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Author
Ventry, DJ

Publication Date
2017-03-07

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Reasonable Basis and Ethical Standards Before 1980

By Dennis J. Ventry Jr.

Dennis J. Ventry Jr. is a visiting scholar in taxation at the UCLA School of Law and an assistant professor of law at the American University Washington College of Law (beginning fall 2006).

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I. Introduction

The Treasury Department dropped a bombshell on the tax practitioner world in September 1980. Only eight months after indicating that it was willing to wait a reasonable period for the organized bar to offer guidance regulating the issuance of tax shelter opinions and the participation of tax lawyers in the thriving tax shelter market, the Treasury released its own guidelines. Proposed amendments to Circular 230 set new standards for legal opinions used in the promotion of tax shelters and outlined punitive disciplinary criteria for practitioners failing to meet the new rules. Treasury’s actions incensed the tax bar, which had responded to Treasury’s solicitation by beginning to formulate new ethical guidelines for tax lawyers. The American Bar Association Section of Taxation had set out about drafting a suggested ethics opinion for the ABA’s Standing Committee on Ethics and Professional Responsibility, while the New York State Bar Association Tax Section established a committee to recommend standards for the issuance of tax shelter opinions. However, the organized bar’s longstanding reluctance to regulate — and punish — the misconduct of members providing legal opinions enabling and fueling the tax shelter industry suggested that Treasury’s preemptive move was more than justified. Fully appreciating the magnitude of Treasury’s 1980 proposed amendments to Circular 230 requires us to understand the universe of ethical standards that predated the new rules.

II. Opinion 314: ‘Noncompliance With Scienter’

The organized bar facilitated the professional misconduct of tax lawyers by setting low ethical standards for tax practice. ABA Formal Opinion 314, issued in 1965, promulgated guidelines governing advice to clients in the preparation of tax returns. The ambit of Opinion 314 quickly widened to represent the prevailing ethical standards “not only for advice to clients in return preparation, but generally for lawyers in their relationship with the Internal Revenue Service.” In advising a return position, the lawyer could “freely urge the statement of positions most favorable to the client just as long as there is reasonable basis for those positions.” When the lawyer formulated a basis that a particular transaction did not generate taxable income, “or that certain expenditures are properly deductible as expenses,” he had “no duty to advise that riders be attached to the client’s tax return explaining the circumstances surrounding the transaction or the expenditures.” The lawyer owed an affirmative duty “not to mislead the Service,” but he was under “no duty to disclose the weaknesses” of his client’s case. Moreover, he was obligated to be “candid and fair” with the IRS and to represent his client “within the bounds of the law and without resort to any manner of fraud or chicane.” Less honorable was the characterization of the IRS as an “adversary party rather than a judicial tribunal” or even a “quasi-judicial institution.” In highly populist fashion, Opinion 314 stated perfunctorily that “few will contend” the IRS “provides any truly dispassionate and unbiased consideration to the taxpayer. Although willing to listen to taxpayers and their representatives and obviously intending to be fair, the service [denied the courtesy of capitalization] is not designed and does not purport to be unprejudiced and unbiased in


5John André LeDuc, “The Legislative Response of the 97th Congress to Tax Shelters, the Audit Lottery, and Other Forms of Intentional or Reckless Noncompliance,” Tax Notes, Jan. 31, 1983, p. 363 at 365.

6ABA Committee on Professional Ethics, Formal Opinion 314 (Apr. 27, 1965). Citations in this paragraph, unless otherwise indicated, are from Opinion 314.

7The Association of the Bar of the City of New York, Special Committee on the Lawyer’s Role in Tax Practice, “The Lawyer’s Role in Tax Practice,” 36 Tax Law. 865 (Summer 1983).

8ABA Committee on Professional Ethics, supra note 6. Emphasis added.
the judicial sense.” The lawyer served as zealous advocate for the taxpayer-client and took comfort in the opinion’s conclusion — independently surprising but objectively shocking in a statement purporting to outline ethical behavior — that “a wrong, or indeed sometimes an unjust, tax result in the settlement of a controversy is not a crime.” Only barely, though.

