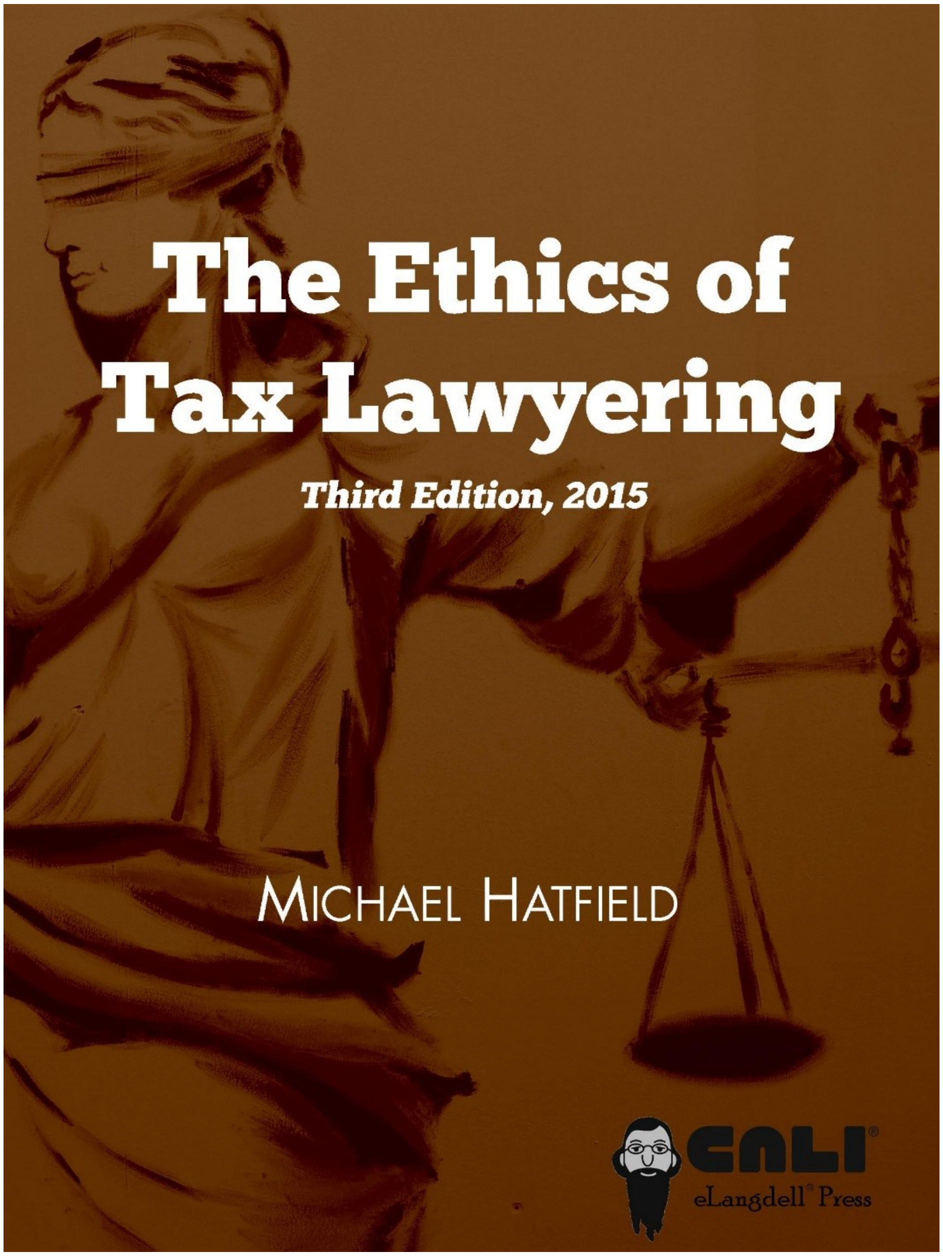
The Ethics of
Tax Lawyering
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MICHAEL HATFIELD
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Ethics of Tax Lawyering

by

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About the Author

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1. Introducing Legal Ethics for Tax Lawyers

In order to appreciate the ethical complications in which tax lawyers often find themselves, it is essential to appreciate and understand the greater contexts of legal ethics and the tax system. While it is important to begin with this more general discussion of ethics and tax lawyers, it may also be useful to re-read this section after finishing the chapter—to get a view of the forest after inspecting some of the trees.

1.1. Ethics for Lawyers

Ethics is practical reasoning. It is thinking through the most important implications of behavior. For lawyers, ethical reflection involves considering not only the lawyer's personal values but also the lawyer's roles as officers in the legal system and as agents and advisors for clients. Organizing and clarifying the layers of obligations and duties implicated in lawyer behavior is the subject matter of legal ethics. The objective is to define a lawyer's professional responsibilities. It is not an abstract or idealistic exercise. A lawyer with a misunderstanding of her professional responsibilities may find herself disbarred from the practice of law, sued by her former clients, fined and jailed—personally miserable even if she escapes discipline, suit, or criminal punishment.

Many ethical considerations reflect a lawyer's personal values, such as the choice of practice area or choice of clients. However, legal ethics is not simply the domain of personal values. A great many duties are imposed on lawyers by fiduciary and contract laws, and, of course, each state has its own ethics rules and means of enforcement. Most states have adopted some version of the American Bar Association's Model Rules of Professional Conduct, and many have followed the ABA's subsequent amendments (as amended, the "Model Rules."). While the popular image of a lawyer may be as a courtroom strategist and dramatist focused on winning at any cost, the Model Rules reflect the complex realities of lawyering, prescribing different standards for a lawyer working as an advisor, neutral third party, and advocate, as well as unavoidable duties to third parties, opposing counsel, and the tribunal.

Unfortunately for the practicing lawyer, burdened with thinking through the consequences of her professional behavior, complying with the state ethics rules does not necessarily mean she escapes liability under malpractice standards. Lawyers may be sued by former clients—and even third parties who were never clients—on either tort or contractual grounds where compliance with the state ethics rules may not provide a sufficient defense. Although the different standards used in disciplinary and malpractice claims may appear to be confusing, a prudent lawyer should never close her eyes, rely on untutored intuition, and hope for the best.

Notes and Questions

1. Under the Model Rules, what are the differences between a lawyer acting as an advisor and a lawyer acting as an advocate? Has the state in which you intend to be admitted adopted the ABA Model Rules? The Tax Court has adopted the Model Rules—both their "letter and spirit." United States Tax Court Rules of Practice Rule 202(a)(3). What does "spirit" mean? How does one comply with the "spirit" when it is not described in the "letter?" We may speak in these terms in casual conversation, but if you are the lawyer needing to know how to proceed in court, how do you determine if "letter" and "spirit" have different requirements? If the requirements are the same, why mention both? If the requirements are not the same, how do you know? Is your client's interest relevant in determining the "spirit" of the Model Rules?

2. Due to the cost of legal advice, tax advice from a lawyer is rarely justified unless a substantial dollar amount is involved. What does that mean about the amount of damages likely to be sought in a tax malpractice suit?

1.2. The Duty to the Tax System

Tax lawyers may be disciplined by the authorities where they are admitted to practice; they also risk malpractice suits for negligence and otherwise failing to fulfill fiduciary or contractual duties to clients or others. Furthermore, they may be subject to discipline by the Internal Revenue Service (the "IRS") under extensive written regulations (usually referenced as "Circular 230").[1] Under these regulations, the minimum standard for advice as to an undisclosed tax return position is "substantial authority,"[2] which is often described as "around a 40% chance of success on the merits."[3] This standard has no counterpart in the Model Rules, and is much higher than the non-frivolous standard for advocacy under ABA Model Rule 3.1.

Such standards for tax lawyers are often described as the tax lawyer's "duty to the system."[4] This duty reflects the self-reporting nature of our tax system in which only 1–2% of tax returns are audited. It requires ignoring the low audit rate. Tax advice must be given on the presumption that the issue will be litigated in court rather than gambling that the IRS will never examine the issue (playing "audit roulette," as it is often called).[5] After all, with a 2% audit rate, even the worst tax advice has a 98% chance of "succeeding" (as 98% of tax returns are not audited).

Notes and Questions

3. If 100% of tax returns were thoroughly audited, would it be relevant in terms of tax lawyers' duty to the system? What would be the duty to the system if returns were never audited?

4. What if criminal defense lawyers had to have "substantial authority" for every legal argument made on behalf of their clients? What are some of the differences between advising as to tax return positions and advising as to criminal defense?

1.3. Sharing the Profession with Non-Lawyers

Tax lawyers share the tax field with Certified Public Accountants ("CPAs"). Federal law authorizes both lawyers and CPAs to represent clients before the IRS,[6] where both practice before the IRS and are regulated by the Secretary of the Treasury.[7] Further, so long as they pass an examination, Rule 200(a)(3) of the United State Tax Court Rules of Practice authorizes CPAs to represent clients before the Tax Court.

