

1997

The Tax Lawyer's Duty to the System

Linda Galler

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Linda Galler, *The Tax Lawyer's Duty to the System*, 16 Va. Tax Rev. 681 (1997)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/475

This Book Review is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

BOOK REVIEW

THE TAX LAWYER'S DUTY TO THE SYSTEM

Ethical Problems in Federal Tax Practice. By Bernard Wolfman, James P. Holden and Deborah H. Schenk. Little, Brown and Company: New York, 3d ed., 1995.

*reviewed by Linda Galler**

Americans are losing faith in lawyers. An American Bar Association poll conducted during the O.J. Simpson criminal trial revealed a substantial erosion in the public's respect for criminal defense lawyers.¹ One article reporting on the ABA poll asked, "Would it be surprising if, in the public mind, quality lawyering is coming to be equated with a Machiavellian disregard for the truth?"² Indeed, trial lawyers and their ethics were the subject of caustic political rhetoric during the 1996 presidential campaign.³ Clearly, lawyers' ethics are under public scrutiny. It is thus particularly good timing for a new edition to Bernard Wolfman, James Holden, and Deborah Schenk's casebook on ethics in tax practice.⁴

* Professor of Law, Hofstra University School of Law. The author thanks Gwen Thayer Handelman, Jay Hickey, and Murray Singer for their helpful comments and suggestions, and Jennifer Pymm for assistance in research.

¹ Victoria Remiasz Mile, *The Public Verdict: Enough, Already*, 81 A.B.A. J. 77 (June 1995). Forty-one percent of those surveyed stated that, as of April 1995, the O.J. Simpson trial had caused them to lose respect for criminal defense lawyers. Thirty-four percent claimed to have lost respect for all lawyers. *Id.*

² Steven Keeva, *Storm Warnings: After Months of Courtroom Maneuvering in the O.J. Simpson Case, the Public is Ready to Indict the Entire Criminal Justice System*, 81 A.B.A. J. 77, 78 (June 1995).

³ See, e.g., *A Transcript of the First Televised Debate Between Clinton and Dole*, N.Y. Times, Oct. 7, 1996, at B8; see also Douglas Frantz, *Trial Lawyers, Their Money and Their Influence Have Become Issues in the Campaign*, N.Y. Times, Oct. 13, 1996, at 18.

⁴ In an essay commenting on the growing contempt for lawyers resulting from the O.J. Simpson trial, Dean David Link proposed that the public's faith in the legal profession could be restored with a renewed commitment to ethics in the training of lawyers.

It is incumbent upon our nation's law schools to develop lawyers who believe their primary responsibility is to bring about justice and peace between litigants, rather than strive for monstrous-sized verdicts; who put a greater emphasis on the beginning rather than the end of the Aristotelian formula "Do good and avoid evil."

David T. Link, *Law Schools Must Lead Legal Profession Back to Its Roots*, Chi. Trib., Sept.

Ethical Problems in Federal Tax Practice is the only set of teaching materials designed for use in a course on professional responsibility in the tax area.⁵ Although the book meets its stated objective to "provide insights and principles that are applicable in virtually every area of law practice,"⁶ its true strength lies in the fusion of generic concepts and standards with those that apply uniquely to tax practice. The authors draw upon their substantial experience and expertise in tax law and legal ethics in introducing students to the philosophical richness and practical conundrums encountered in the establishment of, and compliance with, professional standards.

Attorneys engaged in the practice of tax law encounter traditional forms of professional regulation by the state and federal authorities that admit them to practice, as well as specific federal statutory and regulatory dictates, which mandate standards for carrying out tax-related professional responsibilities.⁷ The Internal Revenue Code imposes civil penalties on lawyers who fail to meet prescribed standards for accuracy in rendering tax advice or who aid or assist others in understating tax liabilities.⁸ Tax attorneys

1, 1995, § 1, at 27.

⁵ Professor Deborah Rhode's book, *Professional Responsibility: Ethics by the Pervasive Method*, includes materials for teaching selected professional responsibility issues within the traditional tax course. Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (1994). Part I of that book is designed for standard courses on legal ethics and addresses basic concepts of professional responsibility. Part II offers selections of materials relevant to ten core first year and advanced courses in which ethical issues might arise, including tax.

Professor Wolfman and Mr. Holden are co-authors of a treatise on ethical problems arising in tax practice that is written primarily for the professional community. Bernard Wolfman, James P. Holden & Kenneth L. Harris, *Standards of Tax Practice* (3d ed. 1995). An earlier edition of that text was described as "a definitive 'how-to' book for tax practice." Paul J. Sax, *Standards of Practice*, 51 Tax Notes 931, 931 (1991)(book review).

⁶ Bernard Wolfman, James P. Holden & Deborah H. Schenk, *Ethical Problems in Federal Tax Practice* xxiii (3d ed. 1995) [hereinafter *Ethical Problems*].

⁷ Every state has adopted, in some form, the ABA *Model Rules of Professional Conduct* or *Model Code of Professional Responsibility*. Stephen Gillers & Roy D. Simon, Jr., *Regulation of Lawyers: Statutes and Standards* xxii (1997 ed.). The ABA Standing Committee on Ethics and Professional Responsibility issues opinions interpreting the *Model Rules* and *Model Code*. While these opinions are issued for advisory purposes only, they are influential. State and local ethics committees provide advice as well.

