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Committee Opinions and Treasury Regulation: Tax Lawyer Ethics, 1965-1985

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COMMITTEE OPINIONS AND TREASURY REGULATION: TAX LAWYER ETHICS, 1965-1985

by

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I. INTRODUCTION AND OVERVIEW

At the beginning of the 21st century, tax lawyers are subject to complex and technical professional regulation.¹ While the incremental changes in this regulation often prompt considerable debate at the time the change emerges,² the intellectual history of those debates and changes has only recently begun to be written.³ In a prior article, I explored these developments in the period 1945-1965, documenting a tax professionalism that tended to be patriotic, philosophical, and pragmatic.⁴ In this Article, I turn to the subsequent 20 years, documenting the domination of the professional debates by committees and the ascent of a significantly more constrained and technically oriented professionalism.

This first section of the Article highlights the themes and tones of the 1945-1965 tax ethics literature, and then provides the political context and an overview of the legal changes in 1965-1985 that frame the tax ethics literature of that period. Section II begins in 1965, documenting the history of the first Formal Opinion (Opinion) on tax lawyer ethics issued by the American Bar Association's (ABA) Committee on Ethics and Professional Responsibility (PR Committee),⁵ which after considerable criticism in the ensuing years was substantially revised by a second Opinion in 1985. Section III is focused on 1980-1985, investigating the first foray of the U.S. Department of the Treasury (Treasury) into directly and significantly regulating tax lawyers through Circular 230⁶—and the bar's response. Section IV highlights the discussions that occurred on the sides of the

1. See, e.g., 31 C.F.R. §§ 10.20–10.22, 10.29, 10.33–10.37, 10.50–10.52 (2013).

2. See, e.g., Dan W. Holbrook, *Imagine the Worst the U.S. Treasury Could Do to Us—They've Done It, Revenge of the IRS: Circular 230 Changes Law Practice*, TENN. B.J., Aug. 2005, at 28; Edward M. Manigault & Steve R. Akers, *Circular 230—How It Changed Our Lives (Or At Least Our Practices)*, 20 PROB. & PROP., May-June 2006, at 32; Isaac J. Roang, *To Disclaim or Not to Disclaim: IRS Circular 230 Requirements for Written Advice*, 19 GEO. J. LEGAL ETHICS 937 (2006).

3. Dennis J. Ventry, Professor of Law at University of California Davis, has written a series of *Tax Notes* articles on aspects of this history. See, e.g., Dennis J. Ventry, Jr., *Filling the Ethical Void: Treasury's 1986 Circular 230 Proposal*, 112 TAX NOTES 691, 691 (Aug. 21, 2006).

4. Michael Hatfield, *Legal Ethics and Federal Taxes, 1945-1965: Patriotism, Duties, and Advice*, 12 FLA. TAX REV. 1 (2012) [hereinafter Hatfield, *Legal Ethics*].

5. This committee is now known as the Standing Committee on Ethics and Professional Responsibility.

6. Treasury Dept. Circular No. 230, 31 C.F.R. Subtitle A, Part 10 (2013).

debates over PR Committee Opinions and Circular 230. Section V provides reflections on the 1945-1985 history of tax lawyer ethics.

A. *Summary of 1945-1965 Tax Lawyer Ethics Literature*

Elsewhere, I analyzed the tax ethics literature of 1945-1965, which were the first two decades of the mass federal income tax as we know it.⁷ During that period, the individuals writing on professional ethics for tax lawyers were professional heavyweights⁸ who were socially and politically active.⁹ Their writings often invoked patriotism and civic duty,¹⁰ concerns about both communism and consumerism,¹¹ and the commercialization of the legal profession.¹² They were writing in a time in which the tax bar took the time to issue a report on the importance of natural law for tax jurisprudence.¹³ Their writings considered the problems of disclosure of tax positions,¹⁴ duties to the tax system,¹⁵ and the risk of over-cleverness in tax advice.¹⁶ They did not hesitate to address client- and business-related pressures¹⁷ or to explore the relationship between law and morals.¹⁸ They agreed that both tax lawyers and tax clients needed moral improvement,¹⁹ and many of them argued that the tax lawyer had a special duty to improve the morality of clients, educating them as to the legitimacy of the tax system.²⁰ They tended to be optimistic and patriotic supporters of the tax system, framing it within the nation's need for revenue in the Cold War.²¹ They emphasized a civic duty to the tax system, though they debated how best to understand the lawyer's professional duty to the tax system.²² They tended to agree there were differences in the professional responsibilities of a tax litigator and a tax advisor.²³ They also tended to agree it was easier to

7. See Hatfield, *Legal Ethics*, *supra* note 4, at 2–3.

8. *Id.* at 5–8.

9. *Id.*

10. *Id.* at 11–15.

11. *Id.*

12. *Id.* at 11.

13. *Id.* at 8.

14. *Id.* at 28.

15. *Id.* at 15.

16. *Id.* at 39–41.

17. *Id.* at 46.

18. *Id.* at 47.

19. *Id.* at 49.

20. *Id.* at 50.

21. *Id.* at 48–49.

22. *Id.* at 50–51.

23. *Id.* at 51.

find consensus on practical answers than on abstract principles,²⁴ emphasizing that practicing tax at the borderline was neither good ethics nor good business.²⁵ They valued broad judgment over technical arguments.²⁶ And, although some asked for better guidance from the organized bar,²⁷ not one of them began or ended the discussion of tax lawyers' ethics with an appeal to the organized bar's Canons of Professional Responsibility or Treasury's Circular 230.²⁸ Indeed, rarely did any of these lawyers even cite either.²⁹

B. Political and Legal Context for 1965-1985 Ethics Literature

Following the prior one, this Article sets forth the history of tax lawyers writing on legal ethics in the 1965-1985 period, which was a period of considerable political crises and change. Within the context of these broader changes, specific changes in the tax code and the professional ethics standards for lawyers frame the debates over the professional responsibilities of tax lawyers.

The decades from 1965-1985 were ones of profound political change, highlighted by controversial policies, political disgraces, and the emergence of a new American conservatism. In 1965, protests against the U.S. involvement in Vietnam spread, and the Civil Rights Movement brought violent reactions from police.³⁰ In 1968, Martin Luther King, Jr. and Robert Kennedy were both assassinated, and the Democratic Convention in Chicago was met by rioters who were met by police brutality.³¹ The 1970s began with escalating violence in Vietnam, the National Guard killing students protesting the war in Vietnam,³² and the publication of the "Pentagon Papers" documenting the government's deception of the public as to events in Vietnam.³³ There was both a break-in at the Democratic National

24. *Id.* at 23-28.

25. *Id.* at 27.

26. *Id.* at 54-55.

27. *Id.* at 55.

28. *Id.* at 55-56.

29. One notable exception would be Randolph E. Paul's questioning whether Circular 230 provided a different standard than the one that binds all lawyers. Although his writings were inconsistent, at the least, it is clear he thought it was debatable. In any event, the use of Circular 230 is more of a literary device in his article than an authority. *See id.* at 23-24.

30. BERNARD GRUN, *THE TIMETABLES OF HISTORY: A HORIZONTAL LINKAGE OF PEOPLE AND EVENTS* 554 (3d ed. 1991) [hereinafter GRUN, *TIMETABLES*].

31. *Id.* at 560, 562.

32. *Id.* at 566.

33. *Id.* at 570.

Headquarters in the Watergate complex and a landslide reelection of President Richard M. Nixon.³⁴ Arab oil-producing nations began embargoing oil shipments to the United States,³⁵ worldwide inflation caused dramatic price increases in food and fuel, and economic growth slowed to near zero by the mid-1970s.³⁶ Vice President Spiro T. Agnew pled no contest to charges of tax evasion and resigned,³⁷ and then convictions in the Watergate cover-up scandal led to President Nixon's resignation.³⁸ As inflation soared through the remainder of the decade, the expansion of the economy slowed and economic productivity stopped growing, causing the nation to suffer from "stagflation."³⁹ The 1980s began with a failed U.S. military attempt to rescue American hostages in Iran and the subsequent election of President Ronald W. Reagan,⁴⁰ bringing with him a conservative realignment of federal politics and social policy⁴¹ and a championing of supply-side economics⁴² and deregulation.⁴³ In 1985, President Reagan began his second term as President, having won 49 of the 50 states in his reelection.⁴⁴

Within this period of political and economic crises and changes, the tax code went through significant changes, almost all aimed at reducing revenue loss caused by aggressive tax planning. The Tax Reform Act of 1969 added a minimum tax on tax preferences, limited the deductibility of hobby losses and investment interest, and restricted depreciation on real estate.⁴⁵ Congress's next step was the Tax Reform Act of 1976, which created at-risk limitations for nonrecourse loans, limited prepaid expense deductions, codified the "substantial economic effect" test for partnership allocations, and added penalties for tax return preparers who neglected or

34. *Id.* at 570, 572.

35. *Id.* at 574.

36. *Id.* at 576, 578.

37. *Id.* at 574.

38. *Id.* at 576, 578.

39. W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A SHORT HISTORY* 133 (2d ed. 2004) [hereinafter BROWNLEE, *TAXATION IN AMERICA*].

40. GRUN, *TIMETABLES*, *supra* note 30, at 594, 596.

41. Joseph P. Byrne, *Reagan Revolution*, in 2 *THE EIGHTIES IN AMERICA* 809 (Milton Berman & Tracy Irons-Georges eds., 2008).

42. M. Casey Diana, *Supply-Side Economics*, in 3 *HISTORICAL ENCYCLOPEDIA OF AMERICAN BUSINESS* 809 (Richard L. Wilson ed., 2009).

43. R. Baird Shuman, *Reaganomics*, in 2 *THE EIGHTIES IN AMERICA* 809 (Milton Berman & Tracy Irons-Georges eds., 2008).

44. GRUN, *TIMETABLES*, *supra* note 30, at 608.

45. Garrison Grawoig DeLee, *Abusive Tax Shelters: Will the Latest Tools Really Help?*, 57 S. CAL. L. REV. 431, 435 (1984) [hereinafter DeLee, *Tax Shelters*]; see also Tax Reform Act of 1969, Pub. L. No. 91-172, § 301(a), 83 Stat. 487, 580 (codified as former I.R.C. § 56); § 213(a), 83 Stat. at 571 (codified as former I.R.C. § 183); § 221(a), 83 Stat. at 574 (codified as former I.R.C. § 163(d)); § 521(a), 83 Stat. at 649 (codified as former I.R.C. § 167(j)).

intentionally disregarded the law.⁴⁶ Only two years later in 1978, Congress took additional aim at tax shelters, tightening the at-risk rules⁴⁷ and reducing the incentive for aggressive tax planning by significantly cutting capital gains and business taxes.⁴⁸ By the time President Reagan took office, the success of many tax shelter investments depended on winning the so-called audit lottery (*i.e.*, escaping audit).⁴⁹

After President Reagan's election, Congress passed the Economic Recovery Tax Act (ERTA) in 1981,⁵⁰ which lowered the maximum tax rate for individuals and thus the incentive for tax sheltering,⁵¹ and also imposed valuation penalties that increased the costs for many successfully challenged tax shelters.⁵² The following year, Congress enacted the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),⁵³ which was designed to increase taxpayer compliance with tax law.⁵⁴ It imposed a penalty on the

46. DeLee, *Tax Shelters*, *supra* note 45, at 437; *see also* Tax Reform Act of 1976, Pub. L. No. 94-455, § 204(a), 90 Stat. 1520, 1531 (codified as former I.R.C. § 465); § 208(a), 90 Stat. at 1541-42 (codified as former I.R.C. § 461(g)); § 213(d), 90 Stat. at 1548 (codified as former I.R.C. § 704(b)(2)); § 1203(b), 90 Stat. at 1689-92 (codified as former I.R.C. § 6694(a)). A willful understatement of taxpayer liability brought the preparer a \$500 penalty for each instance. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1203(b)(1), 90 Stat. 1520, 1689 (codified as former I.R.C. § 6694(b)). Additionally, preparers were assessed penalties for: (1) failure to furnish a copy of the return to the taxpayer, (2) failure to sign the return, (3) failure to furnish his identifying number, (4) failure to retain a copy or list of prepared tax returns, (5) failure of an employer of preparers to keep proper records, and (6) endorsement or negotiation by the preparer of a check issued to the taxpayer relating to his taxes. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1203(f), 90 Stat. 1520, 1692 (codified as former I.R.C. § 6695). The 1976 Act also gave the Secretary of the Treasury the authority to file an action in a district court against a tax preparer to enjoin him from continuing to perform any of the conduct above, misrepresenting his eligibility to practice before the Internal Revenue Service or otherwise misrepresenting his experience or education as a tax return preparer, guaranteeing a refund or allowance of a credit to a taxpayer, or engaging in any other fraudulent or deceptive conduct that "substantially interfere[d]" with the administration of Internal Revenue laws. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1203(g), 90 Stat. 1520, 1693 (codified as former I.R.C. § 7407).

47. DeLee, *Tax Shelters*, *supra* note 45, at 437.

48. BROWNLEE, *TAXATION IN AMERICA*, *supra* note 39, at 135; *see also* Revenue Act of 1978, Pub. L. No. 95-600, § 402(a), 92 Stat. 2763, 2867 (codified as former I.R.C. § 1202(a)); § 301(a), 92 Stat. at 2820 (codified as former I.R.C. § 11(a)).

49. BROWNLEE, *TAXATION IN AMERICA*, *supra* note 39, at 135.

50. *Id.* at 150; DeLee, *Tax Shelters*, *supra* note 45, at 445.

51. DeLee, *Tax Shelters*, *supra* note 45, at 445-46.

52. *Id.* at 446.

53. BROWNLEE, *TAXATION IN AMERICA*, *supra* note 39, at 154.

54. DeLee, *Tax Shelters*, *supra* note 45, at 447.

promoters of abusive tax shelters, and it allowed the Secretary of the Treasury to seek an injunction against such promoters.⁵⁵ It created penalties to discourage both understating tax liability and the aiding and abetting of understating tax liability.⁵⁶ It imposed a penalty on taxpayers for a “substantial understatement” of their income tax liability.⁵⁷ And, in a direct aim at the tax sheltering industry, TEFRA provided that if the understatement of a tax liability was related to a tax shelter investment, the penalty could only be avoided if the position had “substantial authority” and the taxpayer had a reasonable belief that the tax treatment was “more likely than not” the proper treatment.⁵⁸ Two years later, Congress passed the Deficit Reduction Act of 1984 (DEFRA),⁵⁹ with specific curbs on the tax shelter industry, including the registration of tax shelters, the maintenance of lists of tax shelter investors, and changes in reporting obligations.⁶⁰ By 1985, the tax shelter investment landscape had been profoundly altered.

The tax code was not the only relevant law significantly reformed between 1965 and 1985. The law of lawyering went through two significant reforms. In 1969, the ABA adopted the Code of Professional Responsibility, which replaced the thirty-two Canons of Ethics that had been in place since

55. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 320(a), 96 Stat. 324, 611 (codified as former I.R.C. § 6700).

56. DeLee, *Tax Shelters*, *supra* note 45, at 447.

57. *Id.* at 447–48; *see also* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 323(a), 96 Stat. 324, 615 (codified as former I.R.C. § 6661(a)). Under TEFRA, a “substantial understatement” was the greater of ten percent of the tax required to be shown on the return or \$5000. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 323(a), 96 Stat. 324, 615 (codified as former I.R.C. § 6661(b)(1)(A)).

58. DeLee, *Tax Shelters*, *supra* note 45, at 448. TEFRA added a new section to the Internal Revenue Code (I.R.C. § 6661), which required that a tax position taken have substantial authority and a reasonable belief by the preparer that the treatment was proper to reduce an understatement of tax liability. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 323(a), 96 Stat. 324, 615 (codified as former I.R.C. § 6661(b)(2)(B)(i), (C)(i)(II)).

59. BROWNLEE, *TAXATION IN AMERICA*, *supra* note 39, at 155.

60. George Cooper, *The Taming of the Shrewd: Identifying and Controlling Income Tax Avoidance*, 85 COLUM. L. REV. 657, 688 (1985); *see also* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 141(a), 98 Stat. 494, 677–80 (codified as former I.R.C. § 6111); § 142(a), 98 Stat. at 681 (codified as former I.R.C. § 6112); § 145(a), 98 Stat. at 684–85 (codified as former I.R.C. § 6050H); § 148(a), 98 Stat. at 687–88 (codified as former I.R.C. § 6050J); § 149(a), 98 Stat. at 689 (codified as former I.R.C. § 6050K); § 155(b)(1), 98 Stat. at 693 (codified as former I.R.C. § 6050L).

1908.⁶¹ Like the Canons, this code was litigation-oriented, yet unlike the Canons, it was quite complex organizationally. It had three tiers of guidance: canons, ethical considerations, and disciplinary rules. Over the next few years, the ABA was quite successful in convincing state and federal courts to adopt the Code as law.⁶² Arguably, however, the code's only success was its rapid adoption; its reign was quite short. Legal ethics had become a matter of considerable public concern. The Watergate crisis prompted the public spectacle of lawyers attempting to defend their conduct in "a wholly unappealing fashion."⁶³ In this antilawyer climate, the ABA established a commission to devise new ethical standards to replace the Code of Professional Responsibility. Although the Canons had lasted more than six decades, a mere eight years after its adoption, the Code of Professional Responsibility was slated for replacement.⁶⁴

The Model Rules of Professional Responsibility were adopted in 1983 as a wholesale replacement to the Code of Professional Responsibility.⁶⁵ The Model Rules were a complete change in format, organization, and language.⁶⁶ The Model Rules replaced the duty of "zealous representation" with duties of diligence and competence⁶⁷ and explicitly differentiated between the role of a lawyer as a "Counselor" or "Advisor" and an "Advocate" with different rules for each role.⁶⁸ But the Model Rules were most distinctive in being black-letter rules as such.⁶⁹ Unlike the Code, there were neither canons nor ethical considerations.⁷⁰ There were only rules, usually stated in the negative.⁷¹ The shift to the rules approach of the Model Rules has been described as a shift from legal ethics to the "law of lawyering."⁷²

61. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 1-1(d) (2013-2014 ed.) [hereinafter ROTUNDA & DZIENKOWSKI, *LEGAL ETHICS*].

62. *Id.*

63. Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 *ST. MARY'S L.J.* 343, 444 (2008) [hereinafter Ariens, *American Legal Ethics*]; see also ROTUNDA & DZIENKOWSKI, *LEGAL ETHICS*, *supra* note 61, at v-vi.

64. ROTUNDA & DZIENKOWSKI, *LEGAL ETHICS*, *supra* note 61, at § 1-1(e).

65. Ariens, *American Legal Ethics*, *supra* note 63, at 449; ROTUNDA & DZIENKOWSKI, *LEGAL ETHICS*, *supra* note 61, at § 1-1(e).

66. ROTUNDA & DZIENKOWSKI, *LEGAL ETHICS*, *supra* note 61, at § 1-1(e).

67. *Id.* at § 1-2.

68. *Id.* at § 2.1-1.

69. Ariens, *American Legal Ethics*, *supra* note 63, at 448; ROTUNDA & DZIENKOWSKI, *LEGAL ETHICS*, *supra* note 61, at § 1-2.

70. ROTUNDA & DZIENKOWSKI, *LEGAL ETHICS*, *supra* note 61, at § 1-2.

71. *Id.*

72. Ariens, *American Legal Ethics*, *supra* note 63, at 444-52.

Between 1965 and 1985, the political landscape changed considerably, and so did the tax law and the legal ethics standards. With respect to taxation, a series of congressional acts reduced the rates of taxation and the opportunities for tax sheltering while increasing the penalties on taxpayers and their advisors who unsuccessfully played the audit lottery. And, as to legal ethics, the canons that had lasted for over 60 years were replaced by a complex professional code, which itself was soon replaced by professional rules—and by an explicitly legalistic approach to professionalism. It is in this context of increasing taxpayer penalties and increasing professional legalism that the 1965-1985 committees concerned with legal ethics for tax lawyers undertook their tasks.

II. ABA COMMITTEES AND OPINIONS: 1965-1985

The years between 1965 and 1985 are bookended with Opinions on legal ethics for tax lawyers issued by the ABA PR Committee. The 1965 Opinion 314⁷³ was the first such Opinion ever issued, and the 1985 Opinion 85-352⁷⁴ was its *de facto* replacement, altering the basic standard for tax return advice. Neither Opinion was issued by the ABA Section on Taxation (Tax Section), as it is the PR Committee that has the authority to issue formal opinions on ethics standards. But the Tax Section prompted both Opinions through its Committee on Standards of Tax Practice (Tax Standards Committee). This committee had been created in 1962, being charged to “ascertain what ethical problems . . . are peculiar to the tax field” and “to raise the ethical level of practice” in the tax field.⁷⁵

A. Tax Standards Committee and Opinion 314

While the Tax Standards Committee had other goals, such as determining whether or not tax lawyers should have their own canons of ethics, its first priority was to concentrate on the application of the Canons to tax lawyers.⁷⁶ The desire for official clarification of standards by the bar had

73. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 314 (1965), *reprinted in* 51 A.B.A. J. 671 (1965) [hereinafter Opinion 314].

74. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 85-352 (1985), *reprinted in* 39 TAX. LAW. 631 (1986) [hereinafter Opinion 85-352].

75. *Chairman's Page*, BULL. SEC. TAX'N, Apr. 1962, at 1, 3 [hereinafter *Chairman's Page, Apr. 1962*].

76. Merle H. Miller, *Report of the Special Committee on Standards of Tax Practice*, BULL. SEC. TAX'N, July 1963, at 267, 269, 274 [hereinafter Miller, *Report of the Special Committee, July 1963*]; Merle H. Miller, *Report of the Special Committee on Standards of Tax Practice Presented at the Chicago Meeting*, BULL. SEC. TAX'N, Jan. 1964, at 36, 37 [hereinafter Miller, *Report of the Special Committee, Jan. 1964*].

been growing among tax lawyers.⁷⁷ While tax lawyers had been debating their duties and standards for over 20 years, there was still no consensus as to how those duties and standards ought to be stated (though there was more of a consensus as to what those meant in practice).⁷⁸ There were doubts about the application of the Canons to the nonlitigation roles of tax lawyers because “almost all work on codes of ethics for attorneys has been based on the concept of adversary actions before a trial court.”⁷⁹ A further complication in the minds of at least some tax lawyers was that lawyers served in the Treasury Department bar and were subject to the practice standards of its Circular 230 while practicing before the Internal Revenue Service (IRS), which was a Treasury agency.⁸⁰ In addition to the specific duties they might owe, they debated whether they had a more general duty that was relevant to their work and that precluded characterizing the IRS as a mere adversary (at least outside litigation).⁸¹ Alongside this more general

77. The first such call seems to have been John M. Maguire’s call for “marching orders” in 1957. John M. Maguire, *Conscience and Propriety in Lawyer’s Tax Practice*, 13 TAX L. REV. 27, 47 (1957) [hereinafter Maguire, *Conscience*]. He was joined a few years later by both the IRS Commissioner Mortimer M. Caplin’s and Sullivan & Cromwell’s Norris Darrell’s similar calls. Mortimer M. Caplin, *Responsibilities of the Tax Adviser—A Perspective*, 40 TAXES 1030, 1031 (1962) [hereinafter Caplin, *Responsibilities of the Tax Adviser*]; Norris Darrell, *The Tax Practitioner’s Duty to His Client and His Government*, 7 PRAC. LAW. 23, 39–40 (Mar. 1961) [hereinafter Darrell, *Practitioner’s Duty*] (this article was based on various addresses, including the N.Y.U. Institute on Federal Taxation in 1958, where it was subsequently published); see also Hatfield, *Legal Ethics*, *supra* note 4 at 10–11.

78. Hatfield, *Legal Ethics*, *supra* note 4, at 25–28.

79. Miller, *Report of the Special Committee, July 1963*, *supra* note 76, at 274.

80. Willkie Farr & Gallagher partner Thomas N. Tarleau argued that a tax lawyer’s special obligations followed from the lawyer being an enrolled member of the Treasury Department’s bar. *Ethical Problems of Tax Practitioners: Transcript of Tax Law Review’s 1952 Banquet*, 8 TAX L. REV. 1, 10 (1952) [hereinafter *Ethical Problems*]; see also Hatfield, *Legal Ethics*, *supra* note 4, at 15–18; Maguire, *Conscience*, *supra* note 77, at 45, 48; Miller, *Report of the Special Committee, July 1963*, *supra* note 76, at 267, 274.

81. New York University Professor Jerome Hellerstein argued that the relationship between a citizen and the government is not comparable to that between a defendant and plaintiff because the citizen owes “his government and his neighbors the duty of paying his share of taxes,” and that tax lawyers “owe to our Government and to ourselves” to improve the tax morality of the community. *Ethical Problems*, *supra* note 80, at 9 (statements by Jerome Hellerstein). Merle H. Miller argued that tax lawyers had special obligations as American patriots. Merle H. Miller, *Morality in Tax Planning*, 10 N.Y.U. ANN. INST. ON FED. TAX’N 1067, 1083 (1952) [hereinafter Miller, *Morality in Tax Planning*]. Merle H. Miller was with the Office of Chief Counsel of the Bureau of Internal Revenue prior to joining Ice Miller as a

debate on the duties of taxpayers and tax lawyers to the system was a specific—and perhaps more pressing—debate on whether there was a duty to disclose “doubtful but arguable points in a tax return.”⁸² This debate involved duties of both lawyer and client,⁸³ the requirements of Circular 230,⁸⁴ the IRS and Internal Revenue Code (Code), and the impact on the IRS of excessive disclosure.⁸⁵

partner in 1940 and beginning the firm’s federal tax practice. Jerry Crimmins, *Ice, Miller Celebrates Its 100th Anniversary*, ICE MILLER L. BULL., Apr. 12, 2010, http://www.icemiller.com/enewsletter/ICE.news/IM_100_Law_Bulletin.htm [herein after Crimmins, *Ice Miller*]. Harvard Professor John Maguire argued for a double responsibility both to the client and the “public interest.” Maguire, *Conscience*, *supra* note 77, at 44–45; *see also* Hatfield, *Legal Ethics*, *supra* note 4. Former American Law Institute president Norris Darrell described a duty “to help make our self-assessing income tax system work.” Norris Darrell, *Conscience and Propriety in Tax Practice*, 17 N.Y.U. ANN. INST. ON FED. TAX’N 1, 2 (1959) [hereinafter Darrell, *Conscience and Propriety*]; *see also* Hatfield, *Legal Ethics*, *supra* note 4, at 15–16, 50–52.

82. Norris Darrell argued for a general rule of disclosure for any item that “might be considered taxable by the tax authorities,” with the exception of those situations in which “there were many courts decisions uniformly in his client’s favor but as to which the government bullheadedly simply hadn’t yet given up.” Norris Darrell, *Responsibilities of the Lawyer in Tax Practice*, in BORIS I. BITTKER, PROFESSIONAL RESPONSIBILITY IN FEDERAL TAX PRACTICE 92 (1970) [hereinafter BITTKER, PROFESSIONAL RESPONSIBILITY]. In contrast, Professor Jerome Hellerstein thought there was no duty to “recommend full and fair disclosure” where the lawyer is “reasonably clear” that the Bureau would decide the issue adversely, but “not [as] clear as to what the results will be in the courts.” *Ethical Problems*, *supra* note 80, at 8 (statements by Jerome Hellerstein). Randolph Paul characterized this situation as one where “many borderline problems constantly arise.” Randolph E. Paul, *The Lawyer As a Tax Adviser*, 25 ROCKY MNTN. L. REV. 412, 428 (1952) [hereinafter Paul, *Lawyer As Tax Adviser*]; *see also* Hatfield, *Legal Ethics*, *supra* note 4, at 28–30.

83. Indeed, both Professor Bittker and Professor Barnes thought the disclosure issue should be resolved at the taxpayer level rather than the tax lawyer level. Boris I. Bittker, *Professional Responsibility in Federal Tax Practice*, in BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 251; John Potts Barnes, *The Lawyer and the Voluntary Assessment System*, 40 TAXES 1034, 1038 (1962); *see also* Hatfield, *Legal Ethics*, *supra* note 4, at 31–32.

84. *See, e.g.*, Mortimer M. Caplin, *What Is Good Tax Practice: A Statement of the Problem and the Issues Involved*, 21 N.Y.U. ANN. INST. ON FED. TAX’N 9 (1963); Caplin, *Responsibilities of the Tax Adviser*, *supra* note 77, at 1033; Hatfield, *Legal Ethics*, *supra* note 4, at 32.

85. Professor Bittker argued that neither the Regulations nor the Service impose a general obligation of disclosure and, further, that a general obligation of disclosure would burden the IRS tremendously as there would be “hundreds of

With the hope that the right application of the Canons would provide some resolution to the disclosure issues, the Tax Standards Committee requested the PR Committee to opine.⁸⁶ At the annual meeting in 1964, one of the “highlight[s]” of the business was the briefing of the PR Committee on three specific tax problems.⁸⁷ Six tax lawyers made arguments to a panel of PR Committee members.⁸⁸ The three problems centered on the duty of disclosure in different circumstances: planning, settlement negotiation, and litigation.⁸⁹ The first problem raised the issue of whether a lawyer can advise a client to take a position on the client’s return when there is merely arguable but “reasonable grounds” for interpreting the facts in a positive way and, if so, whether or not the position needs to be disclosed.⁹⁰ The second problem asked whether a lawyer negotiating a settlement needs to disclose knowledge

thousands of riders” filed annually. Boris I. Bittker, *Professional Responsibility in Federal Tax Practice*, in BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 252–53; *see also* Hatfield, *Legal Ethics*, *supra* note 4, at 31.

86. The option of seeking a ruling from the experts on the PR Committee was contemplated in the Tax Standards Committee’s first report. *See* Miller, *Report of the Special Committee, July 1963*, *supra* note 76, at 275.

87. *Chairman’s Page*, BULL. SEC. TAX’N, Oct. 1964, at 1, 3 [hereinafter *Chairman’s Page, Oct. 1964*].

88. Those making the arguments were Boris Kostelanetz, Jules Ritholtz, Don V. Harris, Jr., David W. Richmond, Lipman Redmond, and Mitchell Rogovin. Tom Arnold, *Activities of Sections*, 50 A.B.A. J. 1088, 1088 (1964). Merle H. Miller was the one committee member who had written extensively on legal ethics for tax lawyers, but he was not one of the lawyers making arguments to the PR Committee. Interestingly, a review of the biographies of these exceptional lawyers who did make the arguments reveals that more of them appear to have been litigators than advisors. *See* Boris Kostelanetz, 94, *Tax Defense Lawyer for the Notable, Dies*, N.Y. TIMES, Feb. 4, 2006, http://www.nytimes.com/2006/02/04/business/04kostelanetz.html?_r=0&adxnln=1&adxnlnx=1391580183-2b5fThEsPLIJ8/jl4Sp1Ng; Jules Ritholtz, 68, *Dies*; *New York Tax Lawyer*, N.Y. TIMES, Sept. 16, 1993, <http://www.nytimes.com/1993/09/16/obituaries/jules-ritholtz-68-dies-new-york-tax-lawyer.html> (American College of Trial Lawyers member and tax fraud specialist); Don V. Harris Jr., *Tax Lawyer*, WASH. POST, June 4, 2011, http://articles.washingtonpost.com/2011-06-04/local/35235145_1_tax-lawyer-law-review-don-v-harris (estate and corporate tax law specialist); Lipman Redman *Dies at 78*; *Area Tax Lawyer Since 1946*, HIGHBEAM RES., Nov. 19, 1997, <http://www.highbeam.com/doc/1P2-751603.html> (reposting a *Washington Post* obituary; co-author of treatise on tax procedure); Mitchell Rogovin, 65, *Civil Liberties Lawyer*, N.Y. TIMES, Feb. 8, 1996, <http://www.nytimes.com/1996/02/08/nyregion/mitchell-rogovin-65-civil-liberties-lawyer.html> (counsel to the IRS and the Central Intelligence Agency).

89. Merle H. Miller & John H. Grosvenor, Jr., *Report of Special Committee on Standards of Tax Practice*, BULL. SEC. TAX’N, July 1964, at 269 [hereinafter Miller & Grosvenor, Jr., *Report of the Special Committee, July 1964*].

90. *Id.*

of prior deception to an auditing agent.⁹¹ The third problem questioned whether a lawyer in Tax Court should disclose his⁹² client's deception.⁹³ Notwithstanding the PR Committee members having "difficulty with the full import of some of the agreed facts,"⁹⁴ there was a good discussion.⁹⁵ At the end of the day, the consensus among those PR Committee members participating in the sessions was that the tax lawyer had a duty to disclose in each of the situations discussed.⁹⁶

Despite the Tax Standards Committee seeking solution to these three specific tax problems and providing an extensive briefing of the specific problems, the PR Committee declined to address those specific problems. Instead, the PR Committee (which had no tax lawyers on it)⁹⁷ chose to articulate "general principles" for tax lawyers.⁹⁸ These general principles were expected to "make consideration of the specific problems moot."⁹⁹ And so it was that the PR Committee issued Opinion 314, the first ethics opinion

91. *Id.*

92. As noninclusive genders remained the norm throughout this period's text, the usage is reflected in the descriptions of the text. What appears to be the first gender inclusive language in the literature may be found in Gordon M. Weber, Franklin C. Latcham & Joseph J. Hyde, *The Responsibilities and Liabilities of Tax Advisors*, 29 MAJOR TAX PLAN. 605, 653 (1977) [hereinafter Weber et al., *Tax Advisors*] ("A tax man or woman needs to know how to skate over thin ice. He or she must be able to sense [these] difficulties . . .").

93. Miller & Grosvenor, Jr., *Report of the Special Committee, July 1964*, *supra* note 89.

94. *Chairman's Page, Oct. 1964, supra* note 87, at 3.

95. *Id.* While the issues may have seemed closed to the experts, the popular press coverage of the sessions was strongly antidisclosure, dismissing what it described as arguments about "patriotism" and, instead, characterizing the government as "Big Brother," and praising those lawyers who argued that calls for disclosure were "pious" and "subversive of the American system of justice." *The Debate Between the Angels' Advocates (Government Lawyers) and the Devil's Advocates (Taxpayer Lawyers)*, WASH. STAR (Gr. Brit), Sept. 12, 1964, *reprinted in* Lester B. Snyder, *Teaching Professional Responsibility in Tax Courses*, 41 U. COLO. L. REV. 336, 340–41 (1969) [hereinafter Snyder, *Professional Responsibility*].

96. *Chairman's Page, Oct. 1964, supra* note 87, at 3.

97. See James R. Rowen, *When May a Lawyer Advise a Client That He May Take a Position on His Tax Return?*, 29 TAX LAW. 237, 245–46 (1976) [hereinafter Rowen, *Lawyer Advise*] (Rowen notes apparent absence of a tax specialist, though no means of certain verification).

98. Opinion 314, *supra* note 73, at 27.

99. Indeed, in the briefing itself, the members PR Committee expressed "doubt" that the three specific problems would be addressed in a formal opinion, instead expecting the "setting forth of general guidelines that would make consideration of the specific problems moot." *Chairman's Page, Oct. 1964, supra* note 87, at 3.

to address tax lawyers.¹⁰⁰ The Opinion was brief. The only issue it addressed was the potential conflict between the tax lawyer's duty of zealousness for the client's cause and the tax lawyer's duty of loyalty to the courts.¹⁰¹ Given that the IRS is not a court (or even quasi-judicial), the Opinion concluded that the IRS must be nothing other than a "brother lawyer" to the tax lawyer and, as such, not owed any special duties.¹⁰² The tax lawyer is simply his client's advocate against an adversary.¹⁰³ Negotiations with the IRS were not ethically different than the negotiation of any civil dispute.¹⁰⁴ So long as "the client's case is fairly arguable, a lawyer is under no duty to disclose its weaknesses, any more than he would be to make such a disclosure to a brother lawyer."¹⁰⁵ And as to advising a client on tax return positions, the tax lawyer "may freely urge the statement of positions most favorable to the client as long as there is a reasonable basis for those positions."¹⁰⁶ There is

100. The PR Committee had published opinions involving the practice of tax law, but these were related to the unauthorized practice of law by certified public accountants and the dual practice of law and accounting by lawyers who were also certified public accountants. In 1961, the CPE issued Ethics Opinion 297, which prohibited a lawyer-accountant from practicing both. The following year, Opinion 305 took the position that those who are both lawyers and accountants are not entitled to hold themselves out only as accountants but still engage in the practice of law. Maintaining the division between lawyers and accountants was foremost in the mind of at least some members of the ABA. Ariens, *American Legal Ethics*, *supra* note 63, at 436. A Special Committee on Professional Relations considered the relationship between the accounting and lawyering professions, issuing many reports and recommendations. Interestingly, the topic was not found in the Tax Section Committee reports but was rather a generalized concern about the unauthorized practice of law. *See, e.g., American Bar Association Report of the Special Committee on Professional Relations*, UNAUTHORIZED PRAC. NEWS, Dec. 1955, at 32. At the time, Dean Erwin Griswold (Harvard Law School) characterized the situation as the "two great professions of law and accountancy [being] squared away for a battle royal." Erwin N. Griswold, *Role of Lawyer in Tax Practice*, 10 MAJOR TAX PLAN. 1, 1 (1958) (commenting on the consequence of the *Agran* case creating strife between lawyers and accountants). In 1957, the ABA Special Committee on Professional Relations and the Committee on Relations with the Bar of the American Institute of Accountants established the National Conference of Lawyers and Certified Public Accountants to deal with the tensions. *Report of the Special Committee on Professional Relations*, 82 ANN. REP. A.B.A. 491, 492 (1957) (including the Joint Report of the Special Committee on Professional Relations of the American Bar Association and Committee on Relations with the Bar of the American Institute of Accountants).

101. Opinion 314, *supra* note 73, at 28, 31.

102. *Id.*

103. *Id.*

104. *Id.* at 30.

105. *Id.* at 31.

106. *Id.* at 30.

no duty in those situations for the lawyer to “advise that riders be attached to the client’s tax return explaining the circumstances surrounding the transaction or the expenditures.”¹⁰⁷ The authors of the Opinion did allow that “prudence” and “tactical” considerations might also be considered but that disclosures, as such, were not ethically required.¹⁰⁸

One wonders if the members of the PR Committee understood the controversial nature of its Opinion, or if the short form and simple reasoning of the Opinion evidences committee members believing the matters to be nearly self-evident. The committee’s “general principles”—that the IRS is merely an adversary to whom no special duties are owed and against whom one advocates for one’s client, and that no disclosure is required for tax return positions with a “reasonable basis”—had not been self-evident to the tax lawyers debating the issues for 20 years.¹⁰⁹ The Opinion was also at odds with the tentative, prodisclosure conclusions expressed by the panel members who participated in the briefing by the Tax Standards Committee.

Unlike its detailed response to the PR Committee’s revision of Opinion 314 20 years later,¹¹⁰ the Tax Standards Committee had no follow up discussion on the original Opinion 314. In four sentences, the Tax Standards Committee’s report following the Opinion’s publication “marked the receipt” of the Opinion, provided citations to its full text, and noted that it had “received considerable favorable comment.”¹¹¹ Curiously, there is almost no record of any contemporaneous recognition of Opinion 314 by anyone else.¹¹²

107. *Id.*

108. *Id.*

109. The characterization of the relationship as adversarial was also at odds with the description of the cooperative relationship provided by the IRS Commissioner to the Tax Standards Committee. The relationship of tax lawyers with the IRS had been addressed by the then-IRS Commissioner, Mortimer M. Caplin, in what was considered as one of the highlights of the committee’s annual meeting. The Commissioner described the relationship between tax lawyers and the government in terms quite different than Opinion 314 would. For the Commissioner, the relationship was to be cooperative: “The effectiveness of our tax system rests upon . . . cooperation between [tax lawyers and the government] in reaching fair and proper results; . . . in attaining decent and reasonable tax administration; . . . [and] in meeting our responsibilities as practitioners, taxpayers and citizens.” Miller, *Report of the Special Committee, Jan. 1964, supra* note 76, at 39.

110. *See infra* Part II.C.

111. Boris Kostelanetz, *Report of Special Committee on Standards of Tax Practice*, BULL. SEC. TAX’N, July 1966, at 124 [hereinafter Kostelanetz, *Report of the Special Committee, July 1966*].

112. The only other contemporaneous acknowledgment appears to be the report of the Wyoming State Bar Committee for Liaison with the Internal Revenue Service, which encouraged members of the bar to read the opinion, saying “[i]t is significant with respect to the relationship between the representatives of the Internal

B. *Tax Bar Responds to Opinion 314*

There appears to have been virtually no published mention of the Opinion for at least three years,¹¹³ and so, perhaps, it is not too surprising that when University of Connecticut School of Law Professor Lester B. Snyder polled 200 Connecticut lawyers for a 1969 article, “none of the lawyers questioned was aware of Opinion 314.”¹¹⁴ However, by 1974, almost a decade after its issuance, in a bibliography of the materials accumulating on professional responsibilities in tax practice, the Opinion was listed along with Circular 230, the two being described as “two brief but important charters of conduct with members of” the IRS.¹¹⁵ In that same year, N.Y.U. Tax Institute’s Henry Sellin¹¹⁶ cited the Opinion as evidence that the reasonable basis standard reflected the consensus of tax lawyers.¹¹⁷

Revenue Service” and tax lawyers. *Report of the Wyoming State Bar Committee for Liaison with the Internal Revenue Service*, 1 LAND & WATER L. REV. 643, 645 (1966). In his 1966 article, Mr. Corneel makes no mention of the Opinion, even though he considers ethical issues for tax lawyers. Frederic G. Corneel, *Tax Planning: Teaching and Practice*, 22 TAX L. REV. 221 (1967) [hereinafter Corneel, *Tax Planning Teaching*].