Grace v. Allen

407 S.W.2d 321 (Tex. Civ. App. 1966)

> BATEMAN, Justice. This is a suit to recover the value of accountants' services performed…. Appellants pled, Inter alia, that appellees were not entitled to recover because their alleged services constituted the unauthorized practice of law…. The trial court rendered judgment for appellees for the total of $12,600, and appellants appeal on two points of error.
>
> The first of these is that the court erred in holding as a matter of law that the services rendered by appellees did not constitute the practice of law…. Appellees contend that their services in question did not constitute the practice of law . . ., and that in any event such services were within the purview of the federal law and Treasury Department regulations; that although not members of the Bar, they were licensed to practice before the Treasury Department, that everything they did was pursuant to and in accordance with that license, and that if their services were proscribed under New York law they were fully authorized by the federal law and Treasury regulations and, therefore, lawful….
>
> There is no substantial dispute as to the facts. Appellees were both licensed public accountants, one of them being certified, and both were admitted to practice before the Treasury Department, although neither of them was a lawyer. Both of them had been employed by the Internal Revenue Service for a number of years before entering private practice. Although the appellees had not prepared the appellants' income tax returns for the years 1955, 1956, 1957 and 1958, when the Internal Revenue Service assessed additional taxes for those years they were employed to work with appellants' attorneys in New York City in the preparation and presentation of a

protest of such assessment. They did so, and it is these services which appellants say constituted the unauthorized practice of law, pointing out that one of the appellees testified that 'complicated issues' were involved, that the protest cited numerous cases as authority for the position they were taking, some of which cases had been discussed with the lawyers but some of which had been found as a result of research by the appellee Brown. Appellees had prepared in their office several Forms 872, 'Consent to Extension of the Statute of Limitations,' also memoranda used and presented in various conferences, with representatives of the Internal Revenue Service. Appellees conferred frequently with appellants' attorneys and kept them advised by telephone and mail as to audits by the Internal Revenue Service and the preparation of the protest. The attorneys participated and cooperated in the preparation of the protest and in conferences with the Internal Revenue Service examining agent and conference coordinator. Appellees also prepared a power of attorney authorizing the attorneys to act for appellees in connection with audits of appellants' tax returns. Appellants employed appellees to prepare and file their Federal and New York State income tax returns for 1960 and their declarations of estimated income tax (Federal and State) for 1961; also to maintain appellants' proper books and records therefor.

To support their position that under New York law the work done by appellees constituted unauthorized law practice, appellants rely wholly on the case of In the Matter of New York County Lawyers Association (Bernard Bercu, Respondent), 273 App. Div. 524, 78 N.Y.S.2d 209, 9 A.L.R.2d 787. In that case . . . the court recognized that an accountant employed to keep a taxpayer's books or prepare his tax return would be expected and permitted to answer legal questions arising out of and incidental to the accounting work. The court also recognized that the matter of taxation, 'which permeates almost every phase of modern life, is so inextricably interwoven with nearly every branch of law that one could hardly pick any tax problem and say this is a question of pure taxation or pure tax law wholly unconnected with other legal principles, incidents or ramifications.' Recognizing the necessity of drawing a line of demarcation between the work of the tax lawyer and that of the tax accountant, the court said, 'the point at which it must be drawn, at very least, is where the accountant or non-lawyer undertakes to pass upon a legal question apart from the regular pursuit of his calling.'. . .

However, in the case at bar it is not shown that appellants consulted appellees or sought or obtained their opinion on any legal subject that was not incidental to their accounting work. Appellees were preparing the appellants' 1960 income tax returns and were the regular accountants for appellants. They were also doing accounting work in reviewing and classifying the great volume of papers and records of appellants necessary to the preparation of the protest of the tax assessment and to enable them to discuss with the Revenue Agents the asserted tax liability. It is true that in the preparation of the protest appellees cited numerous cases in support of their position, but this was necessary and incidental to the preparation and presentation of the protest. Moreover, appellees consulted the appellants' attorneys concerning these authorities and other aspects of the work being done and kept them informed as the work progressed. . . .

It is clear from the record before us that the work performed by appellees, which appellants assert constituted the unauthorized practice of law, was only incidental to their accounting work and was therefore permissible and not unlawful under New York law.

Appellees assert, and appellants do not deny, that the work done by appellees was all within the purview of their licenses to practice before the Treasury Department. It was agreed on the trial that the court might take judicial notice of the federal law and Treasury regulations on the subject. One of those regulations, in part, provides:

> Practice before the Internal Revenue Service comprehends all matters connected with presentations to the Internal Revenue Service or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include the preparation and filing of necessary documents, correspondence with, and communications to the Internal Revenue Service, and the representation of a client at conferences, hearings, and meetings.

Appellees take the position that if there is a conflict between the state law and the federal law, the former must yield, and that, since the regulations referred to were promulgated under sanction of the federal law, they have the force and effect of law. We agree with appellees. The rights conferred by the admission to practice before the Treasury Department are federal rights which cannot be impinged upon by the states in their praiseworthy efforts to protect their citizens from unskilled and unethical practitioners of the law. Sperry v. State of Florida ex rel. Florida Bar, 373 U.S. 379, 83 S. Ct. 1322, 10 L. Ed.2d 428.

This is not to say that the states have surrendered their right to regulate and control the practice of law within their respective boundaries, as was done in the Bercu case. See also Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 179 S.W.2d 946, 157 A.L.R. 268. In fact, one of the Treasury regulations referred to (§ 10.39) contains this proviso: 'And provided further: That nothing in the regulations in this part shall be construed as authorizing persons not members of the Bar to practice law.' See also Free v. Bland, 369 U.S. 663, 82 S. Ct. 1089, 8 L. Ed.2d 180; Hatfried, Inc. v. Commissioner of Internal Revenue, 3 Cir., 162 F.2d 628; Haywood Lumber & Mining Co. v.

Commissioner of Internal Revenue, 2 Cir., 178 F.2d 769; Burton Swartz Land Corp. v. Commissioner of Internal Revenue, 5 Cir., 198 F.2d 558. Appellants' first point is overruled….

Finding no error requiring reversal, we affirm the judgment of the trial court.

Notes and Questions

5. The *Grace* court cites *Sperry v. State of Florida ex rel. Florida Bar*, 373 U.S. 379, 83 S. Ct. 1322, 10 L. Ed.2d 428 (1963). The *Sperry* case involved a practitioner authorized to practice before the U.S. Patent Office, but not authorized to practice law in Florida, which is where he maintained his office. Federal law authorizes non-lawyers to practice before the U.S. Patent Office. May someone who is not admitted to practice law in the state in which he has offices engage in the practice of tax law? How can federal tax issues and state law issues, such as corporate, creditor, and property issues, be separated in any practical sense? For example, if a tax issue requires determination of the nature of an underlying property right under state law, is someone authorized to practice tax entitled to opine as to the underlying state law issue? Or is it that someone authorized to practice tax law is entitled to opine as to the tax law issue, only if someone else, who is authorized to practice state law, has opined on the state law issue? What does Circular 230 § 10.39 mean? As to Circular 230, see below.

6. What do CPAs do? The National Conference of Lawyers and Certified Public Accountants issued a study on the relationship between lawyers and CPAs. Like lawyers, CPAs are licensed to practice by state professional boards. CPAs engage in accounting and auditing, tax and management consulting, and especially in expert examination of financial statements. They develop and analyze data, especially data expressed in monetary or other quantitative forms.[8]

7. What do lawyers do? Trying to define the "practice of law" in order to prohibit the unauthorized practice of law has consumed

many courts, and few generalizations are useful. Many non-lawyers routinely interpret, apply, and discuss the consequences of the law (e.g., consider bank employees who advise customers on the survivorship rights in accounts). Many non-lawyers routinely prepare legally-binding documents (e.g., consider real estate agents who prepare sales contracts). And many non-lawyers represent others before agencies (e.g., the U.S. Patent Office) and in court (e.g., the U.S. Court of Appeals for Veterans Claims).

8. If CPAs and tax lawyers share the tax field, how is the work divided? Both may prepare tax returns, though, in practice, few tax lawyers specialize in routinely preparing income tax returns for clients. With respect to ascertaining the "probable tax effects of transactions," the National Conference of Lawyers and Certified Public Accountants ("The Conference") recognize that both lawyers and CPAs are qualified, but urge CPAs to consult lawyers when there are uncertainties as to the interpretation or application of laws, and urge lawyers to consult CPAs when there are uncertainties as to describing the transaction in money terms or interpreting financial results.[9] The Conference identifies preparing legal documents as part of the special training of lawyers, and the preparation of financial statements and similar reports as part of the special training of accountants.[10] The Conference recognizes the opportunity for CPAs to represent clients before the Tax Court, but, noting that the client may also pursue remedies in a District Court or the Court of Claims, suggests that a lawyer be consulted when the IRS issues a notice of deficiency.[11]

9. The Conference concludes that all matters involving criminal investigations should be referred to lawyers.[12] Why?

10. Usually we think of lawyers as having a monopoly on advising clients on legal issues and representing clients in court. However, CPAs are authorized to advise clients on the tax law, and CPAs are authorized to represent clients in Tax Court. We also usually think of lawyers as an independent profession—one that regulates itself. However, tax lawyers, like CPAs, are regulated by

the Treasury Department. What is the essence of being a lawyer? Would it make more sense to classify tax lawyers as part of a "tax profession" shared with CPAs? Are tax lawyers and medical malpractice lawyers or criminal defense lawyers members of a shared profession in any meaningful sense?

2. Regulating Tax Lawyering

Lawyers often think of the legal profession's uniqueness as inhering in—or reflecting—the profession's self-regulated nature and its monopoly on certain services, such as representing clients in courts. Yet, for tax lawyers, matters are quite different. Whereas most lawyers are subject to regulation only by the state authorities where they are admitted and the federal courts in which they practice, Congress has enacted parts of the Internal Revenue Code to prescribe tax lawyering standards. Tax lawyers may be subject to both civil and criminal penalties as a result of their tax advice. The Treasury Secretary exercises authority over tax lawyers through Director of the Office of Professional Responsibility (the "OPR") and Circular 230. CPAs who "practice tax" are also subject to the OPR and Circular 230. Unlike most other lawyers, tax lawyers share their profession with non-lawyers and are regulated by non-lawyers.

