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# Am I My Brother's Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession

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AM I MY BROTHER'S KEEPER?  
A TAX LAW PERSPECTIVE ON THE CHALLENGE OF BALANCING  
GATEKEEPING OBLIGATIONS AND ZEALOUS ADVOCACY IN THE  
LEGAL PROFESSION

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**ABSTRACT:** *In recent years the question of whether lawyers have a general ethical obligation to serve a gatekeeping function has been raised in a number of legal contexts. The reaction of the practicing bar generally has been unenthusiastic. While asserting that a gatekeeping function should be generally applicable to all attorneys is a relatively recent stance, such an obligation historically has been acknowledged to various degrees in several specific practice areas, including particularly in the field of federal income taxation. This piece examines the gatekeeping question, and how the practicing bar should react to it, through an examination of the gatekeeping role historically asserted as applicable to tax lawyers, including how modern pressures (e.g., literalist statutory interpretation, profit maximization law firm models, changing business and societal ethical norms, etc.) have altered that historically asserted ethical norm. The article then suggests avenues for combating these modern trends in the tax arena in order to strengthen and reestablish the historic balance in a tax lawyer's planning role (e.g., by creating intentional conflicts of interest to create a "divide and conquer" dynamic between clients and attorneys in aggressive transactions, emphasizing the ethical training of tax attorneys, clarifying the proper approach for statutory interpretation in the tax context, creating disincentives for a legal race to the bottom among attorneys competing for business, highlighting the importance of individual trend setters, channeling the competitive pressures in the legal marketplace in the government's favor, etc.). The piece concludes with some closing thoughts regarding the lessons that the practicing bar might take from the tax gatekeeping example in their future reactions to gatekeeping initiatives in other areas of the law and accepting gatekeeping as a generally applicable ethical norm.*

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I.	Introduction.....	1
II.	Tax Lawyers as Gatekeepers .....	7
	A. <i>What Does Tax “Gatekeeping” Entail?</i> .....	7
	B. <i>Justifications for Tax Gatekeeping</i> .....	12
	C. <i>Arguments Against Tax Gatekeeping</i> .....	16
	D. <i>The Practical Approach</i> .....	18
III.	The Decline of Tax Gatekeeping .....	19
	A. <i>The Rise of Lawyer Facilitated Tax Shelter Activity</i> .....	19
	1. <i>The Tax Shelters of the 1970s</i> .....	20
	2. <i>The Tax Shelters of the 1990s</i> .....	24
	B. <i>Factors Contributing to Weakened Gatekeeping</i> .....	30
	1. <i>Client Norms for Ethical Behavior</i> .....	31
	2. <i>Legal Services Norms</i> .....	33
	3. <i>Judicial Norms of Statutory Interpretation</i> .....	34
	4. <i>Decreased Societal Impetus Toward Taxpaying</i> .....	37
IV.	The Future of Tax Gatekeeping .....	39
	A. <i>Whither (or Wither) Tax Gatekeeping?</i> .....	39
	B. <i>Creating an Accepted and Sustainable Gatekeeping Norm</i> .....	44
	1. <i>Reaching Consensus and Announcing a Standard</i> .....	44
	2. <i>Seizing the Power of Individual Action and Example</i> .....	47
	3. <i>Encouraging Gatekeeping</i> .....	50
	4. <i>Relieving the Anti-Gatekeeping Pressure</i> .....	53
V.	Conclusion .....	55

“And the LORD said unto Cain, Where is Abel thy brother? And he said, I know not: Am I my brother’s keeper?”<sup>1</sup>

## I. Introduction

The essence of the relationship between a lawyer and a client traditionally has been that of a zealous advocate. As Lord Henry Brougham famously stated:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and *in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.*<sup>2</sup> [Emphasis added.]

In modern times Lord Brougham’s admonition that a lawyer should not consider the societal consequences of zealously defending a client has been questioned.<sup>3</sup> More recently, some have gone even farther and questioned whether lawyers generally have an affirmative obligation to act

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<sup>1</sup> GENESIS 4:9.