The reasonable basis standard permitted tax lawyers to “support the use of any colorable claim”10 and to advise “noncompliance with scienter.”11 The familiar jurat on the Form 1040 required the taxpayer to attest “under penalties of perjury” that “I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete.” Section 7206, moreover, made it a felony for an individual to “willfully” make and subscribe to a tax return “which he does not believe to be true and correct as to every material matter.” Thus, as James Rowen observed, “If a taxpayer’s duty in filing a tax return is to report his income to the government according to his honest belief of what the present law requires, then a ‘reasonable basis’ opinion would not justify him in taking a position.”11 Not only did the reasonable basis standard facilitate “reckless disregard under traditional standards,”12 but it also permitted tax lawyers to advise positions they knew did not comply with the tax law. In fact, under the new rules, “A poor lawyer is he who cannot find a reasonable basis for his client’s position.”13 Moreover, because the standard permitted the lawyer to take into account the likelihood of a client being audited, it allowed attorneys to advance any tax position just short of outright deception.14 It facilitated overly aggressive transactions and a lowest-common-denominator kind of professionalism.15 In the end, Opinion 314 created a perverse paradox, providing “a basis for rationalizing as ethical conduct that which the lawyer himself in a different context would characterize as unethical.”16

Given the foregoing, it may surprise the reader to learn that the reasonable basis standard represented an attempt by the organized bar to raise ethical standards for tax practice. At the very least, it articulated a standard when before there was none. Before Opinion 314, tax lawyers were assisted by the subjective “smell test” rather than standardized guidelines.18 Good practice versus bad practice was dictated by personal taste rather than by a matter of ethics.19 And the only thing that prevented a tax lawyer from endorsing abusive tax gimmicks and schemes was that they were “somewhat repugnant” to the practitioner.20 Commentators implored the professional associations, educational institutions, and the IRS to establish order amidst the chaos and to “address themselves to these issues more directly and systematically than they have in the past.”21 Before the ABA issued Opinion 314 in 1965, tax lawyers conducted themselves without official guidance as to whether the lawyer’s obligations to the IRS are as strict as those he owes a court, whether they were more strict, or whether they were of a different order altogether.22

It is unclear which was worse: no ethical standard or one that was “morally enervating.”23 The ABA chose the latter.

III. Fatal Flaw: Tying Tax Ethics to Legal Ethics

The fundamental flaw of Opinion 314 is that it tied tax ethics to legal ethics.24 That connection created a “jurisprudential anomaly,” according to legal scholar Ray Patterson, whereby the client’s conduct was governed by rules of law while the lawyer’s conduct was “governed by quasi-rules of law.”25 The ethical rules themselves were flawed in that they were written “as if the lawyer —

10LeDuc, supra note 5.
12LeDuc, supra note 5, at 365.
15See George Cooper, “The Avoidance: A Tale of Tax Planning, Tax Ethics, and Tax Reform,” 80 Colum. Law. Rev. 1553 (1980); comments of Jerome Kurtz, supra note 14, at 24 (stating that reasonable basis produced “the lowest common denominator. The one with the least conscience gets the best result.”).
16Patterson, supra note 13, at 1165.

17See Wolfman, Holden, and Harris, supra note 9, at 59 (“It is probable that ‘reasonable basis,’ when first articulated, was intended to set a high standard of tax return reporting”); Frank J. Gould, “Giving Tax Advice — Some Ethical, Professional, and Legal Considerations,” Tax Notes, Oct. 28, 2002, p. 523 at 532 (stating that the reasonable basis standard was designed to recognize that “the appropriateness of tax advice must better reflect the legal obligation imposed on the client by the tax law”).
19Comments of Seymour Mintz, supra note 18, at 36-37.
20Comments of H. Brian Holland, supra note 18, at 36.
23Patterson, supra note 13, at 1166.
25Patterson, supra note 13, at 1164.
has no legal relationship with the tribunal, the adversary, or with anyone except the client.”

The ethical rules “remove[d] the lawyer from the legal matrix of which he is a part,” attempting “to place him beyond, if not above, the law.”

“The unarticulated message thereby conveyed is a powerful one,” said Patterson. “Rules of ethics are merely discretionary guidelines to be given effect only as the lawyer deems appropriate. The moral rules, in effect, make the lawyer the arbiter of his own morals.”

Expansive latitude regarding what was morally right or wrong allowed equally free interpretation as to representing the client within the bounds of the law. For if tax ethics were tied to legal ethics rather than to the law obligating clients, the tax lawyer’s own moral schema shaped the parameters of the tax law as he saw it. Not only did legal ethics place the tax lawyer above the law, but they also allowed the tax lawyer to operate below the law by advising a client to take a position the lawyer knew with substantial certainty would subject the client to legal liability. As long as the tax lawyer could suppress laughter, he could ethically advise any position.