2.1. Regulating Tax Lawyering through the IRC

A taxpayer has the right to structure his affairs so as to minimize his tax liabilities. This is the right to avoid unnecessary taxation, that is, taxes he is not obligated to pay. However, a taxpayer commits a felony if he willfully attempts to evade or defeat taxes he is obligated to pay. Under I.R.C. § 7201, such a taxpayer may be fined $100,000 and imprisoned for up to five years. Of course, lawyers may not engage in assisting clients in any criminal behavior, including tax evasion. Model Rule 1.2(d). But where is the line between legal tax avoidance (for which tax lawyers are well-paid) and criminal tax evasion (which can land both client and tax lawyer in prison)? Generally, criminal tax evasion requires that the taxpayer knew her obligations under the tax law but intentionally did not fulfill those obligations. In other words, ignorance of the tax law is a defense to criminal conviction. *See, e.g.*, United States v. Harris, 942 F.2d. 1125 (7th Cir. 1991) (mistresses who received payments but argued exclusion as "gifts" were not criminally liable for tax evasion as the prevailing legal standard was too unclear to establish willful evasion). A civil fraud penalty may also apply. I.R.C. § 6663.

Willfully filing a return that the taxpayer does not believe is true and correct as to every material matter is a felony punishable by up to $100,000 and imprisonment for up to three years. I.R.C. § 7206(a)(1). So is aiding or assisting anyone in doing so:

> **IRC § 7206. Fraud and false statements**
>
> Any person who--
>
> * * *
>
> (2) Aid or assistance.--Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; […]
>
> * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Notes and Questions

11. Note that § 6701 provides a civil penalty for aiding and abetting a tax liability understatement that is very similar to the § 7206(a)(2) criminal penalty.

12. A lawyer who prepares tax-related documents that are "fraudulent" or "false as to any material matter" may be committing a felony under § 7206(a)(2). The false statement need not be material to calculating the tax liability. U. S. v. Abbas, 504 F.2d 123 (9th Cir. 1974), certiorari denied 95 S. Ct. 1990, 421 U.S. 988, 44 L. Ed.2d 477 (1975). Of course, if the return is audited

and the falsity discovered, no tax will be successfully evaded. However, success in evasion is not relevant. U.S. v. Borgis, 182 F.2d 274 (7th Cir. 1950). Note that § 7206(a)(2) applies to "any person," not only a preparer of the return. For example, an engineer who prepared a fraudulent report about coal reserves, knowing the report would be used in claiming undue tax benefits, violated § 7206(a)(2). U.S. v. Nealy, 729 F.2d 961 (4th Cir. 1984).

13. Laura is a second year associate in the tax department of a large law firm. A corporate client was involved in a merger. It was essential for the best tax consequences that the merger be completed on July 1, as this was the first day of the fiscal year for the parties involved. For two months prior to this deadline, Laura, along with many of the other lawyers involved, worked 80 hour weeks. The deal seemed to be completed as planned. However, over the July 4th holiday, the junior partner supervising Laura asked her into his office. He told her that several documents that should have been executed on July 1 had not been. He instructed Laura to prepare the documents with a July 1 date, and that he would send the documents by courier to the client for immediate execution. If Laura knows that the documents will be used in preparing the client's tax returns, is she committing a § 7206(a)(2) felony if she follows the instructions? Would she be subject to the IRC § 6701 civil penalty if she follows the instructions? What if Laura is unsure how these particular documents relate to the tax return? What if she asks the partner, and he tells her that it is a good question but not to worry about it? What if, instead of telling her not to worry about it, he explains that the documents are very useful for "housekeeping" purposes but not essential to the tax treatment and not a material matter for tax purposes? Does Model Rule 5.2 apply? Would complying with the Model Rules protect Laura from criminal prosecution? Being convicted under § 7206(a)(2) may lead to being permanently disbarred by the Secretary of the Treasury (and the state bar). See the Washburn case below.

14. There are multiple IRC sections that impose criminal sanctions. Review IRC §§ 7201–17. There are also criminal provisions

elsewhere in federal law that may apply when tax lawyers assist their clients in crossing the line from tax avoidance into tax evasion, such as conspiracy to defraud the United States (18 U.S.C. § 371 (2012)) or making false statements to the federal government (18 U.S.C. § 1001 (2012)). The mailing of a fraudulent tax return may be a mail fraud felony (18 U.S.C. §§ 1341, 1343 (2012)), which may be a predicate crime for prosecution under the RICO Act (18 U.S.C. §§ 1341–51 (2012)). At what point does advising a client on minimizing taxes become a conspiracy between the lawyer and client to defraud the federal government of its property? Would it be a prudent office procedure to avoid mailing tax returns on behalf of clients?

While the criminal penalties and civil fraud penalties for tax evasion raise many interesting issues, most taxpayers do not willfully evade their tax liabilities or commit fraud. In fact, American taxpayers willfully pay the taxes they owe at a rate that is very high compared to others in the world (about 85%). Most American taxpayers want to "get it right," it seems. But given the complexities of tax law, they may not be able to do so. The tax law is a strict liability law: taxpayers owe what they owe regardless of their knowledge or intention. When a client turns to a tax lawyer for advice, the client should be able to rely on the advice, expecting it to be accurate.

IRC § 6694(a) is prominent in regulating the advice tax lawyers give in connection with tax return preparation. It sets a relatively high standard for the advice, and it imposes a penalty on a tax return preparer if there is an "unreasonable position" on the return that results in an understatement of tax liability.

§ 6694. Understatement of taxpayer's liability by tax return preparer

(a) Understatement due to unreasonable positions.

(1) In general.—If a tax return preparer—

(A) prepares any return or claim of refund with respect to which any part of an understatement of liability is due to a position described in paragraph (2), and

(B) knew (or reasonably should have known) of the position, such tax return preparer shall pay a penalty with respect to each such return or claim in an amount equal to the greater of $1,000 or 50 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.

(2) Unreasonable position.—

(A) In general.—Except as otherwise provided in this paragraph, a position is described in this paragraph unless there is or was substantial authority for the position.

(B) Disclosed positions.—If the position was disclosed as provided in section 6662(d)(2)(B)(ii)(I) and is not a position to which subparagraph (C) applies, the position is described in this paragraph unless there is a reasonable basis for the position.

* * *

(3) Reasonable cause exception.—No penalty shall be imposed under this subsection if it is shown that there is reasonable cause for the understatement and the tax return preparer acted in good faith.

IRC § 6694(a)(2)(A) and (B) secure two types of positions from being characterized as "unreasonable." First are positions for which there is "substantial authority." Second are positions for which there is a "reasonable basis" and were disclosed on IRS Form 8275 or 8275-R. But what does "substantial authority" and "reasonable basis" mean?

"Substantial authority" is often thought to mean "around a 40% chance of success on the merits."[13] According to IRS Notice 2009-5, "substantial authority" has the same meaning under IRC § 6694 as in § 1.6662-4(d)(2) and (d)(3) which provides as follows:

> (2) Substantial authority standard. The substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts. The substantial authority standard is less stringent than the more likely than not standard (the standard that is met when there is a greater than 50-percent likelihood of the position being upheld), but more stringent than the reasonable basis standard as defined in § 1.6662-3(b)(3). The possibility that a return will not be audited or, if audited, that an item will not be raised on audit, is not relevant in determining whether the substantial authority standard (or the reasonable basis standard) is satisfied.
>
> (3) Determination of whether substantial authority is present–
>
>> (i) Evaluation of authorities. There is substantial authority for the tax treatment of an item only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment. All authorities relevant to the tax treatment of an item, including the authorities contrary to the treatment, are taken into account in determining whether substantial authority exists. . . . There may be substantial authority for more than one position with respect to the same item. Because the substantial authority standard

is an objective standard, the taxpayer's belief that there is substantial authority for the tax treatment of an item is not relevant in determining whether there is substantial authority for that treatment.

(ii) Nature of analysis. The weight accorded an authority depends on its relevance and persuasiveness, and the type of document providing the authority. For example, [an] authority that merely states a conclusion ordinarily is less persuasive than one that reaches its conclusion by cogently relating the applicable law to pertinent facts. . . . For example, a revenue ruling is accorded greater weight than a private letter ruling addressing the same issue. An older [document] must be accorded less weight than a more recent one. Any document described in the preceding sentence that is more than 10 years old generally is accorded very little weight…. There may be substantial authority for the tax treatment of an item despite the absence of certain types of authority. Thus, a taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision.

(iii) Types of authority. [Generally, the] following are authority for purposes of determining whether there is substantial authority for the tax treatment of an item: Applicable provisions of the Internal Revenue Code and other statutory provisions; proposed, temporary and final regulations construing such statutes; revenue rulings and revenue procedures; tax treaties and regulations thereunder;

and Treasury Department and other official explanations of such treaties; court cases; congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of a bill's managers; General Explanations of tax legislation prepared by the Joint Committee on Taxation (the Blue Book); private letter rulings and technical advice memoranda issued after October 31, 1976; actions on decisions and general counsel memoranda issued after March 12, 1981 (as well as general counsel memoranda published in pre-1955 volumes of the Cumulative Bulletin); Internal Revenue Service information or press releases; and notices, announcements and other administrative pronouncements…. Conclusions reached in treatises, legal periodicals, legal opinions or opinions rendered by tax professionals are not authority. The authorities underlying such expressions of opinion where applicable to the facts of a particular case, however, may give rise to substantial authority for the tax treatment of an item…. In the case of court decisions, for example, a district court opinion on an issue is not an authority if overruled or reversed by the United States Court of Appeals for such district. However, a Tax Court opinion is not considered to be overruled or modified by a court of appeals to which a taxpayer does not have a right of appeal, unless the Tax Court adopts the holding of the court of appeal....