113. The first sustained discussion appears to be Marvin K. Collie & Thomas P. Marinis, Jr., *Ethical Considerations on Discovery of Error in Tax Returns*, 22 TAX LAW. 455, 455 (1969) [hereinafter Collie & Marinis, *Ethical Considerations*]. As Mr. Collie was Chairman of the Special Committee on Standards of Tax Practice, perhaps this was an effort to raise awareness of the Opinion. *Committee Activities*, 22 TAX LAW. 209, 228 (1969). Mr. Collie made clear that “writings on ethical practices by reputable” tax lawyers were one of the three sources of standards of conduct for tax lawyers along with the Canons and written standards of state and local bar associations such as Opinion 314. Collie & Marinis, *Ethical Considerations, supra*, at 461. Indeed, he made liberal use of the writings of those tax lawyers. *See id.* at 455 n.1, 462 nn.22–24, 463 n.27, 464 n.28, 465 n.31.

114. Snyder, *Professional Responsibility, supra* note 95, at 338.

115. Other resources listed included Frederic G. Corneel, *Ethical Guidelines for Tax Practice*, 28 TAX L. REV. 1, 8 (1972) [hereinafter Corneel, *Ethical Guidelines*], and the ABA Code of Professional Responsibility (both listed ahead of Opinion 314), as well as Professor Boris Bittker’s PROFESSIONAL RESPONSIBILITY IN FEDERAL TAX PRACTICE (1970), *supra* note 82 (an anthology comprised primarily of pre-Opinion 314 articles), and the AICPA Code of Professional Ethics. Harry K. Mansfield, *Report of the Committee on Standards of Tax Practice*, 27 TAX LAW. 581 (1974) [hereinafter Mansfield, *Report of the Committee, 1974*].

116. Mr. Sellin was the director of the New York University’s Annual Institute on Federal Taxation from 1947 until 1972, when he retired. *Henry Sellin*, N.Y. TIMES, May 4, 1985, <http://www.nytimes.com/1985/05/04/nyregion/henry-sellin.html>.

117. Henry Sellin, *Professional Responsibility of the Tax Practitioner*, 52 TAXES 584, 593 (1974) [hereinafter Sellin, *Professional Responsibility*]. He also

About this same time, analyses of Opinion 314's reasonable basis standard became more common, usually with the commentators trying to improve its reasoning, even if accepting its conclusions. Perhaps the first to do this was Sullivan & Worcester's Frederic G. Corneel in his seminal article on tax practice guidelines. He gave several reasons to accept the reasonable basis standard.¹¹⁸ He pointed out that it was the same standard used by certified public accountants (CPAs)¹¹⁹ and that it was consistent with some recent (nontax) court cases on sufficiency of counsel at trial.¹²⁰ He also argued that it is only "permitting execution of returns which may be wrong so long as they are not known to be wrong" that allows the testing of doubtful questions, which "could otherwise be tested only by claims for refund."¹²¹ The reasonable basis standard also was more practical than a standard that required a more specific weighing, as it is "easier to say there is a respectable argument" than to say no contrary argument outweighs or that the argument has some quantifiable chance of success on the merits.¹²²

Like Frederic Corneel, Shearman & Sterling's James R. Rowen tried to improve the rationale for the reasonable basis standard. He asked, "Is there a proper rationale for Opinion 314?"¹²³ He thought it likely that "aggressive taxpayers will ultimately pay substantially less than their share of the tax burden" because lawyers are able to advise positions that have a reasonable basis,¹²⁴ even though they think it "would probably be decided against the [client] if the government raised the issue."¹²⁵ At the time that Opinion 314 was issued, the Canons were governing. Mr. Rowen argued that, under the Canons, there was no support for the reasonable basis standard. Indeed, he believed the appropriate standard under the Canons was that a return position should represent "what [the lawyer] conscientiously believes to be [the law's] just meaning and extent."¹²⁶ He considered whether or not the standard could be justified under the ABA Code of Professional

cited the relevant American Institute of Certified Public Accountants (AICPA) standard as to the consensus of certified public accountants. Apparently, he considered the standards relevant due to their reflecting the consensus of the professionals rather than the formal opinions of the professional associations.

118. Corneel, *Ethical Guidelines*, *supra* note 115, at 7–9.

119. *Id.* at 8. The American Institute of Certified Public Accountants (AICPA) expressed it as "reasonable support" rather than "reasonable basis." *Id.* at 8 n.22.

120. *Id.* at 8 n.23.

121. *Id.* at 8.

122. *Id.* at 8–9.

123. Rowen, *Lawyer Advise*, *supra* note 97, at 240.

124. *Id.* at 244.

125. *Id.* at 243.

126. *Id.* at 246.

Responsibility (PR Code), which had been adopted in 1969.¹²⁷ He concluded that, under the PR Code, the reasonable basis standard would be appropriate if the return is “regarded as like a submission in an adversary proceeding.”¹²⁸ But he argued that a return is not like such a submission.¹²⁹ Ultimately, he believed that the standard was to be justified not in terms of legal ethics, but in light of the taxpayer’s legal obligation.¹³⁰ The taxpayer was required to sign under penalties of perjury that the return was “to the best of my knowledge and belief . . . true, correct, and complete.”¹³¹ As a practical matter, in light of policies “behind the privilege against self-incrimination” and the legal standards for perjury, and so as not to deny “the opportunity to litigate doubtful questions,” Mr. Rowen concluded that a taxpayer ought to be able to sign the return with favorable positions that have a reasonable basis.¹³² And the lawyer ought to be able to so advise. While he thought the reasonable basis standard could be justified along these lines, Mr. Rowen still thought it unjustly affected the administration of the tax laws.¹³³ To remedy this, he considered several alternatives, including a change to Opinion 314 or Congress imposing a standard on tax lawyers.¹³⁴ However, he settled on Congress imposing a penalty on taxpayers when an underpayment is attributable to certain undisclosed positions.¹³⁵ He added that a taxpayer ought to be able to escape the penalty so long as he establishes that “he did not have reason to believe that the item was of a type that required disclosure.”¹³⁶ But, he wrote, “[T]he standards for avoiding the penalty should be tighter than the obtaining of a ‘reasonable basis’ opinion.”¹³⁷

In the same year that James Rowen sought to defend Opinion 314’s reasonable basis standard, John S. Nolan took aim at it, placing it in the context of the audit lottery and concluding that a “greater burden of objectivity” than the reasonable basis standard should be placed on taxpayers and their advisers.¹³⁸ He suggested a change in the standards imposed by Congress, thinking the issue better addressed by law than ethics. He suggested the Code require more disclosure—that return preparers certify

127. *Id.*

128. *Id.* at 248.

129. *Id.* at 255.

130. *Id.* at 250.

131. *Id.*

132. *Id.* at 255–56.

133. *Id.* at 260.

134. *Id.* at 262.

135. *Id.* at 262–63.

136. *Id.* at 263.

137. *Id.*

138. John S. Nolan, *Audit Coverage and Private Tax Planning*, 37 NAT’L TAX J. 425, 428 (1974) [hereinafter Nolan, *Audit Coverage*].

that there was no undisclosed exclusions or deductions “as to which substantial doubt exists as to the correctness”—and a revision of the penalty structure for negligence and fraud.¹³⁹ He also suggested that Congress require the IRS to take only audit positions with a reasonable basis, and that as a matter of policy, the IRS should adopt “a position favorable to the taxpayer where differing interpretations of the law are possible and there is substantial support, both in terms of policy and equity, for the position favorable to the taxpayer.”¹⁴⁰

After the 1976 anti-tax shelter legislation was enacted,¹⁴¹ the criticism of Opinion 314’s reasonable basis standard increased. Some argued that there was a tension between the reasonable basis standard and the new penalty for disregarding rules, with the former allowing “somewhat more aggressive” positions than the latter.¹⁴² Others were concerned that the reasonable basis standard allowed taxpayers knowingly to take positions that were questionable, and thus benefit from the audit lottery, arguing that the solution might be requiring taxpayers to report more information on their returns.¹⁴³ It was suggested that the IRS impose a standard based on Opinion 314’s but require “disclosure where the taxpayer does not in good faith believe he has the better of the argument.”¹⁴⁴

By 1978, the Tax Standards Committee began considering whether the reasonable basis standard should be modified.¹⁴⁵ There was agreement that the standard allowed “many incorrect returns [to be] filed” without being “flagged” and thereby “go largely undetected.”¹⁴⁶ Even though Opinion 314

139. *Id.* at 430.

140. *Id.* at 431.

141. *See supra* Part I.B.

142. David W. Santi, Comment, *Legal Liability of the Professional Tax Practitioner*, 26 EMORY L.J. 403, 427–28 (1977) [hereinafter Santi, *Legal Liability*].

143. *Discussion of “Questionable Positions,”* 32 TAX LAW. 13, 17–21, 23–27 (1978) [hereinafter *Questionable Positions*] (panel discussion with IRS Commissioner Jerome Kurtz and attorneys William H. Smith, Mac Asbill, Jr., and Harry K. Mansfield at an ABA Section of Taxation meeting on May 20, 1978).

144. This was the comment of Harry K. Mansfield at a panel discussion on questionable positions. It was unclear how he related the reasonable basis standard to one that would require disclosure when the taxpayer did not in good faith believe he had the better of the argument. It is unclear what he meant by having the better of the argument; perhaps it was a good faith belief that the taxpayer would be more likely than not to succeed on the merits if the issue were litigated. He considered it to be an issue of “individual conscience[.]” However, he proposed the standard be coupled with the return having a schedule of 100 questions related to transactional facts. *Id.* at 27.

145. Frederic G. Corneel, *Report of the Committee on Standards of Tax Practice*, 32 TAX LAW. 933, 933–34 (1979) [hereinafter Corneel, *Report of the Committee, 1979*].

146. *Id.* at 934.

established the reasonable basis standard for return preparation and technically was silent on tax planning, the committee report noted that “a good number of lawyers” believed that since they could file reasonable basis returns that were probably incorrect, they could advise clients to “engage in transactions that involve taking such very doubtful positions.”¹⁴⁷ At least some of the members of the committee disagreed with this, believing that, at least with respect to tax shelter offerings, no position should be advised “unless there is a substantial likelihood that the tax position” would be sustained.¹⁴⁸ The committee charged Goodfellows & Eells’ Paul J. Sax¹⁴⁹ to prepare an article on tax shelter opinions.¹⁵⁰ In that article, he argued that the reasonable basis standard of Opinion 314 only applied to return positions, not planning advice.¹⁵¹ With respect to returns, the lawyer takes “the facts as he finds them” and claims a position, functioning principally as an advocate.¹⁵² When functioning as an advisor, however, the lawyer has different duties, including the duty “to work within the tax system rather than to attack it” and the duty to predict the outcome.¹⁵³

In 1982, a special committee of the Bar of the City of New York, with its own membership divided in the debate, summarized the arguments for and against the formal reconsideration of Opinion 314.¹⁵⁴ The arguments for reconsideration focused on the new accuracy-related penalties enacted as part of the anti-tax shelter legislation in 1982 and the need to work with other professional groups in considering the standard.¹⁵⁵ Those arguing against reconsideration said that, with respect to other advice that might exploit the audit lottery, “it is for Congress rather than the organized bar” to set the standard.¹⁵⁶ As to the new 1982 penalties, these committee members

147. *Id.*

148. *Id.*

149. Paul J. Sax is senior counsel and a retired partner of the San Francisco office of Orrick, Herrington, and Stutcliffe (previously Goodfellows & Eells), which he joined in 1969 and became a partner in 1975. He received his J.D. from the University of California, Hastings College of Law, and his LL.M. in Taxation from New York University. *Paul J. Sax*, SACRAMENTO ST. C. SOC. SCI. & INTERDISC. STUD., last accessed July 29, 2013, <http://www.csus.edu/ssis/for-community/inductees/academysax.html>.

150. Corneel, *Report of the Committee, 1979*, *supra* note 145, at 933–34.

151. Paul J. Sax, *Lawyer Responsibility in Tax Shelter Opinions*, 34 TAX LAW. 5, 37–38 (1980) [hereinafter Sax, *Shelter Opinions*].

152. *Id.* at 37.

153. *Id.* at 38.

154. *The Lawyer’s Role in Tax Practice*, 36 TAX LAW. 865, 883–884 (1983). The new penalties were on both taxpayers (then-I.R.C. § 6661) and advisers (then-I.R.C. § 6701).

155. *Id.* at 883–84.

156. *Id.* at 884.

emphasized that Congress had not imposed requirements of either “substantial authority or disclosure” on the advisers, but only provided for penalties on advisers who “know” their advice would result in an understatement.¹⁵⁷ Thus, they concluded, the reasonable basis standard should not be reconsidered, especially when “no better or more acceptable ethical standard has been advanced.”¹⁵⁸

Outside the confines of a committee, some critics focused on the relevance of the new 1982 penalty regime,¹⁵⁹ while others took aim at the Opinion’s most fundamental term, “reasonable basis,” and its lack of definition.¹⁶⁰ As Emory Law Professor Ray Patterson put it, “A poor lawyer is he who cannot find a reasonable basis for his client’s position.”¹⁶¹ The reasonable basis standard, he wrote, was a “classic primer for rationalizing unethical conduct” and, as such, was “morally enervating.”¹⁶² The “sin” of Opinion 314—“[h]eads I win, tails you lose”—reflected the premise that the IRS is an adversary, not just for practical purposes, but “in a theoretical sense . . . of promulgating standards of conduct.”¹⁶³ This premise puts the issues as rights to be protected rather than duties to be performed, and when combined with conceiving the lawyer’s role always to be an advocate and the only legal process to be judicial, leads to Opinion 314’s reasonable basis standard.¹⁶⁴ However, as the argument against Opinion 314 went, because lawyers serve many roles and the relevant legal process is not a judicial process but rather an administrative one in which the client has duties (not just rights), Opinion 314’s foundations were irremediably flawed.¹⁶⁵ Twenty years after its issuance, Opinion 314 had almost no defenders.¹⁶⁶

157. *Id.*

158. *Id.*

159. Marvin J. Garbis, *The Tax Professional and the New Tax Compliance Environment*, 29 WM. & MARY TAX CONF. 9, 10–11 (1983) [hereinafter Garbis, *Tax Professional*].

160. Dean Marsan, *Tax Shelter Opinions: Ethical Responsibilities of the Tax Attorney*, 9 OHIO N.U. L. REV. 237, 241 (1982) [hereinafter Marsan, *Ethical Responsibilities*].

161. L. Ray Patterson, *Tax Shelters for the Client—Ethics Shelters for the Lawyer*, 61 TEX. L. REV. 1163, 1165 (1983) (reviewing BERNARD WOLFMAN & JAMES P. HOLDEN, *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* (1981)) [hereinafter Patterson, *Tax Shelters*].

162. *Id.* at 1166.

163. *Id.* at 1167.

164. *Id.* at 1169–70.

165. *Id.* at 1169–1170, 1176.

166. Venable, Baetjer & Howard’s Jacques T. Schlenger and John B. Watkins V did write a provocative article focused on the “Treasury’s relentless march” to regulate tax shelter opinions. In the article, the authors devote a lengthy footnote (but only a footnote) to defending Opinion 314, saying its standard would not justify exploiting the audit lottery, but then, continuing, they add, “One cannot

C. *Revising Opinion 314*

In February 1984, the Tax Section convened to discuss proposing a revision of Opinion 314 to be closer to the 1982 taxpayer understatement penalty, which required either “substantial authority” or disclosure to avoid the penalty.¹⁶⁷ The formally proposed revision being discussed used a “substantial basis” rather than the statutory “substantial authority” standard out of concerns for the technical definition of substantial authority.¹⁶⁸ Harvard Law Professor Bernard Wolfman—who claimed the reasonable basis standard meant any advice you could articulate without laughing—argued for a direct connection between the professional and statutory standards, but there was little support for equating the two.¹⁶⁹

After considering comments, the Tax Standards Committee formally proposed that the Tax Section support a revision of Opinion 314.¹⁷⁰ The proposal was accepted by an “overwhelming majority” of the Tax Section members in the business session.¹⁷¹ The proposal cited several reasons for revision. There had been substantial changes in the bar’s ethical standards since 1965, and differing standards adopted according to the role of the lawyers as adviser, intermediary, evaluator, or advocate.¹⁷² The reasonable basis standard had been construed to support “the use of any colorable claim to justify the exploitation” of the audit lottery, and the consequent problems had already led to new laws (including a new understatement penalty), proposed revisions to Circular 230, and the issuance of Opinion 346 addressing lawyers’ tax shelter opinions.¹⁷³ Although Opinion 314 was

avoid being amused by the latest shallow, chic ‘intellectual analytical’ tool, the ‘audit lottery,’ the ‘digit lottery,’ the ‘health lottery,’ *ad nauseam*—life, tax or otherwise does favor or disfavor” because (indirectly quoting President Kennedy) “life is rough and unfair, not because there is a correctable or unavoidable conspiracy or fault.” Exactly what their defense of Opinion 314 was is quite unclear, but they clearly opposed revising it. Jacques T. Schlenger & John B. Watkins V, *Exploring the Myths of Circular 230*, 62 TAXES 283, 283 n.2 (1984).

167. Lee A. Sheppard, *Ethics Opinion 314 and Tax Shelters Addressed at ABA Meeting*, 22 TAX NOTES 757 (Feb. 27, 1984).

168. *Id.*

169. *Id.*

170. Paul J. Sax, James P. Holden, Theodore Tannenwald, Jr., David E. Watts & Bernard Wolfman, *Report of the Special Task Force on Formal Opinion 85-352*, 39 TAX LAW. 635, 635 (1986) [hereinafter Sax et al., *Report of the Special Task Force*].

171. *Id.*

172. ABA Section of Taxation Proposed Revision to Formal Opinion 314, May 21, 1984, *reprinted in* BERNARD WOLFMAN & JAMES P. HOLDEN, *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* 71 (2d ed. 1985).

173. *Id.*

limited to the standards for return positions, the Tax Section Committee proposed that tax planning advice should be no lower than the revised return position standard.¹⁷⁴ In proposing its revision, the Committee began with the premise that “[a] tax return is not a submission in an adversary proceeding,” but rather serves a “disclosure and assessment function,” and thus “must provide a fair report of matters affecting tax liability.”¹⁷⁵ It proposed requiring a good faith duty in giving advice, which required the advice to be “meritorious” as “evidenced by a practical and realistic possibility of success, if litigated.”¹⁷⁶ If the lawyer thought it unclear that a return position met this standard, then “requisite good faith may be shown by adequate disclosure in the taxpayer’s return.”¹⁷⁷

Having received the proposal from the Tax Section, the following year the PR Committee (which unlike the Opinion 314 committee did include tax lawyers)¹⁷⁸ issued Opinion 85-352.¹⁷⁹ The PR Committee minimized the role that the reasonable basis standard played in the audit lottery, writing that it was “not universally held” that such occurred, and that in any event, the Committee did not believe that a proper interpretation and application of the standard would permit it.¹⁸⁰ However, the PR Committee concluded that, since there had been what it described as “serious controversy . . . and persistent criticisms by distinguished members of the tax bar and IRS officials, and members of Congress,” the standard ought to be restated. The Tax Section had cited the reactions to the abuses of the reasonable basis standard as new federal statutes and regulations, which the PR Committee did not mention when it referenced the “persistent criticisms” by “IRS officials and members of Congress.” Both the PR Committee and the Tax Section cited changes in professional standards as relevant, but they gave different reasons. The Tax Section had emphasized that the changes in professional standards had reflected varying roles of lawyers, the PR Committee said the changes were relevant as the new standards did not refer to “reasonable basis” when addressing the duty of a lawyer in arguing for a position. The Tax Section proposed that the tax planning standard should be no lower than return position advising standards, but the PR Committee made no mention of the relationship. Whereas the Tax Section characterized return preparation as nonadversarial, the PR Committee did not, emphasizing

174. *Id.*

175. *Id.* (when an audit commences, the process becomes adversarial, according to the Committee).

176. *Id.* at 73.

177. *Id.*

178. The committee included two tax lawyers. Dennis J. Ventry, Jr., *Raising the Ethical Bar for Tax Lawyers, Why We Need Circular 230*, 111 TAX NOTES 823, 829 (May 15, 2006).