It is hard to reconcile the foregoing with nearly sanctimonious injunctions of the lawyer as zealous advocate. Indeed, it is tempting to accept the conclusion that legal ethics are governed by the law of self-interest rather than the legal obligations imposed on nonlawyers. But that was the result of tying tax ethics to legal ethics in Opinion 314. From that fundamental error other errors flowed, including inappropriately applying controversy norms and the litigation standard to the modern tax marketplace and ignoring what constituted the law governing tax practice; denying the multiple roles of the tax lawyer; treating the IRS as an adversary; ignoring the distinction between judicial processes and administrative processes; forgetting that the tax lawyer served two masters, the client and the government; and forcing disclosure standards downward.

A. Controversy Norms and Modern Legal Processes

Opinion 314 implied that the lawyer “has only one role (advocacy) to be performed as if there were only one legal process (the judicial) with only one major duty (confidentiality).” The acceptance by the ABA’s Committee on Professional Ethics treating rules governing advocacy as general principles of legal ethics, said Ray Patterson, was “a product of history, for the early codes of ethics, direct antecedents of the current Code, were drafted at a time when the lawyer’s premier, if not only, role was perceived as that of an advocate in the judicial process; consequently the codes reflected only this role and this process.” As lawyers’ roles extended beyond advocacy throughout the 20th century, and as the judicial process was joined by the administrative process and the private legal process as legal forums in which lawyers practiced, the ethical rules failed to recognize the complexity of the law as well as the lawyer’s multiple responsibilities under it.

Unlike his 19th and early 20th century counterparts, the modern tax lawyer was an adviser and planner, a return preparer, an IRS practitioner, and only occasionally an advocate and litigator. But the ABA Committee on Professional Ethics applied the rules covering a lawyer’s conduct in litigation — rules that were “of limited application, governing a specific activity” — to standards of tax practice. By treating these specialized rules governing litigation as ethical principles of widespread application, the ABA applied them in a context for which they were not designed.

Wedded to the anachronistic perspective of the lawyer as advocate, Opinion 314 considered the tax lawyer an advocate and her adversary the IRS.

The lawyer-as-advocate perspective also prevented the ABA ethics committee from examining the properly applicable ethical rule that lawyers must provide representation within the bounds of the law, and, further, to consider that rule’s implications for tax practice. As discussed above, the ABA ethics committee did not feel confined by the bounds of the law as circumscribed by the Form 1040 affidavit or the penalty provision applying to fraud and false statements, section 7206. By adopting the reasonable basis standard, the ethics committee also seemed unimpeded by the bounds of the law as defined by the Model Code of Professional Responsibility. Ethical Consideration 7-4 mandated that a lawyer’s conduct falls within the bounds of the law “and [is] therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law.” Opinion 314 required only a reasonable basis for the position, not an elevated good-faith belief. The tax lawyer armed with the sword and shield of reasonable basis could ignore legal rules imposed on clients and ethical rules imposed on other lawyers.

B. The Tax Lawyer as Advocate vs. Adviser

The tax lawyer as advocate was a litigator. He did not have to believe in the legal correctness of the position he recommended for a taxpayer, in the same way the hoary litigation standard did not require the litigator to believe in the correctness of his espoused position in representing a client with “warm zeal.” Ethical Consideration 7-4

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26Id. at 1165.
27Id.
28Id.
29ABA Ethical Consideration 7-4.
30Patterson, supra note 13, at 1164.
31Id. at 1168.
32Id. See also Ray Patterson, “Legal Ethics and the Lawyer’s Duty of Loyalty,” 29 Emory L. J. 909 (1980).
34Id.
35Id.
37ABA Canons of Professional Ethics, Canon 15 (1908). The ABA dropped “warm zeal” several degrees Fahrenheit in its (Footnote continued on next page.)
stated that the advocate “may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.” The lawyer’s conduct was “within the bounds of the law, and therefore permissible” under the good-faith standard discussed above. The only restriction on zealous advocacy was that the lawyer must not assert a position that was frivolous. And, if the not-trivial threshold meant anything more than plausible, the standard was exceedingly low. The standard was even lower for the tax lawyer under Opinion 314, in which the lawyer was deemed “an advocate before a service which itself represents the adversary point of view” who could apply the reasonable basis threshold to his conduct rather than the good-faith threshold.