A position with a "reasonable basis" is often thought to be one with a 10–20% chance of success on the merits.[14] Though not as high a standard as "substantial authority," Treasury Regulations § 1.6662-3(b)(3) and § 1.6694-2(d)(2) provide that the "reasonable basis" standard is a relatively high standard of tax reporting, that is, significantly higher than not frivolous or not patently improper. The reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim. If a return position is reasonably based on one or more of the authorities set forth above regarding substantial authority, the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantiality authority standard.

Notes and Questions

15. Although § 6694 only applies to a tax return preparer, the definition of a "preparer" is broader than may be anticipated. Even if a tax lawyer does not literally prepare the return, she may be deemed to be a preparer by virtue of providing advice about an entry on a return. In general, advice given prior to a transaction does not turn a tax lawyer into a preparer but advice given afterwards may. The distinction between "before" and "after" advice is easy to maintain in theory, but may rarely hold in practice—after all, there are often follow-up questions. Read Treasury Regulations § 301.7701-15.

16. Laura is a tax lawyer who provides tax advice to a client in connection with the sale of certain business assets. The client consummates the transaction as advised by Laura. Laura's total time involved in the transaction is thirty hours. After the transaction is completed, Laura has no additional contact with the client. The client's CPA prepares its tax return without consulting Laura. Is Laura a "preparer" of that return? What if the client and the client's CPA call Laura for a thirty minute follow-up on some of the tax issues so the CPA will know how to prepare the return? What if the follow up requires fifteen additional hours of work by Laura? What if the client did not consult with Laura prior to the transaction but does so only afterwards?

17. How does a tax lawyer decide whether a position has a 20% or 40% chance of success if litigated? Why should a tax lawyer ever be able to advise a client to take a position if the chances are that a court would hold against the position? After all, at about 40%, the substantial authority standard is considered a relatively high standard of legal advice, by definition, the chances are still about 60% that it will lose in court. Could there be substantial authority for conflicting positions?

18. Private letter rulings are not precedential. Why are they considered "authority" for these purposes? What makes a treatise or law journal authoritative?

19. A position for which there is only a "reasonable basis" will not be considered unreasonable if the position is disclosed to the IRS by attaching Form 8725 to the tax return. Review Form 8275. What is the purpose of Form 8275?

20. The § 6694(a) penalty applicable is the greater of $1,000 or 50% of the preparer's fee. Other punishments may also apply. For example, the tax lawyer may be disciplined pursuant to Circular 230, especially if there is a pattern of inappropriate advising. Note also that § 6694(b) imposes a greater penalty if the understatement was due to "willful or reckless conduct" rather than a merely "unreasonable position." *See also* Circular 230 § 10.51(13).

21. Alongside the "substantial authority" and "reasonable basis" standards, there is also protection provided the preparer had "reasonable cause" and acted in "good faith." § 6694(a)(3). Treasury Regulations § 1.6694-2(e) details this exception, emphasizing factors such as whether or not the provision involved was complex or highly technical; whether the error was isolated or part of a pattern; and whether or not the "normal office practice" of the preparer promotes "accuracy and consistency." This final factor emphasizes the importance of good office practices, such as the routine use of checklists. Even though a tax lawyer makes a mistake, the processes routinely used

in the office may turn out to be very important to providing penalty protection.

2.2. Regulating Tax Lawyering through Circular 230

Consider the following sections of Circular 230:

> **§ 10.2 Definitions.**
>
> (a) As used in this part, except where the text provides otherwise—
>
> * * *
>
> (4) Practice before the Internal Revenue Service comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion, and representing a client at conferences, hearings and meetings.
>
> * * *
>
> **§ 10.3 Who may practice.**
>
> (a) Attorneys. Any attorney who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service….
>
> (b) Certified public accountants. Any certified public accountant who is not currently under suspension or disbarment from practice

before the Internal Revenue Service may practice before the Internal Revenue Service….

* * *

§ 10.20 Information to be furnished.

(a) To the Internal Revenue Service.

(1) A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.

(2) Where the requested records or information are not in the possession of, or subject to the control of, the practitioner or the practitioner's client, the practitioner must promptly notify the requesting Internal Revenue Service officer or employee and the practitioner must provide any information that the practitioner has regarding the identity of any person who the practitioner believes may have possession or control of the requested records or information….

* * *

§ 10.22 Diligence as to accuracy.

(a) In general. A practitioner must exercise due diligence—

(1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;

(2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and

(3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.

* * *

§ 10.27 Fees.

(a) In general. A practitioner may not charge an unconscionable fee in connection with any matter before the Internal Revenue Service.

(b) Contingent fees—

(1) Except as provided in paragraphs (b)(2), (3), and (4) of this section, a practitioner may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.

(2) A practitioner may charge a contingent fee for services rendered in connection with the Service's examination of, or challenge to—

(i) An original tax return; or

(ii) An amended return or claim for refund or credit where the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return.

(3) A practitioner may charge a contingent fee for services rendered in connection with a claim for credit or refund filed solely in connection with the determination of

statutory interest or penalties assessed by the Internal Revenue Service.

(4) A practitioner may charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code.

(c) Definitions. For purposes of this section—

(1) Contingent fee is any fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge by the Internal Revenue Service or is sustained either by the Internal Revenue Service or in litigation. A contingent fee includes a fee that is based on a percentage of the refund reported on a return, that is based on a percentage of the taxes saved, or that otherwise depends on the specific result attained. A contingent fee also includes any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client's fee in the event that a position taken on a tax return or other filing is challenged by the Internal Revenue Service or is not sustained, whether pursuant to an indemnity agreement, a guarantee, rescission rights, or any other arrangement with a similar effect.

(2) Matter before the Internal Revenue Service includes tax planning and advice, preparing or filing or assisting in preparing or filing returns or claims for refund or credit, and all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to,

preparing and filing documents, corresponding and communicating with the Internal Revenue Service, rendering written advice with respect to any entity, transaction, plan or arrangement, and representing a client at conferences, hearings, and meetings.

* * *

§ 10.33 Best practices for tax advisors.

(a) Best practices. Tax advisors should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service. In addition to compliance with the standards of practice provided elsewhere in this part, best practices include the following:

(1) Communicating clearly with the client regarding the terms of the engagement. For example, the advisor should determine the client's expected purpose for and use of the advice and should have a clear understanding with the client regarding the form and scope of the advice or assistance to be rendered.

(2) Establishing the facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating the applicable law (including potentially applicable judicial doctrines) to the relevant facts, and arriving at a conclusion supported by the law and the facts.

(3) Advising the client regarding the import of the conclusions reached, including, for example, whether a taxpayer may avoid

accuracy-related penalties under the Internal Revenue Code if a taxpayer acts in reliance on the advice.

(4) Acting fairly and with integrity in practice before the Internal Revenue Service.

(b) Procedures to ensure best practices for tax advisors. Tax advisors with responsibility for overseeing a firm's practice of providing advice concerning Federal tax issues or of preparing or assisting in the preparation of submissions to the Internal Revenue Service should take reasonable steps to ensure that the firm's procedures for all members, associates, and employees are consistent with the best practices set forth in paragraph (a) of this section.

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(a) Tax returns.

(1) A practitioner may not willfully, recklessly, or through gross incompetence—

***

(ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that—

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance) [*i.e., an undisclosed position without substantial authority, ed.*]; or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence.

***

(d) Relying on information furnished by clients. A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

***

10.36 Procedures to ensure compliance.

(a) Any individual subject to the provisions of this part who has (or individuals who have or share) principal authority and responsibility for overseeing a firm's practice governed by this part, including the provision of advice concerning Federal tax matters and preparation of tax returns, claims for refund, or other documents for submission to the Internal Revenue Service, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with subparts A, B, and C of this part, as applicable. In the absence of a person or persons identified by the firm as having the principal authority and responsibility described in this paragraph, the Internal Revenue Service may identify one or more individuals subject to the provisions of this part responsible for compliance with the requirements of this section.

(b) Any such individual who has (or such individuals who have or share) principal authority as described in paragraph (a) of this section will be subject to discipline for failing to comply with the requirements of this section if—

(1) The individual through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that the firm has adequate procedures to comply with this part, as applicable, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with this part, as applicable;

(2) The individual through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that firm procedures in effect are properly followed, and one or more individuals who are

members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with this part, as applicable; or

(3) The individual knows or should know that one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, that does not comply with this part, as applicable, and the individual, through willfulness, recklessness, or gross incompetence fails to take prompt action to correct the noncompliance.

(c) *Effective/applicability date.* This section is applicable beginning June 12, 2014.

§ 10.37 Requirements for written advice.

(a) *Requirements.*

(1) A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section. Government submissions on matters of general policy are not considered written advice on a Federal tax matter for purposes of this section. Continuing education presentations provided to an audience solely for the purpose of enhancing practitioners' professional knowledge on Federal tax matters are not considered written advice on a Federal tax matter for purposes of this section. The preceding sentence does not apply to presentations marketing or promoting transactions.

