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Lowering the Bar: ABA Formal Opinion 85-352

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I. Introduction

A little more than a year after Treasury issued final regulations to Circular 230 designed to elevate tax practice standards and less than a year after Congress enacted a suite of antishelter provisions in the Deficit Reduction Act of 1984 (which, in turn, followed antishelter legislation in the 1982 Tax Equity and Fiscal Responsibility Act (TEFRA)), the American Bar Association issued Formal Opinion 85-352.¹ In promulgating Opinion 85-352, the ABA Committee on Ethics and Professional Responsibility professed to reconsider the much-maligned reasonable basis standard first articulated in Formal Opinion 314.²

Under Opinion 85-352, a lawyer may advise reporting positions as long as she "has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law" and there is "some realistic possibility of success if the matter is litigated."³ The lawyer acts in good faith even if she concludes that the client's position probably will not prevail.⁴ There is no requirement to disclose a position meeting that standard.

¹ABA Committee on Ethics and Professional Responsibility, Formal Opinion 85-352 (July 7, 1985).

²ABA Committee on Professional Ethics, Formal Opinion 314 (Apr. 27, 1965). In 1971 the ABA changed the name of its Committee on Professional Ethics to the Standing Committee on Ethics and Professional Responsibility. For convenience and readability, this column will refer to the newly designated committee as the Ethics Committee.

³ABA Comm. on Ethics and Professional Responsibility, Op. 85-352, *supra* note 1.

⁴*Id.*

Opinion 85-352 restated that part of Opinion 314 concerning a lawyer's duty in advising a client on tax return positions. It did not supersede Opinion 314 regarding tax controversy representation or negotiation and settlement proceedings before the IRS. Nor did it affect Opinion 346, issued only three years earlier in 1982, which dealt specifically with tax shelter opinions issued to third parties.⁵

In adopting Opinion 85-352, the Ethics Committee rejected an alternative proposal from the ABA Section of Taxation that would have required reporting positions to meet a "meritorious" standard. The Tax Section defined positions meeting its elevated standard as those advanced in good faith and evidenced by a practical and realistic possibility of success, if litigated.⁶ A good-faith position required the tax lawyer to have an honest belief that it "well may be held to be correct, either on the merits of existing authority or by reversal of existing authority."⁷ Only in extraordinary circumstances would the tax lawyer be unable to determine if a position was meritorious; in those situations, the Tax Section's proposal would have allowed the position to be reported with adequate disclosure.⁸

In the end, Opinion 85-352 merely restated the reasonable basis standard without appreciably elevating ethical standards for tax lawyers.

The Ethics Committee rejected not only the Tax Section's meritorious standard, but also its generally non-adversarial view of the IRS. The Tax Section had stated unequivocally that a "tax return is not a submission in an adversary proceeding."⁹ Even in the event of an audit, the relationship between the tax lawyer and his client vis-à-vis the IRS remained nonadversarial unless the revenue agent asserted an adversarial (rather than investigative or fact-finding) position. By comparison, Opinion 85-352 stated that "in many cases a lawyer must realistically anticipate that the filing of a tax return may

⁵ABA Committee on Ethics and Professional Responsibility, Formal Opinion 346 (Revised) (Jan. 29, 1982).

⁶ABA Section of Taxation, "Proposed Revision to Formal Opinion 314," May 21, 1984, *reprinted in* Bernard Wolfman and James P. Holden, *Ethical Problems in Federal Tax Practice*, 2d edition (Charlottesville, Va.: The Michie Company, 1985), at 71-74, 73.

⁷*Id.*

⁸*Id.*

⁹*Id.* at 71.

be the first step in a process that may result in an adversarial relationship between the client and the IRS.¹⁰ By assuming an adversarial relationship, Opinion 85-352 reprised Opinion 314, which had identified the IRS as an adversarial party in its first sentence.¹¹

In the end, Opinion 85-352 merely restated the reasonable basis standard without appreciably elevating ethical standards for tax lawyers. In fact, this column argues that in many ways Opinion 85-352 lowered rather than raised the ethical bar by further separating professional ethical standards (or quasi-legal rules) from legal rules imposed on clients. Indeed, Opinion 85-352 explicitly authorized tax lawyers to advise positions that violated sections of the IRC, including the substantial understatement penalty. In effect, Opinion 85-352 authorized tax lawyers to assist taxpayer-clients in evading the federal tax laws.

Premised on an adversarial relationship, Opinion 85-352, much like Opinion 314, relied on litigation and controversy norms to define the tax lawyer's responsibilities. Consequently, the tax lawyer was advocate and litigator to the near exclusion of adviser and planner. The Ethics Committee's commitment to litigation and controversy norms produced an opinion that allowed tax lawyers to render advice subjecting clients to statutory penalties; thus, and ironically, Opinion 85-352 sanctioned tax lawyers to violate the historically sacrosanct ethical duty to serve as zealous client advocates. At the same time, it permitted tax attorneys to violate additional obligations to the government and the tax system.

Ultimately, the fatal flaw of Opinion 85-352, as with Opinion 314, resides in its failure to equate legal ethics with legal rules.

Ultimately, the fatal flaw of Opinion 85-352, as with Opinion 314, resides in its failure to equate legal ethics with legal rules.¹² Rather than base ethical standards for tax lawyers on tax law, Opinion 85-352 grounds tax ethics in general legal ethics. Thus grounded, the tax lawyer is an advocate and a litigator, not an adviser and a planner or negotiator or dispute resolution expert. Worse, under Opinion 85-352, the tax lawyer was a knowing accomplice in overaggressive reporting positions and tax evasion.

II. Tax Section's Proposed Revision to Op. 314

In the early 1980s, the ABA Tax Section began to reconsider the reasonable basis standard out of concern that its low ethical threshold allowed tax lawyers to issue

opinions that enabled abusive tax shelter activity.¹³ With syndicated tax shelters exploding in number¹⁴ and the Treasury Department issuing proposed amendments to Circular 230 designed to stop the proliferation of tax shelters,¹⁵ the Tax Section focused on assisting in the promulgation of an ethical opinion that dealt specifically with public offerings of tax shelters. That effort culminated in Formal Opinion 346, issued in 1982.¹⁶

By the time the Tax Section resumed its reconsideration of Opinion 314 in 1983, Congress had entered the tax shelter fray. TEFRA created a number of new and strengthened antishelter penalty provisions.¹⁷ In particular, it added section 6661, the substantial understatement penalty for taxpayers, which required "substantial authority" for a return position to avoid the penalty or, alternatively, adequate disclosure of the reporting position.¹⁸ The enactment of section 6661 strongly influenced discussions among the leadership of the Tax Section regarding ethical standards for tax return advice and reconsideration of the reasonable basis standard.¹⁹ Most important, new section 6661 prompted many members within the Tax Section to conclude that ethical standards for tax lawyers should align with the taxpayer penalty provisions of the IRC.

¹³See Michael C. Durst, "The Tax Lawyer's Professional Responsibility," 39 *U. Fla. L. Rev.* 1027, 1041 n.47 (1987) (describing contents of letter from Paul J. Sax to Michael C. Durst and stating that the Tax Section "had discussed possible revision of the 'reasonable basis' standard in connection with the drafting of rules governing lawyers' representations in publicly marketed 'tax shelter' investment offerings" in the "very early 1980s").

¹⁴For a discussion of the rise in the number of tax shelters in the 1970s and early 1980s, see Dennis J. Ventry Jr., "Tax Shelter Opinions Threatened the Tax System in the 1970s," *Tax Notes*, May 22, 2006, p. 947.

¹⁵Proposed Amendments, Tax Shelters; Practice Before the Internal Revenue Service, 45 *Fed. Reg.* 58594 (Sept. 4, 1980).

¹⁶ABA Comm. on Ethics and Professional Responsibility, Formal Op. 346, *supra* note 5. For a discussion of Opinion 346, see Dennis J. Ventry Jr., "ABA Formal Opinion 346 and a New Statutory Penalty Regime," *Tax Notes*, June 12, 2006, p. 1269.

¹⁷P.L. 97-248. For a discussion of those provisions, see Ventry, *supra* note 16, at 1273-1276.