The Model Code of Professional Responsibility acknowledged the role of the lawyer as adviser even if Opinion 314 did not. ABA Ethical Consideration 7-3 provided that a lawyer “may serve simultaneously as both advocate and adviser,” but “the two roles are essentially different.” When serving as advocate, the lawyer should “resolve in favor of his client doubts as to the bounds of the law”; when serving as adviser, however, a lawyer “should give his professional opinion as to what the ultimate decision of the courts would likely be as to the applicable law.” ABA Ethical Consideration 7-5 expanded on the duties of lawyer as adviser, and reaffirmed that a lawyer “furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts.” Even more fundamentally, the lawyer as advocate protects the client from past conduct, while the lawyer as adviser counsels the client about future conduct. As advocate, the lawyer is constrained by past facts, while as adviser the lawyer retains control over the content of his advice and perhaps even over the conduct of his client. As such, the lawyer as adviser can be held independently liable for his advice in a way that he cannot when acting as advocate.

Randolph Paul spoke eloquently about the dual role of tax lawyer as advocate and adviser. Ethics did not require the tax lawyer as advocate “to discard any arguments,” Paul wrote in 1953. “Once he has taken a case, the tax lawyer is obligated to present arguments even though they may contribute to tax avoidance or conflict with his own notions of what the law should be.” Further, “It is no objection to an argument that the lawyer has to put his tongue in his cheek when he presents it.” As an advocate, the tax lawyer “is engaged to dissemble, to pretend; the legal profession and our prevailing system of advocacy make a virtue of some capacities which may on other occasions be vices. The tax lawyer would be breaching his duty to his client if he indulged a sensitivity of conscience.” He was a “partisan advocate.”

The tax lawyer as adviser was almost a different person. Most importantly, he had choices. Paul did not hesitate to advise his clients “fully and frankly in choosing among the oddities in tax consequences” that emerge from different methods of accomplishing the same ultimate result. Assisting the client in reducing tax liability sometimes required “a substantial modification of an originally proposed transaction.” Those modifications must have substance, and the client might decide that its price “is more than the projected tax saving is worth. On the other hand, he may be willing to do what is required to place the transaction on the safe side of the line drawn by the statute.” The client was “entitled to counsel which makes the outline of his choice clear to him.”

As Paul saw it, his ultimate task as a tax lawyer was advisory, “to help the client without letting him venture any further than necessary into unsafe territory.” The task did not involve ethical issues because he made sure his client’s objective was legitimate. Paul even “often resolved some legal doubts in favor of the Government so that the client has a reasonable margin of safety. This too is my duty.” But at the same time, Paul said, “I would be derelict in the performance of my responsibility if I failed, because of moral scruples or because of disagreement with the policy of the statute, to guide the client as far as he can safely go in the direction of his desire.” As adviser, the tax lawyer “must take the law as he finds it” and “be careful that the client does not overstep the line of policy drawn in the statute as Congress has passed it and as the Treasury and the courts have refined that line in their interpretive regulations and decisions.” The tax lawyer as adviser brought the client right up to the line of what was permitted.

formulation of Ethical Consideration 7-1, which requires the lawyer to represent a client only “zealously;” a standard also reflected in the preamble to the ABA Model Rules of Professional Conduct.

ABA Formal Opinion 280 (1949) articulates the principle even more forcefully. The lawyer “is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. . . . His personal belief in the soundness of his cause or of the authorities supporting it, is irrelevant.”

For additional discussion of these issues, see Gould, supra note 17.

Supra note 6.

ABA Ethical Consideration 7-3.

ABA Ethical Consideration 7-5.

ABA Ethical Consideration 7-3, supra note 41 (“In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships.”).

For some commentators, this is the defining characteristic of lawyer as advocate. See Cooper, supra note 15, at 1581 (arguing that a lawyer becomes an advocate only when “presented with a set of acts that are a fait accompli”).


Id. at 418-419. Remaining citations in this paragraph are from Paul, supra note 45, at 418-419.

Id. at 420. Remaining citations in this paragraph are from Paul, supra note 45, at 420.
without crossing it. Meanwhile, the tax lawyer as advocate blurred the line, challenged the line, and even tried redrawing the line to conform to his client’s position.

C. The IRS as Adversary

It was hard to tell whether Opinion 314 considered the tax lawyer an advocate because it viewed the IRS as an adversary party, or whether it considered the IRS an adversary party because it viewed the tax lawyer as an advocate. Either way, under Opinion 314, the tax lawyer was charged with zealously safeguarding a client’s interests from an aggressive, adversarial IRS.