Malpractice liability standards also play a role in establishing and maintaining competence among attorneys. *Ethical Problems* considers professional liability issues in Chapter Seven.

⁸ See, e.g., I.R.C. §§ 6694, 6695, 6701. Additional penalties may be imposed on persons

also must comply with Treasury regulations, referred to as "Circular 230," that govern practice before the Internal Revenue Service (IRS).⁹ Lawyers representing taxpayers before the United States Tax Court are subject to the rules of that court as well.¹⁰ Wolfman, Holden and Schenk have skillfully woven together all of the various sources of professional regulation into a coherent, comprehensive, and thought-provoking vehicle for exploring the ethical responsibilities of tax attorneys.

I.

The book's underlying theme of role differentiation is implemented through a systematic exploration of the four principal areas in which tax practice is conducted. These include *compliance* (preparing or guiding the preparation of a client's tax return), *controversy* (representing clients at audit and in litigation), *planning* (helping clients arrange their affairs in a manner that minimizes tax liabilities while maximizing net returns), and *tax policy* (seeking to modify tax policy in a representative capacity or pro bono publico).¹¹ Each chapter examines the theoretical and practical concerns that are implicated by the applicable rules and emphasizes the separate standards that apply to the tax lawyer as advocate and as adviser.

Chapter One introduces the ethical framework surrounding tax practice. It briefly describes the tax lawyer's duties to the client and to the system and highlights the various sources of ethical rules, including those that apply specifically to tax practice (e.g.,

who participate in tax shelter activities. See I.R.C. §§ 6700, 6111, 6112.

⁹ The Secretary of the Treasury is statutorily authorized to regulate the practice of representatives before the department, as well as admission, suspension, and disbarment from such practice. 31 U.S.C. §§ 330(a), (b) (1996). Under that authority, the Secretary has issued regulations that are commonly referred to as "Circular 230." See 31 C.F.R. part 10 (1996).

¹⁰ The Tax Court Rules expressly adopt the ABA Model Rules. Tax Ct. R. Practice and Procedure 201(a); see also *Drobny v. Commissioner*, 69 T.C.M. (CCH) 2600, 2605 (1995); *Fu Inv. Co. v. Commissioner*, 104 T.C. 408, 411 (1995).

¹¹ *Id.* at 3-4. The book also examines ethical issues encountered by lawyers who represent or are employed by governments or corporations and considers a variety of issues relating to the delivery of professional services, including the unauthorized practice of tax law, advertising and solicitation, specialization, and legal malpractice. See *infra* text preceding note 18.

the civil penalty provisions of the Internal Revenue Code and Circular 230) and those that do not (e.g., rules of professional conduct issued by governments, courts, and the organized bar). The chapter concludes with excerpts from two influential articles that explore the lawyer's moral accountability for lawful actions taken on behalf of her clients.¹²

Chapters Two through Five, comprising the core of the book, examine the tax lawyer's principal roles and the ethical issues that arise in each capacity. Chapter Two addresses the lawyer's ethical responsibilities in preparing a client's tax return or rendering advice in connection with that preparation. Because the lawyer's duties in this context are grounded in the duties of her client, the chapter initially addresses the taxpayer's obligation to submit an accurate tax return, as enforced by the penalties for negligence or disregard of rules or regulations, substantial understatement of income tax, and substantial valuation misstatement.¹³ The chapter then turns to the practitioner's accuracy standards, which derive from statutory penalties, Circular 230, and ABA Formal Opinions 314 and 85-352.¹⁴ The chapter notes emphasize the interrelationship between taxpayer accuracy standards and practitioner accuracy standards and pose such germane questions as: May a lawyer ethically advise a return position that meets the taxpayer's "reasonable basis" standard, but fails to meet the practitioner's higher "realistic possibility" standard? If a client proposes to adopt, but not to disclose, a "reasonable basis" position that falls short of the "realistic possibility" standard, can she expect assistance from her tax lawyer? Is there a philosophical discontinuity between the lower taxpayer standard and the stricter practitioner standard?

The tax lawyer's role as an advocate in disputes with the Internal Revenue Service is the focus of Chapter Three, which addresses the twin duties of loyalty to the client and of maintaining client confidences. As to the duty of loyalty, the chapter considers

¹² Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 669 (1978).

¹³ I.R.C. § 6662.

¹⁴ *Ethical Problems*, *supra* note 6, at 43.

conflict of interest issues arising from multiple representation (e.g., representing both promoters and investors in a tax shelter¹⁵ or representing both husband and wife following their divorce¹⁶), conflicts relating to former clients, conflicts with the lawyer's own interests, and disqualification based on the lawyer's potential status as a witness.

The materials on the duty of confidentiality are extensive and well-selected. The chapter compares the ethical obligation of confidentiality with the attorney-client evidentiary privilege, examines the difficult choices faced by lawyers who discover that clients have filed fraudulent tax returns, and considers a lawyer's disclosure obligations with regard to inadvertent errors made by clients or the IRS. The chapter also considers the duty of confidentiality where a lawyer's work may be relied upon by third party investors to whom the lawyer may also owe ethical or legal duties.