¹⁸Added P.L. 97-248, title III, section 323(a), Sept. 3, 1982, 96 Stat. 613. Repealed by P.L. 101-239, title VII, section 7721(c)(2), Dec. 19, 1989, 103 Stat. 2399. The 1989 legislation also replaced section 6661 with section 6662, the accuracy-related penalty provision, which contained much of former section 6661. See P.L. 101-239, Title VII, section 7721(a), Dec. 19, 1989, 103 Stat. 2395. For tax shelter items, the penalty could be avoided only in the presence of substantial authority *and* if the taxpayer reasonably believed that the return treatment was more likely than not correct when he took the position. Former section 6661(b)(2)(C)(i)(II).

¹⁹Durst, *supra* note 13, at 1041 n.47. See also James P. Holden, "New Professional Standards in the Tax Marketplace: Opinions 314, 346, and Circular 230," 4 *Va. Tax Rev.* 209, 238-240 (Winter 1985).

¹⁰ABA Comm. on Ethics and Professional Responsibility, Op. 85-352, *supra* note 1.

¹¹ABA Comm. on Professional Ethics, Op. 314, *supra* note 2.

¹²For a discussion of the "fatal flaw" as applied to Opinion 314, see Dennis J. Ventry Jr., "Reasonable Basis and Ethical Standards Before 1980," *Tax Notes*, May 29, 2006, pp. 1047, 1048-1054.

While the majority of the Tax Section agreed that tax ethics should equate with tax law,²⁰ there was disagreement whether the current tax law was sufficiently clear to base ethical rules on it. Specifically, participants debated the relevance of the code's substantial authority standard to proposed revisions of Opinion 314.

Two views emerged. One group argued that a tax lawyer should not be permitted to advise a client to take a reporting position that could subject the client to the substantial understatement penalty because of lack of substantial authority. Any revision of Opinion 314 should adopt "substantial authority" as described under section 6661 and Treasury regulations as the minimum threshold ethical standard. A second group did not disagree that tax ethics should align with tax law. But it objected to adopting substantial authority as defined under section 6661 as the new ethical standard because the IRS had interpreted the definition too narrowly, excluding arguments in treatises, legal periodicals, legal opinions, or opinions rendered by other tax practitioners, general counsel memoranda, technical memoranda, and written determinations such as private letter rulings. The second group recommended substituting "meritorious position" for "substantial authority" as the appropriate ethical standard. The meritorious standard would recognize that some ethically defensible conduct may yet fall short of satisfying the IRS's restricted definition of substantial authority.²¹

The second group prevailed. The Tax Section rejected the substantial authority standard. But it also rejected reasonable basis. It sought an ethical standard "more demanding than 'reasonable basis' but less demanding than 'substantial authority'" as construed by the IRS.²² In the process, the Tax Section more closely aligned ethical guidelines for tax lawyers with modern tax practice. Reasonable basis was grounded in litigation and controversy norms. But little of what a tax lawyer did reflected those norms. The modern tax lawyer was largely an adviser and a planner, not an advocate. Her ethical standards, therefore, should reflect planning and negotiation norms rather than litigation and controversy norms.

²⁰See Durst, *supra* note 13, at 1041 (stating that the Tax Section "began with the assumption that the attorney's ethical rules should be based on the taxpayer penalty provisions of the code"); Holden, *supra* note 19, at 239 (noting that members of the Tax Section "did not question the desirability of congruence between the minimum ethical and penalty standards").

²¹Holden, *supra* note 19, at 239. According to knowledgeable commentators, "all of these interpretations may be viewed as authority, though some are clearly entitled to more weight than others. If a proposed tax return position is supported by the conclusions of several respected commentators and is not at variance with any official pronouncement or the statute itself," Holden reasoned, "it does seem appropriate to consider the views expressed by those commentators in assessing whether substantial authority is present." *Id.* Ultimately, Holden hoped the IRS would revise its definition of substantial authority so that it would be useful "as the basis for both the minimum penalty standard and the minimum ethical standard." *Id.*

²²Durst, *supra* note 13, at 1042.

A. Tax Lawyer as Adviser

The Tax Section perceived a substantial change in the ethical obligations of tax lawyers since the promulgation of Opinion 314 in 1965.²³ The transformation had been recognized 15 years earlier with the 1969 revision of the Ethical Canons, which, according to the Tax Section, "was directed at the changed role of the lawyer as adviser, rather than as litigator." Also, the Model Rules of Professional Conduct, adopted in August 1983, discussed the lawyer's "historic role" as advocate, but also afforded considerable space to discussing the modern lawyer's role as "adviser, intermediary and educator." The ethical standards governing tax practice, however, had yet to recognize those evolving, modern obligations.

B. Tax Practice as Nonadversarial

As planner and adviser, the modern tax lawyer had a relationship with the IRS that was predominately non-adversarial. Whether preparing a client's tax return or advising on tax planning alternatives that might result in a corresponding reporting position, the modern tax lawyer should not treat the IRS as an adversary. Even on commencement of an audit, the relationship remained nonadversarial until the revenue agent altered the nature of the relationship by "tak[ing] adversarial positions."²⁴

The Tax Section based its nonadversarial view of the IRS on two related factors: the disclosure and self-assessment function of filing a tax return and the inherent limitations on tax enforcement.

For the tax return to serve its disclosure and self-assessment functions, the taxpayer had to provide "a fair report of matters affecting tax liability."²⁵ In fact, the U.S. tax system depended on taxpayer cooperation and voluntary compliance, or, at the least, on the absence of knowing, purposeful noncompliance. "Paying taxes is not a battle aiming at the government's defeat," but "a collective obligation of citizenship," Theodore Falk wrote.²⁶ Paying taxes is, at its heart, a moral obligation. And obeying the law by paying one's taxes "is something one does for the government [of which the taxpayer is inherently linked as a member of the polity], not against it."²⁷ Of course, taxpayers can be subject to civil and criminal liability for failing to obey the nation's tax laws. And those failures can result in adversarial proceedings. But complying with the tax law by filing a tax return is not the natural, first step in an adversarial proceeding. Only after the IRS challenges the return on audit, and after the IRS investigates the reporting position, and after

²³ABA Tax Section, *supra* note 6, at 71. Remaining citations in this paragraph are from *id.*

²⁴*Id.*

²⁵*Id.* In similar language, James Lewis, then chair of the Tax Section, argued that a tax return "serves primarily a disclosure, reporting, and self-assessment function. It is the taxpayer's report to the government of his or her activities for the tax period." James B. Lewis to Robert O. Hetledge of the ABA Ethics Committee (June 4, 1985), cited in Theodore C. Falk, "Tax Ethics, Legal Ethics, and Real Ethics: A Critique of ABA Formal Opinion 85-352," 39 *Tax Law.* 643, 644 n.4 (1985-1986).

²⁶Falk, *supra* note 25, at 648.

²⁷*Id.*

any negotiations fail, and finally, after enforcement proceedings commence, can the relationship between the taxpayer (and her tax lawyer) and the government be said to be adversarial.

In fact, in nearly all cases, a tax return never underwent an audit. Audit coverage fell steadily in the 1980s, remaining below 2 percent every year and reaching an all-time low of 1.2 percent in 1985.²⁸ That limited enforcement of the tax laws, largely a function of inadequate appropriations for IRS services, hardly made for a fair fight. Underfunded, underequipped, and allowed to verify only a fraction of tax returns (to say nothing of the myriad return positions embedded within every individual return), the IRS was not the usual pugnacious adversary.²⁹ And once the lax reasonable basis standard was factored in, it wasn't a fight at all. "The complications of the tax law," the Tax Section wrote in its proposed revision of Opinion 314, "the inadequacy of Internal Revenue Service audits, the impracticability of training revenue agents to achieve expertness and the flexibility available to the taxpayer in legitimately resolving to his own advantage numerous doubtful issues resulting from those complexities, impose a substantial burden upon the government."³⁰ Indeed, "the Service is a paper tiger," Falk observed, "not a leviathan the taxpayer should defeat by cunning."³¹ Right. Why waste the energy? Armed with

²⁸See Susan B. Long, "Estimating Criminal Tax Violations," *Tax Notes*, June 8, 1981, p. 1325, excerpted from Long's book, *The Internal Revenue Service: Measuring Tax Offenses and Enforcement Response*, published by the Justice Department's National Institute of Justice (reporting audit coverage of 1.77 percent for 1981); John André LeDuc, "An Evaluation of Recent Taxpayer Compliance Legislation and Future Options," *Tax Notes*, July 11, 1983, pp. 115-116 (reporting audit coverage of 1.55 percent for 1982); Lucia N. Smeal, "Senate Finance Committee Considers Nominations for IRS, Treasury Posts," *Tax Notes*, Mar. 19, 1984, p. 1173 (reporting audit coverage of 1.36 percent for 1985); Lee A. Sheppard, "Unpopular Spending: IRS Budget and Tax Administration," *Tax Notes*, Sept. 19, 1985, p. 821 (reporting audit coverage of 1.2 percent for 1986).