The first sentence of Opinion 314 declared the IRS “an adversary party rather than a judicial tribunal.” It was not even a “quasi-judicial institution.” As such, the tax lawyer advocate did not owe the IRS the same duty of disclosure he owed the courts. Rather, he was merely obligated to extend to the IRS the same candor and fairness owed “brother attorneys,” which was “admittedly adversary in nature.”

The ABA Committee on Professional Ethics treated the IRS as an adversary from the moment a lawyer began preparing a client’s tax return all the way through any subsequent dealings with the IRS. By requiring the tax lawyer to assume the role of adversary, Opinion 314 authorized the tax lawyer to resolve all disputes in favor of the client and to withhold information from the government. The adversarial message of Opinion 314 was “the antithesis of ethical conduct — it’s all right if you can get away with it.”

It may be argued that an adversarial relationship exists between the tax lawyer and the IRS when the Service undertakes an audit of a client’s tax return or in the event a tax dispute reaches the courts. But the preparation and filing of a return — the official sphere of Opinion 314 — cannot be viewed as equivalent to preparing and submitting materials in an adversarial proceeding such as a pleading in civil litigation. Indeed, as one thoughtful observer noted, the filing of a return “involves obligations that extend well beyond the filing of a personal injury suit.” Specifically, and as discussed earlier, the lawyer acts as advocate when dealing with past conduct and facts, and as adviser when dealing with future conduct and facts. Reporting a position on a tax return, although informed by completed or ongoing transactions, more often than not involves charting the course of conduct, facts, and relationships going forward. That is especially true when deciding whether to pursue an aggressive position on a tax return when the law is unsettled or ambiguous. In those instances, the lawyer acts as an adviser, not an advocate.

Preparing and filing a tax return cannot in good faith be considered an adversarial act, because the mark of an adversarial proceeding — that is, “the presence of opposing counsel who can be expected to scrutinize critically the lawyer’s statements” — is missing. The chances that a tax return will be closely examined by the government, Michael Durst has said, “are very low.” According to that argument, because the IRS “is not a fairly equipped opponent, a tax return is not governed by the usual rules of adversarial proceedings.” Accordingly, the IRS should be viewed as “a paper tiger, not a leviathan the taxpayer [nor the tax lawyer] should defeat by cunning.”

1. The judicial process vs. the administrative process

The ABA Committee on Professional Ethics perceived an adversarial relationship between the IRS and tax lawyers because it confused the legal processes at work. The tax lawyer did not operate under the traditional judicial process in advising a client on a tax position. Rather, he operated under the administrative process, a crucial differentiation that Opinion 314 “blithely ignore[d].”

“Distinctions between the highly structured, rights-oriented judicial process conducted under the aegis of a judge who does not rely on the ex parte presentation of information,” wrote Ray Patterson of Opinion 314, “and the amorphous, duty-oriented administrative process that does rely on the ex parte presentation of information, are ignored.” Permissible restrictions on the duty of candor that apply to parties in a courtroom in the administrative process are ignored.

54Gould, supra note 17, at 532.
55Durst, supra note 33, at 1034. See also Rowen, supra note 11, at 249 (“The premise of the adversary system, that the two adversaries will be in an equal position to uncover and present the facts, is unrealistic as applied to the current system. While the government’s disadvantage is overcome somewhat by the rule that places the burden of proof on the taxpayer, this rule only applies when an issue has been raised; it does not help the government to uncover the issue.”).
56Id. See also Stanley S. Surrey, Paul R. McDaniel, Hugh J. Ault, and Stanley Koppelman, Federal Income Taxation (Mineola, N.Y.: The Foundation Press Inc., 1986), at 45 (criticizing the view that filing a return represents the first step in a process that might result in an adversary relationship between the client and the IRS by noting the low audit coverage and the ability of lawyers to justify nearly any tax position under prevailing ethical guidelines).
57Falk, supra note 24, at 647-648.
58Id. at 648.
59Patterson, supra note 13, at 1169.
60Id.
presence of an adversary do not apply to the administrative process. Thus, the analogy endorsed by Opinion 314 equating the preparation and submission of a tax return with the judicial process — an analogy that essentially authorized lying by omission — was "false."

2. Serving two masters — the client and the government. The tax lawyer did not necessarily owe the client a lesser duty because a government agency was on the other side. The tax lawyer’s duty to his client was "paramount and exclusive," and his "devotion" must be "entire and unadulterated." He must treat his client better than he treats other people. The tax lawyer’s fidelity to his client naturally informed his relationship with the IRS. Thus, one might conclude that "tax proceedings in the Treasury are predominantly adversary proceedings calling for no higher ethical standards than those imposed upon attorneys engaged in general practice." Under that view, and as discussed above, the practice standard required of a tax lawyer "closely resembles the conduct of attorneys in private litigation."