179. Opinion 85-352, *supra* note 74.

180. *Id.*

instead that the return “may be the first step in a process that may result in an adversary relationship.”¹⁸¹ Considering the lawyer’s basic duties to “zealously and loyally . . . represent the interest of the client,” a lawyer “may advise [a] reporting position . . . where the lawyer believes the position probably will not prevail.”¹⁸² The lawyer could do this, even if there were neither substantial authority nor disclosure, so long as the “lawyer in good faith believes [the position] is warranted in existing law or . . . by a good faith argument for an extension, modification, or reversal of existing law.”¹⁸³ This, the PR Committee concluded, “requires that there is some realistic possibility of success if the matter is litigated.”¹⁸⁴ While this conclusion was consistent with the Tax Standards Committee’s conclusion, the Tax Section had not cited the duty of zealous representation and had framed the conclusion in the context of the nonadversarial nature of return preparation.

D. Responding to Opinion 85-352

Given the differences between the Tax Section’s and the PR Committee’s approaches (which some characterized as the PR Committee’s rejection of the Tax Section’s proposal),¹⁸⁵ the Tax Section appointed a Special Task Force to examine the PR Committee’s new Opinion and “how it will apply to tax practice.”¹⁸⁶ The Task Force’s report noted that Opinion 85-352 did not take into consideration the various roles of tax lawyers and that it did not address negotiation and settlement roles (“which continue to be governed by Opinion 314”) or litigation.¹⁸⁷ It also did not explicitly address

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. The draft of the Opinion, it was said, “could be read to have rejected the standard proposed by the Section of Taxation and to have restated a low minimum standard of tax reporting. The net effect . . . likely would be business as usual, and we fear that the American Bar Association would be subjected to widespread criticism on the ground that it has condoned practices that been condemned by the Treasury and the Congress.” Theodore C. Falk, *Tax Ethics, Legal Ethics, and Real Ethics: A Critique of ABA Formal Opinion 85-352*, 39 TAX LAW. 643, 644 n.8 (1986) (citing Letter from James B. Lewis, Chairman, ABA Section of Taxation, to Robert O. Hetledge, ABA Ethics Committee (June 4, 1985)). Opinion 85-352 is “an advance from Opinion 314. It improves the ethical climate in which to practice tax law and probably has some positive effect on the ‘audit lottery’ problem. But it stops short of what it could and should do.” *Wolfman Recalls History of Circular 230, Suggests What Should Constitute Substantial Authority*, 1987 TAX NOTES TODAY 30-24 (Feb. 13, 1987).

186. Sax et al., *Report of the Special Task Force*, *supra* note 170, at 635.

187. *Id.* at 636.

tax planning advice, though the Task Force argued that the Opinion's standards for return preparation ought to apply to advising as well. Concerned that some might infer tax shelter opinions were exempted from the Opinion's "realistic possibility of success," the Task Force took the position that this was the minimal standard for all tax advice. The Task Force considered the equation of good faith with the objective standard of a "realistic possibility of success," suggesting that, in pursuit of some uniformity, the Treasury Department might adopt the same standard in Circular 230 and urge Congress to do likewise for the return preparer penalty. As to the substance of the new standard, the Task Force opined that "good faith" had to be determined without regard to the chance of audit (which the PR Committee had not made explicit), and that a one-third chance of success should be satisfactory, as should a position with substantial authority. If the standard was not met, disclosure was not an alternative, though an advance payment of the tax and a suitably detailed claim for refund would be.¹⁸⁸ As to whether or not tax returns were adversarial, the Task Force emphasized that the new Opinion did not "suggest that tax returns are adversarial," but only that some (aggressive) returns "may result in an adversary relationship."¹⁸⁹ For its part, the Task Force restated the approach of the Tax Section that a tax return is not an adversarial filing, but rather it is a "citizen's report to the government," which serves a "disclosure, reporting, and self-assessment function."¹⁹⁰

III. TAX SHELTERS AND TREASURY DEPARTMENT REGULATION: 1965-1985

The history of Opinion 314 and the issuance of Opinion 85-352 is not the only substantial tax lawyer ethics story in 1965-1985. As significant as these ABA Opinions are, it may be that the larger story is actually Treasury's foray into regulating tax lawyers as part of the anti-tax shelter crackdown. While Treasury eventually followed the ABA's lead on the appropriate standards for the bar, the years between making clear its intention to regulate the bar in 1980 and its 1984 acceptance of the ABA's standards as its own were years of ongoing debate among the bar members as not only to the appropriate ethics standards for tax lawyers, but also the relevance of statutory and regulatory standards for both lawyers and their taxpayer clients.

188. *Id.* at 638–39.

189. *Id.* at 640.

190. *Id.*

A. *Revising Circular 230 to Regulate Tax Shelter Opinions*

When Jerome Kurtz was appointed IRS Commissioner by the newly elected President Jimmy Carter in 1977,¹⁹¹ he left private tax practice in Philadelphia, bringing a specific agenda with him to D.C.¹⁹² He wanted to inspire public confidence that the administration of the tax law did not favor the wealthy.¹⁹³ His target was to reduce the playing of the audit lottery, which he believed many wealthy taxpayers were winning with abusive tax shelter positions that were never audited.¹⁹⁴ This increased inequities in the tax system. He contrasted abusive tax shelters with appropriate shelters, which admittedly reduced “the equity of the tax system by reducing the taxes . . . of upper income taxpayers,” but for nonabusive shelters, Congress had decided this was a “tolerable side effect of a special tax provision” to encourage particular investments.¹⁹⁵ Abusive tax shelters were the ones in which the loss of equity was not offset by intended greater benefits and that, accordingly, decreased the fairness of and respect for the tax system.¹⁹⁶ Even though both Congress and the IRS had been fighting abusive tax shelters, the Commissioner said that new leaks sprung as soon as the known ones “in the dike [were] plugged.”¹⁹⁷

In a 1980 speech to the Securities Regulation Institute, Treasury General Counsel Robert H. Mundheim expanded the anti-tax shelter campaign to tax opinions, which he described as “one of the critical elements in promoting” abusive tax shelters.¹⁹⁸ He explained the promotional value of tax opinions, saying that the “theory is that the tax opinion . . . provides the

191. *In Washington*, 55 TAXES 367 (1977).

192. James S. Byrne, *Kurtz Sets Reform Agenda for IRS*, 5 TAX NOTES 3, 3 (June 6, 1977) [hereinafter Byrne, *Reform Agenda*].

193. *Id.*

194. *Id.* at 5. He also wanted to encourage greater participation of the tax bar in providing expert comments on proposed regulations. “I think it is unfortunate that many lawyers feel constrained by their client representation (from expressing) privately held views,” he said. “I don’t think it is necessary, and I think we would have a better tax system if the people who really understood the technical issues would come forward and state their views.” *Id.* at 4.

195. Jerome Kurtz, *Commissioner’s Remarks on Abusive Tax Shelter Issues*, 55 TAXES 774, 774 (1977) [hereinafter Kurtz, *Commissioner’s Remarks*].

196. *Id.*

197. *Id.* Initially, his efforts were aimed at increasing audits (and increasing the use of computerized applications), rulings, and disclosures. Byrne, *Reform Agenda*, *supra* note 192; Kurtz, *Commissioner’s Remarks*, *supra* note 195, at 775–78; *Questionable Positions*, *supra* note 143, at 17, 25.

198. Robert H. Mundheim, *Mundheim on “Abusive Tax Shelters,”* 10 TAX NOTES 213, 213 (Feb. 18, 1980) [hereinafter Mundheim, *Abusive Tax Shelters*]. Mr. Mundheim’s speech on abusive tax shelters and the need for the bar to respond was delivered before the Securities Regulation Institute, not the tax bar.

investor assurance that a negligence or fraud penalty will not be assessed even if [the tax benefits] are disallowed.”¹⁹⁹ If protected from the fraud penalty, even if the tax benefits are disallowed, the time value of the deferral of the increased tax liability “will generally protect the investor from losses on the shelter.”²⁰⁰ Tax lawyers, he concluded, were not fulfilling their professional responsibility with these opinions, and the solution was to restrain “the unprofessional conduct of tax lawyers” who provided them.²⁰¹ He commended the Tax Standards Committee for formulating its “Guidelines to Tax Practice”²⁰² that suggested a firm not assist with tax shelters unless there was a “substantial likelihood” that the tax benefits would be sustained.²⁰³ But he strongly urged the bar to issue a formal opinion on tax shelter opinions, specifically citing the “confusing signals” from Opinion 314’s reasonable basis standard for preparation of individual returns²⁰⁴ and adding that “if an appropriate response is not forthcoming, we [at Treasury] may be forced to act.”²⁰⁵ He identified four types of opinions that required action: the false opinion (“false or totally incompetent”), the assumed facts opinion (“disclaim[ing] knowledge of the accuracy of the facts”), the nonopinion (“never relate[s] the law to the [relevant] facts”), and the negative opinion (“reasonable basis but you’ll probably lose”).²⁰⁶

Even before Mr. Mundheim’s speech, the Tax Standards Committee had begun working on the ethical problems related to tax shelters, beginning by “collecting examples of particularly smelly offerings for review,”²⁰⁷ and

199. *Id.* at 214.

200. *Id.*

201. *Id.*

202. *Id.* Interestingly, he limited the application of Opinion 314 to return preparation, which technically was its scope, though the implication was accepted that the standard for return preparation determined the standards for advice as well. Opinion 314 begins by referring to practicing before the Internal Revenue Service. Opinion 314, *supra* note 73. However, Opinion 314 later provides that a lawyer is under a duty not to mislead the IRS deliberately and affirmatively, either by misstatements, silence, or permitting his client to mislead “with regard both to the preparation of returns and negotiating administrative settlements.” Opinion 85-352, *supra* note 74.

203. *Guidelines to Tax Practice: Report of the Committee on Standards of Tax Practice, Section of Taxation, American Bar Association*, 31 TAX LAW. 551, 554 (1978) [hereinafter *Guidelines to Tax Practice*].

204. Mundheim, *Abusive Tax Shelters*, *supra* note 198, at 214.

205. *Id.*

206. *Id.*

207. Frederic G. Corneel, *Committee on Standards of Tax Practice*, 32 TAX LAW. 531 (1979) [hereinafter Corneel, *Committee Report*, 1979]. In 1973, the committee had taken opinions as their principal focus, specifically studying due diligence, disclaimers, and disclosure to the IRS, with the objective of forming some guidelines. Harry K. Mansfield, *Committee on Standards of Tax Practice*, 27 TAX

studying the propriety of “tax shelter package plans” in which a lawyer charges a single fee that covers the planning and execution of a transaction as well as the representation of the client before the IRS upon audit and litigation.²⁰⁸ In 1979, the Committee had worked with securities lawyers to prepare a program (including a skit) on tax shelter offerings and professional responsibility.²⁰⁹ A subcommittee was working on a proposal for tax shelter opinions.²¹⁰ After Mr. Mundheim’s challenge, both the Tax Section and the NYSBA Tax Section also began to work on standards for tax shelter opinions.²¹¹

Even though Mr. Mundheim had suggested there would be time for the bars to respond, and even though they had begun, the Treasury Department itself proposed rules on tax shelter opinions in September 1980, only seven months after his speech.²¹² The proposal was to amend Circular 230. The proposal’s release repeated Mr. Mundheim’s explanation of the use of opinions as penalty insurance and his identification of four problematic opinion types.²¹³ However, it added that the bar was concerned with these opinions as they “put significant and unhealthy pressure” on careful practitioners (either in the form of being offered a high fee for “an elaborately qualified” opinion, “which the practitioner knows another will give if he or she does not,” or the “unpleasant task” of explaining to a client who invested in a tax shelter that, despite there being an opinion from

LAW. 319 (1974); Carl A. Stutsman, Jr., *Report of the Committee on Standards of Tax Practice*, 26 TAX LAW. 616 (1973). In 1978, the committee did publish some guidelines for practice (which Mr. Mundheim commended in his 1980 speech). *Guidelines to Tax Practice*, *supra* note 203, at 554.

208. Hart H. Spiegel, *Committee on Standards of Tax Practice*, 30 TAX LAW. 538 (1977). The committee had begun analyzing the professional responsibility problems raised by tax opinions as early as 1972. Carl A. Stutsman, Jr., *Committee on Standards of Tax Practice*, 26 TAX LAW. 346 (1973).

209. Corneel, *Report of the Committee, 1979*, *supra* note 145.

210. James B. Lewis, *Report of the Committee on Standards of Tax Practice*, 33 TAX LAW. 1083 (1980) [hereinafter Lewis, *Report of the Committee, 1980*].

211. Tax Section, N.Y. State Bar Ass’n, *Circular 230 and the Standards Applicable to Tax Shelter Opinions*, 12 TAX NOTES 251, 261 (Feb. 9, 1981) [hereinafter N.Y. State Bar Ass’n, *Circular 230*]; *Statement on Proposed Rule Amending Circular 230 with Respect to Tax Shelter Opinions*, 34 TAX LAW. 745, 748 (1981) [hereinafter *Statement on Proposed Rule Amending Circular 230*] (comments of the ABA Section of Taxation).

212. The proposals had been urged by the Commissioner’s Advisory group at its June 9, 1980 meeting. Tax Shelters; Practice Before the Internal Revenue Service, 45 Fed. Reg. 58,594, 58,595 (proposed Sept. 4, 1980) (to be codified at 31 C.F.R. pt. 10).

213. *Id.*

another lawyer, the “tax benefits promised . . . cannot properly be taken”).²¹⁴ The only opinions regulated were those that would be part of offering materials distributed to nonclients in “connection with the promotion of a tax shelter.”²¹⁵ “Tax shelter” was defined as a transaction “in which the claimed tax benefits are likely to be perceived by the taxpayer as the principal reason for his or her participation.”²¹⁶ In general, the proposal was that the lawyer “exercise due diligence in representing the facts and Federal tax aspects,” and in assuring the opinion was accurately described in the offering materials.²¹⁷ The only type of opinion permitted was one concluding that it was “more likely than not that the bulk of the tax benefits . . . promoted are allowable under the tax law.”²¹⁸ Violations of these standards could lead to disbarment or suspension from practice before the IRS.²¹⁹

Not surprisingly, the proposed revisions to Circular 230 generated considerable comment and debate, the vigor of which impeded the finalization of the changes to Circular 230. It was not until 1984 that Circular 230 was finally revised.²²⁰ In the years between the proposal and finalization, two significant events in 1982 remade the tax shelter opinion landscape.

The first was the PR Committee issuing Opinion 346²²¹ on tax shelter opinions, which the final revisions to Circular 230 in 1984 would generally follow. Opinion 346 prohibited false opinions.²²² It required the tax lawyer to make the same factual inquiries a securities lawyer is required to make; that is, neither an audit of the facts nor accepting “as true that which he should not reasonably believe to be true.”²²³ It required the lawyer to “relate the law to the actual facts” to the extent known.²²⁴ Thus it addressed the first three types of opinions targeted by Treasury. It did not require a more likely than not conclusion, however, but rather did require that, if possible, the lawyer should opine as to “the probable outcome on the merits of each material tax issue,” defined as an issue “respecting which there is a

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 58,598.

220. Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries Before the Internal Revenue Service, 49 Fed. Reg. 6719 (Feb. 23, 1984) (codified at 31 C.F.R. Subtitle A, pt. 10 (1984)).

221. *See infra* Part II.C.

222. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 346 (revised) (1982), *reprinted in* 68 A.B.A. J. 471, 471 (1982) [hereinafter Opinion 346].

223. *Id.*

224. *Id.*

reasonable certainty” the IRS would challenge the tax benefit.²²⁵ If such a prediction is not possible, or if the prediction is that benefits “probably will not be realized,” then full explanation and disclosure is required.²²⁶ Unlike Treasury’s focus on the intention of the tax shelter investor in its definition, the PR Committee defined tax shelters by explicitly excepting a list of investments (*e.g.*, municipal bonds), but generally providing that a tax shelter was an investment that has as a “significant feature” deductions or credits in excess of income from the investment or tax attributable to it which would offset income or taxes from other sources.²²⁷

The second significant event also occurred in 1982. Anti-tax shelter legislation passed, including a penalty on taxpayers, which required substantial authority for undisclosed tax positions on returns, but the penalty could be avoided if there was a reasonable basis for the taxpayer to believe that the position was more likely than not to prevail.²²⁸ This meant that the problematic opinions targeted by the IRS—including negative opinions permitted by Opinion 346—would no longer provide “penalty insurance,” which was the problem the Treasury had sought to solve.

Treasury finalized its revisions to Circular 230 only after the 1982 issuance of Opinion 346 and the new penalty regime.²²⁹ The final revisions to Circular 230 differed from Opinion 346 in some technical ways, but the Treasury followed the PR Committee’s standards in the most important ways.²³⁰ Most significantly, despite their proposed prohibition, Circular 230 allowed negative opinions (with explanation and disclosure) so long as they

225. *Id.*

226. *Id.* The sanctioning of negative opinions (with disclosure) was a significant change from an earlier version of Opinion 346, which was quickly withdrawn and replaced with this revised one. The earlier version did not permit negative opinions. For a critical discussion, see Patterson, *Tax Shelters*, *supra* note 161, at 1177–79.

227. Opinion 346, *supra* note 222.

228. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 323(a), 96 Stat. 324, 613 (codified at I.R.C. § 6661). A “substantial understatement” was defined as the greater of ten percent of the tax required to be shown on the return or \$5000. *Id.* (codified at I.R.C. § 6661(b)(1)(A)).

229. Regulations Governing the Practice of Attorneys, Certified Public Accounts, Enrolled Agents, and Enrolled Actuaries Before the Internal Revenue Service, 49 Fed. Reg. 6719 (Feb. 23, 1984) (codified at 31 C.F.R. Subtitle A, pt. 10 (1984)).

230. Treasury followed Opinion 346 by stating that a lawyer does not have to independently audit the facts provided by the client unless the lawyer “has reason to believe that any relevant facts asserted to him/her are untrue.” *Id.* at 6722; *see also* William A. Falik, *Standards for Professionals Providing Tax Opinions in Tax Shelter Offerings: An Analysis of the Treasury’s Final Circular 230 Regulations and a Comparison to ABA Formal Opinion 346*, 37 TAX LAW. 701, 704 (1984) [hereinafter Falik, *Standards for Professionals*].

were “correctly, fairly and clearly described in the offering materials.”²³¹ The debate on negative opinions had been largely mooted by the 1982 penalty regime changes.²³² The statute ended the opinions’ usefulness to taxpayers, thereby ending the temptation for taxpayer clients and their lawyers.

B. *Debating Tax Shelter Opinions*

Before these 1982 changes (Opinion 346 on tax shelter opinions and the new statutory penalties) paved the way for Circular 230’s final revisions in 1984, the debates over the initial proposal consumed much of the tax bar’s attention. The tax bar tended to agree that abusive tax shelters were a problem because they allowed investors to exploit the audit lottery, cost revenue, increased administrative burdens, and undermined the integrity of the tax system.²³³ The prevailing opinion was that the success of tax shelter investors in turn reduced overall compliance.²³⁴ Abusive tax shelters were

231. Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries Before the Internal Revenue Service, 49 Fed. Reg. 6719, 6720 (Feb. 23, 1984). With the new penalties for abusive tax shelters under TEFRA, Treasury apparently agreed with the ABA that negative opinions would become a rare occurrence. Falik, *Standards for Professionals*, *supra* note 230.

232. Falik, *Standards for Professionals*, *supra* note 230, at 703; Mark J. Gimenez, *Tax Shelter Opinions—Securities and Tax Liabilities after TEFRA*, 35 BAYLOR L. REV. 25, 42–43 (1983) [hereinafter Gimenez, *Securities and Tax Liabilities*]; John Andre LeDuc, *The Legislative Response of the 97th Congress to Tax Shelters, the Audit Lottery, and Other Forms of Intentional or Reckless Noncompliance*, 18 TAX NOTES 363, 367 (1983) [hereinafter LeDuc, *The Legislative Response*].

233. *See, e.g.*, Kurtz, *Commissioner’s Remarks*, *supra* note 195; *Practitioners Attack Limits on Tax Shelter Opinions*, 11 TAX NOTES 1143 (Dec. 8, 1980); Laurence Goldfein & Stanley Weiss, *An Analysis of the Proposed Changes under Circular 230 Affecting Tax Shelter Opinions*, 53 J. TAX’N 340, 346 (1980) [hereinafter Goldfein & Weiss, *Proposed Changes*]; Sax, *Shelter Opinions*, *supra* note 151, at 5, 37–38; *Statement on Proposed Rule Amending Circular 230*, *supra* note 211; Gerald J. Robinson, *Attacking Tax Shelters—IRS in Blunderland?*, 12 TAX NOTES 646 (1981) [hereinafter Robinson, *Blunderland*]; George A. Page, Jr., *Tax Shelter Opinions of Counsel: Association Criticizes Treasury Proposal*, BOSTON B. J., Feb. 1981, at 6, 7 (1981) [hereinafter Page, *Tax Shelter Opinions*]; Marsan, *Ethical Responsibilities*, *supra* note 160, at 245. *But see* Jacques T. Schlenger, *Comments on the Proposed Regulations on Tax Shelter Opinions*, 59 TAXES 173, 174, 181 (1981) [hereinafter Schlenger, *Comments on Proposed Regulations*] (criticizing the anti-tax shelter campaign).