²⁹The Preamble to the ABA Model Rules of Professional Conduct states that "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." The IRS is not a well-represented party with respect to individual taxpayers. In fact, nearly 99 percent of the time, it is not represented at all, raising serious ethical doubts whether a lawyer can advise a reporting position (or a planning strategy, for that matter) that will never be seen by the IRS.

³⁰ABA Tax Section, *supra* note 6, at 71.

³¹Falk, *supra* note 25, at 648. Falk criticized the Tax Section's conclusion that limited enforcement rendered the IRS a nonadversary. The limited enforcement view, Falk argued, "suggests that it might be ethical to be less forthcoming on tax returns if the government were capable of vigorous and knowledgeable enforcement." Ultimately, it "fail[ed] to explain why the taxpayer's legal obligations or the attorney's ethical obligations depend only on the likelihood of getting caught." But that is not what the Tax Section meant to convey by adopting its limited enforcement view. Nor is it what the Tax Section wrote. Far from suggesting that legal or ethical obligations "depend only on the likelihood of getting caught," the Tax Section's limited enforcement view clearly argued that the IRS was not only an unworthy adversary in most circumstances, it was no adversary at all.

(Footnote continued in next column.)

negligible audit rates and the reasonable basis standard, taxpayers had no need for cunning.

C. The Tax Section's Proposed Ethical Standard

The Model Rules of Professional Conduct allowed lawyers to advance any nonfrivolous position in the name of client advocacy.³² According to the Tax Section, however, the nonfrivolous standard set too low an ethical threshold for tax lawyers advising reporting positions. There was a difference between, on one hand, asserting a position or designing an argument that could raise a reasonable doubt in the minds of a jury to avoid liability for filing an allegedly false or fraudulent tax return, and, on the other, advising a taxpayer to take a particular position on a return.

To advise a reporting position, the Tax Section concluded, the position must be meritorious and "advanced in good faith, as evidenced by a practical and realistic possibility of success, if litigated."³³ Good faith, in turn, equated with holding an honest belief in the reporting position.³⁴ The lawyer must honestly believe the position could be upheld, "either on the merits of existing authority" or by reversal of existing authority.³⁵ Only in extraordinary circumstances would the lawyer be unable to determine if a proposed tax position was meritorious; in those situations, the lawyer could demonstrate good faith and an honest belief by adequately disclosing the position in the tax return.³⁶ As long as the position was meritorious (which, again, required an honest belief in a potentially favorable outcome in the courts), the tax lawyer was permitted to advise reporting positions and continue representation of a client even if she believed the asserted position would not be sustained by the courts,³⁷ there was no substantial authority as defined

The IRS was permitted to confront the opposing party only 1.2 percent of the time. Even then, few of the "confrontations" made it past the investigative or negotiation stages to a form of confrontation that reflected adversary features.

³²Rule 3.1 of the ABA Model Rules of Professional Conduct stated: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

³³ABA Tax Section, *supra* note 6, at 73.

³⁴*Id.* The Tax Section's "honest belief" method differed from that asserted by Boris Bittker 20 years earlier. In 1965 Bittker called for an honest belief approach for determining adequate disclosure of tax return positions. According to Bittker, however, Opinion 314 and its reasonable basis standard (which the Tax Section in 1985 was attempting to overturn) "came to the same conclusion" about advising tax positions and disclosure standards. See Boris I. Bittker, *Professional Responsibility and Federal Tax Practice* (New York: New York University Press, 1965), at 24.

³⁵*Id.*

³⁶*Id.*

³⁷Here the Tax Section adopted what might be termed the "could be but wouldn't be" standard. That is, the tax lawyer was permitted to advise a position for which she honestly believed could be sustained by the courts, but with an equally honest belief that it wouldn't be sustained by the courts.

under section 6661 in support of the position,³⁸ and there was no adequate disclosure of the position.³⁹

III. The ABA's 'Revision' of Opinion 314

The ABA Tax Section submitted its proposed revision of Opinion 314 to the Ethics Committee in May 1984. It hoped the committee would follow its recommendation to replace the reasonable basis standard with the "practical and realistic possibility of success" standard. As the Tax Section noted in its proposed revision of Opinion 314, the reasonable basis standard, as it evolved over the course of 20 years, "ha[d] been construed to support the use of any colorable claim to justify exploitation of the audit lottery."⁴⁰ Individual section members were less charitable. During a panel discussion on Opinion 314 at the Tax Section's midyear meeting in 1984, Bernard Wolfman referred to the reasonable basis standard as "anything you can articulate without laughing."⁴¹ The Tax Section also hoped the Ethics Committee would adopt its view that a tax return "is not a submission in an adversary proceeding"⁴² and that tax lawyers should be held to an ethical standard for advising reporting positions that exceeded the nonfrivolous litigation standard.⁴³

There were early signs that the Ethics Committee had no intention of departing significantly from the reasonable basis standard. In June 1985 the Tax Section commented on an early draft of Opinion 85-352. Although the draft opinion incorporated some of the Tax Section's recommendations (including its suggestion that a lawyer advise a reporting position in good faith and with a realistic possibility of success), it refused to acknowledge that a tax return is not a submission in an adversary proceeding. The Tax Section urged the Ethics Committee "to recognize that a tax return serves primarily a disclosure, reporting, and self-assessment function, and only a relative handful are examined." "Substantial concern was expressed," the Tax Section's fall 1985 newsletter reported, "that application of the same standard to tax returns as to civil matters generally would be vulnerable to misinterpretation and fail successfully to elevate the minimum reporting standard."⁴⁴ In fact, according to a June 1985 letter from James Lewis, then chair of the Tax Section, to Robert Hetledge of the Ethics Committee, the draft opinion preserved rather than replaced the reasonable basis standard. The draft "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," Lewis complained, "likely would be business as usual, and we fear that the American Bar Association would be subjected to widespread criticism on the ground it has condoned practices that have been condemned by the Treasury and the Congress."⁴⁵

The Ethics Committee was unmoved. In July 1985 it issued Formal Opinion 85-352, which, according to one commentator, represented the ABA's "deliberate decision *not* to take visible action to raise the ethical standard for tax advice."⁴⁶

A. Opinion 85-352

The Ethics Committee reconsidered the reasonable basis standard only reluctantly and not on its own initiative.⁴⁷ "The Committee has been requested by the Section of Taxation of the American Bar Association to reconsider the 'reasonable basis' standard in the Committee's Formal Opinion 314 governing the position a lawyer may advise a client to take on a tax return."⁴⁸ Although it was aware that many lawyers were using the reasonable basis standard to justify "any colorable claim" to "justify exploitation" of the audit lottery, the Ethics Committee argued that such a view "is not universally held" and said it did not believe that "the reasonable basis standard, properly interpreted and applied, permits this construction." Given the criticism directed at the standard, however, by "distinguished members of the tax bar, IRS officials and members of Congress, sufficient doubt has been created regarding the validity of the standard so as to erode its effectiveness as an ethical guideline," the committee wrote. Opinion 85-352 undertook to "restate" the standard.

1. Scope of Opinion 85-352. Opinion 85-352 restated that portion of Opinion 314 regarding a lawyer's duty in advising a client on tax return positions. It did not

⁴⁵Lewis to Hetledge, *supra* note 25.

⁴⁶Falk, *supra* note 25, at 645. Some commentators were more generous. See, e.g., Bernard Wolfman, "Wolfman Recalls History of Circular 230, Suggests What Should Constitute Substantial Authority," *Doc 87-808, 87 TNT 30-24* (Feb. 13, 1987) (calling Opinion 85-352 "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.")