But not quite. According to Paul, in tax law, the adversary of the taxpayer is his own, and the tax adviser’s own, government. The tax lawyer thus had a dual responsibility: He must serve two masters. He must be loyal to his client, but he is also duty bound to the Government to see that his client does not 'avoid his just responsibility.' He must treat his client better than he treats other people. The tax lawyer’s fidelity to his client naturally informed his relationship with the IRS. Thus, one might conclude that "tax proceedings in the Treasury are predominantly adversary proceedings calling for no higher ethical standards than those imposed upon attorneys engaged in general practice." Under that view, and as discussed above, the practice standard required of a tax lawyer "closely resembles the conduct of attorneys in private litigation."

Lest the corners turn round, the loyalty owed a client was divided. Obligations of the tax lawyer did not start and stop with zealous client advocacy. "The responsibilities of the tax adviser, qua tax adviser, may be said to end at the point of faithful attendance to his client’s interest," Paul wrote, parroting the myopic view of some tax attorneys. But that was not the "end of the tax adviser’s responsibility. He is a citizen as well as a tax adviser." Moreover, he "is more than the ordinary citizen; he is a specially qualified person in one of the most important areas of the public interest," and special qualifications brought special responsibilities which may not be passively discharged. One of those responsibilities was facilitating the smooth operation of the self-assessment tax system. "Paying taxes is not a battle aiming at the government’s defeat," Theodore Falk said. "Rather, it is a collective obligation of citizenship. Failure to obey the law can result in an adversarial proceeding," to be sure, "but obeying the law is something one does for the government, not against it." The tax lawyer should advocate for his client while also dealing fairly with the government. In so doing, he is serving both his client’s interest and the public interest.

3. Disclosure requirements: How much is too much? It was hard for the tax lawyer not to consider the IRS an adversary. But the government was not the usual opponent. For one thing, established procedures for tax disputes made "the Government more dependent upon the taxpayer than is the private litigant upon the other side in an ordinary controversy." Taxpayers had all the facts. The government received "no more than the data and facts made available...by the taxpayer, his accountant, or lawyer." In the ordinary civil case, the lawyer was free to furnish — or to refuse furnishing — facts to his adversary. In the tax case, however, with the government on the other side, more disclosure was required, thereby representing one of the significant differences between the ordinary situation and the tax situation. Candid disclosure was even more important in the presence of low audit coverage. Under that view, the government was a silent partner in all business transactions and was "entitled to a fair view of those transactions so that it may assert its claim of interest." Thus, tax lawyers should feel obligated to place the evidence of

Footnote continued in next column.

61Id. For some commentators, even the administrative process should be conducted in an adversarial manner. See Bittker, supra note 21, at 45 ("The adversary system of administering governmental rules and regulations unquestionably has its drawbacks, but I think it contributes to the preservation of a democratic society by assuring the citizen that in disputes with the government, he will have the vigorous assistance of independent practitioners.").

62Paul, supra note 45, at 421.

63Id. at 422.

64Id.

65Id. at 429.

66Id.

67Id.

68Id.

69Id.

70Id.

71Id.


73Id. Emphasis in the original.

74Id.

75Falk, supra note 24, at 648.

76Id.

77Paul, supra note 72, at 384.


79Id. at 11.

80Id.

81Paul, supra note 45, at 420.
transactions squarely on the books so that for tax minimization the documents fairly reflect the transaction.\textsuperscript{82} Ultimately, the tax lawyer should provide "open covenants even if they may not be openly arrived at."\textsuperscript{83}