Chapter Four addresses the lawyer's obligations in the tax planning context, where she assists clients in creating transactions rather than in managing past facts. The chapter presents a series of worthwhile hypothetical fact patterns that demonstrate the difficulties of drawing a line between lawful, aggressive representation and legal advice that is over the proverbial edge. The materials on legal opinions and tax shelters raise challenging issues, including a lawyer's duties to unsophisticated clients and to non-clients who may be affected by legal opinions, but would be more effective if shortened and summarized. Because conventional tax shelters are no longer widely marketed, it is difficult to justify spending much time on them in an ethics course given the complexity of the underlying substantive issues.

¹⁵ *Para Technologies Trust v. Commissioner*, 64 T.C.M. (CCH) 922 (1992). Unfortunately, the edited version of *Para Technologies* in *Ethical Problems* omits important facts that are needed to understand the nature of the conflict of interest.

¹⁶ *Devore v. Commissioner*, 963 F.2d 280 (9th Cir. 1992), and *Coleman v. Commissioner*, No. 44-86-86 (T.C. 1991), reprinted in *Ethical Problems*, *supra* note 6, at 92-97, are wonderful cases to teach because they demonstrate the interplay between ethical rules and a substantive provision of the Internal Revenue Code, i.e., innocent spouse relief. See I.R.C. § 6013(e). The fact that Mrs. Devore is the widow of Nat King Cole adds a bit of spice. See Gail Levin Richmond & Carol A. Roehrenbeck, *From Tedious to Trendy: A Tax Teacher's Triumph*, 17 Nova L. Rev. 739 (1993) (advocating substitution of a course on "Tax Styles of the Rich and Famous" for the traditional federal income tax course as a means of livening up classes and boosting enrollment).

Chapter Five considers ethical responsibilities of tax lawyers who seek "to mold or modify tax policy"¹⁷ on behalf of a client or pro bono publico by expressing their own opinions or those of clients or professional organizations. The chapter compares the rules that apply to a lawyer representing a client before a legislative or administrative body with those that apply to representation before a tribunal. On the client side, may a lawyer ethically represent a client in advocating a policy change that the lawyer does not personally endorse? May a lawyer, on behalf of a client (or on her own behalf), ethically urge a policy change that would adversely affect another client? On the pro bono side, the chapter includes a series of readings lamenting the public interest's lack of representation and the organized bar's dismal participation in the tax legislative process. Among the practical concerns raised are the need for disclosure or recusal when a client shares policy objectives with a bar organization in which the lawyer is active and the propriety of advancing a bar organization's position that is not in the best interests of one's client.

Chapter Six contemplates the unique ethical concerns of lawyers employed by the government or by corporations. How do the ethical obligations of a lawyer working for the government differ from those of private practitioners representing private clients? The materials also address conflict of interest considerations, including criminal penalties, that apply to former government lawyers who enter private practice and former private lawyers who enter government service. Special problems of corporate representation are examined, including recognizing the identity of the client (i.e., the corporation itself, as distinguished from its shareholders, directors, officers, or employees), the lawyer's duty to disclose corporate misconduct, the parameters of the attorney-client privilege, and the special concerns of in-house lawyers.

The final chapter surveys a variety of issues confronted collectively by lawyers as an organized profession. These include constraints on the unauthorized practice of law, constitutional limits on advertising and solicitation restraints, specialization, and professional liability. The materials on unauthorized practice of law by nonlawyers raise difficult and longstanding definitional

¹⁷ *Ethical Problems*, *supra* note 6, at 261.

questions concerning what constitutes the practice of law and emphasize the tensions that exist between tax lawyers and tax accountants.¹⁸ The book closes with a discussion of the legal community's obligation to ensure that legal services are available to persons of limited means and leaves students with the question of what additional steps their professional community should take to secure adequate legal representation for the nonaffluent.

II.

A central theme of *Ethical Problems in Federal Tax Practice*, which reflects a fundamental issue in the field of lawyers' ethics, is the conflict (or apparent conflict) between the lawyer's duty to the client and her duty to the justice system. The authors rightly observe – in general terms – that a lawyer's behavioral choices may be affected when her client's private interests conflict with the lawyer's duty to the system. When the two duties conflict, the duty to the system takes priority.¹⁹ As is common with most legal ethics literature, however, the book provides only a cursory definition of the "system" to which the duty relates, viz., "an imprecise concept blending together notions of society, the profession, and the law."²⁰ This definitional imprecision makes it difficult for students to conceptualize the lawyer's competing obligations²¹ and to appreciate the policy considerations that apply in reaching an ethically reasonable result. The notion of zealous representation of client interests is intuitive to law students;²² offsetting

¹⁸ *The Florida Bar re Advisory Opinion – Nonlawyer Preparation of Pension Plans*, 571 So. 2d 430 (Fla. 1990), specifically identifies disputed activities in employee benefits practice and might usefully be included in the next edition or in supplementary materials.

¹⁹ See, e.g., ABA Commission on Professionalism, "... In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243, 278-80 (1986); see also Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 Geo. J. Legal Ethics 593, 604 (1994) ("The lawyer's primary duty is to his client, with the understanding that he owes a duty to the system of justice as well.").

²⁰ *Ethical Problems*, supra note 6, at 1.