234. *See, e.g.*, Kurtz, *Commissioner’s Remarks*, *supra* note 195; Sax, *Shelter Opinions*, *supra* note 151; LeDuc, *The Legislative Response*, *supra* note 232.

described as absurd, outrageous, threatening, and fraudulent.²³⁵ Some also argued that abusive shelters also caused problems for tax lawyers who had both incentives to facilitate the investments for promoters and the duties to disappoint clients with a negative analysis of the investments.²³⁶ There was concern that individual lawyers' involvement in these shelters cost the bar in terms of its public perception.²³⁷ Several noted that lawyers' self-interest in preserving their individual professional reputations,²³⁸ especially including any avoiding liability under the securities laws (either to the Securities Exchange Commission (SEC) or investors),²³⁹ ought to chill their participation in abusive tax shelters. Most argued that writing abusive tax shelter opinions was already inconsistent with the bar's professional standards, which most agreed already required not merely a declaration of a reasonable basis for claiming the tax benefits, but a prediction of the outcome if the benefits were challenged²⁴⁰ and a refusal to exploit the audit lottery.²⁴¹

There was considerable agreement that tax shelters were a problem but also considerable agreement that "the right lines simply ha[d] not been

Mr. LeDuc described this as the prevailing opinion but questioned its empirical grounding.

235. Sax, *Shelter Opinions*, *supra* note 151, at 5; Roscoe L. Egger, *Warning: Abusive Tax Shelters Can Be Hazardous*, 68 A.B.A. J. 1674, 1674-75 (1982).

236. The Treasury Department described this as a significant concern of the bar when it proposed revising Circular 230. Tax Shelters; Practice Before the Internal Revenue Service, 45 Fed. Reg. 58,594, 58,595 (Sept. 4, 1980) (codified at 31 C.F.R. pt. 10).

237. Page, *Tax Shelter Opinions*, *supra* note 233, at 7.

238. See, e.g., James B. Lewis, *Lawyers' Ethical Responsibilities in Rendering Opinions on Tax Shelter Promotions*, 12 TAX NOTES 795, 797 (Apr. 13, 1981) [hereinafter Lewis, *Ethical Responsibilities*].

239. See, e.g., Weber et al., *Tax Advisors*, *supra* note 92, at 613; Sharon Burrell, *Legal Malpractice of the Tax Attorney*, 34 TAX EXECUTIVE 259, 270-71 (1982) [hereinafter Burrell, *Legal Malpractice*]; Gimenez, *Securities and Tax Liabilities*, *supra* note 232, at 25-28, 42-43, 46.

240. See, e.g., Corneel, *Ethical Guidelines*, *supra* note 115, at 25; *Guidelines to Tax Practice*, *supra* note 203, at 554; Goldfein & Weiss, *Proposed Changes*, *supra* note 233, at 343; Sax, *Shelter Opinions*, *supra* note 151, at 5, 35, 37-38; *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 745-46; N.Y. State Bar Ass'n, *Circular 230*, *supra* note 211, at 261-62. The role of prediction in legal opinions was a topic of greater interest during this time. See Detlev F. Vagts, *Legal Opinions in Quantitative Terms: The Lawyer as Haruspex or Bookie?*, 34 BUS. LAW 421 (1979).

241. See, e.g., Sax, *Shelter Opinions*, *supra* note 151, at 37-38; *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 745-46; N.Y. State Bar Ass'n, *Circular 230*, *supra* note 211, at 261-62.

drawn” in Treasury’s 1980 proposal to revise Circular 230.²⁴² The proposed provisions and definitions were criticized as imprecise and unworkable²⁴³: The tax shelter definition was too broad and not objective,²⁴⁴ and the more likely than not standard was too subjective and not always appropriate.²⁴⁵ The due diligence requirements were too burdensome²⁴⁶ or, at the least, not the same as what the SEC required.²⁴⁷ And several argued that sometimes, surely, a limited opinion with a disclosure of its limitations was better than a prohibition on limited opinions.²⁴⁸ Some criticized the proposal as too ambitious, as it was higher than any existing legal or ethical duty.²⁴⁹ The last point was Paul Sax’s in the article he prepared for the Tax Standards Committee on tax shelter opinions,²⁵⁰ which along with the Tax Section’s report on Treasury’s proposals, made essentially the same points about the technical shortcomings.²⁵¹

Many predicted the 1980 proposals would be counterproductive if implemented without change. One substantial limitation identified by Paul Sax, the Tax Section, the Tax Committee of the Boston Bar Association (Boston Tax Committee), and others was that, by the definitions of Circular 230, it only applied to those who practiced before the IRS. As a result, many

242. James B. Lewis, *The Treasury’s Latest Attack on Tax Shelters*, 11 TAX NOTES 723, 724 (Oct. 13, 1980) [hereinafter Lewis, *Treasury Attacks Tax Shelters*]; James P. Holden, *Practice Rules: Valid Response to Tax Shelter Abuse*, LEGAL TIMES WASH., Nov. 17, 1980, at 14 [hereinafter Holden, *Valid Response*].

243. Lewis, *Treasury Attacks Tax Shelters*, *supra* note 242; N.Y. State Bar Ass’n, *Circular 230*, *supra* note 211, at 252.

244. *Practitioners Attack Limits on Tax Shelter Opinions*, *supra* note 233; *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 746; Thomas Volet, *Circular 230 and the Definition of a Tax Shelter*, 12 TAX NOTES 949 (Apr. 27, 1981); Marsan, *Ethical Responsibilities*, *supra* note 160, at 246–47.

245. *Practitioners Attack Limits on Tax Shelter Opinions*, *supra* note 233; *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 746.

246. *Practitioners Attack Limits on Tax Shelter Opinions*, *supra* note 233.

247. *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 746; Kim Masters, *Bar Groups Hit Tax Shelter Proposals*, LEGAL TIMES WASH., Dec. 1, 1980, at 4 [hereinafter Masters, *Bar Groups*]. However, some objected to using SEC standards on the theory that tax and securities lawyers played very different roles. Goldfein & Weiss, *Proposed Changes*, *supra* note 233, at 342.

248. *See, e.g.*, Goldfein & Weiss, *Proposed Changes*, *supra* note 233, at 342.

249. Sax, *Shelter Opinions*, *supra* note 151, at 40; Lewis, *Ethical Responsibilities*, *supra* note 238, at 797.

250. The article began as part of the Tax Standards Committee’s review of “smelly” tax shelter offerings. Corneel, *Report of the Committee, 1979*, *supra* note 145; Sax, *Shelter Opinions*, *supra* note 151, at 5.

251. Sax, *Shelter Opinions*, *supra* note 151, at 37–46; *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 746–50.

opinion-writing lawyers could (and already did) choose not to be involved in representing their clients in IRS administrative matters, and so these lawyers would not be subject to the new opinion restrictions.²⁵² Jacques T. Schlenger (Venable, Baetjer & Howard (Venable)) made this point as well, but he also argued that as the lawyers who were not involved in practice before the IRS were actually less qualified to opine than those who were, the proposal would result in less-competently-drafted opinions.²⁵³ Mr. Sax and others argued that “Gresham’s Law”²⁵⁴ would apply such that careful tax lawyers who were concerned with their duties would be replaced by careless lawyers who were not, rather than risk the damage of even an unjustified disciplinary proceeding.²⁵⁵ Those willing to give shoddy opinions would get the work.²⁵⁶ Both the Tax Section and the Boston Tax Committee predicted that, since opinions were only required in certain securities offerings, tax lawyers would become less involved in structuring tax shelters, as promoters simply opted to forgo their opinions.²⁵⁷ And what opinions were drafted would be more complex and difficult for investors to understand, which surely was not what Treasury intended, as some critics pointed out.²⁵⁸ Worse yet, with respect to those willing to write abusive tax shelter opinions, the promoters could better

252. Sax, *Shelter Opinions*, *supra* note 151, at 45; *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 747; Page, *Tax Shelter Opinions*, *supra* note 233, at 9.

253. Schlenger, *Comments on Proposed Regulations*, *supra* note 233, at 180.

254. Explicit mention of Gresham’s Law having a similar effect precedes the tax shelter discussion in the tax ethics literature. *See, e.g.*, Sidney I. Roberts, Wilbur H. Friedman, Martin D. Ginsburg, Carter T. Louthan, Donald C. Lubick, Milton Young & George E. Zeitlin, *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 325, 331 (1972) [hereinafter Roberts et al., *Complexity*] (report from the New York State Bar Association, Tax Section, Committee on Tax Policy); Nolan, *Audit Coverage*, *supra* note 138, at 430. Gresham’s Law is an economic principle that states where two forms of currency have identical face values, the currency with the lower commodity value will be used as currency, while the other with the higher commodity value will be hoarded or exported, and disappears from circulation. *See Gresham’s Law*, ENCYCLOPEDIA BRITANNICA ONLINE, last accessed Jan. 6, 2014, <http://www.britannica.com/EBchecked/topic/245850/Greshams-law>. Over time, Gresham’s Law has been simplified as “bad money drives out good.” *Id.*

255. *See, e.g.*, Sax, *Shelter Opinions*, *supra* note 151, at 45; Goldfein & Weiss, *Proposed Changes*, *supra* note 233, at 345; Gimenez, *Securities and Tax Liabilities*, *supra* note 232, at 46.

256. Timothy N. Vettel, *Circular 230 Exposure Draft Is Expected Soon*, 17 TAX NOTES 561 (Nov. 15, 1982) (statement of William L. Raby, Chairman, The American Institute of Certified Public Accountants).

257. *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 747; Page, *Tax Shelter Opinions*, *supra* note 233, at 9.

258. Goldfein & Weiss, *Proposed Changes*, *supra* note 233, at 342.

market the opinions by “proudly proclaim[ing] that they ‘comply with the new rules.’”²⁵⁹ Thus, the critics argued, the new rules would leave the opinion-writing field to the less ethical and the less competent who would write more-complex opinions and benefit from claiming that their opinions were IRS-compliant. Clearly, this would be counterproductive.

Although there was significant agreement on the line-drawing problems in Treasury’s 1980 proposals, and even on the chances that proposal would be counter-productive, the bar was divided on the most fundamental issue: whether or not to support Treasury’s general approach. For example, the Tax Section and The Association of the Bar of the City of New York (City Bar Association) supported it, while the Tax Section of the New York State Bar Association (NYSBA Tax Section) and the Boston Tax Committee did not.²⁶⁰ There was a substantive legal issue as to whether the Treasury Department’s authority to regulate those who practiced before the IRS on the basis of character and competency was sufficient to legalize its regulation of tax shelter opinion writing. Many doubted it did.²⁶¹ Venable’s Jacques Schlenger made the most forceful argument against the legality of the regulations, saying that a “fair and truthful opinion based on a careful study” could not negatively reflect on a lawyer’s character, reputation, or competency, so such an opinion could in no way subject a lawyer to discipline by the Treasury, even if it did not comply with Circular 230’s requirements for an opinion.²⁶² The more common view was that Treasury did have the legal authority to implement the proposed regulations, at least so long as some adjustments to the regulations were made, such as making

259. Robinson, *Blunderland*, *supra* note 233.

260. Masters, *Bar Groups*, *supra* note 247; *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 746; *Practitioners Attack Limits on Tax Shelter Opinions*, *supra* note 233; *Committee Report: Proposed Amendments to Circular 230 with Respect to Tax Shelter Opinions*, 36 REC. ASS’N B. CITY N.Y. 133 (1981) (report of the Association’s Committee on Taxation); Tax Committee of Boston Bar Association, *Treasury Lacks Authority*; Page, *Tax Shelter Opinions*, *supra* note 233. The City Bar explicitly accepted the right of agencies such as the IRS to regulate specialists, and studying how such agency regulation fit with bar regulation was the premise of the report on the lawyer’s role in tax practice. Special Comm. on Lawyer’s Role in Tax Practice, Ass’n of the Bar of the City of N.Y., *The Lawyer’s Role in Tax Practice*, 36 TAX LAW. 865, 865 (1983). Even before the proposals, a Tax Section representative had stood against an ABA professional discipline committee proposal opposing the discipline of lawyers by the federal agencies before which they practiced. Lewis, *Report of the Committee, 1980*, *supra* note 210.

261. See, e.g., *Practitioners Attack Limits on Tax Shelter Opinions*, *supra* note 233; Page, *Tax Shelter Opinions*, *supra* note 233, at 8.

262. Schlenger, *Comments on Proposed Regulations*, *supra* note 233, at 179.

discipline dependent upon willfully violating Circular 230²⁶³ or failing to make a full disclosure of the prediction of success, even if it did not meet the proposed more-likely-than-not standard.²⁶⁴

The greater debate was not as to the outer legal limits on Treasury's authority to regulate tax lawyers but rather whether Treasury ought to try. The NYSBA Tax Section argued that Treasury's obvious conflict of interest in regulating tax lawyers would not only chill advice,²⁶⁵ but "pose[d] an incipient threat to the right of American citizens to be represented by independent counsel—a matter far more fundamental and important than the topic of tax shelters."²⁶⁶ Many individual lawyers echoed this sentiment,²⁶⁷ characterizing it as "inherently dangerous,"²⁶⁸ a compromise of the adversarial process,²⁶⁹ and an undermining of the legal profession.²⁷⁰ Along these lines, Jacques Schlenger argued not only that the lawyer's role is to serve his client's interest rather than Treasury's, but that Treasury's proposals undermined the bar in a way he described as "sow[ing] the seeds for government abuse of power."²⁷¹ Making a similar point but in more-directly-political terms, Dallas tax lawyer Mark Gimenez (Shank, Irwin & Conant) wrote:

When the government becomes bored with regulating airplanes, trucks and railroads, and begins regulating lawyers, the American legal system will soon follow the airplanes, trucks and railroads into "bankruptcy." The legal

263. Goldfein & Weiss, *Proposed Changes*, *supra* note 233, at 344. Some, however, argued that the Treasury Department clearly had the statutory authority, even without such adjustments. Lewis, *Treasury Attacks Tax Shelters*, *supra* note 242, at 725.

264. *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 746.

265. N.Y. State Bar Ass'n, *Circular 230*, *supra* note 211, at 252.

266. *Id.*

267. *Incoming Treasury Letters: Proposed Regulations on Tax Shelter Opinions Said to Threaten Adversary System*, 11 TAX NOTES 1009 (Nov. 24, 1980) [hereinafter *Proposed Regulations Threaten Adversary System*]; Masters, *Bar Groups*, *supra* note 247; Alan Parnes, *Tax Shelters*, in EVALUATING TAX SHELTER OFFERINGS 301–02 (Alan S. Rosenberg ed., PLI Tax Law & Practice Course Handbook Series No. 155, 1981) [hereinafter Parnes, *Tax Shelters*]; Marsan, *Ethical Responsibilities*, *supra* note 160, at 254–55.

268. Lewis, *Treasury Attacks Tax Shelters*, *supra* note 242, at 725.

269. *Proposed Regulations Threaten Adversary System*, *supra* note 267.

270. *Incoming Letters: Attorney Defends Profession Against Proposed Amendments to Rules on Tax Shelter Opinions*, 11 TAX NOTES 743 (Oct. 13, 1980) [hereinafter *Attorney Defends Profession*].

271. Schlenger, *Comments on Proposed Regulations*, *supra* note 233, at 180.

system will be bankrupt when it loses its most important asset: the principle that when a lawyer speaks, he speaks for one, and only one, person—his client. When the government interposes itself between a lawyer and his client, an irreconcilable conflict arises. A lawyer cannot zealously represent his client when he’s worried about the . . . IRS assessing a penalty against him. The . . . tax laws should be concerned with . . . collecting taxes . . . and not with regulating lawyers; that responsibility should remain with the lawyer’s peers and clients.²⁷²

To the contrary, in his Tax Standards Committee article, Paul Sax rejected the argument that the 1980 proposals were illegitimate due to undermining the adversarial role of the lawyer, pointing out that a lawyer writing an opinion is not serving in the role of an adversary but the role of an adviser, a distinction then made in the bar’s ethics rules.²⁷³ Laurence Goldfein and Stanley Weiss²⁷⁴ argued that the “proposals are not a threat to the right of counsel, as some have suggested,” as they do not apply if the opinion is only given to the client; it is only the dissemination of the opinion to nonclient investors that trigger the proposed requirements.²⁷⁵ And, the proposals are reasonable because these nonclient investors do not have the opportunity to discuss the opinion with the lawyer, and thus may not understand it,²⁷⁶ and because there is a conflict of interest between the client (promoter) and the nonclient investors (and the requirements are intended to prevent the lawyer from glossing over weaknesses in order to induce investment).²⁷⁷ Even though it is within Treasury’s discretion, Paul Sax counseled that Treasury’s caution and restraint in these matters was prudent to increase confidence in Treasury’s regulation.²⁷⁸ Similarly, Laurence Goldfein and Stanley Weiss, the Tax Section, and the City Bar suggested the

272. Gimenez, *Securities and Tax Liabilities*, *supra* note 232, at 46.

273. Sax, *Shelter Opinions*, *supra* note 151, at 44.

274. Laurence Goldfein served as editor of the *Journal of Taxation* and serves as special counsel to the EisnerAmper accounting firm in its New York office. He received his J.D. from New York University and his LL.M. from Georgetown University. *Laurence Goldfein*, EISNERAMPER, last accessed Jan. 6, 2014, <http://www.eisneramper.com/about-us/professional-directory/Laurence-Goldfein.aspx>. Stanley Weiss is a Certified Public Accountant and the President and Director of Weiss, Sugar, Dvorak & Dusek, a Chicago-based accounting firm. *Stanley H. Weiss*, WEISS, SUGAR DVORAK & DUSEK, last accessed Jan. 6, 2014, <http://www.wsdd.com/team.html>.

275. Goldfein & Weiss, *Proposed Changes*, *supra* note 233, at 341.

276. *Id.*

277. *Id.*

278. Sax, *Shelter Opinions*, *supra* note 151, at 44.

use of private lawyers in Treasury's disciplinary process.²⁷⁹ But at least one commentator thought Treasury was too cautious and restrained in its proposals, suggesting that only a more radical approach would work, specifically applying the proposed opinion requirements to all nonabusive tax shelters and disciplining any lawyer who wrote an opinion for an abusive tax shelter, regardless of the opinion's contents, the lawyer's process, or the circumstances.²⁸⁰

While the bar was divided over Treasury's foray into opinion regulation, most agreed that Treasury should have provided more time for bar associations to respond "to the challenge given them" in 1980 by Treasury's Robert Mundheim.²⁸¹ There was a call for Treasury to provide more time to the bar²⁸² or to include a sunset provision so that the regulations would phase out as state bar associations implemented plans to discipline lawyers for abusive tax shelter plans.²⁸³ However, even if self-regulation was the ideal, not all supported more practical opportunities for the bar to act. James Holden (Steptoe & Johnson) said the appeals for more time for the bar to act would be more impressive if the bar "had in fact been clamoring to take action,"²⁸⁴ and Donald Alexander (Morgan, Lewis & Bockius) argued that, rather than there being fifty bar associations with fifty rules, "a national rule makes the best sense."²⁸⁵

Others also suggested national approaches—but different ones—premised on the regulation of tax lawyers being an inadequate response to the tax shelter problem. One proposal was for Treasury to significantly increase audits of tax shelters, especially those with lawyers in the habit of giving objectionable opinions, as well as increasing criminal prosecutions.²⁸⁶ There was also a call for Congressional action rather than agency action, but not so much through substantive changes in the tax law, which tended to be a step behind the ingenuity of tax planners.²⁸⁷ Many, including Paul Sax in his

279. Goldfein & Weiss, *Proposed Changes*, *supra* note 233, at 344; *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 748.

280. Robinson, *Blunderland*, *supra* note 233.

281. Lewis, *Treasury Attacks Tax Shelters*, *supra* note 242, at 724.

282. N.Y. State Bar Ass'n, *Circular 230*, *supra* note 211, at 261.

283. *Practitioners Attack Limits on Tax Shelter Opinions*, *supra* note 233; Marsan, *Ethical Responsibilities*, *supra* note 160, at 254.

