

LEGAL CREATIVITY

Dear Professor Rosenstein

by Lawrence Savell

Dear Professor Rosenstein:

Let me begin by thanking you very much for the insight, enthusiasm, and energy you clearly put into your teaching of Introductory Taxation this semester. It was very obvious to me that you enjoy this course, and that you make an extra effort to reach out to all the students in your class, to ensure that they understand the concepts being presented.

I am looking ahead with a considerable degree of mixed feelings to graduation next week. While it would be a relief to have this three-year and six-digit odyssey behind me, I am a bit apprehensive of the next turns of the road: the bar exam and, finally, actual law practice. I do feel that the Law School has prepared me well for both these challenges, although I suspect perhaps more completely for the former than the latter.

Like many of my classmates who desired to pursue such a path, I was thankfully successful in landing a coveted associate position at a prominent law firm. I appreciate that the prestige and reputation of the Law School significantly helped make it possible for my efforts to translate to such a job, which might during the course of my projected life span actually allow me to pay off at least the majority of my student loans.

From growing up watching rerun episodes of *Perry Mason*, spending a couple of summers at firms doing primarily litigation work, and, perhaps most significantly, being told throughout my life that I can be difficult to get along with, I plan to be a litigator. Nevertheless, I thought it useful to be exposed to a broad variety of legal disciplines, which is why I picked for my last four credits your Introductory Taxation course. Given that purpose, I did think it prudent to take the class on a pass-fail basis.

I concede and apologize for the fact that I inordinately focused my efforts this semester on the courses and activities that most directly related to the work I plan to do, in particular the moot court competition and the law clinic. And I also confess that I did allocate my energies and time more to those courses that I was taking for a letter grade, although I was

convinced that, after seven years of college and grad school, I knew what I needed to do and what kind of exam essays I needed to write to comfortably earn that critical "P." All of this had the unfortunate result of my not always being prepared for your class, and actually missing class on far too many occasions.

I have often heard people speak or write of time standing still, but I have never experienced or fully understood that concept until this moment. But I am experiencing and understanding it incredibly well now.

What I obviously regret most was missing your last week of classes, including the class in which you apparently advised that the final exam, which was placed before me over an hour ago and remains untouched, would not be an essay exam, but a computation exam requiring specific numerical calculations with particular results.

I have often heard people speak or write of time standing still, but I have never experienced or fully understood that concept until this moment. But I am experiencing and understanding it incredibly well now. As I look around this massive exam room (temporarily renamed during testing periods to emphasize it is no longer a classroom where knowledge could be obtained), with its cathedral-like ceilings and windows, I see scores of my classmates scribbling furiously with their originally sharpened pencils and pounding relentlessly the keys of their trusty calculators.

Mine is the only head that is not looking down.

Knowing that passing this course would provide the last credits I needed for what I believed to be the technicality of graduation, I had prepared for it with no less (and arguably

even a bit more) rigor than I had for other classes I have taken with such a grading option. I was prepared to discuss eloquently the nature of tax law, and the positive and critical public and social policies that often (but not always, regrettably) underlie it. For each of the concepts you taught, I had come up with what I thought were compelling examples of the arguments and implications on both sides, and airtight analysis to support the conclusions I had reached about them.

But these efforts are of no moment now. No examples, reasoning, or creativity can guide my pen (in my ignorance, I didn't even bring a pencil) to generate the supportive calculations and magical final numbers you seek. I am at sea, with (pursuant to your direction, also apparently issued during those last classes, and abruptly enforced upon my arrival in this room) no treatise, outline (original or commercial), or notebook with which to paddle to safety.

I hear nothing except the sound of my own breathing.

And so I am doing the only thing I can do: I am filling my exam book with this desperate, and knowingly futile, plea for help.

I have no illusions that you will help me. Preparation is (usually) rewarded with success, and failure to prepare adequately is (usually) met with the array of sanctions designed to deter such behavior from occurring again in those that are properly fearful.

I cannot begin to imagine (although I of course am) how my family, and my friends, will react to my getting a failing grade and not graduating. I've recklessly let those who care about me down — those who have sacrificed to give me opportunities that they were not given, those who encouraged me and who looked forward to rejoicing in my having succeeded. And even if they are charitable, I have no delusions that my law firm (or any law firm) would be.

How could I have been so stupid? I think of the fallen trapeze artist in the Judy Collins song, "Send In The Clowns," and ask myself how I could have lost my balance this late in my academic career, literally when the bar is in sight.

Finally, I do thank you for reading this, if indeed you have (surely many in your position would have stopped and slapped on the "F" pages ago). I'm not sure I could have made it through these four hours without writing *something*, without being able to concentrate on something other than trying to work up the courage to leave this room early, perhaps four hours early.

