⁷ Scott Fruehwald recommends this approach. *See* Fruehwald, *supra* note 4, at 27; FRUEHWALD, *supra* note 4, at 226.

²²⁸ *See, e.g.*, Appendix A (providing a few such scenarios that could be turned into role-plays).

²²⁹ *See* Daicoff, *supra* note 4, at 214-16. George Cooper's article reflects a version of this type of project, and this article could be updated for today's tax laws and tax advising environment. Cooper, *supra* note 223.

difficult but as realistic as possible for the junior lawyer and to try to provide the junior lawyer with the words to respond. Students could then perform the script for the class.

Because role-playing requires that students actually inhabit the role of the junior lawyer, this can be more realistic, challenging, and impactful than merely engaging in a discussion about how the junior lawyer could or should respond in a particular situation.

4. Reflection Essays

In addition, students could be required to write reflection papers in response to one or more components of the exercise.²³⁰ These can be in response to particular prompts, or they can be open-ended, merely asking students to reflect on what the exercise meant to them. Reflection essays can help ensure that each student is actively engaging with the material. Further, if the exercise is broken up over time (e.g., part 1 is done in the first half of the semester and part 2 is done in the second half of the semester) and if students complete reflection essays for each part, the essays may also help the professor to see the extent to which the student is growing and deepening her learning over time.

5. A Stand-Alone Course

The exercise described herein, together with some of the foregoing ideas about additional strategies for deepening learning, could constitute a stand-alone course on ethical professional identity in tax. There are models for stand-alone professional identity formation courses,²³¹ and a course could be created for students who are interested in careers in tax. Alternatively, an institution could create a two-part course, where the first part of the course is for a large group of students and addresses professional identity issues generally, and where the second part of the course breaks students into smaller groups by practice-area interest (e.g., tax) in order to grapple with professional identity issues that might arise in the subject-specific context. The experience of a stand-alone professional identity course (whether focused entirely on the tax context or whether part general and part tax-focused) could be profound for the student participants. However, unless such a course is required by the institution, the course would reach only those students who choose to invest in developing their ethical professional identity, rather than reaching (albeit to a more limited extent) all of the students who enroll in a particular subject-matter course.

F. Assessing Learning & Engagement

Another challenge with professional identity development exercises is assessment.²³²

One tool for formative assessment is to assign a reflection paper after the class discussion.²³³ As discussed above, the prompt could be based on either part of the exercise, or if the parts of the exercise are administered separately, a reflection paper could be assigned after each part.²³⁴ For summative assessment, an exam or take-home paper assignment could include a short essay question that involves an ambiguous question of

²³⁰ See Daicoff, *supra* note 4, at 211-13.

²³¹ See, e.g., Thomson, *supra* note 4, at 319-20 (describing two stand-alone courses on professional identity; Fruehwald, *supra* note 4, at 16 (advocating for such a class); see also, e.g., GANTT & MADISON, *supra* note 9 (a text for teaching such a class).

²³² Neil W. Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470 (2008) (discussing methods for measuring growth in ethical professional identity); Monson & Hamilton, *supra* note 4 (same).

²³³ See Daicoff, *supra* note 4, at 211-13.

²³⁴ See *supra* Part V.E.4.

substantive law and asks the student to explain how two different lawyers, each with a different philosophy of lawyering (e.g., a hired gun and a legalist) would advise the client.

From the perspective of assessing institutional program outcomes, data from the Law Student Survey of Student Engagement (LSSSE) could provide insight about the extent students learn ethics in traditional classes and about how effective they believe that learning to be.²³⁵ LSSSE data could also provide insight into the extent to which students believe their law school experiences contributed to their integrity, commitment to the public good, capacity for moral reasoning, and ability to handle the stress of law practice.²³⁶ This data, if tracked over time for students who participate in particular courses where ethical professional identity development efforts are undertaken, can provide insight into the effectiveness of the exercises.

These are a couple of possible ideas, but admittedly, assessing learning is a continuing challenge, particularly with a topic that is so personal.

G. Influencing Student Choices

There is a tension between the desire to provide each student with the platform to discover her own professional identity and the desire to influence the way in which each student conceives of her role as a future tax lawyer. In particular, some professors may want to encourage students to internalize a greater sense of duty to the system.²³⁷ This is understandable because, among other reasons, many of the benefits of investing in the professional identity development of aspiring tax lawyers (e.g., compliance, tax morale, reputation of the profession) depend on those lawyers embracing ethical professional identities that provide an effective counterweight to overly aggressive clients.²³⁸