284. Holden, *Valid Response*, *supra* note 242.

285. Masters, *Bar Groups*, *supra* note 247.

286. *See, e.g.*, Parnes, *Tax Shelters*, *supra* note 267; N.Y. State Bar Ass'n, *Circular 230*, *supra* note 211, at 262. "The ABA Tax Section played an important role in the development of the partnership audit provisions" after the 1982 anti-tax shelter legislation. LeDuc, *The Legislative Response*, *supra* note 232, at 367.

287. Lester B. Herzog, *Tax Shelter Opinions after TEFRA*, *Circular 230, and ABA Formal Opinion 346: Who Will Want to Sign Them?*, 14 CUMB. L. REV. 493, 504 (1984) [hereinafter Herzog, *Opinions after TEFRA*].

Tax Standards Committee article, called for Congress to reduce the tax burden as a means of reducing the incentive for tax shelter investments.²⁸⁸ The Boston Bar proposed that Congress impose standards on the marketing of tax shelters,²⁸⁹ perhaps, as some others specifically suggested, requiring the registration of tax shelters.²⁹⁰

But the most interesting—and ultimately most persuasive—calls were related to penalties. In 1976, Congress imposed a preparer penalty on negligence and disregard of rules, which generated focus, for example, on how the penalty was related to Opinion 314's reasonable basis standard²⁹¹ and, more importantly, the level of confidence or disclosure needed to comply²⁹²—not only to avoid the penalty but also the malpractice claims the penalty might evidence.²⁹³ The bar, however, did not call on Congress to extend penalties to combat tax shelters through new statutes applicable to tax professionals but rather to expand penalties to taxpayers—that is, their clients. The Tax Standards Committee had actually begun calling for such increased penalties on taxpayers soon after the new penalty standards for preparers were enacted, arguing that such penalties would increase taxpayer compliance, which would increase the “proper observance of professional standards” by tax lawyers.²⁹⁴ After the Circular 230 proposals, this call was continued by Paul Sax in his Tax Standards Committee article and echoed by many others, including the Tax Section and the NYSBA Tax Section.²⁹⁵ Laurence Goldfein and Stanley Weiss argued that, if the problem is the use of opinions as insurance to escape penalties on tax shelter investors, then the solution is to revise the statutes that impose the penalties.²⁹⁶ The result would be that clients would police their tax lawyers rather than the other way around.²⁹⁷ Indeed, Commissioner Kurtz previously suggested this tactic,

288. Sax, *Shelter Opinions*, *supra* note 151, at 46; *see also* Lewis, *Treasury Attacks Tax Shelters*, *supra* note 242; *Attorney Defends Profession*, *supra* note 270.

289. Page, *Tax Shelter Opinions*, *supra* note 233, at 8.

290. Parnes, *Tax Shelters*, *supra* note 267.

291. Santi, *Legal Liability*, *supra* note 142, at 427–28.

292. Corneel, *Committee Report, 1979*, *supra* note 207. The bar was quite focused on this new standard, and their comments to Treasury sufficed to reduce the burdens under the final regulations. Frederic G. Corneel, *Report of the Committee on Standards of Tax Practice*, 31 TAX LAW. 980 (1978) [hereinafter Corneel, *Report of the Committee, 1978*].

293. Santi, *Legal Liability*, *supra* note 142, at 423–26.

294. Corneel, *Report of the Committee, 1978*, *supra* note 292, at 981; *see also* Corneel, *Committee Report, 1979*, *supra* note 207, at 532.

295. Sax, *Shelter Opinions*, *supra* note 151, at 46; *Statement on Proposed Rule Amending Circular 230*, *supra* note 211, at 747; N.Y. State Bar Ass'n, *Circular 230*, *supra* note 211, at 262.

296. Goldfein & Weiss, *Proposed Changes*, *supra* note 233, at 345–46.

297. LeDuc, *The Legislative Response*, *supra* note 232, at 380–81.

adding that such penalties might even prompt Treasury to withdraw the proposed changes to Circular 230.²⁹⁸

Ultimately, the calls were effective and Congress enacted new penalties on taxpayers in 1982,²⁹⁹ which shifted the weight of tax shelter compliance from Treasury's regulation of lawyers' opinions to the compliance of their clients.³⁰⁰ This new penalty regime in 1982, along with Treasury's fundamental acceptance in 1984 of Opinion 346 for setting the standards for tax shelter opinions, resolved the issues. The Tax Section "warmly support[ed]" the resulting situation, especially Treasury's acceptance of the role of the bar in regulating lawyers.³⁰¹ However, critics of the resolution insisted it would drive from tax shelter work the most careful tax attorneys and, thus, not solve the abuses,³⁰² which some argued could only be solved by more-demanding professional standards being inserted into Circular 230 by Treasury or legislated into the Code by Congress.³⁰³

IV. BROADER DISCUSSION OF LEGAL ETHICS FOR TAX LAWYERS: 1965-1985

The discussion of ethics for tax lawyers in 1965-1985 was dominated by debates over Opinion 314's reasonable basis standard and debates over the standards for tax shelter opinions.³⁰⁴ Both of these debates, though especially the one on tax shelter opinions, were increasingly technical and focused on Treasury Department regulations and statutory provisions.³⁰⁵ Given the vigor of the debates, the novelty of the issues, and the questioning of fundamentals (such as, who should regulate the bar?), it is not surprising that in 1981 a law school casebook on ethics for tax lawyers was published,

298. These were among his suggestions to the incoming IRS Commissioner in 1981. Jerome Kurtz, *Notes to a New Commissioner of Internal Revenue*, 12 TAX NOTES 1195, 1197 (June 1, 1981).

299. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

300. Kenneth W. Gideon, *Gideon Discusses Substantial Understatement Penalty*, 18 TAX NOTES 560 (Feb. 7, 1983); *ABA's Tax Section Comments on Revised Circular 230*, 18 TAX NOTES 810 (Mar. 7, 1983).

301. ABA Section of Tax'n, *Statement on Revisions to Proposed Rule Amending Circular 230 with Respect to Tax Shelter Opinions*, 36 TAX LAW. 861 (1983).

302. See, e.g., DeLee, *Tax Shelters*, *supra* note 45, at 435; Herzog, *Opinions after TEFRA*, *supra* note 287, at 502.

303. See, e.g., Ann Southworth, *Redefining the Attorney's Role in Abusive Tax Shelters*, 37 STAN. L. REV. 889, 905, 916, 918 (1985) [hereinafter Southworth, *Redefining the Attorney's Role*].

304. See *supra* Parts II.B, II.C, III.B.

305. *Id.*

Bernard Wolfman and James P. Holden's *Ethical Problems in Federal Tax Practice*.³⁰⁶ That tax lawyers would be the first specialists for whom a specific ethics casebook would be developed underscores how complicated, technical, and confusing the situation had become by 1981.³⁰⁷

A. *Continuing Influence of Pre-Opinion 314 Literature*

Even though the ethics discussion in 1965-1985 became increasingly complicated, technical, and focused, a broader discussion continued several of the themes from the pre-1965 period, sometimes tangential to but other times nested within the debates on the technicalities and specificities of committee opinions and proposals. Instrumental in this broader discussion were the articles of the older tax ethics literature that Yale professor Boris Bittker included in his 1970 anthology, *Professional Responsibility in Federal Tax Practice*. In a time before keyword searches and electronic databases, such an anthology preserved literature and made it accessible in a way that those now accustomed to database searches may not remember to appreciate. Appearing after Opinion 314, but including articles that almost entirely preceded Opinion 314, the anthology ensured the continuation of discussions broader—and perhaps deeper—than committee opinions, and also evidenced that Opinion 314 did not address, or at least did not solve, most of the questions tax lawyers had about their duties. In 1974, the Tax Standards Committee prepared a bibliography of materials on ethics for tax lawyers, describing Bittker's collection as "by far the most useful,"³⁰⁸ and in 1977, when it published its "Guidelines to Tax Practice," Bittker's collection was listed as the first suggested source for beginning research on ethical problems in tax practice.³⁰⁹

The endorsement of the collection would be no surprise, as within it were articles written by exceptionally impressive tax lawyers. It included two articles³¹⁰ written by Randolph E. Paul, who was a founder of Paul, Weiss, Rifkind, Wharton & Garrison (Paul Weiss), an architect of the modern income tax, and an advisor to President Franklin D. Roosevelt, as well as

306. Deborah H. Schenk, *Tax Ethics*, 95 HARV. L. REV. 1995, 1995 (1982) (reviewing BERNARD WOLFMAN & JAMES HOLDEN, *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* (1981)).

307. *Id.*

308. Mansfield, *Report of the Committee, 1974*, *supra* note 115, at 582.

309. *Guidelines to Tax Practice*, *supra* note 203, at 554.

310. Randolph E. Paul, *The Responsibilities of the Tax Adviser*, 63 HARV. L. REV. 377, 378 (1950) [hereinafter Paul, *Tax Adviser Responsibilities*] (an adaptation, with minor revisions, of an address before the 1949 Second Annual Institute on Federal Taxation, University of Southern California School of Law. Paul, *Lawyer As Tax Adviser*, *supra* note 82).

Henry Ford, Standard Oil Co., and General Motors.³¹¹ It also included two articles³¹² by Sullivan & Cromwell's Norris Darrell,³¹³ and two companion articles authored for the 1963 University of Southern California Tax Planning Institute—one by New York tax lawyer and treatise author Mark H. Johnson³¹⁴ and the other by fellow New York lawyer and former NYU law faculty member Milton Young.³¹⁵ It included articles by Merle H. Miller, a former IRS lawyer who founded the ACLU in Indianapolis as well as one of the city's most prominent law firms;³¹⁶ NYU Law professor Jerome

311. *Historical Perspective—Profiles in Tax History: Randolph E. Paul*, TAX HIST. PROJECT, Oct. 6, 2004, <http://www.taxhistory.org/thp/readings.nsf/cf7c9c870b600b9585256df80075b9dd/afd2a67073f6b87085256f8600681f74?OpenDocument>. Ever-dedicated to the issues of taxation, Randolph E. Paul died while testifying before a congressional committee and complaining about President Eisenhower's tax policies.

312. Darrell, *Practitioner's Duty*, *supra* note 77, at 39; Norris Darrell, *Responsibilities of the Lawyer in Tax Practice*, in BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 87.

313. "Mr. Darrell was a partner of Sullivan & Cromwell for 42 years and president of the American Law Institute for 15 years. He represented the law firm in Paris and Berlin from 1928 to 1930 and was made a partner in 1934. He was elected to the Council of the American Law Institute in 1947 and headed a project that laid the groundwork for the Internal Revenue Code of 1954. He retired in 1976." *Norris Darrell, Lawyer and Tax Expert*, 90, N.Y. TIMES, Aug. 15, 1989, <http://www.nytimes.com/1989/08/15/obituaries/norris-darrell-lawyer-and-tax-expert-90.html>. Mr. Darrell was also the son-in-law of legal legend Learned Hand and executor of his estate. See Gerald Gunther, "Contracted" *Biographies and Other Obstacles to "Truth,"* 70 N.Y.U. L. REV. 697 (1995).

314. Mark H. Johnson, *Does the Tax Practitioner Owe a Dual Responsibility to His Client and the Government?—The Theory*, in BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 161 [hereinafter Johnson, *Dual Responsibility—The Theory*].

315. Milton Young, *Does the Tax Practitioner Owe a Dual Responsibility to His Client and the Government?—The Practice*, in BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 175 [hereinafter Young, *Dual Responsibility—The Practice*].

316. Merle H. Miller, *Morality in Tax Planning*, in BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 47. Merle H. Miller was with the Office of Chief Counsel of the Bureau of Internal Revenue prior to joining Ice Miller as a partner in 1940 and beginning the firm's federal tax practice. Crimmins, *Ice Miller*, *supra* note 81. He was instrumental in founding the Indianapolis affiliate of the American Civil Liberties Union (ACLU). Some in the Indianapolis legal community believed that the ACLU was connected to communism, but Mr. Miller and his firm believed that the ACLU was good for the law profession and the community they served. *Firm History*, ICE MILLER LLP, last accessed Jan. 7, 2014, <http://www.icemiller.com/firm/firm-history/>. Mr. Miller and his firm partner Harry Ice were both Eagle Scouts, and they founded the I and M Firesets Company to manufacture and sell flint and

Hellerstein;³¹⁷ and Harvard Law School Professor John M. Maguire.³¹⁸ Professor Bittker's own contribution to his anthology was his 1965 article on professional responsibility in federal tax practice, which focused, in great part, on understanding the purpose of the return and how disclosure with respect to questionable positions was related to the purpose.³¹⁹

Even though Opinion 314 had set forth the PR Committee's opinion as the standard for advice on returns and the necessity of disclosure, the issues continued to generate discussion, often drawing on the pre-Opinion 314 literature in Professor Bittker's anthology. Articles in his anthology were used to provide historical context, tracing the pre-Opinion 314 debate from Professor Hellerstein's bemoaning the unethically low standards used to determine when to disclose,³²⁰ through Norris Darrell's standard for disclosure whenever "there is a substantial doubt about the position that is taken"³²¹ and Randolph Paul's standard for disclosure "when the weight of the law is on the government's side,"³²² to Mark Johnson's articulation of the reasonable basis standard prior to Opinion 314.³²³ Anthology articles were mined for observations on the distance between public statements and actual practice,³²⁴ the different disclosure standards applicable to different stages of

steel fire starting kits to Boy Scouts. The company was later passed down through the hands of various scouts and troop leaders in Indianapolis. *Firm Fact Sheet for 100 Year Celebration*, ICE MILLER LLP, last accessed Jan. 7, 2014, <http://www.icemiller.com/news/100YearFacts.htm>.

317. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 16. Professor Hellerstein's comments were captured in a panel discussion.

318. John M. Maguire, *Conscience and Propriety in Lawyer's Tax Practice*, in BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 109–30.

319. Boris I. Bittker, *Professional Responsibility in Federal Tax Practice*, in BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 233–92.

320. Rowen, *Lawyer Advise*, *supra* note 97, at 238 (citing *Ethical Problems*, *supra* note 80, at 8 (statements by Jerome Hellerstein)).

321. Rowen, *Lawyer Advise*, *supra* note 97, at 237 (citing Darrell, *Conscience and Propriety*, *supra* note 81, at 10). Mr. Rowen cites what he describes as an unpublished paper of Mr. Darrell's, though it sets forth a similar position to what Mr. Darrell maintained in his published writings, which were included in Bittker's anthology. Norris Darrell, *The Tax Practitioner's Duty to his Client and his Government*, in BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 135–39.

322. Rowen, *Lawyer Advise*, *supra* note 97, at 237 (citing Paul, *Lawyer As Tax Adviser*, *supra* note 82, at 427–28).

323. Rowen, *Lawyer Advise*, *supra* note 97, at 239 (citing Mark H. Johnson on no need to disclose if reasonable basis).

324. See Sellin, *Professional Responsibility*, *supra* note 117, at 586 (citing Professor John Maguire on likelihood that full disclosure on returns is not as prevalent in practice as public discussions would suggest); *id.* at 585–86 (citing Norris Darrell on "a tendency towards a little larceny when it comes to taxation").

representation,³²⁵ and the general discussion of factors relevant to determining the appropriate standard.³²⁶ However, the most commonly cited article related to disclosure standards was Professor Bittker's own. His was cited for his substantive view that the return was to express the taxpayer's "honest opinion" of his tax liability (no more, no less),³²⁷ but more so for his caution that "when they demand too much, legal and ethical systems fall of their own weight," criticizing full disclosure on returns as adding too many demands and weights on taxpayers.³²⁸

The earlier ethicists were often cited for describing the various duties of tax lawyers, such as Professor Hellerstein's argument that tax lawyers should be "professional[s] . . . not mere hired hands," and ought not "be an accessory to an escape by taxpayers of their duty to their government."³²⁹

325. Corneel, *Ethical Guidelines*, *supra* note 115, at 17 n.49 (citing Randolph Paul for considerations relevant to the duty to make disclosures to the service once an audit has begun); *id.* (citing Mark Johnson on analysis of duty to make disclosures to the service once an audit has begun).

326. *Id.* at 12 n.34 (citing Professor John M. Maguire for the proposition that a lawyer's obligation with respect to the correctness of a return does not override duties of confidentiality); *id.* at 10 n.27 (citing Thomas Tarleau for the proposition that disclosure may preserve the lawyer's reputation with the IRS); *id.* at 6 n.17 (citing NYU panel discussion for the proposition that "[e]ven full disclosure of all relevant facts may not justify a return known to be incorrect"); *id.* at 6 n.18 (citing NYU panel discussion of developing two types of returns—one in which the preparer assumes accuracy of facts and one in which he verifies).

327. *Id.* at 7 n.21, 10 n.26 (citing Professor Bittker for idea that the return expressed "the taxpayers' honest opinion of his legal liability"); *see also* Johnnie M. Walters, *Ethical and Professional Responsibilities of Tax Practitioners*, 17 GONZ. L. REV. 23, 28 (1981) [hereinafter Walters, *Ethical and Professional Responsibilities*] (citing Professor Bittker for "best policy" being "disclosure of every essential fact" but not "every detail").

328. Sax, *Shelter Opinions*, *supra* note 151, at 41–42 (citing Professor Bittker article in the anthology for the proposition that when "they demand too much, legal and ethical systems fall of their own weight," and criticizing Treasury's proposals for being "too ambitious" and exceeding the legal and ethical requirements). Marc Asbill, in a panel discussion on questionable positions, quoted Boris Bittker's article in the anthology stating that when "they demand too much, legal and ethical systems fall of their own weight," and criticizing full disclosure on returns as adding too many demands and weights on taxpayers. However, IRS Commissioner Kurtz responded, "I don't agree with you . . . because I don't agree with Bittker;" Kurtz having just described the success with disclosure the SEC had and that disclosure in tax matters could follow similarly. *Questionable Positions*, *supra* note 143, at 25–26.

329. Walters, *Ethical and Professional Responsibilities*, *supra* note 327, at 30 (alteration in original) (quoting BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 21); *see also, e.g., id.* at 25 (citing Milton Young for quadruple responsibilities of tax lawyers: the duty to be proficient, the duty to ensure their

Randolph Paul described the duty of the lawyer to use “technical attention and undivided concentration”³³⁰ and be willing to pursue a “statutory loophole,” even if he would “promptly close” it if a legislator.³³¹ Both Mr. Paul and Norris Darrell were invoked in the debate on tax shelter opinions, with Paul Weiss’s James B. Lewis arguing that Randolph Paul and Norris Darrell would turn down tax shelter work on practical grounds, not wanting to use their reputations to promote a strategy unlikely to work, as well as it being inconsistent with their emphasis on lawyers working to improve the tax system.³³² Paul Sax, in his article for the Tax Standards Committee on Lawyers’ Responsibilities in Tax Shelter Opinions, cited Norris Darrell for the duty to work within the tax system rather than attack it,³³³ and he cited Merle Miller for the proposition that tax lawyers’ sense of “right and wrong” used “in their daily lives” might keep them from participating in tax shelter promotion.³³⁴

The most striking use of the articles in Bittker’s anthology was in an article that most resembled earlier literature in its free style and wide-ranging considerations of tax lawyering, written by Columbia Law School Professor George Cooper.³³⁵ Professor Cooper’s article stands out from the technical comments on formal opinions and proposed regulations, proposing the ideal tax lawyer as one who integrates his skills and duties in a manner that benefits the client and the public. The article abandoned the common law-

suggestions are “neither technically unsound nor morally repugnant,” the duty to “help evolve a workable system of taxation,” and the duty “above all, to walk upright”); BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82, at 183–85 (quoting Milton Young).

330. Corneel, *Ethical Guidelines*, *supra* note 115, at 3, n.5 (quoting Paul, *Lawyer As Tax Adviser*, *supra* note 82, at 418).

331. Sellin, *Professional Responsibility*, *supra* note 117, at 606 (quoting Paul, *Tax Adviser Responsibilities*, *supra* note 310, at 385).

332. Lewis, *Ethical Responsibilities*, *supra* note 238, at 797.

333. Sax, *Shelter Opinions*, *supra* note 151, at 38.

334. *Id.* at 43 (quoting Miller, *Morality in Tax Planning*, *supra* note 81, at 1077).