There were limits, of course, on those higher disclosure standards. It was not the tax lawyer's duty to restore balance regarding the possession of relevant facts by volunteering information adverse to the client.\textsuperscript{84} In fact, there was "a shadow of Big Brother," Boris Bittker observed, in suggestions that the tax lawyer owed a special obligation to Treasury because it regulated the tax lawyer certainly owed no special obligation to Treasury because it regulated the tax lawyer owed a duty "to recommend full and fair disclosure of the facts as to items questionable in law."\textsuperscript{85} In fact, there is reason to believe that the practice standards before promulgation of Opinion 314 conformed very closely to the pro-taxpayer, antigovernment reasonable basis standard. In April 1965, the same month the ABA released Opinion 314, Bittker delivered a series of lectures at New York University in which he called for an "honest-belief" approach to disclosure that rejected the "audit assistance concept."\textsuperscript{86} In the published collection of those lectures, Bittker included a footnote to recently released Opinion 314, stating that it came to the same conclusion regarding advising a tax position and disclosure standards. While Bittker's honest-belief approach presaged the reasonable basis standard contained in Opinion 314, other commentators presaged the actual moniker. In 1963 Mark Johnson wrote that once we are convinced that a client "has a reasonable basis for an advantageous position, we can counsel and advocate that position without first satisfying ourselves that we would accept that position if we were a revenue agent."\textsuperscript{87} While there may have been more enlightened calls for standards of practice that exceeded ethical obligations under a reasonable basis standard, they were met by arguments for a more realistic set of ethical and practice guidelines.\textsuperscript{88}

Even the idealists recognized that the ethic of the profession rejected the duty "to recommend full and fair disclosure of the facts as to items questionable in law."\textsuperscript{89} In fact, there is reason to believe that the practice standards before promulgation of Opinion 314 conformed very closely to the pro-taxpayer, antigovernment reasonable basis standard. In April 1965, the same month the ABA released Opinion 314, Bittker delivered a series of lectures at New York University in which he called for an "honest-belief" approach to disclosure that rejected the "audit assistance concept."\textsuperscript{86} In the published collection of those lectures, Bittker included a footnote to recently released Opinion 314, stating that it came to the same conclusion regarding advising a tax position and disclosure standards. While Bittker's honest-belief approach presaged the reasonable basis standard contained in Opinion 314, other commentators presaged the actual moniker. In 1963 Mark Johnson wrote that once we are convinced that a client "has a reasonable basis for an advantageous position, we can counsel and advocate that position without first satisfying ourselves that we would accept that position if we were a revenue agent."\textsuperscript{87} While there may have been more enlightened calls for standards of practice that exceeded ethical obligations under a reasonable basis standard, they were met by arguments for a more realistic set of ethical and practice guidelines.\textsuperscript{88}

4. Opportunity lost. Perhaps Bittker was right when he suggested that legal and ethical systems "fall of their own weight in practice" if they demand too much.\textsuperscript{84} But it is also possible that the ABA missed an opportunity for setting higher standards for tax practice. There certainly existed a critical mass of tax lawyers and scholars supportive of higher practice standards than those promulgated under Opinion 314. More importantly, once the Committee on Professional Ethics separated the lawyer's obligations from the client's rights, there was no self-evident reason why the quasi-legal rules that governed lawyers should require lower rather than higher standards of conduct than the legal rules that obligated clients. Indeed, if the bounds of the law regarding what a lawyer was authorized to do ethically could operate below the law imposed on nonlawyers, one could argue that the ethical bounds of the law could also be set to operate above the law, imposing higher rather than lower obligations on the lawyer. A valid objection to the argument, I suppose, would be that once ethical standards exceed legal standards, we are concerned about the protection of a right rather than the performance of a duty. And if the lawyer was derelict in his protection of a right, he could subject himself to liability or — worse, depending on whom you ask — lose clients.

An unobjectionable middle ground would tie the lawyer's rights and duties to those of his client. That alternative seems so obvious and simple that Patterson...
has asked "why the rules of ethics have not acknowledged it."95 Until the lawyer’s rights align with the client’s, the quasi-legal ethical rules remain abstract duties. As such, and regarding tax practice, they allow tax lawyers to write tax shelter opinions, even potentially abusive ones. Although the client could be violating his legal duties by participating in the tax shelter market, the tax lawyer is operating sufficiently within his quasi-legal rights to avoid charges of ethical misconduct.96

If legal ethics equated legal rules, Formal Opinion 314 would look very different. Even if legal ethics merely recognized more directly the obligation of legal rules, Formal Opinion 314 would have to be substantially rewritten and, to my mind, improved. The duties of the client would become the duties of the lawyer. Thus, the tax lawyer would have to demonstrate more candor and honesty toward the IRS. He would be obligated to attach riders explaining questionable positions despite a reasonable basis for the position (or, for that matter, a meritorious basis, as required under Formal Opinion 85-352).97 In other words, an attorney would “forget the nonsense about reasonable basis and present the facts.”98 He would reveal weaknesses in a client’s case without breaching quasi-legal ethical rules allowing him to lie by omission. And he would be obligated to reveal a client’s deceit in misleading the IRS, because the client’s duty of candor would now be his. The duty of confidentiality would correspondingly fall from its sacrosanct position, a duty that also authorizes a lawyer to deceive by silence. In the end, and as Patterson observed almost 25 years ago, aligning legal ethics with legal rules would nullify what amounts to Formal Opinion 314’s most unsavory conclusion: Even though a “wrong, or indeed sometimes an unjust, tax result in the settlement of a controversy” may not be a crime according to Formal Opinion 314, “it should be if it is obtained through artifice and deceit.”99