The exercise exerts this influence to some degree. First, the exercise raises for students the notion of a duty to the system and engages students in a conversation about whether such a thing exists and what it might entail. Students may have had very little exposure to this concept before the exercise (and may get very little exposure to this notion from work experience in private practice). Thus, the mere discussion of these issues raises their salience and potential impact. Second, the exercise affirms for students that their personal values matter. The exercise presents the ideas that lawyers can decline representations that do not reflect who they want to be as lawyers and that lawyers can counsel clients in favor of taking more conservative positions even if clients initially express a desire to be aggressive. Since many students come to law school with some desire to make the world a better place, this exercise articulates a path through which they can do so, even if they pursue a career in private tax practice. Third, the reflection statements embody a slightly more conservative worldview,²³⁹ which means that the class

²³⁵ Carole Silver et al., *Unpacking the Apprenticeship of Professional Identity and Purpose: Insights from the Law School Survey of Student Engagement*, 17 J. LEGAL WRITING INST. 373, 388-95 (2011).

²³⁶ *Id.* at 400-04.

²³⁷ See, e.g., David M. Schizer, *Enlisting the Tax Bar*, 59 TAX L. REV. 331, 370-71 (2006) (citing Richard Lavoie, *Deputizing the Gunslingers: Co-Opting the Tax Bar into Dissuading Corporate Tax Shelters*, 21 VA. TAX REV. 43 (2001), and explaining that “Richard Lavoie urges legal academics to use their bully pulpits, inculcating students with a sense of their professional duty to the system, so that they will be faithful to this imperative after they graduate.”).

²³⁸ See *supra* Part III.B.1.

²³⁹ For example, compare statement #10 (re: golf) with the alternate statement that I used to employ (re: basketball). See *supra* note 159.

discussions will be anchored around these perspectives. The more aggressive the statements, the more they may lead to more aggressive outcomes for students.

Because this is a self-discovery exercise that is based on student reflection and engagement in discussion, I think it is important that the instructor not lecture about how she believes students should conceive of their roles. Thus, I tend to take a relatively light hand when steering the conversation because I want students to be true to who they are rather than to the people they think I want them to be. Moreover, I have seen the exercise in action, so I trust that the exercise as described above, coupled with inherent sense of right and wrong that most students have, is enough to help students make thoughtful and balanced determinations about how they want to approach their roles as tax lawyers.

However, an instructor who wants to exert more influence over the conversation can certainly do so by modifying the reflection statements, by posing only certain statements for reflection, by focusing the conversation on certain reflection statements rather than others, and/or by asking questions that will steer the discussion toward notions of greater responsibility to the system.²⁴⁰ Also, the more an instructor can get students to articulate arguments in favor of more conservative approaches to ethical professional identity, the more she creates social norms within the classroom and more powerful those arguments may be for the rest of the students. Ultimately, it is challenging to strike the right balance between (a) fostering self-discovery and articulation of students' personal values and (b) influencing students to become the type of tax lawyers that we believe the profession needs.

VI. CONCLUSION

Certainly, there is room for improving my exercises, and I continue to tweak my approach. Despite the challenges, I have received positive feedback from students about the impact of these exercises on their careers and lives, and I strongly believe that this investment in my students' ethical professional identities is worthwhile.

I hope that, by sharing my arguments for using the traditional tax classroom as a vehicle for fostering professional identity and by explaining, step-by-step, how I have tried to do so, I can encourage others to build on what I have done, and I can help them invest in the professional identity development of their own students. In this way, I hope to make a small contribution, both to our students as they try to build ethical careers and to the tax profession as a whole.

²⁴⁰ Further, if the instructor leverages alumni or other tax practitioners in the discussion, she can choose those individuals who embody the ethical professional identity that she wishes to foster among her students. *See supra* Part V.E.2. (discussing options for incorporating practicing attorneys into the exercise).