335. George Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 COLUM. L. REV. 1553 (1980) [hereinafter Cooper, *The Avoidance Dynamic*]. Throughout his article, Professor Cooper cites many of the articles included in BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82. See Cooper, *The Avoidance Dynamic*, *supra*, at 1577, 1586 (citing Paul, *Tax Adviser Responsibilities*, *supra* note 310); *id.* at 1583 (citing Paul, *Lawyer As Tax Adviser*, *supra* note 82); *id.* at 1584, 1588 (citing Darrell, *Practitioner’s Duty*, *supra* note 77); *id.* at 1586–88 (citing Thomas J. Graves, *Responsibility of the Tax Adviser*); *id.* at 1587 (citing Johnson, *Dual Responsibility—The Theory*, *supra* note 314); *id.* at 1577, 1588 (citing Young, *Dual Responsibility—The Practice*, *supra* note 315). Professor Cooper also quotes Bittker and Darrell, *id.* at 1587–88, but provides citations to BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 82.

review-article form, instead taking the form of a narrative between a senior lawyer advocating for the ideal and then, by turns, a less experienced and more aggressive tax lawyer (whose plan is under question), and then the Tax Standards committee (to whom the senior lawyer complains of the younger one's plan), and then to Congress (to whom he turns to reform the problems exploited by the younger lawyer's plan).³³⁶ Professor Cooper lectures the younger lawyer on tax ethics, which he describes as more "basic and transcendent" than substantive tax.³³⁷ He said that there is "some mix" in the tax lawyer's duty of "avoidance-seeking" with "allegiance to the fisc and to higher principle," which means some things are "wrong, even if they work" and arriving at the right point requires one to "agonize" in the "quest to sort out right from wrong."³³⁸ He contrasted this with the younger lawyer's "modern" approach, one of "cost-benefit analysis," which exploits the audit lottery in carrying an argument "as far as we can, so long as the downside risk is not too bad."³³⁹ Professor Cooper divided the tax lawyer's advising role into (1) advising on a "non-tax-motivated transaction that the client has already determined to pursue" and (2) advising on "how to save taxes as an end itself, without any particular transactional objectives in mind."³⁴⁰ The client's nontax objectives meaningfully constrain the lawyer in the first, but in the second, there is "only the lawyer's wisdom and self-restraint."³⁴¹ Without wisdom and self-restraint, the tax lawyer would resort to a "smart aleck's tax gimmick[s]."³⁴² These gimmicks shared several marks: "creating an unintended [tax] benefit out of quirks" of the law, pursuing tax benefits that have "unlimited" scope (being the product of quirks), using knowledge known only to "tax avoidance cognoscenti," and relying on a "low profile" on the tax return.³⁴³ In contrast to these smart aleck gimmicks, acceptable tax planning availed the client of tax benefits intended by Congress, even if not "intended for us;" meaning tax benefits that have some limit to them, being intended (at least for someone) by Congress; benefits that are known to

336. The article begins with the young lawyer's tax plan. Cooper, *The Avoidance Dynamic*, *supra* note 335, at 1554–77. The younger and senior partner exchange memorandums, with the younger partner defending his plan legally and ethically while the senior partner criticizes it. *Id.* at 1577–92. The client decides to use the plan of the younger partner, and the senior partner reports the plan to the Subcommittee on Practice Standards of the bar association Section on Taxation. *Id.* at 1592–93. Eventually the senior partner takes his concerns to Congress to address the problems raised by this plan. *Id.* at 1596–622.

337. *Id.* at 1577.

338. *Id.* at 1578.

339. *Id.*

340. *Id.* at 1581.

341. *Id.* at 1582.

342. *Id.* at 1586.

343. *Id.*

Congress and the IRS as well as “any orthodontist or orthopedist” and that will be disclosed acceptably on the return.³⁴⁴ The responsible tax lawyer, Professor Cooper argued, was to give advice that respected the basic structure of the tax law, thereby overcoming the “great temptation to tout clever dodges[] because it makes us look smart,”³⁴⁵ and better “serv[ing] the law, ourselves, and even our clients.”³⁴⁶

B. Guidelines of Tax Lawyers

In pre-1965 articles included in Professor Bittker’s anthology, both Merle Miller and Professor John Maguire suggested the usefulness of written office conduct codes for tax lawyers,³⁴⁷ which Frederic Corneel in 1972,³⁴⁸ and then the Tax Standards Committee in 1978, produced.³⁴⁹ The two were substantially the same, as Mr. Corneel was the Chairman of the committee when its guidelines were drafted and was one of the two principal draftsmen of the committee versions.³⁵⁰ The guidelines were not drafted to change the standards of the tax bar so much as to educate less-experienced tax lawyers as to the norms of more-experienced tax lawyers,³⁵¹ specifically as to the fact that not everybody does “it”—that is, “sham and corner cutting.”³⁵² Mr. Corneel’s version presented the guidelines at the conclusion of an article in which he discussed the results of a polling of “approximately 100 Boston tax practitioners” as to “a variety of ethical problems” that commonly occurred in tax practice.³⁵³ He did not set out to resolve those ethical problems by applying ethical standards; rather, he set out to report how those problems are, in fact, resolved by those he considered sufficiently experienced to teach

344. *Id.*

345. *Id.* at 1588.

346. *Id.*

347. Corneel, *Ethical Guidelines*, *supra* note 115, at 35.

348. *Id.* at 1.

349. *Guidelines to Tax Practice*, *supra* note 203.

350. *Id.* Mr. Corneel also drafted a model set of guidelines for use by the nonlawyer employees in the office. Frederic G. Corneel, *The Code and the Law Firm*, 63 A.B.A. J. 570 (1977).

351. In his version, Mr. Corneel wrote that it was intended to be “a primer for young attorneys entering upon tax practice.” Corneel, *Ethical Guidelines*, *supra* note 115, at 1. Whereas the committee version as described as intended for tax practitioners who are not themselves experienced. *Guidelines to Tax Practice*, *supra* note 203, at 551.

352. *Guidelines to Tax Practice*, *supra* note 203, at 551.

353. Corneel, *Ethical Guidelines*, *supra* note 115, at 5.

the newer generation of practitioners.³⁵⁴ The guidelines addressed audits (focusing on avoiding misrepresentation)³⁵⁵ and return preparation (due diligence and reasonable basis).³⁵⁶ As to tax planning, the advice would be against any plan “bound to fail if all of the facts become known to the Service,” usually excluding transactions “entirely lacking in economic substance and intended solely to conceal or mislead,” and usually against “borderline plans since borders in taxation frequently shift.”³⁵⁷ As to tax shelters, the guideline was to assist only when “there is a substantial likelihood that the tax consequences will be resolved in favor of the taxpayer” and to always remember that giving an opinion “may be taken . . . as our endorsement” of the shelter.³⁵⁸

C. Duties of Tax Lawyers

The guidelines addressed tax lawyering at a practical level, but the discussion of roles and duties at a more abstract level continued from the pre-1965 literature. As Frederic Corneel put it—revealing the imprint of his own time—are tax lawyers doing anything other than helping their clients “in their unchristian endeavor to shift their tax burden to their neighbors?”³⁵⁹ If so, he wondered, how “can the tax lawyer return at night to his innocent children without ‘cheeks incarnadined by a blush of shame?’”³⁶⁰ Mostly, there was agreement that the tax lawyer had duties beyond those to the client, such as those to the tax system, the profession, or himself.³⁶¹ The discussion

354. The use of professional custom as setting ethical standards was an approach also used by Henry Sellin. Sellin, *Professional Responsibility*, *supra* note 117, at 589.

355. *Guidelines to Tax Practice*, *supra* note 203, at 552–53. Discovery of “clear and substantial mistake[s]” on prior returns was to be followed by informing the client of the mistake and the absence of a requirement of filing an amended return—accompanied with the advice that “a tax that is owing is a debt” and that an amended return should nevertheless be filed and the tax paid. *Id.* at 553.

356. The guidelines required a reasonable basis for return preparation (including the prudence of documenting the reasonable basis to avoid penalty), a rejection of exploiting the audit lottery, the duty to make “further inquiry” when there is an indication “that the material supplied to us may be incorrect or incomplete,” and the potential for the need to withdraw if a client disregards advice as to the return. *Id.*

357. *Id.* at 554.

358. *Id.*

359. Corneel, *Ethical Guidelines*, *supra* note 115, at 2.

360. *Id.*

361. *See, e.g.*, Sellin, *Professional Responsibility*, *supra* note 117, at 585 (citing WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 3); Sax, *Shelter Opinions*, *supra* note 151, at 30; Walters, *Ethical and Professional Responsibilities*, *supra* note 327, at 25–26; Garbis, *Tax Professional*, *supra* note 159, at 23–24.

of these duties was premised on some points of general agreement: the protection of the tax system,³⁶² the condemnation of exploiting the audit lottery,³⁶³ and the variability of duties with roles (*e.g.*, return preparer, audit representative).³⁶⁴ Some of those roles were generally regarded as clearly adversarial, but the degree to which other roles were adversarial—or, indeed, the appropriateness of an adversarial attitude towards IRS lawyers—was commonly discussed.³⁶⁵ On the point of attitude, Henry Sellin argued that the government should never be considered an adversary, saying that a tax dispute is never “a taxpayer against the government,” but rather is always “one taxpayer against all the other taxpayers,” as the one who pays “less than his fair share” shifts the costs of our government to the rest of us.³⁶⁶ He also thought IRS agents should be given astronaut-like respect for their role in the tax system.³⁶⁷

Frederic Corneel answered his own question (about “unchristian” burden-shifting) by saying that a world without tax lawyers would be unjust, as only the IRS would know about tax laws,³⁶⁸ and that tax lawyers served both clients and the system by providing assurance—both that the taxes that should be paid are and, just as importantly, that the taxes that should not be paid are not.³⁶⁹ He added that, while “this does not mean that in terms of Judeo-Christian ethics the work of a tax lawyer ranks with the nursing in a leper colony,” it is a socially necessary work that ought to be done well.³⁷⁰ But Mr. Corneel joined with others to argue that in addition to the good this work does for the client, the tax lawyer also ought to devote significant time to reforming—primarily simplifying—the tax law.³⁷¹ Others, such as David

362. *See, e.g.*, Sax, *Shelter Opinions*, *supra* note 151, at 38.

363. *See, e.g.*, Roberts et al., *Complexity*, *supra* note 254, at 330; Nolan, *Audit Coverage*, *supra* note 138, at 426; Sellin, *Professional Responsibility*, *supra* note 117, at 597; Sax, *Shelter Opinions*, *supra* note 151, at 36.

364. *See, e.g.*, Walters, *Ethical and Professional Responsibilities*, *supra* note 327, at 28–29 (as return preparer), 29–32 (during audit), 33–34 (as litigator), 34–37 (as planner); Patterson, *Tax Shelters*, *supra* note 161, at 1171.

365. *See, e.g.*, Corneel, *Ethical Guidelines*, *supra* note 115, at 16; Sellin, *Professional Responsibility*, *supra* note 117, at 606; *Questionable Positions*, *supra* note 143, at 21, 26; *Proposed Regulations Threaten Adversary System*, *supra* note 267; Southworth, *Redefining the Attorney’s Role*, *supra* note 303, at 910; Sax et al., *Report of the Special Task Force*, *supra* note 170, at 458.

366. Sellin, *Professional Responsibility*, *supra* note 117, at 608 (emphasis omitted).

367. *Id.* at 587.

368. Corneel, *Tax Planning Teaching*, *supra* note 112, at 222.

369. Corneel, *Ethical Guidelines*, *supra* note 115, at 2.

370. *Id.* at 3.

371. *Id.* at 36; Roberts et al., *Complexity*, *supra* note 254, at 327–31, 367–73. IRS Commissioner Jerome Kurtz wanted more lawyers who really understood

E. Watts, Vice-Chair of the Tax Standards Committee, emphasized that the lawyer's devotion to the client's knowledge and, just as importantly, the client's awareness of the lawyer's devotion, serves not only the client, but the system itself by building taxpayer confidence in the system, rightly informing tax reporting and easing the administrative burdens of the IRS.³⁷² Former government lawyer-turned-private practitioner Johnnie M. Walters thought the lawyer's duties to the client and the tax system (which supports both "our democratic system of government and private enterprise")³⁷³ were fulfilled by the same result the Government should be seeking: the correct result "under the circumstances, and facts, and the applicable law."³⁷⁴ A NYSBA Tax Section committee contended that the good tax lawyers did for both clients and the public was in providing conservative tax advice, which helped to turn "their backs and their clients' backs" on questionable schemes.³⁷⁵ This restraining effect of conservative tax advice protected both the client and the system.³⁷⁶ Not all explanations of a tax lawyer's duties were so conventional, however. A much more radical position was taken by Harvard Law Professor Ray Patterson, who declared the bar's ethical interpretations to be self-serving.³⁷⁷ He argued that the lawyers' duties were derived from the client's legal obligations rather than the bar's ethics rules and that the taxpayer's legal duty of candor meant the lawyer had to reveal the weaknesses of the client's position to the IRS.³⁷⁸

D. *Separate Rules for Tax Lawyers*

The discussion of special duties for tax lawyers prompted an obvious question: whether or not tax lawyers should have a code of professional conduct that differed in some ways from the one generally applicable to lawyers. The 1965-1985 period was an especially good time for the question, given that during this period the code of conduct for lawyers underwent significant changes, with the tax bar invited to participate.³⁷⁹

the technical issues of the tax system to provide their private views on proposed regulations. See Byrne, *Reform Agenda*, *supra* note 192, at 4.

372. David E. Watts, *Professional Standards in Tax Practice: Conflicts of Interest, Disclosure Problems under Regulatory Agency Rules, Potential Liabilities*, 33 N.Y.U. ANN. INST. ON FED. TAX'N 649, 650-51 (1975) [hereinafter Watts, *Conflicts of Interest*].

373. Walters, *Ethical and Professional Responsibilities*, *supra* note 327, at 25.

374. *Id.* at 26.

375. Roberts et al., *Complexity*, *supra* note 254, at 369.

376. *Id.* at 331, 369-70.

377. Patterson, *Tax Shelters*, *supra* note 161, at 1176.

378. *Id.*

379. See *supra* Part I.

The Tax Standards Committee had been appointed in 1962, and in its first report had identified the possibility that there may be “new responsibilities voluntarily to be assumed by lawyers in the tax practice, and if so, this could be made the subject of a new Canon of Ethics.”³⁸⁰ Determining whether or not tax lawyers ought to have a different professional code became an ongoing project for the committee.³⁸¹ The opportunity to establish a special code for tax lawyers became significant in 1964 when the ABA created a Special Committee on Evaluation of Ethical Standards—the “Wright Committee”—to draft rules intended to replace the Canons, which had been in effect since 1908.³⁸² When the Wright Committee began its work, the Chairman of the Tax Standards Committee “inquired of the Tax Section Committee whether the revision of the Canons of Ethics should provide special rules for tax lawyers. Such survey found the Committee overwhelmingly opposed to such an approach.”³⁸³ Curiously, this survey is not mentioned in the reports of the Tax Standards Committee but is mentioned in a footnote in an article later written by the then-Chair Marvin K. Collie.³⁸⁴

It may be that a change in the chair and membership of the Tax Standards Committee changed its course, narrowing its focus to commenting on the applications of the Canons. When Mr. Collie signed the 1969 Report of the Tax Standards Committee, he opened it with a history of the committee, writing that it had been created “primarily as an ombudsman for the Tax Section with respect to” the Wright Committee’s work in drafting a new Code.³⁸⁵ He added that there “was very little for the Section Committee

380. Miller, *Report of the Special Committee, July 1963*, *supra* note 76, at 270.

381. *Special Committee on Standards of Tax Practice*, BULL. SEC. TAX’N, Jan. 1964, at 35; Miller, *Report of the Special Committee, Jan. 1964*, *supra* note 76, at 37; Miller & Grosvenor, Jr., *Report of the Special Committee, July 1964*, *supra* note 89, at 272.

382. Although there had been discussion of reforming the professional standards, the proximate reasons for the creation of the committee “remain elusive.” Ariens, *American Legal Ethics*, *supra* note 63, at 433–34. About this time, Wall Street lawyers were questioning the sufficiency of the Canons, and amendments to the Code of Trial Conduct of the American College of Trial Lawyers were being considered. *Id.* For the history of the committee’s work and a context for it, see *id.*

383. Collie & Marinis, *Ethical Considerations*, *supra* note 113, at 460 n.16.

384. *Id.*

385. Marvin K. Collie, *Report of the Special Committee on Standards of Tax Practice*, 22 TAX LAW. 759, 759 (1969) [hereinafter Collie, *Report of the Special Committee, 1969*]. To the extent the committee then took its primary purpose to be commenting on the new Code, its input as a committee was minimal. In January 1969 (only months before the new Code was adopted), the STP Committee was provided a preliminary draft of the new Code for its members’ comments. *Id.* at 761. A confidential preliminary draft of the new Code of Professional Responsibility

to do” until the Wright Committee issued a report.³⁸⁶ But in fact, contrary to the chair’s history, the Tax Standards Committee had been created in 1962, while the Wright Committee was not created until 1964, and the Tax Standards Committee’s first report was a lengthy overview of ethical principles related to tax practice, specific issues for the Committee to consider, and a reproduction of a very pro-tax-system statement of conduct for corporate tax executives.³⁸⁷ Nevertheless, with Chairman Collie’s polling,

was released to the committee members for personal comment in October 1968, though there is no record of their comments. In response to the January 1969 preliminary draft were only three comments directly related to taxation. One comment was as to a footnote summarizing case law, to the effect that criminal violations of the tax law did not involve “moral turpitude” for disciplinary purposes. The committee believed “the Code should disagree with such implication at least if the violation is a felony.” A second comment was a technical comment on the limitations of holding oneself out as a specialist. *Id.* The issue of specialization came under considerable discussion during this period. The members of the committee were generally unenthusiastic, ambivalent, or opposed to specialization but believed it inevitable. *Id.* at 760. They also doubted that tax lawyers should be considered “specialists,” even if nontax lawyers thought tax lawyers were. *Id.* at 762; *see also Committee Activities*, BULL. SEC. TAX’N, Jan. 1965, at 5, 17; Kostelanetz, *Report of the Special Committee, July 1966*, *supra* note 111. The broadest comment was that the new Code provided “no real answer . . . to the ‘dual responsibility’ question” nor to the question of when “in the administrative process the governmental representative ceases to be an advocate and becomes a ‘tribunal.’” Collie, *Report of the Special Committee, 1969*, *supra*, at 761. When the new Model Code of Professional Responsibility became effective on January 1, 1970, its failure to address the dual responsibilities of tax lawyers and when the government was to be considered an adversary were not addressed.

386. Collie, *Report of the Special Committee, 1969*, *supra* note 385, at 759.

387. Miller, *Report of the Special Committee, July 1963*, *supra* note 76, at 267–75. When the Tax Standards Committee was created, it was charged with raising the ethical level of practice among tax lawyers. *Chairman’s Page, Apr. 1962*, *supra* note 75, at 3. The committee located its concerns as “part of the study of morality and ethics in business, now preoccupying many people.” Miller, *Report of the Special Committee, July 1963*, *supra* note 76, at 268. The committee reproduced in its annual report standards of conduct for the tax executive adopted by the Tax Executives Institute, including “(1) He accepts taxes as the cost of civilization and he accepts the laws imposing taxes as the mechanisms for distributing that cost among businesses and individuals; (2) [I]f a tax law or a combination of tax laws appears open to an interpretation that would give . . . an advantage which was not considered in the enactment of such law or laws, he will have due regard for the interests of society in sound tax policy; (3) [W]ith respect to efforts to have the tax laws changed, . . . he will place the interests of society in sound tax policy before both his and his company’s interests and the interests of his company before his own interests; (4) He accepts each government representative with whom he deals as a person devoted to fulfilling the obligation to collect revenue honorably in accordance

the consideration of a special code for tax lawyers was set aside, and though occasionally mentioned by writers over the years, never pursued by the tax bar.³⁸⁸

E. *Liabilities for Tax Lawyers*

As part of the debate over tax shelter opinion standards, the new penalty standard on taxpayers enacted in 1982 requiring substantial authority and a reasonable belief that the tax treatment was more likely than not proper³⁸⁹ rendered negative opinions of little to no value and thereby rendered moot a significant debate over the regulation of opinion-writers.³⁹⁰ Even putting aside the 1982 penalty, during this 1965-1985 period there was significant consideration of the role of penalties. In 1974 Shearman & Sterling's James Rowen proposed a new taxpayer penalty for underpayments attributable to certain types of undisclosed positions (*e.g.*, contrary to rulings or involving transactions with related parties),³⁹¹ and within a few years thereafter, the Tax Standards Committee began studying the usefulness of increasing penalties on taxpayers.³⁹² Of course, following the 1976 legislation that created penalties for tax return preparers who understate taxpayer liability through unreasonable positions or willful or reckless conduct, tax lawyers had to consider more carefully their own exposure to penalties, not just their clients'.³⁹³ There was also increasing concern as to criminal charges being brought against tax lawyers for inappropriate advising or opinion writing.³⁹⁴ As one tax lawyer summarized near the end of the period, the "tax professional is far more vulnerable to the I.R.S. and taxpayers than previously. There can no longer be aggressive planning and reporting without concern for penalty exposure for the taxpayer and/or the professional."³⁹⁵

However, it was not only tax-related penalties that were of increasing concern. The use of tax opinions in the securities sales literature

with law; (5) He will present without concealment the facts required in tax returns and the facts pertinent to the resolution of questions at issue with representatives of the government imposing the tax." *Id.* at 268-69.