I suspect that this letter (or whatever it is; it surely is not the answers to the questions you have asked) at this point may be more for me as an exercise in self-flagellation and self-analysis than it will be for you in making any decision other than the expected one. But at least my exam booklet is not blank. I can for the moment join my classmates who are now rising to

hand in their calculation-filled volumes, all of whom appear to be smiling, presumably through some combination of glee and relief. I obviously feel neither. I feel only emptiness.

Sincerely yours,
Nicholas Bennett

Dear Mr. Bennett:

This is the first occasion in my 45 years of teaching that I have returned an exam booklet to a student, but I thought it necessary and appropriate to respond to your words directly and in kind.

No professor wants to acknowledge that a student has been a failure in his or her course, because, if even to a small degree, it means the teacher has also failed. But students do fail, and teachers do issue failing grades, no matter how reluctantly.

Obviously, as a teacher, I am dismayed that you did not devote the necessary efforts to my class. No professor wants to acknowledge that a student has been a failure in his or her course, because, if even to a small degree, it means the teacher has also failed. But students do fail, and teachers do issue failing grades, no matter how reluctantly.

I am not completely unsympathetic to your situation. I have to confess that, even to this day, and although there is no personal historical basis for it, I occasionally (and usually during particularly stressful periods) have the recurrent and still horrific nightmare in which I find myself in a final exam for which I am totally unprepared. Perhaps all lawyers do.

As you may or may not know, this was also my last class at the Law School. Last December, after 52 years of marriage, my beloved wife, Faith, passed away. I have tried to carry on the routines of my life, in particular the teaching that has for so long given me so much pleasure and satisfaction, but I have found that it is impossible to experience those feelings without her.

When I first took this position, my wife, a very charitable and forgiving person, asked me to make her a promise: that I would never fail a student. And, frankly, before this semester, there was never really a situation where I had to test the resolve of that oath. But obviously there is now.

But there are many oaths in my life. Another is the oath to

maintain the standards and principles upon which this institution and others like it are built, and by which students as well as faculty strive to conform their behavior. I take these requirements very seriously, as we should.

Thus, I cannot simply and offhandedly say, "Oh, what the heck!" But perhaps the analysis should not stop there.

I do believe you have done a degree of preparation for this exam, although obviously you have not done enough. In terms of its relation to the correct responses, your answer booklet unavoidably warrants a failing grade.

But you have taken this opportunity to assess and discuss a variety of other matters. Although they bear no reasonable relation to Introductory Taxation, they (albeit belatedly) reflect your recognition and understanding of the need for proper preparation and diligence, the responsibilities inherent when others depend upon you, and the value of balancing out competing demands. You echo feelings of despair that countless clients who find themselves in apparently hopeless situations experience, until they are comforted by the support of knowledgeable and reliable counsel on and at their side. And you present your sentiments in a reasoned and compelling way.

I have always felt that those who want to be litigators should, as part of their training, have their own deposition taken, so they can feel firsthand the terror a first-time witness experiences. Those who plan to be criminal defense counsel should spend a few hours being "processed" in the criminal justice system, so that they can gain a modicum of understanding of what their clients are going through.

As you may be aware, during my career I have, in addition to this course, also taught a variety of small-group practical and practice-oriented seminars, on such subjects as Legal Negotiation, Legal Ethics, Lawyers and Their Clients, Equity, and Remedies. It could be argued that you have demonstrated that you have learned much of what I have attempted to convey in these seminars, although of course you have technically never taken them. And so, with perhaps a generous helping of logical extrapolation, I can justify viewing your exam as meeting the requirements by which I could have issued a passing grade in a couple of those two-credit courses.

So, following that reasoning, I believe I can, in good conscience, essentially transfer these credits and pass you in this class.

But please do not consider this a free ride. I strongly hope you will appreciate it as one who suffers a sudden but thankfully transitory chest pain heeds it as a fortuitous warning sign, and does everything in his power to prevent himself from experiencing such terror again. Your clients and your colleagues will be relying upon you, and you cannot let them, or yourself, down again.

You cite songs; I cite movies. I find myself watching a lot of them lately, and what comes to mind is the scene in *Wall Street* where Hal Holbrook's fatherly character advises the about-to-be-arrested young hotshot played by Charlie Sheen: "Man looks in the abyss, there's nothing staring back at him. At that moment, man finds his character. And that is what keeps him out of the abyss."

Stay out of the abyss.

And perhaps down the road, when you are a senior partner or a general counsel (or even a law professor), and a young underling messes up, you will give him or her similar heartfelt advice and a similar second chance.

That's all I wanted to say. Please read these words carefully (as I suspect you have), and perhaps read them a second time. Then find a nice open space away from other combustible materials and burn this booklet, so that the only record of its contents will be in your and my memory.

And never forget them.

Have a great career, and congratulations on your upcoming graduation.

Sincerely yours,
Professor Simon Rosenstein

(Editor's Note: This short story was originally published in the December 2003 issue of Washington Lawyer, and is reprinted here with permission.)