VII. APPENDIX A: SAMPLE PRACTICE SCENARIOS THAT MIGHT PRESENT PROFESSIONAL IDENTITY CHALLENGES

1. You have been working with a partner on a matter for a client, and you and the partner disagree about the strength of the tax position that the client wants to take (i.e., likelihood of success on the merits if challenged). The partner thinks the position is more likely than not to succeed.²⁴¹ You disagree because you think that the partner's reading of the Code is too technical and fails to take into account the intent of the law. You are also concerned about the potential application of the economic substance and step transaction doctrines. The partner acknowledges these concerns but still thinks she can opine at a "more likely than not" level. What do you do? Why?
 - a. [Follow-up: The client told you that, if you cannot get to the more likely than not opinion, she will fire your firm and go to another firm that will render the opinion. This is a big client for the firm, and your bonus and ability to advance in the firm is based on (a) the number of hours you bill to ongoing clients and (b) the role that you play in retaining clients and keeping them happy.]
2. Your firm has a practice group that comes up with (potentially aggressive) tax reduction strategies (e.g., investment structures, financial products) that can be offered to clients who are seeking to reduce their taxes. The head of that practice group has taken notice of your outstanding work as a junior tax associate, and she has asked you to join her practice group. If you join the practice group, the practice group's work will consume the vast majority of your time. You have heard that members of the practice group tend to get very good bonuses. What do you do? Why?
3. You have just been assigned to a new matter. In your first meeting with the partner, she explains to you that you will be helping to determine whether there is substantial authority or just a reasonable basis for a position that a client wants to take. The partner says that the firm and the client are hoping that you can help them reach a "substantial authority" opinion because the client definitely does not want to disclose. What do you do? Why?
4. You just left a partner's office after you and the partner had a conversation with the client about the tax treatment of a particular transaction that the client wants to undertake. You think that the partner glossed over the degree of legal uncertainty and the amount of downside risk (penalties, etc.) when counseling the client.

²⁴¹ This and other hypotheticals (particularly 3-6) can be made more specific to a given course in which they are used. For example, in a partnership tax course, the hypothetical could be modified to say that the substantive issue is whether a transaction will be treated as a disguised sale under Section 707. In a corporate tax course, the hypothetical could be modified to say that the substantive issue is whether a redemption will meet the test in Section 302(b)(1) and be treated as a sale/exchange or whether the redemption will be treated as a Section 301 distribution.

Assume that you and the partner agree that there is substantial authority for the position, but you think that it is a “very close call.” [If you prefer, you can assume that you and the partner agree that the position is more likely than not to succeed on the merits, but again, you think it is a “very close call.”] What do you do? Why?

5. You are working on a matter in which your firm is about to render a tax opinion. The opinion is written and ready to go. As the junior associate, you are working on the “backup memo” (i.e., the memo to the file documenting the legal basis for the firm’s opinion), and you discover a new fact that you think alters the analysis and undermines the opinion’s strength. If the firm does not render the opinion at the agreed-upon level of certainty, the deal will not close, and the client and the firm will both lose a lot of money. What do you do? Why?
 - a. [Follow-up: Assume you raised the new fact with the partner, and she told you, “I don’t think that is particularly probative. Minimize it in the backup memo.”]
6. You are working on a matter that requires that your firm render a tax opinion, and your firm has a policy that all tax opinions must be reviewed by a second partner who has not otherwise been involved in the matter. The partner you with whom you are working has tasked you with getting the second partner review for the opinion on which you have been working. She told you to get Partner X’s sign-off on the opinion because “he’ll agree”, and she told you, “Definitely don’t take this to Partner Y because he’ll put up a big stink about the opinion, which will just rack up more fees and potentially blow up the transaction.” Assume that you and the partner with whom you have been working agree that it is a very close call as to whether the opinion can be rendered at the desired level of certainty, but you both believe you “can get there”. What do you do? Why?

7. You work at a small tax planning firm, and Individual is your firm's biggest client. You help represent Individual in connection with the tax planning for his sole proprietorship business; you/your firm do/does not represent him with respect to his non-business affairs. You have developed a good relationship with Individual, but you know that Individual holds grudges against people that "have wronged him." Last night at a dinner that you and Individual both attended, Individual (after a few glasses of wine) bragged to you that he recently won \$50,000 at an underground poker game, and with a wink, he said, "And Uncle Sam will never know!" You know that the \$50,000 is taxable to him. What do you say, and why?
 - a. [Follow up: What if, later that evening, he asks you what you think the chances are that he will get audited for this year? What do you say, and why? Would it make a difference if he asked about his audit risk at a subsequent business meeting when you were discussing the business's tax planning?]
8. You work for the IRS, and you just took over handling a controversy with a taxpayer. Two sources of deficiencies were raised by the person who previously handled the matter.²⁴² You believe that the government's case with respect to issue #1 is very strong, but that your case on issue #2 is quite weak. Specifically, on issue #2, you think the government's argument is not frivolous, but you think that it is pretty clear that the taxpayer's position should prevail. You think that, if you proceed with both issues, taxpayer is likely to agree to pay the deficiency on issue #1 if you drop issue #2, which you would be willing to do. But if you proceed with only issue #1, you think that the taxpayer will continue to fight the proposed deficiency. What do you do, and why?

²⁴² To add context, considering the following additional facts, which would be most relevant in a corporate tax or taxation of financial instruments course. "The first issue alleges that the taxpayer, a corporation, improperly took a current deduction for an expenditure that should have been capitalized. The second issue alleges that the taxpayer's interest deductions on a particular instrument were improper because the instrument is properly characterized as equity rather than debt." As with the other hypotheticals, the factual context for the scenario can be tailored to whatever aspects of tax are taught in the particular course.