388. *See, e.g.*, Corneel, *Ethical Guidelines*, *supra* note 115, at 35.

389. I.R.C. § 6621(b)(2)(B) (1982); *see also* DeLee, *Tax Shelters*, *supra* note 45, at 448.

390. *See supra* Part III.A.

391. Rowen, *Lawyer Advise*, *supra* note 97, at 237, 262-63.

392. Corneel, *Committee Report, 1979*, *supra* note 207, at 532.

393. I.R.C. § 6694 (1976).

394. *See, e.g.*, David F. Pike, *New Salvos in the Tax Shelter War; IRS, Justice Step Up Attack*, NAT'L L.J., Mar. 12, 1985, at 12; Santi, *Legal Liability*, *supra* note 142, at 418-19, 427-28.

395. Garbis, *Tax Professional*, *supra* note 159, at 23.

and the duties to the investors exposed lawyers to potential liability not only from potential investors but also from the SEC.³⁹⁶ At least one tax lawyer worried about the “inter-agency coordination” of the IRS and SEC³⁹⁷ as well as the relevance of state authorities premised on state securities or consumer protection laws.³⁹⁸ David Watts, Vice-Chair of the Tax Standards Committee, considered the “principal risks of incurrence of liability in connection with rendering tax opinions” to “arise under the Federal securities laws,”³⁹⁹ with claims that could be “staggering.”⁴⁰⁰ Although securities-related liabilities were mentioned repeatedly, there was growing concern over professional liabilities in all its forms. Articles were written specifically on the malpractice liabilities of tax lawyers,⁴⁰¹ and one concluded that not only must the lawyer “protect the client, third parties and the I.R.S.—but he must also protect himself.”⁴⁰² The concern that the tax lawyer’s “focus must be on protection at every stage”⁴⁰³ prompted Marvin Garbis to offer his “law of survival” on these issues: “If you can’t completely solve a tax compliance problem, at least make it someone else’s.”⁴⁰⁴ Clearly, whatever the theoretical duties of a tax lawyer, or whatever the standards in Circular 230 or an ABA opinion, the risk of civil liabilities and malpractice suits were demanding increased attention.

V. REFLECTIONS ON LEGAL ETHICS FOR TAX LAWYERS, 1945-1985

The 1965-1985 literature is quite unlike its 1945-1965 counterpart in several ways. The pre-1965 literature is dominated by contributions from individuals writing as individuals.⁴⁰⁵ Their writings are more individualistic, more personal—conveying their personal tastes, revealing their professional pressures, and articulating personal perspectives.⁴⁰⁶ None of the writers were focused on professional ethics canons or potential liabilities, making only

396. See, e.g., Nolan, *Audit Coverage*, *supra* note 138, at 429; Weber et al., *Tax Advisors*, *supra* note 92, at 613; Sax, *Shelter Opinions*, *supra* note 151, at 16; Burrell, *Legal Malpractice*, *supra* note 239, at 270–71; Gimenez, *Securities and Tax Liabilities*, *supra* note 232, at 25–28, 42–43, 46.

397. Gimenez, *Securities and Tax Liabilities*, *supra* note 232, at 28.

398. *Id.* at 36–38.

399. Watts, *Conflicts of Interest*, *supra* note 372; see also, e.g., Burrell, *Legal Malpractice*, *supra* note 239, at 270–71.

400. Watts, *Conflicts of Interest*, *supra* note 372, at 659.

401. See, e.g., Santi, *Legal Liability*, *supra* note 142, at 404–11; Burrell, *Legal Malpractice*, *supra* note 239, at 270–71.

402. Burrell, *Legal Malpractice*, *supra* note 239, at 275.

403. *Id.*

404. Garbis, *Tax Professional*, *supra* note 159, at 24.

405. See, e.g., Hatfield, *Legal Ethics*, *supra* note 4, at 5–6, 9, 32.

406. See, e.g., *id.* at 46–55.

incidental references to either.⁴⁰⁷ They referenced the state of the world and the needs of their government and focused on their civic duties, relating their professional roles within the tax system to those civic duties.⁴⁰⁸ Given their government's need for revenue and the voluntary assessment system feeding the revenue, they pondered the specialness of their roles as tax lawyers.⁴⁰⁹ They debated whether there were special duties of tax lawyers to the system, at least when *advising* clients on minimizing their liabilities or assessing their liabilities.⁴¹⁰ How to improve the tax-related morals of both lawyers and clients was a common concern, as was the idea that tax lawyers had a special duty to educate their clients with respect to their duties to the tax system.⁴¹¹ Whatever their opinions on abstract issues of principle, there was a near consensus on practical issues in which good ethics and good business and good tax advice conveniently coalesced.⁴¹² The 1945-1965 writers were patriotic pragmatists, comfortably convinced that good advice served their government's interests, their client's interests, and their own interests without any diminution through conflict.

In contrast, the 1965-1985 literature is largely the literature of committees rather than individuals: beginning with the 1962 appointment of the Tax Standards Committee and the 1965 Opinion of the PR Committee and continuing through the work of both of those committees on revising the 1965 Opinion, as well as the work of the Tax Section, the NYSBA Tax Section, the Boston Tax Committee, and the City Bar Association.⁴¹³ The work of the committees was mostly in reaction to external prodding, such as the Tax Section's charge to the Tax Standards Committee, the PR Committee's response to requests, and all the committees' response to the Treasury Department's proposal to regulate tax lawyers directly.⁴¹⁴ Gone were the free-flowing and wide-ranging ruminations of the individual lawyers writing in 1945-1965, and in their place were the specific issues, narrowed scope, and narrowed language of committee reports.⁴¹⁵ The specificity, scope, and language of the committee reports then determined the manner in which even the committees' critics considered the issues, resulting in the discussions becoming more tightly focused and technical.⁴¹⁶ New terms of art unknown to prior generations of tax lawyers—"reasonable

407. *See, e.g., id.* at 11, 23, 43.

408. *See, e.g., id.* at 46-55.

409. *See, e.g., id.* at 16-28.

410. *See, e.g., id.* at 16-28.

411. *See, e.g., id.* at 10-11, 19, 22, 49-50.

412. *See, e.g., id.* at 23-28, 32-44.

413. *See, e.g., supra* Parts I, II.B, II.C, III.B.

414. *See, e.g., supra* Parts I, II.B, II.C, III.B.

415. Compare Hatfield, *Legal Ethics*, *supra* note 4, at 12, 19, 27, with *supra* Parts II.A, II.C, II.D, III.A.

416. *See, e.g., supra* Parts II.B, II.C, II.D, III.B.

basis,” “substantial support,” “substantial likelihood,” “substantial basis,” “substantial authority,” and “realistic possibility of success”—became both the centers and constraints of the debates.⁴¹⁷ While the committee reports were less philosophical, provocative, and, perhaps, profound than the earlier writers’ more personal works, the committee processes of negotiation and compromise not only made the discussion more focused and technical but more informed and nuanced—and presumably more acceptable to a greater number of tax lawyers.

While negotiation and compromise may have reduced contentiousness within the committees, there was remarkable contention between the tax expert committees and ethics experts committees. In 1965, the PR Committee rejected the Tax Standards Committee’s request for guidance on specific problems and gave instead general principles that were not informed by the considerable prior analysis and discussion of the ethical principles of tax lawyering.⁴¹⁸ And then in 1985, the PR Committee again rejected the Tax Standards Committee’s characterization of returns as nonadversarial, its emphasis on the variability of duties due to the lawyers’ role, and its claim that the standard for tax planning advice should be no lower than the return position standard.⁴¹⁹ However, unlike in 1965, the Tax Standards Committee responded by issuing its own interpretation of the PR Committee’s 1985 Opinion, restating parts of its initial proposal, and, perhaps more importantly, asserting its own weight by doing so.⁴²⁰

Why such a disagreement between the tax expert committees and the ethics expert committees? It was not that tax lawyers were arguing for special ethics rules as such an idea had been shelved for almost two decades before the 1985 Opinion duel.⁴²¹ The 1965 and 1985 Opinions of the ethics experts emphasized the adversarial role of lawyers, and perhaps their concern was that no Opinion be taken as precedent to diminish adversarial rights against the government.⁴²² However, the tax lawyers emphasized the advisor role, and also the use of tax advice to protect against penalties and its potential to exploit the audit lottery, which was not a potential with an analog in the adversarial system.⁴²³ The Tax Standards Committee and others who had criticized the reasonable basis standard were concerned to hold the line against overly aggressive advisors who threatened to replace more-

417. *See supra* Parts II.A, II.B, II.C.

418. *See supra* Part II.A.

419. *See supra* Part II.C.

420. *Compare supra* Part II.A, with *supra* Part II.D.

421. *See supra* Part IV.D. Query how the development of tax lawyer regulation would have differed had different ethics rules been adopted in the 1960s. Would the need for Circular 230’s expansion have arisen?

422. *See supra* Parts II.A, II.C.

423. *See supra* Parts II.B, III.B.

conservative advisors.⁴²⁴ There is no reason to suspect this was an issue of financial interests at stake in competition with aggressive advisors, as such an economic competition could be met by becoming more aggressive in advice, as the PR Committee standards arguably allowed. These tax lawyers expressed concern as to the potential damage to the tax system: revenue loss, administrative burden, and increased complexity.⁴²⁵ But perhaps there was also defense of a professional model in which satisfaction was found in respecting civic concerns while exercising broad judgment in pursuing a client's actual business objectives—rather than pursuing “a smart aleck's tax gimmicks,” as Professor Cooper put it.⁴²⁶

Unlike the considerations of legal ethics for tax lawyers before 1965, the PR Committee's 1965 Opinion began and ended with considering the Canons.⁴²⁷ This began a new approach, not just in appeal to objective standards, such as the Canons and then the Model Rules in the 1985 Opinion, but also in a focus on technicalities.⁴²⁸ It was even suggested that the technical changes between the Canons and PR Code had actually changed how tax lawyers were to understand their duties.⁴²⁹ This shift towards a legalistic approach to professional standards may partially reflect the greater shift in the bar from legal ethics towards a law of lawyering, to the extent there was buy-in to the suggestion that the technical changes were substantively relevant for tax lawyers.⁴³⁰ The focus on ethical technicalities was soon met with the focus on legal technicalities, as new penalties on taxpayers and their advisors further changed the approach to legal ethics from what had occurred prior to 1965.⁴³¹ The result was an analysis more about avoiding violations than fulfilling aspirations.⁴³² It also transformed some considerable legal ethics issues for tax lawyers into the compliance issues of their clients.⁴³³ The writers began considering what penalties for noncompliance should be, some arguing that this would be a more effective solution for the Treasury's problems than issuing professional standards for tax lawyers.⁴³⁴ Others, echoing Boris Bittker and Virginia professor John Potts Barnes in the earlier literature, argued that clarification of the lawyer's

424. *See supra* Part III.B.

425. *See supra* Part III.B. In the earlier literature, Sullivan & Cromwell's Norris Darrell had recognized the risk that more-conservative tax advisers might lose clients to more-aggressive ones. Hatfield, *Legal Ethics*, *supra* note 4, at 37.

426. *See supra* Part IV.A.

427. *See supra* Part II.A.

428. *See supra* Parts II.A, II.B, II.C.

429. *See supra* Part II.B.

430. *See Ariens, American Legal Ethics*, *supra* note 63, at 444–53.

431. *See supra* Parts II.B, II.C, III.B.

432. *See supra* Parts II.B, IV.E.

433. *Id.*

434. *See supra* Parts II.B, II.C, III.B.

duties could be reached only by beginning with the client's.⁴³⁵ Yet, what was new was asking Congress to impose statutory penalties on clients as a means of reducing client pressure on lawyers to evade their professional duties.⁴³⁶ In with calls for these penalties were also calls for more direct government regulation of tax lawyers, be it through Congress or the Treasury or the rejection of the bar as regulator.⁴³⁷ While an earlier generation of tax lawyers had sought additional guidance for lawyers advising their clients, some in this generation were seeking additional regulation of both lawyers and their clients.⁴³⁸

This growing awareness and even acceptance of increasing penalties and regulation may also reflect the growing awareness tax lawyers had of their exposure to liabilities from various directions. The earlier generation of writers did not focus on the potential liabilities imposed on the lawyer, though there were passing references to malpractice concerns and securities laws.⁴³⁹ But in 1965-1985, the potential liabilities considered by the tax lawyers were not just related to the new tax standards, but also to criminal laws and securities suits by both investors and the SEC.⁴⁴⁰ There was also considerable attention devoted to the potential malpractice liabilities.⁴⁴¹

The openness of some tax lawyers to more direct governmental regulation was in stark contrast to the government skepticism of others. Given the economic malaise of the 1970s and the conservative realignment of the 1980s, Mark Gimenez's writing that "when the government becomes bored with regulating airplanes, trucks and railroads, and begins regulating lawyers," the legal system will become bankrupt too, presumably hit a resonant chord among some lawyers of the day.⁴⁴² Many of whom, including the NYSBA Tax Section, described the Treasury's proposed amendments to Circular 230 as striking at fundamental American rights to adversarial challenges to their government.⁴⁴³ More subtly, but perhaps more revealing of the degree to which government skepticism had grown, were those who proposed that the solution for the abusive tax-shelter problem was neither increased penalties on taxpayers or advisors, but rather lowered tax

435. Compare Hatfield, *Legal Ethics*, *supra* note 4, at 30, with *supra* Parts II.B, IV.C.

436. See *supra* Part III.B.

437. See *supra* Parts II.B, III.B.

438. Compare Hatfield, *Legal Ethics*, *supra* note 4, at 55, with *supra* Parts II.B, III.B.

439. The reference to securities laws was speculation as to their influence on those advocating a high degree of disclosure on returns. See Hatfield, *Legal Ethics*, *supra* note 4, at 32, 42.

440. See *supra* Parts I, II.A, III.B, IV.E.

441. *Id.*

442. Gimenez, *Securities and Tax Liabilities*, *supra* note 232, at 45.

443. See *supra* Part III.B.

burdens—as if the high rates justified a high rate of evasion.⁴⁴⁴ In the 1945-1965 period, there was caution against “police state” and “Big Brother” mentalities in tax administration, but this caution was during a time of broad bipartisan support for the tax system with its extraordinarily high marginal rates and the government revenue needs it satisfied, especially as these related to winning the Cold War.⁴⁴⁵ But, of course, by 1985 (post-Vietnam, post-Watergate, and post-reelection of Ronald Reagan) the attitude towards the federal government had changed considerably, and it is not surprising that this might affect how some lawyers understood their relationship to the government and their clients’ money. At least one writer, however, resisted this skepticism—Henry Sellin thought IRS agents should be given astronaut-like respect and that the government should never be considered an adversary.⁴⁴⁶ However, his attitude is the exception that proves the rule as to the change in tone, given how out of place it sounds in 1965-1985—and how commonly sounded it was in 1945-1965.⁴⁴⁷

Whatever the degree of skepticism of government programs and regulations, legal ethics for tax lawyers were not entirely reduced to avoiding penalties and liabilities during this period. The claim that tax lawyers had special duties continued, mostly on the same grounds claimed in 1945-1965, especially the self-assessment nature of the tax system and the nonadversarial role of the tax lawyer as advisor.⁴⁴⁸ Unlike the earlier literature, the 1965-1985 literature’s duty references were not usually tied to patriotism.⁴⁴⁹ Like the earlier literature, the 1965-1985 writers did not advance a specific “special” duty but rather used the concept more as a catch-all for the complex considerations that tax lawyers had in a self-assessing tax system. In large part, perhaps this is best understood as an attempt to articulate the ways in which the tax lawyer provided value to both the client and the system. As Frederic Corneel asked, are tax lawyers doing anything other than helping their clients “in their unchristian endeavor to shift their tax burden to their neighbors”?⁴⁵⁰ In terms of advice, the suggestions included that the tax lawyers benefitted the system by easing the burden on the administrative system with sound advice, availing their clients of intended benefits, and protecting the basic structure of the tax law.⁴⁵¹ The

444. *Id.*

445. See Hatfield, *Legal Ethics*, *supra* note 4, at 2–3, 12–15.

446. See *supra* Part IV.C.

447. Compare Hatfield, *Legal Ethics*, *supra* note 4, at 12–14, with *supra* Part IV.C.

448. Compare Hatfield, *Legal Ethics*, *supra* note 4, at 17–18, 20–21, with *supra* Parts IV.C, IV.D.

449. Hatfield, *Legal Ethics*, *supra* note 4, at 11–14, 19–20.

450. Corneel, *Ethical Guidelines*, *supra* note 115, at 2; see also *supra* Part IV.C.

451. See *supra* Parts IV.A, IV.C.

loudest echo of reasoning with the earlier writers was the sentiment that the tax system was served by conservative advice, or as Merle Miller had put it in 1952: “The man who can kill off a bad tax scheme at its inception is contributing greatly to the well being of the country at large.”⁴⁵²

Indeed, whatever the differences between the writers in the two periods, both sets may largely be understood as trying to articulate what divided good, high-quality advice from bad, low-quality advice. In both eras, the understanding of good advice tended to reflect an ideal of broad judgment over narrow technicalities. Perhaps this reflects a certain philosophy of law shared by some tax lawyers over these decades, or perhaps it reflects a high degree of personal satisfaction found in a certain professional approach. Ironically, the 1965-1985 attacks on the technical orientations to tax advice were themselves increasingly technical.⁴⁵³ By 1985, lawyers were left subject to incomparably more technical regulation of their profession than they had in 1965, though the tax shelter industry was far more damaged by the passive activity loss rules and taxpayer penalty provisions than this new approach to professional regulation.

Whatever the effect of the new approach to professional ethics in terms of client compliance and revenue protection, the change in tone between the periods is attention-grabbing. It is tempting to infer that the change reflects perhaps a loss of innocence in America or an increase in realism in Americans between 1945 and 1985. But given that the writers of the 1945-1965 periods were the ones who had witnessed the Soviet liberation of Auschwitz and the American obliteration of Hiroshima, it is implausible to argue they lived in a morally simpler or more innocent time. They certainly did not have a more naïve view of tax administration either, given that the 1950s’ corruption scandals at the Bureau of Internal Revenue (which resulted in renaming the bureau as the IRS) had no counterpart in 1965-1985.⁴⁵⁴ If the change cannot be described in large part as due to a loss of innocence of some type, one might conclude at least a loss of optimism as to the government’s role. Generally, of course, the post-Vietnam and post-Watergate years in America are associated with a decline in trust in public institutions. But many of the 1965-1985 writers evidence considerable trust in the federal government. After all, there were the calls for greater (not less) government involvement in their clients’ affairs through greater penalties to

452. Compare Hatfield, *Legal Ethics*, *supra* note 4, at 40 (quoting Miller, *Morality in Tax Planning*, *supra* note 81, at 1076), with *supra* Parts IV.A, IV.C.

453. See *supra* Parts II.B, II.C, III.B.

454. More than 200 then-current and former tax officials resigned, were removed, and/or were indicted. In 1952, Truman released a plan that reorganized the Bureau, and the reorganization carried over into the Eisenhower administration. Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717, 755-59, 761-64 (2001).

encourage compliance.⁴⁵⁵ There were also intense and sustained efforts to cooperate with the Treasury Department's call for greater standards and oversight.⁴⁵⁶ Indeed, in the end with Treasury's adoption of the bar's standards, the episode may be interpreted as a considerable success story of cooperation with the government.

Even if, in substantive terms, a particular tax scheme was to be rejected by lawyers in both periods, one wonders if something was lost or something gained with the differences in understanding why the scheme should be rejected. What are the differences between Merle Miller analyzing the transaction in 1952 while considering his "great duty to the country that . . . educated him, and made possible his present success," and a tax lawyer in 1985 trying instead to decide if the conclusion had a "realistic possibility of success on the merits if litigated"?⁴⁵⁷ What are the differences between Merle Miller's conscious devotion to his county's revenue needs and a lawyer in 1985 devoted to his client's need to avoid a penalty? Is "realistic possibility of success" clearer in practical terms than the older appeal to patriotism? Does pondering penalties rather than patriotism better clarify how to proceed? Is aiming to avoid penalties on your client the same as yourself aiming to be ethical? Does it make any difference in terms of professional anxiety, aspiration, or satisfaction? Does it make a difference in who counts as a good tax lawyer? Does it make a difference in understanding the good it is that tax lawyers do?

455. *See supra* Part III.B.

456. *See supra* Parts II.B, II.C, III.B.

457. Compare Hatfield, *Legal Ethics*, *supra* note 4, at 19 (quoting Miller, *Morality in Tax Planning*, *supra* note 81, at 1083), with *supra* Parts II.C, II.D.