²¹ See *Model Rules of Professional Conduct Preamble* (1995) [hereinafter *Model Rules*] ("Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living.").

²² Professors Hazard and Hodes have argued that misperceptions of the meaning of zealous representation compelled removal of that principle from the *Model Rules*. Geoffrey C.

responsibilities, all too often, are not.²³ A suggestion for improving the book, therefore, would be to clarify the meaning of the lawyer's "duty to the system," thereby affording context to the authors' admonitions.

Despite the book's references to a "duty to *the* system," the authors use the phrase to mean four distinct obligations, only some of which relate to lawyers who practice in fields other than tax. First, "duty to the system" is used to refer to a series of limitations under the *Model Rules* or *Model Code* on lawyers' zealous representation of clients. Second, "duty to the system" serves as a surrogate for the sentiment that lawyers should act honestly and ethically. Third, in some contexts the term "system" refers specifically to the set of laws and system of administration that comprise our nation's revenue raising process. Finally, the duty may not be to a system as such, but rather to a particular participant in the tax collection process, namely the Internal Revenue Service, which administers and enforces the tax laws on behalf of the federal government.

A. *Limitations on Zealous Representation*

In its broadest sense, the concept of a duty to the system derives from the principle of zealous regard for a client's interests. Under the *Model Code*, lawyers are ethically bound to represent clients "zealously within the bounds of the law."²⁴ This paramount duty of

Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.3:101 at 70 (2d ed. 1996); see also Michael C. Durst, *The Tax Lawyer's Professional Responsibility*, 39 U. Fla. L. Rev. 1027, 1047-48 n.74 (1987).

²³ Indeed, tax professionals themselves may not appreciate the nature of their countervailing obligations. In a report on the Invitational Conference on Professionalism in Tax Practice (a summit conference held in 1993 and attended by representatives of the Internal Revenue Service, American College of Tax Counsel, tax sections of the American Institute of Certified Public Accountants and the American Bar Association, and the Tax Executives Institute), Professor Michael Mulroney proffered a series of recommendations for enhancing the efficient operation of our nation's tax system through a continuing dialogue on tax professionalism. Among his suggestions are the consideration, development and articulation by each professional community of "the concept of the tax professional's duty to the system." Michael Mulroney, *Report on the Invitational Conference on Professionalism in Tax Practice*, Washington, D.C., October 1993, 11 Am. J. Tax Pol'y 369, 402 (1994).

²⁴ *Model Code of Professional Responsibility* Canon 7 (1995) [hereinafter *Model Code*]. Although the duty of a lawyer to represent her client zealously may be thought of as a duty to the client, it is described in the *Model Code* as a duty both to the client and to the legal

"warm zeal" was described in the 1908 *Canons of Professional Ethics*:

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy and defense.²⁵

Although the *Model Rules* state the principle of zealous representation only in a comment²⁶ and substitute "reasonable diligence and promptness" for "zeal," the comment makes clear that Model Rule 1.3 carries forward interpretations of "zealous representation" under the *Model Code*.²⁷

A lawyer's duty to zealously represent her clients is not unrestrained. As an officer of the court or the legal system,²⁸ the

system. *Model Code* EC 7-1; *Model Code* EC 7-19. Indeed, EC 7-19 is the first Ethical Consideration under the heading "Duty of the Lawyer to the Adversary System of Justice."

²⁵ *Canons of Professional Ethics* Canon 15 (1908) [hereinafter 1908 *Canons*].

²⁶ The comment to Model Rule 1.3 states:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

Model Rules, *supra* note 21, Rule 1.3 cmt.

The obligation of zeal as stated in the *Model Code* was subject to three criticisms. First, "zealousness" might be interpreted to mean "zealotry," justifying wrongful conduct on behalf of a client. Second, "zeal" might imply personal involvement by the lawyer rather than detached professional commitment. Third, there is a lack of fit between the concept of "zealousness" and the appropriate quality of representation in nonadversarial contexts. Hazard & Hodes, *supra* note 22, § 1.3:101.

²⁷ Hazard & Hodes, *supra* note 22, § 1.3:101; see also Durst, *supra* note 22, at 1047-48 n.74.

²⁸ *Model Rules*, *supra* note 21, Preamble. The *Model Code* emphasized the lawyer's duties to her client. Those who sought to minimize the primacy of these duties referred to the lawyer as an "officer of the court," implying either that her primary duty was to the state or that she had consequential countervailing obligations to the state. The change in terminology under the *Model Rules* to "officer of the legal system" has been characterized as a deliberate attempt to reject the client-centered values of the *Model Code*. Monroe H. Freedman, *Understanding Lawyers' Ethics* 9-10 (1990); W. Frank Newton, *A Lawyer's Duty to the Legal*

lawyer must abide by a series of limitations stated in the *Model Rules* or the *Model Code*. For example, lawyers have a duty of candor toward tribunals and of fairness to opposing parties and their counsel; lawyers must disclose adverse authority to the court; lawyers may not advise or assist clients in criminal or fraudulent conduct, etc. These limits on zeal, which apply primarily but not exclusively to lawyers engaged in litigation, are often described as duties to the system of justice or to the court, which override a lawyer's duty to her client when a conflict arises.²⁹