⁴⁷Some commentators have given the Ethics Committee more credit than it deserves in spearheading the revision of Opinion 314 and its reasonable basis standard. See, e.g., Loren D. Prescott Jr., "Challenging the Adversarial Approach to Taxpayer Representation," *30 Loy. L.A. L. Rev.* 693, 719 (January 1997). ("The profession's failure to define and enforce the reasonable basis standard established by Formal Opinion 314, together with the lack of guidance offered tax practitioners by subsequent revisions in the profession's rules of ethics, prompted the ABA Ethics Committee to revisit the question of tax return disclosure in 1985 in Formal Opinion 85-352.")

⁴⁸ABA Comm. on Ethics and Professional Responsibility, Op. 85-352, *supra* note 1. Remaining citations in this paragraph are from *id.*

³⁸The lawyer was still required to advise the client-taxpayer of potential penalties under section 6661 and recommend adequate disclosure to exonerate the position under section 6661(b)(2)(B)(ii).

³⁹The tax lawyer satisfied her ethical duties by advising the client of potentially applicable penalties and the effect of adequate disclosure.

⁴⁰ABA Tax Section, *supra* note 6, at 71.

⁴¹Lee A. Sheppard, "Ethics Opinion and Tax Shelters Addressed at ABA Meeting," *Tax Notes*, Feb. 27, 1984, p. 757.

⁴²ABA Tax Section, *supra* note 6, at 71.

⁴³*Id.* at 73.

⁴⁴ABA Tax Section, *Newsletter* (Fall 1985), at 1, 6.

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supersede Opinion 314 regarding tax controversy representation or negotiation and settlement proceedings before the IRS.⁴⁹ Nor did it affect recently promulgated Opinion 346 dealing with tax shelter offerings, “which involve very different considerations, including third party reliance.”⁵⁰ Further, Opinion 85-352 said nothing about the ethical obligations associated with tax planning, a curious omission given the close practical relationship between rendering tax return advice and offering tax planning strategies.⁵¹

2. Filing a tax return is an adversarial act. The Tax Section had been explicit in its proposed revision of Opinion 314: “A tax return is not a submission in an adversary proceeding.”⁵² The Ethics Committee, in the eyes of some observers, tempered that view⁵³ by stating that assisting a client on reporting positions involves two roles — adviser and advocate — and that the ethical standards applicable to both roles provide relevant guidance.⁵⁴ But the Ethics Committee was clear as to which role dominated. “In many cases a lawyer must realistically anticipate that the filing of the tax return may be the first step in a process that may result in an adversary relationship between the client and the IRS.”⁵⁵ Further, the Ethics Committee argued that the likelihood of an adversarial relationship materializing “normally occurs in situations when a lawyer advises an aggressive position on a tax return, not when the position taken is a safe or conservative one that is unlikely to be challenged by the IRS.”⁵⁶

In other words, the lawyer could choose to establish an adversarial or nonadversarial relationship with the IRS based on the aggressiveness of the reporting position she advised. More aggressive positions afforded the lawyer and her client more protection under the ethical rules because they presupposed an adversarial relationship and thus freed the lawyer to proceed zealously and to assert all but nonfrivolous positions.⁵⁷ Less aggressive positions, however, compromised the lawyer and her client vis-à-vis those parties asserting more aggressive

positions. The lawyer’s zealotry was restricted as adviser. When serving as adviser, for instance, a lawyer was obliged to “give his professional opinion as to what the ultimate decision of the courts would likely be as to the applicable law”; when serving as advocate, however, the lawyer could “resolve in favor of his client doubts as to the bounds of the law.”⁵⁸ Also, the lawyer who advised less aggressive positions (or aggressive positions unlikely to result in an audit proceeding) had to proceed under the less protective ethical considerations of lawyer as adviser, even if the position she advised was ultimately challenged (at which point, but only then, an adversarial relationship might develop).⁵⁹ Opinion 85-352 hardly discouraged lawyers from asserting any colorable claim, despite claims to the contrary.

While the opinion’s incentive structure was perverse, particularly for an ethical opinion, its logic was circular. The opinion deemed to define the proper practice standards for tax lawyers advising return positions. But it assumed the existence of a potential controversy between the taxpayer-client and the IRS (initiated by an aggressive reporting position), which forced the tax lawyer to don her advocate hat. Thus, from the very beginning of the analysis, the lawyer was advocate rather than adviser. The facts and circumstances and nuances of individual situations were assumed away, never to challenge the original assumption of a potential controversy, and thus, an adversarial environment.⁶⁰

frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”); Ethical Consideration 7-4 (stating that “a lawyer is not justified in asserting a position in litigation that is frivolous”).

⁴⁹ABA Ethical Consideration 7-3. See also ABA Ethical Consideration 7-5 (expanding on the duties of lawyer as adviser and reaffirming 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”); Preamble, ABA Model Rules of Professional Conduct (2002) (describing fundamental difference between lawyer as advocate and lawyer as adviser: “As adviser, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”)

⁵⁰Falk wrote that Opinion 85-352 “collapses the ethical distinction between tax return advice and advocacy on the grounds that a tax return could provoke a controversy.” “By glossing over whether tax return advice is a submission in a proceeding,” Falk wrote, “Opinion 352 leaves unclear what standard applies to an attorney who is advising a client on a position that is not aggressive but is unlikely to culminate in a proceeding.” Falk, *supra* note 25, at 678. What is clear from the opinion is that the lawyer has little to lose and much to gain by advising aggressive reporting positions. In fact, the less aggressive lawyer could be risking more (lower ethical protections, restricted advocacy, potential loss of clients) than an overly aggressive lawyer (higher ethical protections, nearly unlimited advocacy, and minimal likelihood of malpractice given nearly nonexistent enforcement of aggressive positions).

⁶⁰Gwen Thayer Handelman has offered similar criticism of Opinion 85-352. “Prompted by concerns about exploitation of the audit lottery,” Handelman observed, “the ABA undertook in Opinion 352 to prescribe how aggressive a return position may

⁴⁹See Frank J. Gould, “Giving Tax Advice — Some Ethical, Professional, and Legal Considerations,” *Tax Notes*, Oct. 28, 2002, pp. 523, 532-533; Jasper L. Cummings, Jr., “The Range of Legal Tax Opinions, With Emphasis on the ‘Should’ Opinion,” *Tax Notes*, Feb. 17, 2003, pp. 1125, 1127.

⁵⁰ABA Comm. on Ethics and Professional Responsibility, Op. 85-352, *supra* note 1.

⁵¹More on this relationship in Section III.B.1 *infra*.

⁵²ABA Tax Section, *supra* note 6, at 71.

⁵³Gould, *supra* note 49, at 535.

⁵⁴ABA Comm. on Ethics and Professional Responsibility, Op. 85-352, *supra* note 1.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷See Ethical Consideration 7-1 (“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.”); Preamble, ABA Model Rules of Professional Conduct (2002) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”). For the nonfrivolous standard, see Rule 3.1, ABA Model Rules of Professional Conduct (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not

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3. Litigation and controversy norms in the 'new' ethical standard. Opinion 85-352 grounded its analysis in litigation norms in the model rules. It referred specifically to the nonfrivolous standard for asserting a position contained in Rule 3.1, which also included the good-faith standard for advocating "an extension, modification or reversal of existing law." In addition, the Opinion referenced Rule 1.2(d) permitting a lawyer to advise in making "a good faith effort to determine the validity, scope, meaning or application of the law."

On the basis of those rules, the Ethics Committee formulated a new ethical standard for tax lawyers.⁶¹ A lawyer may advise reporting positions "most favorable to the client if the lawyer has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law." A lawyer can possess a good-faith belief even if she concludes that the client's position probably will not prevail if challenged. But she must also believe that there exists "some realistic possibility of success if the matter is litigated." The tax lawyer's duties were "consistent with the basic duty of the lawyer to a client, recognized in ethical standards since the ABA Canons of Professional Ethics, and in the opinions of this Committee: zealously and loyally to represent the interests of the client within the bounds of the law." The tax lawyer was like any other lawyer. And tax practice was ordinary legal work, which required zealous advocacy on behalf of the client in a battle against well-represented opposition.