(2) The practitioner must—

(i) Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);

(ii) Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;

(iii) Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;

(iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;

(v) Relate applicable law and authorities to facts; and

(vi) Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

(3) Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent.

(b) *Reliance on advice of others*. A practitioner may only rely on the advice of another person if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances. Reliance is not reasonable when—

(1) The practitioner knows or reasonably should know that the opinion of the other person should not be relied on;

(2) The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice; or

(3) The practitioner knows or reasonably should know that the other person has a conflict of interest in violation of the rules described in this part.

(c) *Standard of review.*

(1) In evaluating whether a practitioner giving written advice concerning one or more Federal tax matters complied with the requirements of this section, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.

(2) In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing, or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, with emphasis given to the additional risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances, when determining whether a practitioner has failed to comply with this section.

(d) *Federal tax matter*. A Federal tax matter, as used in this section, is any matter concerning the application or interpretation of—

(1) A revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code;

(2) Any provision of law impacting a person's obligations under the internal revenue laws and regulations, including but not limited to the person's liability to pay tax or obligation to file returns; or

(3) Any other law or regulation administered by the Internal Revenue Service.

(e) *Effective/applicability date*. This section is applicable to written advice rendered after June 12, 2014.

Notes and Questions

22. Leon is a tax lawyer who regularly e-mails his clients. His clients appreciate the convenience. Carla has asked Leon to consider the tax planning possibilities of a particular investment she is considering, and Leon responds in an e-mail advising her of various ways the investment can be planned in order to avoid unnecessary taxes. Is Leon engaged in practice before the IRS? If so, what are the requirements for the advice he is writing in his e-mail? What if Leon does not e-mail Carla but only explains the alternatives in a telephone call, is he subject to Circular 230 with respect to the phone call's contents?

23. Laura is a tax lawyer. Her client Cody is an impatient business man, he is always pressing Laura for the "bottom line" and "to get there without a bunch of lawyer time." Cody has invested in a business that has generated a loss this year. Cody's CPA wants to avoid the application of the IRC § 469 passive activity loss limit. In order to do so, Cody's participation in the activity must have been "material," and the CPA is taking the return position that

Colby's participation was material. The CPA has told Cody that he can be protected from an IRC § 6662 negligence penalty even if the "material participation" return position is not sustained on audit or in litigation, so long as he has written advice from a lawyer. Prompted by his CPA, Cody tells Laura to assume that he spent more than 500 hours actively engaged in the business. This is an essential fact, as, if true, it would mean Cody materially participated and thus is not subject to the passive activity loss limits. Laura does not know whether Cody spent so much time with the business. On the one hand, he is a very busy man involved in many different businesses, but, on the other hand, she knows he is a very hard worker and it is possible that he did. Cody has told Laura not to "rack up the legal fees" on this but just send him a short e-mail advising him of the tax consequences if the assumption is true. What should Laura do? If she makes the assumption, she may be violating her duties under Circular 230. However, if she spends more time on the issue, trying to document how many hours he spent on the business, she is violating her client's instructions (and he will not pay for it!). Should she undertake the additional work—but simply not charge Cody for it? Query why the CPA suggested Cody ask Laura for the analysis and did not provide it herself—after all, the CPA would earn a fee for the work. (Is the CPA right about so easily avoiding the negligence penalty? Read Treasury Regulations § 1.6664-4(c)).

24. Review the explanation of "substantial authority" in Treasury Regulations §§ 1.6662-4(d)(2) and (d)(3) (above). Under Circular 230 § 10.34(a)(2), a tax lawyer may not willfully advise a client to take a position that lacks substantial authority, unless the position is disclosed to the IRS. As explained above, this is often characterized as a 40% chance of success on the merits. This is the minimum standard of confidence required for undisclosed positions, and it became the requirement in 2011. However, in 1985, the ABA Section of Taxation's Committee on the Standards of Tax Practice issued guidelines that tax advice should have a "realistic possibility" of successful defense in court,

meaning a "likelihood of success closely approaching one-third ...."[15] Thus, the tax section's minimum standard is lower than that of Circular 230. Who regulates the tax bar? Who has the power to discipline tax lawyers? How much advice is likely to fall below the "substantial authority" standard while remaining above the "realistic possibility" standard? Note that, after the changes to Circular 230, the penalty standard in the Code and the standard in Circular 230 have been harmonized. Should a tax lawyer ever be entitled to advise a client to take a position contrary to penalty standards?

25. While the substantial authority standard might not seem high compared to the realistic possibility standard, compared to a standard that legal advice should be merely non-frivolous, the substantial authority standard seems very high. Advice with even a 5% chance of success in court may not be frivolous, but the realistic possibility standard requires about a 33% chance of success. But, why should a lawyer ever give advice she believes is more likely than not to fail in court? After all, if the advice has a 40% chance of success, it has a 60% chance of failure. What percentage of success do you think clients expect to "buy" with tax advice from a tax lawyer?

26. Liz is a tax lawyer who has met with a potential new client, Chris. Chris owns several business entities. Chris has not retained Liz. Rather, after reviewing his information, Liz is going to make a presentation to Chris and then he will decide whether or not to hire her. Liz studies the structure of the business entities, and she discovers that the structure is very tax inefficient. She concludes that with some straightforward re-structuring she could reduce the overall tax liabilities of the entities by about $30,000 each year. The restructuring is very straightforward and Liz is surprised that Chris has not done it in the past. She believes it is so straightforward that it will take only about six hours of her time, which at her standard $500 an hour billing rate is $3000. Liz is very interested in making a good impression on Chris, hoping to win his long-term business. She believes she can impress him if she "guarantees" her work as part of her presentation to him. She

is considering offering to charge him a contingent fee of 10% of the tax savings, which she thinks will be about $3000. Further, if the IRS successfully challenges the restructuring in the future, she will refund the fee. Ignoring the complications of reasonably defining "tax savings," is this type of fee proper?

27. Circular 230 obligates the lawyer on many issues that are also the subject of state law, such as conflicts of interest, client information, and diligence. The Circular 230 requirements and the state law requirements may not be identical. For example, the conflict waiver requirements under § 10.29 include time periods and signatures that may not be found in state bar rules regarding conflicts of interest. What if the two directly conflict? What if, for example, information required to be disclosed under § 10.20 is prohibited from being disclosed by state bar laws? If it is impossible to comply with both, what is a tax lawyer to do? In some situations, federal regulations pre-empt state law. Does Circular 230? (Model Rule 1.6 allows disclosure of confidential information when necessary to comply with "other law." Is Circular 230 "other law"?)

28. Lou is the senior partner in a tax law firm. What are his responsibilities with respect to the firm's practices under Circular 230 §§ 10.33 and 10.36? How would Lou educate himself about what constitutes "best practices?" Recall that Treasury Regulations § 1.6694-2(e) references office procedures that may protect tax lawyers from certain penalties.

Circular 230 establishes disciplinary procedures. Those who practice before the IRS may be reprimanded, suspended, or disbarred. Circular 230 §§ 10.25–.52. If a practitioner is suspended or disbarred, no other practitioner may employ or accept assistance from them. Circular § 10.24. Consider that the agency before which the lawyer represents clients is the same agency that is authorized to suspend or disbar him or her from doing so. Is that troubling?

WASHBURN v. SHAPIRO

409 F. Supp. 3 (S.D. Fla. 1976)

An accountant was criminally convicted under § 7206(a)(2) (he knowingly prepared a joint return for a client who signed on behalf of his wife even though he was not authorized to do so). As a result of his criminal conviction, the Director of Practice instituted disbarment proceedings. An administrative law judge held that the accountant had violated Circular 230 § 10.50 (he had behaved disreputably), and he disbarred the accountant from practice before the IRS. The accountant appealed to the General Counsel of the Treasury Department, who affirmed the administrative law judge's decision. The judicial review of this final decision, of an administrative agency, is "whether there is substantial evidence in the record to support the challenged administrative determination," and the court found there was. The accountant was convicted of a felony and did not deny it, and under Circular 230 the conviction subjected him to disbarment. The accountant complained that his rights to due process had been violated, but, upon reviewing various steps in the process, the court concluded he received "the requisites of elementary fairness–due notice and the opportunity to be heard" to which he was entitled.

2.3. Regulating Tax Lawyering through Malpractice Standards

Lawyers may be sued by unhappy former clients and, in some cases, persons who may not have been clients—or who, at least, the lawyer did not consider to be a client. Most commonly those suits are premised on the lawyer's negligence or violation of fiduciary duties to the client (or non-client third parties) or contractual duties between the lawyer and client. Lawyering with an eye on a successful defense of professional judgment can consume the mental and emotional energy of lawyers on a regular basis. Limiting liability, especially for the acts of those with whom one works, is an ongoing concern of lawyers. Many lawyers carry malpractice insurance, which means that complying with the terms of the policy becomes important. Worrying about malpractice suits and the consequent strategies for reducing risk may do far more to regulate lawyering than fear of discipline by the state bar and, for tax lawyers, the Treasury Department.

In a malpractice suit, lawyers are liable for failing to "exercise the competence and diligence normally exercised by lawyers in similar circumstances."[16] Both competence and diligence also are required under Model Rules 1.1 and 1.3 and Circular 230 §§ 10.22 and 10.35. Of course, the difference is that a malpractice suit may result in a financial judgment against the lawyer, while violating the ethics rules may result in disciplinary actions. Generally, in terms of damages, tax lawyers may find themselves liable for the penalties and interest their clients had to pay the IRS for the improper tax position, but usually not the increased tax liability itself.