Ethical Problems in Federal Tax Practice considers limitations on zealous representation in each of the tax lawyer's roles, although contextual references to the conflicting duties are sparse. In the context of the tax lawyer's role as return preparer, the book observes the evolution of ethical obligations regarding tax return accuracy from the "reasonable basis" standard of ABA Formal Opinion 314 to the "realistic possibility of success if litigated" standard of ABA Formal Opinion 85-352. In the context of the tax lawyer's role as advocate at audit and in litigation, the book raises an assortment of tax-specific issues. Regarding a lawyer's duty to disclose adverse legal authority to a tribunal: if a contested matter is pending before the IRS, is the IRS considered a tribunal for purposes of the disclosure rule? In light of the statutory prohibition against use or citation as precedent of letter rulings,³⁰ is it unethical to cite letter rulings in ruling requests and legal briefs? Regarding a lawyer's duty to maintain client confidences: what are the lawyer's obligations upon discovering that the client fraudulently reported an item on a tax return? In the context of the tax lawyer's role as tax planner and adviser: does the lawyer's duty not to assist a client in fraudulent conduct preclude billing a

System and to a Client: Drawing the Line, 35 S. Tex. L. Rev. 701, 717-18 (1994).

²⁹ ABA Commission on Professionalism, *supra* note 19, at 278-80; cf. Clement F. Haynsworth, Jr., *Professionalism in Lawyering*, 27 S.C.L. Rev. 627, 628 (1976) (The lawyer "owes a duty of loyalty to his client, but he has a higher duty as an officer of the court."); Charles W. Joiner, *Our System of Justice and the Trial Advocate*, 24 U.S.F.L. Rev. 1, 9 (1989) ("That the duty to the administration of justice supersedes any claim of the client is a professional obligation of the civil advocate.").

³⁰ I.R.C. § 6110(j)(3) ("Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent."); ABA Committee on Ethics and Professional Responsibility, Formal Op. 94-386. (1995) (stating that it is ethically improper for a lawyer to cite an unpublished opinion to a court that has a rule prohibiting any reference in briefs to an opinion marked by the issuing court as not for publication).

corporate client for legal services rendered to a shareholder, director, or officer? Does the lawyer's duty of competence constrain her from agreeing to limit the scope of representation of a client who requests scaled-down tax advice due to budget constraints? In each of these settings, the tax lawyer, like her counterparts in other areas of law practice, must carefully weigh the obligation to zealously represent her client against the restraints imposed by the *Model Rules* or *Model Code*.

B. The Duty to Act Honestly and Ethically

The tax lawyer's duty to the system has been described as a responsibility to act fairly and honestly and to represent one's clients with integrity.³¹ "The tax practitioner has the responsibility, above all, to walk upright."³² Former Commissioner of Internal Revenue Margaret Richardson has said:

[T]he confidence of the American people in our tax system, which is still the standard for the rest of the world . . . , ultimately . . . rests on the integrity and professional conduct of those of us who are charged with administering the system, as well as those of you whose livelihoods depend upon the system.³³

That the responsibility to act ethically extends beyond the client to the legal system is reflected in the standards of ethics adopted by the profession. The Preamble to the *Model Code*, for example, admonishes that "it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest

³¹ Randolph W. Thrower, *Preserving the Integrity of the Federal Tax System*, 33 N.Y.U. Inst. on Fed. Tax'n 707, 709-11 (1975); Milton Young, *Does the Tax Practitioner Owe a Dual Responsibility to His Client and to the Government? - The Practice*, 15 S. Cal. Tax Inst. 39, 49 (1963); see also Henry Sellin, *Professional Responsibility of the Tax Practitioner*, The Nat'l Pub. Acct. 6, 7-8 (April 1971) (asserting that a tax adviser has a responsibility to follow his own conscience).

³² Young, *supra* note 31, at 49. Mr. Young similarly stated, "It seems to me that we have a continuing responsibility to our clients and to all citizenry, hence the Government, to maintain a dignity and a decency in our professional conduct." *Id.* at 41.

³³ Margaret Milner Richardson, Remarks at the Invitational Conference on Professionalism in Tax Practice (Oct. 1993), *quoted in* Mulroney, *supra* note 23, at 373.

possible degree of ethical conduct.³⁴ Ethical rules that impose a duty of candor to the court or fairness to an adversary, for example, are premised upon maintenance of public confidence in a concept of justice that is both fair and impartial.³⁵ Likewise, in order to obtain effective legal assistance, a client must be able to trust her lawyer. It is not enough that the lawyer be skilled and act diligently; she also must be worthy of her client's confidence.³⁶

The duty to act with honesty and integrity permeates each of the tax lawyer's roles. As *Ethical Problems in Federal Tax Practice* demonstrates, however, the lawyer's personal integrity is particularly significant in tax planning, where the lawyer assists her client in making or creating facts, rather than in characterizing events that have already occurred. Some cases are easy. For example, the book counsels that if a client, acting as church usher, proposes to substitute her own check in favor of the church for the amount in the collection plate and claim a charitable contribution deduction, the lawyer must advise the client that the conduct is fraudulent and should withdraw from representation if the client