The only problem was that it was hardly clear that tax lawyers were interchangeable with other lawyers regarding duties and obligations. For at least two generations, the tax profession had debated the tax lawyer's multiple roles: to client and to government as well as to other taxpayers and to self.⁶² More immediately, the Tax Section's proposed revision of Opinion 314 had examined those multiple obligations. It referred to the same model rules and ethical considerations discussed by the Ethics Committee in Opinion 85-352. But while the Ethics Committee primarily saw advocacy emerging from the various rules and guidelines, the Tax Section saw a

be advised without disclosure. But the opinion assumed its conclusion by presupposing an adversarial relationship. If the determinative issue in establishing a standard of return advice is whether an adversarial relationship exists, it is circular to define the nature of the relationship by assuming an aggressive return position. By assuming that the existence of a potential controversy triggers the advocacy role, the opinion disregards the context in which the issues are to be raised and resolved. That a lawyer may risk confrontation by advising an aggressive position does not establish adversarial conditions." Handelman, "Constraining Aggressive Return Advice," 9 *Va. Tax Rev.* 77, 95 (Summer 1989).

⁶¹ABA Comm. on Ethics and Professional Responsibility, Op. 85-352, *supra* note 1. Remaining citations in this paragraph are from *id.*

⁶²For a discussion of those debates, see Dennis J. Ventry Jr., "Raising the Ethical Bar for Tax Lawyers: Why We Need Circular 230," *Tax Notes*, May 15, 2006, pp. 823, 826-829 and corresponding notes; Ventry, *supra* note 12, at 1048-1054 and corresponding notes.

recognition of the multiple roles of the modern tax lawyer. The 1969 revision of the Canons of Ethics and subsequent adoption of the Model Code of Professional Responsibility, the Tax Section noted, was motivated almost exclusively by "the changed role of the lawyer as adviser, rather than as litigator."⁶³ Moreover, promulgating ethical guidelines required consideration of the additional responsibilities accompanying the tax lawyer's multiple roles as both advocate and adviser.⁶⁴ "It is important to distinguish between the minimum standard of conduct required for the taxpayer's return not to be false or fraudulent," the kind of conduct admittedly sanctioned by the model rules, and "the appropriate ethical standard for lawyers in advising as to reporting positions," which required additional considerations.⁶⁵ "It may be that any claim grounded in reason, no matter how tenuously," the Tax Section explained, "would raise a reasonable doubt in the minds of a jury and avert a successful prosecution of a taxpayer for filing a false or fraudulent return."⁶⁶ But advising a client on a reporting position required a higher standard; it required that the position be meritorious and advanced in good faith as evidenced by a practical and realistic possibility of success.⁶⁷ The Ethics Committee eliminated the meritorious standard, and "practical and realistic possibility of success" became "some realistic possibility of success." Both changes significantly lowered the standard, suggesting that a small possibility of success was sufficient to justify advising a reporting position, "not unlike the degree of success required under the reasonable basis test."⁶⁸ At

⁶³ABA Tax Section, *supra* note 6, at 71. See also Section II.A *supra*. It is important to note that in 1969 the chair of the Tax Section's Committee on Standards of Tax Practice surveyed the committee members whether the ABA's revision of the canons should carve out special rules for tax lawyers and tax practice. The chair's survey "found the Committee overwhelmingly opposed to such an approach." Marvin K. Collie and Thomas P. Marinis Jr., "Ethical Considerations on Discovery of Error in Tax Returns," 22 *Tax Law.* 455, 460 note 16 (1969).

⁶⁴See Section II.B *supra*.

⁶⁵ABA Tax Section, *supra* note 6, at 73.

⁶⁶*Id.*

⁶⁷*Id.* See Section II.C. *supra*.

⁶⁸Bernard Wolfman, James P. Holden, and Kenneth L. Harris, *Standards of Tax Practice: Professional Responsibility and Ethics* (Chicago: Commerce Clearing House Inc., 1992), at 61. See also J. Timothy Philipps, "It's Not Easy Being Easy: Advising Tax Return Positions," 50 *Wash. & Lee L. Rev.* 589, 613-618 (Spring 1993) (discussing the effect of eliminating "practical" from the new realistic possible of success standard); Matthew C. Ames, "Formal Opinion 352: Professional Integrity and the Tax Audit Lottery," 1 *Georgetown J. Legal Ethics*, 411, 424 (1987) (criticizing the new standard as too low a threshold and as preserving the maligned status quo); Falk, *supra* note 25, at 654. James Lewis, chair of the Tax Section during the proposal of Opinion 314 and the Ethics Committee's promulgation of Opinion 85-352, was highly critical of the decision to replace "practical and realistic possibility of success" with "some realistic possibility of success." In commenting on a draft of Opinion 85-352, Lewis complained that it did not "expressly adopt the requirement that a position be 'practical' as well as 'realistic,' nor enumerate types of positions that fall below the standard. The Section of Taxation concluded that a position should not satisfy return

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best, Opinion 85-352 restated the reasonable basis standard. At worst, it lowered it.

B. The Tax Section's Spin of Opinion 85-352

Almost immediately after the Ethics Committee issued Opinion 85-352, the Tax Section tried minimizing the damage. A Special Task Force on Formal Opinion 85-352 spearheaded the damage control. The task force report⁶⁹ was adopted by the Committee on Standards of Tax Practice in early 1986 and later approved by the Tax Section Council. It was neither reviewed nor approved by the Ethics Committee, and thus its precedential value was unclear. However, it offered the Tax Section's interpretation of what Opinion 85-352 said, what it didn't say, and what it should have said.

1. Scope of the opinion. The task force sought to expand the scope of Opinion 85-352, which had restricted itself to advising a client on reporting positions. "The same principles should apply to all aspects of tax practice to the extent tax return positions would be involved,"⁷⁰ the task force wrote, adding that, in particular, Opinion 85-352 should apply to lawyers rendering tax planning advice to clients. The opinion did not, however, cover negotiation or settlement proceedings with the IRS (which were still covered by Opinion 314) nor the lawyer's duties regarding tax litigation.

2. Tax shelter advice. The Ethics Committee stated that Opinion 85-352 did not cover a lawyer's opinion on tax shelter investment offerings, "which is specifically addressed by this Committee's Formal Opinion 346 (Revised), and which involves very different considerations, including third party reliance."⁷¹ The Tax Section was concerned that the language could be interpreted to suggest that third-party advice covered by Opinion 346 was not subject to the minimum ethical standard of Opinion 85-352. The task force report therefore clarified that Opinion 85-352 "does not detract from the high standards of candor and diligence" of Opinion 346 and

disclosure requirements unless the prospects for sustaining that position are realistic in practice as well as in theory. If the only way to prevail would be to overcome a series of adverse lower court and appellate court decisions to a Supreme Court remedy, on a matter when it would be wholly impractical to do so, such that there is no intention to conduct a contest, the position is not 'practical.' If there is an intention to concede if challenged, the position is not advanced in good faith and the possibility of success is not 'practical.'" Lewis, cited in Falk, *supra* note 25, at 644 n.4. Praise for the new standard as an improvement was scant. *But see* Mortimer Caplin, "Tax Shelter Disputes and Litigation With the Internal Revenue Service—1987 Style," 6 *Va. Tax Rev.* 709 (Spring 1987) (stating that "realistic possibility of success" was "much stricter" than "reasonable basis").

⁶⁹See ABA Tax Section, "Report of the Special Task Force on Formal Opinion 85-352," 39 *Tax Law.* 635 (Spring 1986). Although reflecting all of the Tax Section membership, the task force report was written by five of the tax profession's heavyweights: Paul J. Sax, James P. Holden, Theodore Tannenwald Jr., David E. Watts, and Bernard Wolfman.

⁷⁰*Id.* at 636.

⁷¹ABA Comm. on Ethics and Professional Responsibility, Op. 85-352, *supra* note 1.

that tax shelter advice, given either to third parties or one's client, is not exempt from the new ethical standard.⁷²

3. Role of the audit lottery. Opinion 85-352 stated that the lawyer, in her role as adviser, was required to "refer to potential penalties and other legal consequences should the client take the position advised."⁷³ The task force extended that requirement to all of the tax lawyer's roles by glossing over the distinction in Opinion 85-352 regarding the role of adviser.⁷⁴

4. Interpreting 'realistic possibility of success if litigated.' The new standard raised the ethical bar, according to the task force spin. While commentators criticized the new realistic possibility of success standard for merely restating the discredited reasonable basis standard,⁷⁵ the task force argued that the new standard elevated the ethical bar.