Notes and Questions

29. Carl is involved in a real estate transaction that could easily have been structured to qualify for non-recognition under IRC § 1031. However, his lawyer, Lee, failed to advise him of this possibility. The result is an immediate $400,000 tax liability that otherwise might have been deferred indefinitely. What if Lee thought Carl had a CPA providing him tax advice? What if Lee had written a letter to Carl stating that he would not be responsible for tax advice? What if a provision to that effect was in Lee's engagement agreement with Carl? Is it ethically appropriate for Lee to attempt to transfer the burden of the tax advice to a CPA? Would it make a difference if he attempted to transfer it to another lawyer? Could he be disciplined by the state bar for attempting to do this? Would this be a reasonable limit on his scope of representation? (Read Model Rule 1.2(c).) If you were representing Carl in a malpractice suit, what would you argue the damages should be based on? If you were defending Lee, what would you argue about the right measurement of damages?

30. Lara is a lawyer who has been practicing for a year. She is a solo practitioner. She has no experience in handling tax matters. She is handling her first divorce case and she is concerned that there may be tax issues. She wants to involve a specialist. Her law school classmate, Ted, is a first year lawyer interested in handling tax matters. She also knows Terry who is a very experienced tax lawyer. Lara's client is of very modest means and the total

property involved is of relatively little value. Lara could refer her client to either Ted or Terry. Ted, as a new lawyer, charges a much lower fee than Terry. In fact, it seems unlikely that her client could afford Terry's fees. Lara also knows an experienced CPA who would be willing to "help" Lara with the tax issues but not take primary responsibility. The CPA's rates are much lower. What should Lara do? What if she refers the client to Ted, knowing Ted is not very experienced, would she be liable for Ted's mistakes? What if, as a practical matter, the client cannot afford the tax expertise she needs—but Lara is representing her?

31. Leo is not a tax lawyer. When tax issues arise, he routinely provides his clients with the names of three tax specialists, suggesting they interview each of them. He does this in an effort to protect himself from claims by disgruntled former clients that he should be liable for the bad advice of the lawyer to whom he referred them. If a tax issue arises that is so unusual and technical that only one of those tax lawyers is competent, how should Leo handle the referral? Since Leo is not a tax lawyer, how would he recognize that the issue is so unusual and technical that only one of those lawyers is competent? On a more basic level, how does Leo spot all the tax issues that need referral when he is not a tax lawyer?

32. Model Rules 1.1 requires a lawyer to provide "competent representation." The comments explain that a "lawyer can provide adequate representation in a wholly novel field through necessary study." Is that really true? What are the risks of taking a client with the plan of engaging in "necessary study" in order to competently represent the client?

33. Both lawyers and CPAs practice in the tax field. How do you think assessment of malpractice risks affect the division of the field between the two professions?

3. Ethical Problems for Tax Lawyers

While tax lawyers face many of the professional responsibility problems other lawyers do, such as conflicts of interest and handling confidential information, there are several distinctive situations that pose ethical problems for tax lawyers. First are those situations in which a tax lawyer provides advice to a client in a manner expected to protect the client from certain penalties, even if the advice turns out to be wrong. Second are situations involving mistakes, such as discovering that a prior year's tax return is incorrect or catching the IRS making a mistake in the client's favor. Finally are situations that involve how private tax lawyers interact with lawyers and other employees at the IRS.

3.1. Tax Opinions and Tax Shelters

A taxpayer who makes an "honest mistake" still owes the taxes due (and interest on the amount due), an audit may reveal this. Yet, the taxpayer must pay additional penalties only in certain situations. For example, IRC § 6662 imposes a 20% penalty, if the taxpayer underpaid tax due to "negligence or disregard of the rules or regulations," or, regardless of negligence or disregard, if the underpayment was "substantial" (i.e., more than the greater of $5,000 or 10% of the tax owed). IRC § 6662(b)(1), (b)(2), (d)(1).[17] It is in seeking protection from penalties that many clients turn to tax lawyers. Thus, clients will often seek assurances from a tax lawyer as to a favorable position on the return since such assurances may protect them from the penalties, even if the position fails to be sustained on audit or in litigation. Tax lawyers earn significant fees in providing such assurances (i.e., providing opinions as to the proper tax treatment).

In general, a taxpayer will not be subject to a § 6662 penalty if she acted reasonably and in good faith with respect to the return position that resulted in the underpayment of tax. IRC § 6664(c)(1). A taxpayer who relies on a tax lawyer's professional advice may cite doing so as evidence of acting reasonably and in good faith. Treasury Regulations § 1.6664-4(b)(1). However, the taxpayer must have disclosed all relevant facts to the lawyer, and the lawyer must base the advice on all relevant law taking the facts into consideration, making no unreasonable assumptions. Treasury Regulations § 1.6664-4(b)(1). In short, the tax lawyer's advice must be reasonable and in good faith and the taxpayer's reliance itself must be reasonable and in good faith.

While the taxpayer penalty regime is complex, it is important to note that there are specific protections provided for different levels of confidence in tax advice. Similar to the requirements on a tax return preparer under § 6694, there will be no penalty premised on a tax position for which there is "substantial authority" or a tax position that is disclosed on Form 8275 and for which there is a "reasonable basis." IRC § 6662(d)(2)(B). Re-read the considerations described above with respect to § 6694 and the meaning of "substantial authority" and "reasonable basis." Remember that a position with substantial authority is one for which there is about a 40% chance of success, if litigated, and a position for which there is a reasonable basis is one for which there is about a 10–20% chance of success if litigated.

The substantial authority and reasonable basis standards are objective standards. However, in some instances, in order to avoid a penalty, the taxpayer must also reasonably believe that the position is "more likely than not" to be sustained on its merits in litigation.[18] The "more likely than not" standard is greater than 50%. A taxpayer is considered to "reasonably believe" if the taxpayer reasonably relies in good faith on the opinion of a professional tax advisor, if the opinion is based on the tax advisor's analysis of the pertinent facts and authorities … and unambiguously states that the tax advisor concludes that there is a greater than 50-percent likelihood that the tax treatment of the item will be upheld if challenged by the Internal Revenue Service. Treasury Regulations §§ 1.6662-4(g)(4)(i)(B) [non-corporate taxpayer]; 1.6664-4(f)(2)(B)(2) [corporate taxpayer].

This special requirement applies to "tax shelters." In common usage, a "tax shelter" is a complicated tax scheme intended to generate substantial tax benefits that do not correspond to the underlying economic realities of the scheme. In other words, it is a complicated and abusive tax plan. Tax shelters tend to be marketed as investments, and those who are marketing the shelters hire tax lawyers to provide written tax opinions designed to protect the investors from penalties.[19] Thus, these opinions are extremely valuable to tax shelter promoters—and providing these opinions on law firm letterhead can be an extremely lucrative business for tax lawyers. Over a five year period, one large firm tax partner "personally netted $93 million"—and hundreds of millions for his firm—by providing about six hundred tax shelter opinions.[20] However, when the tax shelters began to unravel under IRS scrutiny, the lawyer and his firm were sued in a class action suit brought by the tax shelter investors, which resulted in the dissolution of the law firm, payments to the investors, and criminal penalties.[21]

The war against tax shelters began in the 1970s.[22] With income tax rates exceeding 70%, many high earning individual taxpayers were investing in tax shelters. These shelters had no economic reality—and often no other reality—but supposedly generated great tax deductions that could be used to offset (i.e., "shelter") other income. By 1980, the IRS began to focus on written opinions given by tax advisors. These opinions were given to protect investors from penalties, even if the underlying tax benefits were ultimately disallowed. Given the significant tax "savings" of these shelters and the time value of money, even if the investors had to pay the taxes at some point, the shelter could remain a good "investment," so long as there were no penalties imposed. The IRS focused on four types of problematic opinions: (1) substantively incompetent opinions; (2) opinions based only on assumed facts; (3) opinions that discussed the law and the facts but never related the two; and (4) negative opinions, those that said there was a reasonable basis but that it was more likely than not the position would not be sustained. In 1982, Congress amended the substantive law regarding tax penalties, making these problematic opinions useless for penalty protection. In that same year, the American Bar Association Committee on Professional Responsibility issued guidance requiring tax lawyers writing opinions to make factual inquiries and relate the law to the facts. In the context of the new penalty law, Circular230 was amended in 1984to include a new § 10.33 on tax shelter opinions, which essentially mirrored the ABA guidance. This was the first time that tax advice as such was covered by Circular 230.

About twenty years later, tax shelters had become increasingly sophisticated and oriented towards corporate taxpayers. Congress amended the law to explicitly sanction the regulation of written tax advice by the IRS and the IRS was encouraged to expand its efforts against tax shelter opinions. The result was a new Circular 230 § 10.35. The purpose of Circular 230 § 10.35 was to make it more difficult for taxpayers to evade penalties by claiming good faith reliance on tax opinions. This was done by forcing tax professionals to write those opinions in a very detailed way. Each relevant fact had to be identified and related to the relevant law. In short, all was to be made explicit, nothing left implicit or assumed or ignored. The professional had to give a more likely than not opinion on every significant tax issue. If the professional wasn't willing to do that, then the opinion had to inform the taxpayer that it wouldn't provide penalty protection.