³⁴ *Model Code*, *supra* note 24, Preamble. The 1908 *Canons* spoke in aspirational terms only. The *Model Code* separates mandatory minimum standards (Disciplinary Rules) from aspirational goals (Ethical Considerations), thereby sequestering matters of law from matters of morality. See Charles Frankel, Book Review, 43 U. Chi. L. Rev. 874, 877, 879 (1976) (reviewing American Bar Association, *Code of Professional Responsibility* (1975)). Unlike their predecessors, the *Model Rules* do not endeavor to explore moral ideals at all, perhaps because too many lawyers chose to ignore the *Model Code's* Ethical Considerations and merely complied with its Disciplinary Rules. Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 Md. L. Rev. 1, 87 n.251 (1992). Perhaps the *Model Rules* avoid such ideals in recognition of the difficulty of "permit[ting] a group as large, diverse, and unwieldy as the American Bar Association to make collective statements" about matters of morality. Charles W. Wolfram, *Modern Legal Ethics* § 2.7.1 at 70 (1986).

³⁵ See L. Ray Patterson, *The Fundamentals of Professionalism*, 45 S.C. L. Rev. 707, 713-14 (1994). Similarly the 1908 *Canons* state:

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration.

1908 *Canons*, *supra* note 25, Preamble.

³⁶ ABA Commission on Evaluation of Professional Standards, *Model Rules of Professional Conduct* 7 (Discussion Draft Jan. 30, 1980). Cf. *Model Rules*, *supra* note 21, Preamble ("[A] lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.").

insists on claiming the deduction.³⁷ Quite simply, the lawyer may not participate in perpetrating a lie.

Other situations are more difficult. Where the tax consequences of a transaction depend upon the taxpayer's purpose or motive, what degree of assurance must the lawyer have that the client's state of mind is in fact that which is most favorable from a tax standpoint? If the lawyer believes that the client's state of mind is otherwise, may she assist in creating evidence to support the desired tax treatment? Surely, the first consideration in answering questions like these – before consulting professional regulations – must be the lawyer's own sense of honesty and integrity.

C. Duty to the Revenue System

Despite the seemingly generic nature of the phrase "duty to the system," most commentators on tax ethics mean to refer to the tax lawyer's responsibilities to the nation's revenue raising apparatus – "a set of laws and a system of administration."³⁸ Tax attorneys, they say, are obliged "to protect the revenue"³⁹ and "to see that [the tax system] is functioning honestly, fairly and smoothly."⁴⁰ Under this view, lawyers advising clients in tax matters must balance the immediate demands of their clients against the public's interest in a sound tax system which operates in accord with policy judgments reached through a democratic process. The duty to the revenue laws, of course, overlaps with the lawyer's duty to act honestly and with integrity: "When you are fair and honest and able in your controversies with the Service, you contribute to the system."⁴¹

The duty to the revenue system may be conceptualized as a duty to third parties, not in the sense of investors or other non-clients who could rely upon a lawyer's written opinion,⁴² but of "unrepresented citizens who ascribe value to a well-functioning tax

³⁷ *Ethical Problems*, *supra* note 6, at 194; *Model Rules*, *supra* note 21, Rule 1.16.

³⁸ Thrower, *supra* note 31, at 707.

³⁹ Durst, *supra* note 22, at 1051 n.81.

⁴⁰ Mortimer M. Caplin, *Responsibilities of the Tax Advisor – A Perspective*, *Taxes (CCH)* 1030, 1032 (Dec. 1962).

⁴¹ Thrower, *supra* note 31, at 711.

⁴² *Model Rules*, *supra* note 21, Rule 2.3 ("Evaluation For Use By Third Persons").

system."⁴³ The public, after all, has an abiding interest in protecting the government's ability to fund itself and in ensuring that each taxpayer pays her fair share of governmental costs as allocated by democratic processes.

Tax practice differs from other areas because the client's adversary is always the government. The question has long been debated whether this distinction implies that attorneys engaging in tax practice are subject to different standards than attorneys who practice in other areas of law.⁴⁴ On one side, it is argued that ethical issues encountered in dealing with the government are largely the same as those presented in dealing with any adversary.⁴⁵ On the other side, proponents of separate (or additional) standards for tax practitioners argue that a tax system based on voluntary compliance and self-assessment necessitates dual responsibilities to the client and to the tax laws.⁴⁶

In ordinary situations, lawyers or their clients can be expected to review documents received from adversary parties; where differences cannot be resolved, courts are called upon to make determinations.⁴⁷ The IRS, however, receives approximately 200

⁴³ Ann Southworth, Note, *Redefining the Attorney's Role in Abusive Tax Shelters*, 37 Stan. L. Rev. 889, 912 (1985).

⁴⁴ Attorneys practicing before the IRS are subject to additional responsibilities under Circular 230. Failure to comply with the terms of Circular 230 may result in disbarment or suspension from practice before the agency. 31 C.F.R. § 10.50 (1996).