Good faith provided the foundation of the new standard under Opinion 85-352. It was an objective rather than a subjective standard: "some realistic possibility of success *if litigated*."⁷⁶ The result, the task force insisted, "is an objective standard which can be enforced"; indeed, state disciplinary bodies, the task force urged, "should scrutinize lawyer conduct with respect to the new standard under Opinion 85-352."⁷⁷

Unlike the reasonable basis standard, the new standard required more than just any possibility of success. The possibility of success "must be 'realistic.'"⁷⁸ And a possibility of success could not be realistic "if it is only theoretical or impracticable. This clearly implies," according to the task force interpretation, "that there must be a substantial possibility of success."⁷⁹ A 5 percent or 10 percent likelihood of success was not enough to meet the new standard, while a position with a likelihood of success approaching one-third should pass muster. The task force noted that a position supported by substantial authority as defined under section 6661 would satisfy the realistic possibility of success standard. True enough.

But the task force was engaging in wishful thinking. The realistic possibility of success standard in Opinion 85-352 was a lower standard than the substantial authority standard in the code's substantial understatement penalty. In fact, Opinion 85-352 authorized a lawyer to

⁷²ABA Tax Section, *supra* note 69, at 637.

⁷³ABA Comm. on Ethics and Professional Responsibility, Op. 85-352, *supra* note 1.

⁷⁴ABA Tax Section, *supra* note 69, at 638 ("The standard adopted by Opinion 85-352 does not permit taking into account the likelihood of audit or detection in determining whether the ethical standard is met.").

⁷⁵See *supra* note 68.

⁷⁶ABA Comm. on Ethics and Professional Responsibility, Op. 85-352, *supra* note 1. Emphasis added.

⁷⁷ABA Tax Section, *supra* note 69, at 637. Some commentators were unconvinced, and criticized the good-faith foundation as requiring nothing more than a nonfrivolous position, much like Opinion 314's reasonable basis standard. See Ames, *supra* note 68, at 421-425 (arguing that replacing the reasonable basis standard with a good-faith standard did not effect meaningful change).

⁷⁸*Id.* at 638.

⁷⁹*Id.*

advise a reporting position that subjected the client-taxpayer to the risk of the section 6661 penalty. (More on that perverse result in Section IV *infra*.) Also, by endorsing the new standard and praising its “objective” underpinnings, the Tax Section was at the same time endorsing the litigation standard that it had criticized in its earlier proposed revision of Opinion 314 (see Section III.A.3 *supra*). The “good faith” overlay in Opinion 85-352 may have created an objective rather than a subjective standard. But “some realistic possibility of success if litigated” meant that the standard, by definition, reflected litigation norms.

The task force was engaging in wishful thinking.

5. Obligation to withdraw from representation. Reporting positions had to meet the realistic possibility of success standard under Opinion 85-352. If the position failed to meet that standard, the lawyer was required to counsel the client not to assert the position on a tax return without adequate disclosure. The position could be advanced by payment of the tax and claim for refund as long as it was not frivolous.

The task force read into those requirements several circumstances in which the lawyer was obliged to withdraw. If the client asserted a position that failed to meet the realistic possibility of success standard and the lawyer had advised against the position, the lawyer “must withdraw from the engagement, at least to the extent it involves advice as to the position to be taken on the return.”⁸⁰ The extent of a particular engagement did not include subsequent advocacy if the position was nonfrivolous. Commentators noted that the task force interpretation produced the draconian result that a lawyer would be required to withdraw even when the reporting position that failed to meet the realistic possibility of success standard reflected a minor aspect of the lawyer’s engagement.⁸¹

The task force took an equally hard line on the effect of disclosure. Although Opinion 85-352 was silent whether disclosure exonerated a position that fell below the realistic possibility of success standard, the task force was emphatic: “If there is not a realistic possibility of success, if litigated, the new standard could not be met by disclosure or ‘flagging’ of the position in the return.”⁸² Several authorities argued that Opinion 85-352 included a disclosure option.⁸³ In particular, Opinion 85-352 stated that a position without substantial authority (as defined under section 6661) and not disclosed can still be advanced on the tax return as long as the position is supported by a realistic possibility of success. By infer-

ence, if the position was disclosed, it would not have to meet the realistic possibility of success standard.⁸⁴

6. Tax returns are not adversarial proceedings. The task force attempted to disclaim the Ethics Committee’s statement in Opinion 85-352 that the role of the tax lawyer is largely adversarial. It was a strained interpretation.

Recall that Opinion 85-352 leaned heavily in the direction of considering the submission of a tax return as an adversarial act: “In many cases, a lawyer must realistically anticipate that the filing of a tax return may be the first step in a process that may result in an adversary relationship between the client and the IRS.”⁸⁵ The task force undertook to read out that sentence: “The Opinion does not state that the general ethical guidelines governing advocacy in litigation are determinative, or suggest that tax returns are adversarial proceedings.”⁸⁶ It sure came close, though. “To the contrary,” the task force insisted, reading in what it wished were there, “a tax return initially serves a disclosure, reporting, and self-assessment function. It is the citizen’s report to the government of his or her relevant activities for the year.”⁸⁷ Opinion 85-352 clearly subordinated the tax lawyer as adviser to the tax lawyer as advocate. In the hands of the task force, however, the opinion referred offhandedly but responsibly to the tax lawyer’s occasional advocacy role. “The Opinion says that because some returns, particularly aggressive ones, may result in an adversary relationship, there is a place for consideration of the ethical considerations regarding advocacy.”⁸⁸ And finally, in a statement that thoroughly misrepresented the plain language and content of Opinion 85-352, the task force wrote that the opinion “blends the ethical guidelines governing advocacy with those applicable to

⁸⁴It is notable that in 1987 the Tax Section, in commenting on proposed revisions to Circular 230, adopted the view that taxpayers were permitted to advance a reporting position that did not meet the realistic possibility of success standard provided the position was not frivolous and was adequately disclosed. See letter from John B. Jones, ABA Tax Section chair, to Leslie Shapiro, director of practice (Feb. 12, 1987). Some commentators endorsed the idea of allowing disclosure to exonerate a substandard position. “Permitting adequate disclosure to cure a nonfrivolous substandard position,” J. Timothy Philipps argues, “would be in consonance with the goal of diminishing the role of the audit lottery and would promote the policy of consistency between the Treasury regulations and the ABA standards.” Philipps, *supra* note 68, at 618. Also, permitting disclosure to absolve a substandard position would overcome the problem whereby a lawyer may be required to adopt a narrower view of what is an acceptable tax position than other nonlawyer tax practitioners whose professional standards may be less restrictive.

⁸⁵ABA Comm. on Ethics and Professional Responsibility, Op. 85-352, *supra* note 1.

⁸⁶ABA Tax Section, *supra* note 69, at 640.

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁰*Id.* at 639.

⁸¹See Wolfman, Holden, and Harris, *supra* note 68, at 63.

⁸²ABA Tax Section, *supra* note 69, at 638.

⁸³See Wolfman, Holden, and Harris, *supra* note 68, at 64.

advising, from which the new ethical standard is derived."⁸⁹ The "blend," however, was two heaping cups of lawyer as advocate and a dash of lawyer as adviser.⁹⁰

IV. Fatal Flaw Revisited: Tax Ethics as Legal Ethics

The fatal flaw of Opinion 85-352, as with Opinion 314 before it, is that it equated tax ethics with legal ethics rather than with tax law.⁹¹ General legal ethics reflected the litigation standard.⁹² Yet litigation and controversy norms had scant application to the practice of tax law. Tax practice was largely nonadversarial. Overlaying litigation and controversy norms created an ethical standard that did not accurately reflect the tax lawyer's everyday considerations. Worse, it created a dangerous disconnect between tax ethics and tax law whereby the tax lawyer was ethically permitted to advise reporting positions that fell below the requirements of tax law and subjected clients to potential penalties. In some instances, it also permitted the tax lawyer to assist in tax evasion. "Such a practitioner," Wolfman said in 1986 in criticizing the Opinion, "fails utterly in his obligation to support his tax system. His conduct should be prohibited."⁹³ Perversely, however, Opinion 85-352 authorized that conduct.