Many tax lawyers became concerned that Circular 230 § 10.35 did not apply only to tax shelters, but also might be applied to less controversial tax avoidance techniques. Considerable anxiety developed in the tax bar as to giving written advice, and the IRS did nothing to lessen the anxiety. The only way to avoid having to provide a detailed written opinion that complied with covered opinion rules was to include a disclaimer on written advice that it did not provide penalty protection. The result was the near-universal use of such disclaimers on lawyer e-mails and other communications.

However, within a decade, it became generally agreed that the effect of Circular 230 § 10.35 was not so much to increase the quality of tax advice as it was to increase the amount of boilerplate disclaimers. In 2014, the opinion rules were removed from Circular 230, leaving written advice to be governed by § 10.37, which required nothing in particular other than reasonableness.

Notes and Questions

34. "Tax shelters" are commonly thought of as abusive transactions. However, the technical definition of a tax shelter includes "any plan or arrangement, if a significant purpose of such … plan or arrangement is the avoidance … of Federal income tax." IRC § 6662(d)(2)(C). While the organized tax bar disapproves of tax lawyers engaged in abusive planning, this definition of "tax shelter" has troubled many tax lawyers because it technically seems to include legitimate tax planning. How might "tax shelter" be re-defined so that it included only abusive transactions?

35. It may be that criminal prosecution of tax advisors becomes the "weapon of choice" for deterring abusive tax scheming.[23] Given that professional ethics standards have failed, is criminal prosecution the only alternative left?

3.2. Mistakes

To err is human. But there are many kinds of errors, and when the errors involve the administration of the tax law, the tax lawyer may find herself pondering what to do. For example, tax lawyers routinely ponder what to do when they discover mistakes in a prior year's return.

Circular 230 § 10.21 provides as follows:

> A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as

> provided under the Code and regulations of such noncompliance, error, or omission.

Circular 230 makes it clear that a tax lawyer has the obligation to advise the client of any "noncompliance, error, or omission." If a tax lawyer discovers a mistake on a prior year's return, it is clear that the tax lawyer should inform the client of the mistake. Note that there is no requirement that the client be advised to file an amended return, but Circular 230 requires the client be advised of the "consequences" of the mistake. What are the consequences?

It is often said that there is no legal obligation to file an amended tax return correcting a prior year's return. Some, however, argue that because the tax is legally due and owing, the taxpayer is legally obligated to correct the prior return and pay the tax due.[24] In other words, the argument is that, even if the IRC does not require an amended return, other legal principles do. Others may point to language in the Treasury Regulations that provide that taxpayers "should" file an amended return, but it is hard to miss that the regulations do not use the word "must" or "shall." See Treasury Regulations §§ 1.45-1(a) and 1.461-1(a)(3). The IRS certainly encourages the filing of amended returns; it provides forms for that purpose. Even if filing an amended return is not required by the IRC, filing the return and paying the tax due may be useful for other reasons, such as stopping the accrual of interest—after all, the tax due may be discovered on an audit, even if no amended return is filed.

What if the mistake on the prior year's return was not an "honest mistake," but intentional? Choosing to amend the return may be the choice to disclose a crime and Fifth Amendment rights may be implicated. If a taxpayer has the right not to incriminate himself, obviously his lawyer is not obligated to advise him to do so.

Tax returns are filed on an annual basis, but a given return may be relevant across many years. If the client chooses not to amend the return to correct one year's mistake, the tax lawyer cannot simply ignore her knowledge of the mistake in continuing to represent the client. She must be diligent in ensuring that she does not incorporate the mistake into future planning or reporting. Review Circular 230 § 10.22; Model Rules 1.2, 1.6, 4.1 and 8.4; IRC §§ 6701 and 7206(2). This may be very difficult in some situations, but not others. In some situations, the most prudent course of action may be withdrawing from the representation (and the client should be advised that withdrawal may be one of the "consequences" implicated by § 10.21.) Of course, as a client's circumstances and tax planning changes, and as the tax law changes, tax positions in prior years may suddenly become more important in later years than anyone would have anticipated.

If the client chooses not to correct the return and the return later becomes the subject of an audit, the tax lawyer's bind increases and she may need to withdraw. While the return is being reviewed, it may be almost impossible for the lawyer not to make a false or misleading statement about the return, and, of course, she is also generally unable to disclose the error over the objection of the client. Review Circular 230 § 10.22; Model Rules 1.2, 1.6, 4.1, and 8.4.

What if the mistake in question was not made by the client on a prior year's return but rather by the IRS—and it is a mistake in your client's favor? The Committee on Standards of Tax Practice of the ABA Tax Section considered this issue in detail in its Standards of Tax Practice 1999-1. The Committee distinguished between computational and conceptual mistakes, generally advising that the tax lawyer notify the IRS of the mistake if it is computational (i.e., a math mistake) but not if it is conceptual. The Committee considered that, on the one hand, the lawyer may not disclose confidential information without the client's consent (Model Rule 1.6(a)) but, on the other hand, the lawyer may not engage in dishonest conduct (Model Rule 8.4(c)). If the client objects to disclosing the IRS's computational mistake to it, the tax lawyer may have the duty to withdraw.

Notes and Questions

36. ABA Formal Opinion 314 instructs the lawyer who knows of a mistake on a prior return to advise the client to file an amended return. However, Circular 230 only requires advising the client as

to the consequences of failing to correct the mistake. Presumably bar authorities in states that have adopted the Model Rules would consult the ABA Formal Opinions in considering discipline under the rules. Such opinions serve as persuasive authority along with state ethics opinions. But wouldn't those authorities be likely to consult Circular 230 too?

37. Lanny is a tax lawyer who has been hired by a new client. In reviewing the client's files in order to provide some tax advice for a possible business deal, Lanny reviews a prior year's tax return in detail. During this review, he discovers a minor mistake that resulted in very limited tax savings and is extremely unlikely to be relevant in any future years. Lanny believes the mistake was "honest," and that no negligence or other penalty would be applicable. He believes the client has no legal obligation to amend the return. The client's CPA prepared the return. Lanny is surprised to discover any mistake on a return prepared by this CPA, as she is well-known for her extraordinary work. Lanny is concerned that if he tells the client of the mistake, the client may fire the CPA. Lanny believes the client is very hot-tempered and fairly unsophisticated and is unlikely to comprehend that hiring a new CPA will not ensure mistake-free returns in the future. It will also involve a great deal of transition costs as the new CPA would have to spend a good deal of time learning about the client's business and reviewing the files. Lanny believes it is in the client's best interests to retain this CPA. Must Lanny tell the client about the mistake? What if Lanny believes the error was not a "mistake" but intentional? What if Lanny had prepared the return, and then later discovered the error?

3.3. Working with IRS Lawyers and Other Employees

Who would want to be an IRS lawyer? It is a complicated role with considerable regulation. There are, of course, the state ethics rules, but there is also Circular 230, tax code provisions (such as IRC §§ 6103 and 7214), and the general restrictions on all federal government lawyers and employees. As with all government lawyers there are inter-agency issues, intra-agency issues, and bureaucratic realities. There is also the fact that IRS employees, in general, and IRS lawyers in particular, are rarely well-received. Mentioning at a dinner party that one is a tax lawyer may chill conversation, but saying that one is a lawyer for the IRS may have even more dire social consequences. Violence against IRS employees in general is also a real risk; more than 900 threats against IRS employees are investigated each year.[25]

Yet many tax lawyers choose to work for the IRS. Working for the federal government has its benefits in terms of lifestyle, even if not in terms of cash compensation. But many tax lawyers who choose this line do it for other reasons. Though not as prevalent a professional development choice as it once was, service in the IRS may be good professional training for future private tax lawyers, perhaps much like a stint in the prosecutor's office serves future defense attorneys. One reason some tax lawyers choose the IRS is in order to defend the interests of the honest taxpayers. These lawyers often think of themselves not as representing "the system" but "all the taxpayers." When litigating against a taxpayer who crossed the line, these lawyers consider themselves to be representing all of the taxpayers who did not cross the line.

When private tax lawyers believe their clients did not cross the line in tax planning and their clients' reputations and assets are on the line, they too, of course, consider themselves to be carrying on a noble crusade. The conflict between the private tax lawyer and the IRS tax lawyer may occur in an emotional and stressful situation for the client. It is here that professional rules are essential for navigating the high stakes and high stresses that otherwise might erode the professional barriers and reduce the conflict to a personal level.

These situations may also involve another source of tension—potential sanctions against the tax lawyer. Review the readings above related to "substantial authority" and "reasonable basis" and the penalties to which tax lawyers may be subject to as a result of their tax advice (IRC § 6694), as well as the materials above related to the criminal sanctions that may be imposed on tax lawyers in certain situations (IRC § 7206). The tax lawyer may be personally at risk as a result of a review of the client's tax reporting, and thus the tax lawyer may be defending not only his client but himself. Indeed, it is often prudent, and in some situations necessary, for the tax lawyer who provided the tax planning advice not to be the tax lawyer who defends it.

With these tensions in mind, consider the following from Circular 230:

§ 10.51 Incompetence and disreputable conduct.

> (a) Incompetence and disreputable conduct. Incompetence and disreputable conduct for which a practitioner may be sanctioned under § 10.50 includes, but is not limited to—
>
> * * *
>
> (4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof . . . knowing the information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term "information."
>
> * * *
>
> (7) Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.
>
> * * *
>
> (9) Directly or indirectly attempting to influence, or offering or agreeing to attempt

to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of an advantage, or by the bestowing of any gift, favor or thing of value.