⁴⁵ Marvin K. Collie & Thomas P. Marinis, Jr., *Ethical Considerations on Discovery of Error in Tax Returns*, 22 Tax Law. 455, 460-61 (1969); Mark H. Johnson, *Does the Tax Practitioner Owe a Dual Responsibility to His Client and to the Government? - The Theory*, 15 S. Cal. Tax Inst. 25, 32 (1963); Note, *Ethical Problems and Responsibilities of the Tax Attorney*, 66 W. Va. L. Rev. 111, 115 (1964). When the ABA began revising the 1908 *Canons*, members of the ABA Tax Section's Committee on Standards of Tax Practice were asked whether the *Model Code* should provide special rules for tax lawyers. The Committee overwhelmingly opposed such an approach. Collie & Marinis, *supra*, at 460 n.16. Cf. Durst, *supra* note 22, at 1037 (suggesting that the ABA Ethics Committee's decision to ground its "reasonable basis" standard on the 1908 *Canons* rather than on the Internal Revenue Code penalty provisions reflected a desire "that tax practice not be subject to constraints different from those applying to lawyers generally").

⁴⁶ The system is not really voluntary because taxpayers are legally obliged to file returns. The system's success, however, depends upon taxpayers complying with their duty to file timely returns and accurately reflecting income, deductions, and credits on those returns. *Ethical Problems*, *supra* note 6, at 37.

⁴⁷ Gwen Thayer Handelman, *Constraining Aggressive Return Advice*, 9 Va. Tax Rev. 77, 89-93 (1989); Note, *supra* note 45, at 114.

million tax returns annually⁴⁸ and cannot possibly be expected to scrutinize each return to assure its accuracy. Lawyers advising clients in the preparation of tax returns, therefore, may have a special duty to the tax system to see that client returns are as accurate and truthful as possible, without regard to whether they will ever be examined.⁴⁹ Certain restrictions are necessary to discourage the taking of return positions designed to exploit the audit selection process.⁵⁰ Circular 230's "realistic possibility" standard and its limitations on contingent fees may be thus explained.

The duty to the revenue raising system arises in the controversy setting as well. An age-old issue that remains controversial today, and is explored in *Ethical Problems in Federal Tax Practice*, is the dilemma confronted by an attorney who receives a settlement document from the IRS that contains a mathematical error in favor of the client. Does the lawyer's duty to the system trump her duty to the client if the client instructs her not to call the error to the attention of the IRS? Must she consult with the client in the first instance, before notifying the IRS of the error?

⁴⁸ During the 1995 fiscal year, for example, the IRS received 205,747,185 tax returns. Internal Revenue Service, *Data Book 9* (1995).

⁴⁹ The IRS itself has characterized the tax lawyer's duty to the system in this manner. In 1986, the IRS proposed regulations to Circular 230 that would have prohibited a practitioner from advising or preparing a tax return that would lead to imposition of the substantial understatement penalty. Although the proposed regulations were withdrawn, the IRS's premise for the rules is indicative of a view that tax lawyers owe special responsibilities to the revenue system. The IRS stated:

The area of tax return preparation and advice given with respect to positions on tax returns clearly reflects a practitioner's dual responsibility. A tax return is not a submission in an adversary proceedings [sic]. Rather, the tax return serves a disclosure, reporting and self-assessment function. It is a citizen's report to the government of his or [sic] relevant activities for the year. To serve its disclosure and assessment function, a tax return must be [sic] provide a fair report of matters affecting tax liability. The complexities of the tax and the limited number of tax return examinations the IRS is able to perform impose a substantial burden upon the government. Hence, the representations made on tax returns must accurately reflect the facts, and positions taken on tax returns must be supportable by the law. *A practitioner, during an engagement with a taxpayer-client, has an affirmative duty to assure that these occur.*

Notice of Proposed Rulemaking, 51 Fed. Reg. 29,113 (1986) (emphasis added).

⁵⁰ *Ethical Problems*, *supra* note 6, at 117; Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries Before the Internal Revenue Service, Preamble, 59 Fed. Reg. 31,523, 31,525 (1994).

The duty to the revenue raising system also contemplates a duty to improve the laws. Indeed, such a duty is reflected in Canon 8 of the *Model Code*, which states that "[a] lawyer should assist in improving the legal system," and in Model Rule 6.1, which includes "participation in activities for improving the law" among the list of pro bono publico legal services that all lawyers should aspire to provide.⁵¹ The decision to comprehensively explore the tax lawyer's role in formulating tax policy implies that the authors of *Ethical Problems in Federal Tax Practice* take this duty very much to heart.

Randolph Paul, whose work is excerpted in the book, suggested that tax lawyers' education, knowledge, and experience enable them to perceive weaknesses in the tax law and to construct proposals for improvement or reform.⁵² He argued that these special qualifications carry with them correlative responsibilities to aid the public interest.⁵³ Paul did not believe that a tax lawyer should consider the larger picture in advocating a client's position or advising a client, but asserted that lawyers should work with the government and bar groups to effect changes in tax policy.⁵⁴ Taken as an aspirational goal, such a notion makes sense. However, it would seem inappropriate to label an attorney as unethical merely because she chooses not to participate in nonremunerative activities meant to improve the nation's tax laws.⁵⁵

⁵¹ *Model Code*, *supra* note 24, Canon 8; *Model Rules*, *supra* note 21, Rule 6.1.

⁵² Randolph E. Paul, *Taxation in the United States* 771 (1954), excerpted in *Ethical Problems*, *supra* note 6, at 286-89.

⁵³ Randolph E. Paul, *The Responsibilities of the Tax Adviser*, 63 Harv. L. Rev. 377, 386 (1950).