Comparatively, basing ethical norms on legal norms was a good idea. "The [Model] Code's disciplinary rules are designed to be legally binding,"⁹⁴ Ted Schneyer argued. "Violations can result in severe sanctions, even disbarment. This places a premium on giving lawyers adequate warning of what constitutes an offense. One way to give lawyers adequate warning is to base professional responsibilities on other law."⁹⁵ As important, and with specific reference to tax practice, equating tax ethics with tax law would prevent the tax lawyer from condoning deception or aiding tax evasion.⁹⁶ Members of the Tax Section envisioned that connection in the mid-1980s.⁹⁷ But the Ethics Committee rejected anything less than

⁸⁹*Id.*

⁹⁰As discussed above, Opinion 85-352 viewed the tax lawyer almost exclusively as advocate. See Sections III.A.2 and III.A.3, *supra*. The task force, in observing a "blend" of advocacy and advising guidelines in Opinion 85-352, was seeing something that simply was not there.

⁹¹For a fuller discussion of the fatal flaw regarding Opinion 314, see Ventry, *supra* note 12, at 1048-1054.

⁹²Recall that Opinion 85-352 referred to the "nonfrivolous" litigation standard in Model Rule 3.1 for asserting a position, as well as the adversarial standard in rules 1.2(d) and 3.1 permitting an attorney to make a good-faith effort to determine the validity, scope, meaning, or application of the law and to advocate an extension, modification, or reversal of existing law.

⁹³Wolfman, *supra* note 46.

⁹⁴Ted Schneyer, "Moral Philosophy's Standard Misconception of Legal Ethics," *Wis. L. Rev.* 1529, 1556 (1984).

⁹⁵*Id.*

⁹⁶Handelman, *supra* note 60, at 95.

⁹⁷In a letter from Paul Sax to the ABA Committee on Standards of Tax Practice in 1984 during deliberations over the Tax Section's proposed revision of Opinion 314, Sax commended a "gentl[e] move toward a single standard for both the understatement penalty and the minimum ethical standard." Letter from Paul Sax to ABA Committee on Standards of Tax Practice (Apr. 18, 1984), cited in Falk, *supra* note 25, at 658 n.67.

treating tax ethics as an extension of general legal ethics. The consequences were disastrous.

A. The Corrosive Effect of Litigation Norms

Litigation norms turned the tax lawyer into an advocate and turned her relations with the IRS adversarial. Yet as advocates, tax lawyers could be "blinded by [their] own brightness"⁹⁸ and enter into a kind of pro-client fantasyland that focused on clever tax plans rather than on the dual obligation to taxpayer-client and to tax-collector-government.

The litigation standard in Opinion 85-352 undermined the voluntary, self-assessment federal income tax.

The litigation standard in Opinion 85-352 undermined the voluntary, self-assessment federal income tax. It effectively resolved questionable positions in the taxpayer's favor by allowing tax lawyers to advise aggressive reporting positions on tax returns that they knew with substantial certainty would never be viewed by the opposition.⁹⁹ Reporting tax positions on a tax return, however, was not an adversarial act. Rather, filing a tax return "satisfies a citizen's legal obligation to her government and is not a response to an IRS challenge."¹⁰⁰ At that early stage of the compliance process, the tax lawyer is merely advising the client on how best to comply with that legal obligation. More fundamentally, filing a tax return, even those with overaggressive positions, "should not serve as the basis for characterizing a compliance process that in all cases precedes an actual dispute between a taxpayer and the government."¹⁰¹ Nor is the internal revenue audit necessarily adversarial. The audit serves to "complement . . . the return preparation and filing process" and offers the government an opportunity to collect more information from the taxpayer to ensure that reporting positions accurately reflect the tax law.¹⁰² The filing of tax returns and the use of audits, therefore, should be viewed as integral parts of the tax

⁹⁸Frederic G. Corneel, "Guidelines to Tax Practice Second," 43 *Tax Law.* 297 (Winter 1990).

⁹⁹Durst, *supra* note 13, at 1035; Prescott, *supra* note 47, at 713-714; Ann Southworth, Note, "Redefining the Attorney's Role in Abusive Tax Shelters," 37 *Stan. L. Rev.* 889, 910-911 (1985).

¹⁰⁰Linda Galler, "The Tax Lawyer's Duty to the System," 16 *Va. Tax Rev.* 681, 697 note 57 (Spring 1997), book review of Bernard Wolfman, James P. Holden, and Deborah H. Schenk, *Ethical Problems in Federal Tax Practice*, 3d edition (New York: Little, Brown and Co., 1995).

¹⁰¹Prescott, *supra* note 47, at 727.

¹⁰²*Id.* at 728. In fact, according to Prescott, even revenue agents who "invite an adversarial response from taxpayers and their representatives" do "not justify recharacterization of an otherwise nonadversarial process. The purpose of the internal revenue audit is to confirm compliance, not to resolve disputes. Disputes between taxpayers and the government are the product of the audit process. Nevertheless, the possibility of a dispute does not justify an adversarial approach to the audit

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system's compliance process. "Neither," Loren Prescott observed, "is part of a forum for the resolution of disputes between taxpayers and the IRS."¹⁰³

Of course, both processes can precipitate an adversarial relationship with the IRS. And "breaking the law can provoke the government's adversarial wrath."¹⁰⁴ But that does not mean that complying with the tax law is the first step in an adversarial proceeding. "Just as complying with a contract is not a first step in a breach of contract proceeding," Falk wrote, "and applying for a driver's license is not a first step in a traffic proceeding, filing a tax return is not a first step in a tax enforcement proceeding. Rather, until the return has been questioned and enforcement proceedings begun, a tax return is (however much the taxpayer may resent it) a step towards cooperating with the government. It is how the taxpayer proposes to comply with tax laws."¹⁰⁵ In the end, the Ethics Committee's blind commitment to the litigation standard, "an approach to taxpayer representation that leads to limited disclosure on tax returns," is inconsistent with both the nature and purpose of the tax compliance system.¹⁰⁶

B. Permitting Deception and Evasion

Opinion 85-352 and its emphasis on litigation and controversy norms not only condones noncompliance, it also condones deception¹⁰⁷ and tax evasion.

The opinion authorizes a lawyer to advise reporting positions that the client has affirmatively decided to hide.¹⁰⁸ In that way, the opinion arguably permits the lawyer to violate her duty of candor. According to Gwen Thayer Handelman, a true adversarial relationship is characterized by the lawyer proposing arguments "as candidates for the status of 'law' and there is no expectation that the view advanced have a recognized claim as law."¹⁰⁹ Under that scenario, the law emerges "from the give and take of the adversarial process,"¹¹⁰ which "necessarily involves affording the opposition the opportunity to rebut."¹¹¹ Lawyers can assert litigating positions without risk of deception reflecting the client's selfish and myopic perspective of "the law" or what she may want the law to be. Advising and filing a tax return, however, requires an implicitly higher duty of candor "made explicit in the adviser's signed declaration."¹¹² The litigation standard embedded in Opinion 85-352 allows tax lawyers to advise positions "even where the lawyer believes the position probably will not prevail,

there is no 'substantial authority' in support of the position, and there will be no disclosure of the position in the return."¹¹³ While the opinion requires that the position to be asserted must be one which the lawyer in good faith "believes is warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law,"¹¹⁴ that standard is the overly generous nonfrivolous standard inapplicable to all stages of tax representation with the exception of those engagements that have reached the controversy or litigation stage.

Deception is not the worst of it. Opinion 85-352 also facilitates evasion. The opinion permits a lawyer to advise a reporting position that he believes lacks substantial authority and is not disclosed. "Opinion 85-352 countenances the participation of a practitioner in a return preparation transaction," Wolfman has observed, "as to which he believes a no-fault, 20 [percent] penalty attaches, but knows that the penalty will not be collected unless the return is audited and the item is discovered, two highly unlikely events in the absence of disclosure. The practitioner, then is helping a taxpayer evade the very clear objectives which Congress sought to attain in the enactment of section 6661,¹¹⁵ and later section 6662."¹¹⁶ Opinion 85-352 merely required the lawyer to warn her client about potential penalties. But Frederic Corneel, in his famous aspirational "Guidelines to Tax Practice Second," urged more elevated standards, calling it "highly unusual" for firms "to participate in conduct certain to lead to civil tax penalties." "Indeed," Corneel added, firms should "generally not participate when a civil penalty to the taxpayer would more likely than not result

¹¹³ABA Comm. on Ethics and Professional Responsibility, Op. 85-352, *supra* note 1.