* * *

(12) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language, making false accusations or statements, knowing them to be false or circulating or publishing malicious or libelous matter.

(13) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. …

Internal Revenue Manual 4.1.1.7.6.1 - Badges of Practitioner Abuse (05-20-2005)

(1) Practitioners may be subject to discipline under Circular 230 if they exhibit a pattern of attempting to influence the case disposition or a Service employee to obtain the desired results in several collection investigations by:

- Using abusive language
- Threatening claims of misconduct (e.g. Section 1203)
- Making false claims of misconduct
- Making false accusations
- Verbal/Physical threats or assaults

- Making a bribe (e.g. offering gifts or other things of value)

* * *

(2) A second badge of practitioner misconduct is a pattern of delay by the practitioner in performing one or more of the following actions (Circular No. 230 Section 10.20) during the course of several collection cases:

- Missing appointments
- Canceling appointments at the last moment with no good cause provided
- Agreeing to provide requested documentation and/or information and then refusing to do so, thereby hindering the Service's efforts to continue its investigation
- Providing partial information requiring repeated call backs and correspondence causing delays

From 1991-2 C.B. 1137:

A practitioner's meeting with IRS representatives concerning a client's affairs deteriorated into acrimony. As people began to leave the meeting room, the practitioner grasped a revenue officer by the shoulder and urged her to continue the meeting. The revenue officer refused, telling the practitioner to remove his hand. The practitioner again grasped the revenue officer by the shoulder and repeated his request, which was refused.

The matter was referred to the Director of Practice. The Director notified the practitioner of his possible violation of Treasury Department Circular No. 230, section 10.51(i), which states that a practitioner may be discharged or suspended for contemptuous conduct in connection with practice before the IRS.

The physical contact, the Director found, was akin to contemptuous conduct as defined in section 10.51(i). The practitioner consented to a short suspension from practice before the IRS. The Director deemed suspension appropriate due to the seriousness of physically accosting an IRS employee engaged in the performance of his duties. However, the Director's finding that the practitioner made no attempt to threaten or coerce was a mitigating circumstance.

Notes and Questions

38. If a tax lawyer is disciplined under Circular 230, how likely is it she will also be disciplined by state bar authorities? What is the difference?

39. IRS lawyers may be motivated by the idea that they represent "all the (other) taxpayers." But, of course, this is an insufficient conception of their client's identity. It is important for a lawyer to know who the client is, for example, in order to determine with whom confidential information may be shared. If Leo is an IRS lawyer, who is his client? The U.S. government? The President? The Treasury Department? The IRS? The Secretary of the Treasury? The Commissioner of the IRS? If Leo is asked by Congress to provide certain information, may he? Must he? In what circumstances? What if the President requests it? What if the IRS Commissioner requests it? Lawyering for the government raises complex professional responsibility issues.

40. If an IRS lawyer concludes that the taxpayer's argument is very strong and the government's argument is very weak, may she continue to pursue the taxpayer? What if she concludes the law is squarely on the taxpayer's side rather than the government's side? What if the government's position is not frivolous, but close to it? In Rev. Proc. 64-22, 1964-1 C.B. 689, the IRS announces that it will not assert a "strained construction" of the law. What does that mean?

41. Lacey is a tax lawyer. She is representing Cory before the IRS. Lacey discusses the return with both Cory and the CPA who prepared the return. One of the transactions reflected on Cory's return relates to the sale of real property to Cory's sister-in-law in

exchange for a promissory note. Lacy learns that, initially, the transaction "was not documented exactly right," as the CPA put it. But, after first being contacted by the IRS, the CPA advised Cory to contact a lawyer, Abe, who "fixed the problem" by providing documentation back-dated to the date of sale and containing the terms the CPA advised should be contained in order to qualify for the position taken on the return. The CPA has provided Lacy with an envelope of supporting documents, most of which are not related to this transaction but rather were specifically requested by the IRS. If Lacy simply forwards the envelope to the IRS with a cover letter stating only "enclosed please find the requested materials," is she subject to discipline? Has she committed mail fraud? Has she committed any other crime?

42. Larry is a tax lawyer. He is representing Casey before the IRS. The IRS employee has asked Larry for copies of a sales contract, the minutes of a corporation Casey owns, and a lease agreement. Larry agrees to send these documents during the first week of July. When he fails to do so, the IRS employee calls and asks him for the information. He sends the sales contract in the last week of July. He then sends several pages of the lease agreement in mid-August, and then, two weeks later, after receiving another call from the IRS employee, he sends the remainder of the lease agreement with a cover letter apologizing for failing to send the entire agreement earlier. In September he sends the corporation's minutes for its annual meeting, and then in October, after the IRS employee calls to ask if there are other minutes, Larry provides the minutes for the corporation's special meetings. Is this misconduct? Does it matter if Larry is intending to delay the matter, or if, instead, he is simply disorganized?

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[1] 31 U.S.C. § 330 (2012?).

[2] Circular 230 § 10.34.

[3] Donald B. Tobin, Richard Lavoie, and Richard E. Trogolo, Problems in Tax Ethics 22 (2009). See Jasper L. Cummings, Jr., The Range of Legal Tax Opinions, with Emphasis on the 'Should' Opinion, Tax Notes, February 17, 2003, p. 1125, 1128.

[4] Tax lawyers are said to have a "duty to the system." Bernard Wolfman, James P. Holden, and Kenneth L. Harris, Standards of Tax Practice § 101.2 (5th ed., 1999). Professor Deborah Schenk has written that the self-reporting nature of the tax system means that the tax system cannot permit the "absolute adversarial" relationship that lawyers might have in other situations. Deborah H. Schenk, Book Review: Tax Ethics, 95 Harv. L. Rev. 1995, 2004 (1982). The idea that "tax ethics … must be approached from a special perspective", as a consequence of the self-reporting nature of our tax system, seems the most common argument for tax lawyers' duty to the system. Id. at 89. See also Anthony C. Infanti, Eyes Wide Shut: Surveying Erosion in the Professional Tax Bar, 22 Va. Tax. Rev. 589, 606 (2003). However, some have criticized this conception of the tax lawyer. See, e.g., 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).

[5] See, *e.g.*, Treasury Regulations § 1.6662-4(d)(2) ("The possibility that a return will not be audited, or, if audited, that an item will not be raised on audit, is not relevant in determining whether the substantial authority standard (or the reasonable basis standard) is satisfied.")

[6] 5 U.S.C. § 500 (2012?).

[7] Indeed, under Circular 230 §10.3(c), enrolled agents may also practice before the IRS, but this discussion is limited to tax lawyers and CPAs as these two professions dominate tax planning.

[8] National Conference of Lawyers and Certified Public Accountants: A Study of Interprofessional Relationships, 36 Tax Law. 26, 28–29 (1981).

[9] Id. at 33–34.

[10] Id. at 34.

[11] Id. at 34–35.

[12] Id. at 35.

[13] Donald B. Tobin, Richard Lavoie, and Richard E. Trogolo, Problems in Tax Ethics 22 (2009). See Jasper L. Cummings, Jr., The Range of Legal Tax

Opinions, with Emphasis on the 'Should' Opinion, Tax Notes, February 17, 2003, p. 1125, 1128.

[14] Donald B. Tobin, supra, note 11, at 25 Cummings, supra, note 11, 1126–27.

[15] Report of the Special Task Force on Formal Opinion 85-352, 39 Tax Law. 635, 639-40(1985). The realistic possibility standard does not need to be met if the position "is advanced by payment of the tax and claim for refund, which necessarily sets forth in detail each ground upon which a refund is claimed." ABA Tax Section's *Report of the Special Task Force on Formal Opinion 85-352*, 39 Tax Law. 635, 639 (1985). See also IRC §6694(a)(2)(B) and IRC § 6692(d)(2)(B). Note that pursuit-of-refund alternative would only be available for taxpayers with sufficient funds to pay the tax upfront and then pursue the refund. This connects with the forum-shopping issues between the Tax Court and the federal district courts/Court of Federal Claims.

[16] Restatement (Third) of Law Governing Lawyers § 52 (The Standard of Care).

[17] Additionally, the penalty applies to substantial valuation misstatements. IRC § 6662(b)(3).

[18] If the tax lawyer is considered a preparer (as discussed above), a position related to a tax shelter or reportable transaction will be considered unreasonable, unless it was reasonable for the lawyer to believe that the position was "more likely than not to be sustained on its merits" in litigation. IRC § 6694(a)(2)(C).

[19] The opinions, of course, do not protect the investors from paying any back taxes (and interest) due when the scheme is audited, but are intended to protect the investors from penalties.

[20] Karen C. Burke and Grayson M.P. Crouch, COBRA Strikes Back: Anatomy of a Tax Shelter, 62 Tax Law 59, 61-62 (2008).

[21] Id. at 63.

[22] See Michael Hatfield, Committee Opinions and Treasury Regulation: Tax Lawyer Ethics, 1965-1985, 15 Fla. Tax Rev. 675–735 (2014).

[23] See Scott A. Schumacher, Magnifying Deterrence by Prosecuting Professionals, 89 Ind. L.J. 511–58 (2014).

[24] It is assumed that a mistaken past return resulting in an overpayment will be corrected in order to claim a refund.

[25] Andrea Ball, Hatred Toward IRS Nothing New, The Dallas Morning News, March 3, 2010, http://www.dallasnews.com/sharedcontent/dws/news/texassouthwest/stories/DN-irsworkers_03tex.ART.State.Edition1.4bdd764.html.