IV. The Tax Section’s ‘Guidelines to Tax Practice’

Based on the foregoing discussion, it appears that the law of self-interest largely governed the promulgation of Formal Opinion 314. By disaggregating the quasi-legal rules governing tax lawyers from the legal rules governing clients, the ABA Committee on Professional Ethics promulgated disciplinary rules that were merely aspirational and would never subject the lawyer to liability. Formal Opinion 314 was unconcerned about the health of the U.S. tax system. It was only slightly less unconcerned about the welfare of the client. But it was very concerned about the interests of lawyers. If lawyers were restrained in preparing and filing tax returns on behalf of clients, clients would shop around for lawyers who ignored the restraints.

That self-interest was evident in a 1978 report issued by the ABA Tax Section, “Guidelines to Tax Practice.” It seems that the impetus for the report in large part was to dispel the general impression among practitioners that “everybody does it” — that is, that “sham and corner cutting are an acceptable and customary part of tax practice.”100 The report provided sample guidelines for firms to use in designing standards for dealing with ethical problems particular to tax practice. In a telling statement revealing the ABA’s own anxiety that everybody does it, the report said, “It is easier for us all to adhere to proper standards when we know that we are not alone.”101

The guidelines began inauspiciously. “There is nothing in any way unethical in assisting clients in arranging their affairs so as to reduce their tax obligations.”102 Tax lawyers must zealously represent their clients, restrained only by respect for the law and avoiding deception when dealing with adversaries. Reasonable doubts in connection with the preparation of returns were to be resolved in favor of a client, and, per Formal Opinion 314, the existence of those doubts “need not generally be flagged by explanatory statements or riders.”103 Lawyers had no obligation to audit the taxpayer, and they could assume that the tax return information supplied by clients is correct and complete.104 The sample guidelines discouraged borderline tax plans and recommended against assisting in tax shelter offerings unless there was a substantial likelihood that the tax consequences would be resolved in favor of the taxpayer.105 The guidelines also recognized that tax opinions, even if fairly representing possible risks and adverse consequences, “may be taken by the public as endorsement of the program.”106

In counseling one’s own clients rather than providing opinions to promoters and marketers, the tax lawyer could advise any position unless it was “bound to fail if all of the facts become known to the Service.” That raised two questions: Could the lawyer advise a position that stood a 10 percent chance of success? 5 percent? 1 percent? And what if the facts never became known to the Service. Could the tax lawyer ethically advise participation in any transaction, short of fraud?

Also, the 1978 report incorporated a full reprint of Formal Opinion 314, effectively republishing it as official guidance for tax lawyers. The report also reprinted an excerpt from the “Guidelines to Tax Practice” section of the Audit Technique Handbook for Internal Revenue Agents.107 While Formal Opinion 314 treated the relationship between the IRS and tax practitioners as adversarial, the IRS guidelines stated that “each internal revenue agent is not only an officer of the Government

95Patterson, supra note 13, at 1175.
96Of course, the lawyer could be subject to liability under Circular 230 and statutory penalties.
97ABA Committee on Ethics and Professional Responsibility, Formal Opinion 85-352 (July 7, 1985).
98Patterson, supra note 13, at 1176.
99Id.
101Id. at 552.
102Id.
103Id. at 552-553.
104Id. at 553.
105Id. at 554.
106Id.
107Audit Technique Handbook for Internal Revenue Agents, Internal Revenue Memorandum 4231, 431 Public Relations.
but also, in effect, a representative of the taxpayer.’’ Assuming that tax lawyers were limited in their representation of clients by the nature of the relationship between clients and the IRS, and further assuming that the client-IRS relationship was largely nonadversarial (which reflected the Service’s official position in 1978), the nature of the tax lawyer-IRS relationship was correspondingly nonadversarial. Yet in the eyes of the organized bar, as well as the tax bar, the IRS remained an adversary. Treasury was quickly losing patience with that interpretation.

In the next installment of Policy and Practice: The 1980 Proposed Amendments to Circular 230 and Reaction From Tax Lawyers.