¹¹⁴*Id.*

¹¹⁵Wolfman, *supra* note 46. See also Handelman, *supra* note 111, at 634 (stating that under Opinion 85-352, lawyers, unlike taxpayers, "were assured of the ethical propriety of asserting their opposition to rules and regulations surreptitiously"). Phillips, *supra* note 68, at 616 (noting that Opinion 85-352 "permits Lawyer to advise Client with respect to a position for which Client may incur a penalty").

¹¹⁶See Gould, *supra* note 49, at 537 ("A lawyer is ethically permitted to recommend an aggressive tax strategy or transaction that will expose the client to a tax penalty. In support of this conclusion is the fact that the 'some realistic possibility of success' standard of Opinion 85-352 is lower than the substantial authority standard of section 6662(b)(2). The IRS places the required degree of success under the latter standard at 45 percent. In the case of establishing 'some realistic possibility of success,' the [1986 Tax Section] task force report places the required degree of success at 'approaching one-third.' Moreover, in considering whether 'some realistic possibility of success' exists, a tax practitioner can consider a wider range of authorities than when he considers whether substantial authority exists for purposes of the section 6662 tax penalties."). See also Wolfman, Holden, and Harris, *supra* note 68, at 62 (noting different standards of substantial authority under section 6662(b)(2) and Opinion 85-352). In 1989 Congress repealed section 6661 and replaced it with section 6662, the accuracy-related penalty. For citations, see *supra* note 18.

process and the resulting lack of cooperation that undermines the effectiveness of the compliance testing system." *Id.* at 731.

¹⁰³*Id.*

¹⁰⁴Falk, *supra* note 25, at 648.

¹⁰⁵*Id.* at 648-649.

¹⁰⁶Prescott, *supra* note 47, at 730.

¹⁰⁷Handelman, *supra* note 60, at 95.

¹⁰⁸*Id.*

¹⁰⁹*Id.* at 96.

¹¹⁰*Id.*

¹¹¹Gwen Thayer Handelman, "Law and Order Comes to 'Dodge City'—Treasury's New Return Preparer and IRS Practice Standards," 50 *Wash. & Lee L. Rev.* 631, 634 (Spring 1993).

¹¹²Handelman, *supra* note 60, at 96.

if the return were audited and all the facts were presented to a court."¹¹⁷ Corneel's practice standards were too stringent for the Ethics Committee, which authorized a lower threshold for minimum ethical conduct. In the process, it approved deception, noncompliance, and even evasion of the tax law.

C. Tax Advice and Moral Considerations

Some commentators have argued that tax ethics should interpret the general rules of legal ethics.¹¹⁸ But that's true only if general legal ethics supply appropriate standards for tax practice. And as the foregoing suggests, most tax practice requires altogether different considerations than those covered in legal ethics defined and animated by the litigation standard. Of course, the tax lawyer engages in professional activities shared by other legal professionals. And the nature of her representation of a particular client can invoke controversy and litigation norms. But generally speaking, the tax lawyer is less an advocate than an adviser, a planner, a negotiator, and an intermediary. The tax law recognizes that litigation and controversy norms are inapposite to tax practice. So should tax ethics.

"Giving legal advice ethically is different from advising on legal ethics."¹¹⁹ But it doesn't have to be. The worst that can be said of an ethical standard for lawyers that imposes stricter responsibilities than legal rules is that the lawyer might be derelict in his protection of a right in the pursuit of performing a duty or that the lawyer might lose clients to less ethical nonlawyer practitioners. Those are real problems, to be sure— but ones that do not currently threaten lawyers given modern tax law, which largely imposes higher rather than lower standards on taxpayers and their advisers compared with legal ethics (at least as defined under the litigation standard reflected in Opinions 85-352 and 314).

Equating tax ethics with legal ethics authorizes lawyers to substitute their own construction of private law for public law.

Ultimately, equating tax ethics with legal ethics authorizes lawyers to substitute their own construction of private law for public law. Both the reasonable basis standard and realistic possibility of success standard create "an unparalleled license to deviate from the prescriptions of lawful authority [as defined by the legislature, courts, and administrative bodies] by substituting the adviser's judgment for 'law.'"¹²⁰ The dangers of that kind of lawmaking are many. Allowing private lawyers

to define the boundaries of public law means "legal reasoning may become fortunetelling, an exercise of imagination influenced by wishful thinking, creative rather than compliant."¹²¹ Law defined by private individuals acting on behalf of private interests is a frightening prospect. But it is a reality under the ethical standards articulated in Opinion 85-352.

Rendering tax advice often involves moral considerations.¹²² That does not mean the tax lawyer should engage in gratuitous moralizing. "Supererogation — i.e., going beyond what duty requires — should be left to saints."¹²³ But one need not believe that the filing of a tax return involves a moral obligation on behalf of the citizen-taxpayer or the citizen-tax adviser to consider the act of advising a questionable reporting position or to consider assisting in the submission of a return a moral endeavor. A little moralizing is required.

Echoing Randolph Paul 40 years earlier,¹²⁴ Corneel wrote in 1990 that clients "are less well-informed than we are as to whether a proposed plan involves ethical but risky 'skating on thin ice' or whether it involves 'walking on water,' that is, a breach of law."¹²⁵ Tax lawyers must therefore "make the difference clear to them, and explain that being on the right side of this line is vital to our working with them on their tax plans."¹²⁶ Although "lectures to clients on morality are likely to be resented and useless," clients would certainly "understand that we do not want to jeopardize continuing to make our living in our accustomed way" by asserting an overaggressive position on a tax return that could subject them to penalties, civil or criminal.¹²⁷

¹²¹*Id.* at 632-633. See also Corneel, *supra* note 98.

¹²²This is hardly a radical statement. The Model Rules contemplate that lawyers will supplement ethical rules promulgated by the ABA with "their own moral compass" as well as "the norms imposed on them by their peers." Anthony C. Infanti, "Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar," 22 *Va. Tax Rev.* 589, 605 (Winter 2003). The Preamble to the ABA Model Rules of Professional Conduct, for instance, states that while a lawyer's professional responsibilities "are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law," a lawyer "is also guided by personal conscience and the approbation of professional peers."

¹²³Falk, *supra* note 25, at 661-662. The lawyer should not act as a "moral busybody," Falk continued. She should hold views "regarding the morally right solution to a problem of tax compliance, but should hesitate to impose moral views on the client." In fact, a lawyer's moralism "may be self-defeating, because the client who is being held to someone else's lofty moral standards may seek out a morally neutral tax advisor." Gresham's Law, it turns out, is never far from the surface when defending the ethical status quo. "Perhaps willingness to lose unscrupulous clients is a price the good lawyer must pay, but the attorney's primary moral duty is to encourage the rule of law." Right. And if the rule of law sets higher standards than legal ethics, then legal ethics is morally enervating and should evolve.

¹²⁴Randolph E. Paul, "The Responsibilities of the Tax Adviser," 63 *Harvard L. Rev.* 378 (January 1950).

¹²⁵Corneel, *supra* note 98.

¹²⁶*Id.*

¹²⁷*Id.*

¹¹⁷Corneel, *supra* note 98. Corneel made the same point regarding the preparers' penalty ("Further, we will not serve as return preparers if it appears more likely than not that we would be subject to any preparers' penalty if all the facts were known to the Service.")

¹¹⁸Falk, *supra* note 25, at 643.

¹¹⁹*Id.* at 659.

¹²⁰Handelman, *supra* note 111, at 636.

In 1950 Paul had written that clients were “honest innocents,” and the tax lawyer “bears a heavy responsibility” because “his standards may become the guiding standards for his client.”¹²⁸ Moreover, as a “specially qualified person in one of the most important areas of the public interest” with “special qualifications,” the tax lawyer had “special responsibilities which may not be passively discharged.”¹²⁹ Opinion 85-352 allowed the tax

lawyer to discharge those responsibilities. As long as the tax lawyer met the low ethical threshold of “some realistic possibility of success,” she could render advice that subjected a client to penalties, that undermined the self-assessment system, and that evaded the intent of the federal tax laws. Hardly moral behavior. But then again, Opinion 85-352 outlined professional ethics, not morality.

¹²⁸Paul, *supra* note 124, at 385.

¹²⁹*Id.* at 386.