⁵⁴ *Id.*; see also Frederic G. Corneel, *Guidelines to Tax Practice Second*, 43 Tax Law. 297, 301-02 (1990); Johnnie M. Walters, *Ethical and Professional Responsibilities of Tax Practitioners*, 17 Gonz. L. Rev. 23, 24-25 (1981); *Model Rules*, *supra* note 21, Rule 6.1(b)(3) (Lawyers should "participat[e] in activities for improving the law, the legal system or the legal profession."); *Model Code*, *supra* note 24, EC 8-1 (Lawyers "should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.").

⁵⁵ Such a characterization would be particularly deplorable with respect to an attorney who satisfies her pro bono obligations by providing legal services to the poor rather than by joining a bar association.

D. Duty to the Government

Finally, tax lawyers have a duty to the government itself. The rules here vary with role or context. At the return preparation stage, the lawyer acts as both an advocate and an adviser.⁵⁶ As an adviser, the lawyer's role is to advise her client how to comply with the legal obligation to file an annual return, not to engage the government as an opponent.⁵⁷ ABA Formal Opinion 85-352, however, regards the filing of a tax return as a possible first step in an adversary proceeding.⁵⁸ Therefore, the lawyer has a duty not to mislead the IRS by misstatement, silence, or through her client, but has no duty to disclose the weaknesses of her client's case.⁵⁹ She may advise the statement of positions most favorable to the client, even if she believes that the positions probably will not prevail, so 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.⁶⁰

If an audit or litigation is underway, the IRS is on notice that the lawyer is an adversary and her primary duty is to the client. The lawyer's obligations to the IRS are then those of "one litigator to another – to abide by the rules of litigation."⁶¹ She may make any

⁵⁶ ABA Committee on Ethics and Professional Responsibility, Formal Op. 85-352 (1985).

⁵⁷ Wolfman, Holden & Harris, *supra* note 5, § 201.2. The authors argue that an adversarial view of the return process is unwarranted for two reasons. First, the filing of a tax return satisfies a citizen's legal obligation to her government and is not a response to an IRS challenge. At this stage, then, the lawyer's role is to advise the client how to comply with her legal obligations. *See also* Theodore C. Falk, *Tax Ethics, Legal Ethics, and Real Ethics: A Critique of ABA Formal Opinion 85-352*, 39 Tax Law. 643, 647-49 (1986). Second, even if it is assumed that an adversarial relationship does exist at the return preparation stage, the low incidence of IRS audits suggests that assumptions based upon the standard litigation paradigm of two parties urging positions before an independent tribunal are inappropriate. Without assurance of IRS review, the adoption of a litigation standard would effectively resolve most questionable positions in the taxpayer's favor. *See generally* Handelman, *supra* note 47.

⁵⁸ Formal Op. 85-352, *supra* note 56. A Special Task Force Report issued by the ABA to clarify Formal Opinion 85-352 asserts that tax returns are not adversarial proceedings. *Report of the Special Task Force on Formal Opinion 85-352*, 39 Tax Law. 635, 640-41 (1986).

⁵⁹ Formal Op. 85-352, *supra* note 56; *see also* ABA Committee on Ethics and Professional Responsibility, Formal Op. 314 (1965).

⁶⁰ Formal Op. 85-352, *supra* note 56.

⁶¹ Henry Sellin, *Professional Responsibility of the Tax Practitioner*, 52 Taxes (CCH) 584,

nonfrivolous argument that could win for the client⁶² and may not act in the government's interest.⁶³

In the tax planning context, the lawyer acts only as an adviser. Although she may be obliged to consider the consequences of her advice to the revenue system or to third parties,⁶⁴ she has no direct obligations to the IRS.

III.

Ethical Problems in Federal Tax Practice is an excellent casebook and makes a welcome addition to the library of ethics texts available to law students. Its unique subject matter reflects the range of ethical issues that are likely to be encountered by future tax lawyers as well as by students who intend to pursue legal careers in other areas. The book makes it possible for law schools to offer at the J.D. level a specialized ethics course that focuses attention on the practical application of professional standards, both minimum and aspirational, and that avoids the distraction of skipping from one substantive subject matter to another. In this respect, the book contributes to bringing legal ethics from the theoretical realm to the real world of law practice.

606 (1974).

⁶² A lawyer may advance a claim that is unwarranted by existing law if it is supported by a good faith argument for extension, modification, or reversal of existing law. *Model Rules*, *supra* note 21, Rule 3.1; *Model Code*, *supra* note 24, DR 7-102(A)(2).

⁶³ Special Committee on the Lawyer's Role in Tax Practice, The Association of the Bar of the City of New York, *The Lawyer's Role in Tax Practice*, 36 Tax Law. 865, 878 (1983) (citing Paul, *supra* note 53, at 385 and Sellin, *supra* note 61, at 606). Cf. Remarks of Gersham Goldstein, quoted in Mulroney, *supra* note 23, at 376 ("[T]his is an advocacy system. The Service is not a court. It is not a tribunal And so because this is an advocacy system, and because of the tensions, there is never going to be necessarily cooperation in determining what the correct tax is.").

⁶⁴ See *supra* notes 38-54 and accompanying text.