<sup>2</sup> 2 THE TRIAL OF QUEEN CAROLINE 3 (1821). To understanding the full import of the emphasized language it is necessary to place Lord Brougham’s statement in its historical context. Queen Caroline was popular with the masses but had been charged with adultery. However, her husband King George IV also had a secret indiscretion. While he was heir-apparent, the King had secretly married a Catholic. If this fact became known, the King would have lost his own title pursuant to the Law of Settlement. The quoted language was part of Lord Brougham’s opening statement in defense of Queen Caroline and represented a direct threat that Lord Brougham would not hesitate to produce this evidence against the King if required to defend his client, no matter the resulting confusion and tumult to the country. Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213, 1215 (2006).

<sup>3</sup> See, e.g., William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978); David Luban, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); Deborah Rhode, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000); Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

as gatekeepers safeguarding the structure and purpose of the law.<sup>4</sup> Indeed, in the realm of the securities laws, Congress and the Securities Exchange Commission have moved to require lawyers to assume a pro-active gatekeeping role in policing their clients' actions via legislation,<sup>5</sup> regulations<sup>6</sup> and prosecutions.<sup>7</sup>

While the idea that gatekeeping is a general obligation of all lawyers is relatively new, the tax bar in the United States has been debating whether it has a special gatekeeping obligation almost since the inception of the income tax.<sup>8</sup> Over most of the modern income tax era the prevailing view of commentators has been that the unique nature of the tax system requires tax lawyers to have an ethical obligation to create, nurture and promote a fair tax

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<sup>4</sup> See e.g., Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986); John C. Coffee, Jr., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE (2006); Arthur B. Laby, *Differentiating Gatekeepers*, 1 BROOK. J. CORP. FIN. & COM. L. 119 (2006); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U.L. REV. 1167 (2005). The gatekeeping role envisioned in these works goes well beyond the traditionally accepted notion that a lawyer is an "officer of the court" and therefore cannot knowingly make false statements to a tribunal, fail to disclose controlling adverse authority, etc. Model Rules of Prof'l Conduct R. 3.3 and associated comment.

<sup>5</sup> See e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) § 307, 15 U.S.C. § 7245 (2002) (directing the SEC to adopt certain rules of minimum professional conduct for attorneys) and § 602(a), 15 U.S.C. § 78d- 3(a) (2002) (allowing administrative actions against attorneys and accountants to censure, suspend, or bar them from appearing or practicing before the SEC).

<sup>6</sup> See 17 C.F.R. Part 205 (implementing Sarbanes-Oxley § 307) and 17 C.F.R. § 201.102(e) (allowing SEC to censure and bar attorneys from appearing or practicing before the SEC). See also, Roger Cramton, George Cohen & Susan Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 740 (2004).

<sup>7</sup> George W. Dent, Jr., *Lawyers In The Crosshairs: The New Legal And Ethical Duties Of Corporate Attorneys: Introduction*, 57 CASE W. RES. L. REV. 337, 338 (2007) (Noting that "SEC enforcement actions [against attorneys] have mushroomed. There is also concern that . . . the SEC has altered its enforcement program, and now under [its censure/suspension authority] it pursues attorneys allegedly guilty of nothing worse than negligence. Private damage actions against lawyers also seem to have increased.").

<sup>8</sup> See generally, Michael Hatfield, *Legal Ethics and Federal Taxes, 1945-1965: Patriotism, Duties and Advice*, 12 FLA. TAX REV. 1 (2012). Indeed, law review discussions regarding how far a tax practitioner can go in counseling tax reduction strategies to clients can be found as early

system.<sup>9</sup> Additionally, as a practical matter, most tax practitioners likely conducted their affairs in a manner consistent with such a role even if they did not specifically endorse gatekeeping as an actual ethical requirement.<sup>10</sup> However, with the advent of widespread lawyer assisted tax shelters activity in the 1970s and the 1990s, this reality began to change. Despite academic protestations to the contrary, an ethical gatekeeping norm has, as both a formal and practical matter, been increasingly questioned, and seemingly rejected, by a large segment of the tax bar in recent decades.<sup>11</sup> This lack of self-regulation has opened the door for the federal government<sup>12</sup>

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as the 1920s. *See, e.g.*, John H. Sears, *Effective and Lawful Avoidance of Taxes*, 8 VA. L. REV. 77, 85 (1921).

<sup>9</sup> William H. Simon, *Organizational Representation and the Frontiers of Gatekeeping*, 19 AM. U.J. GENDER SOC. POL'Y & L. 1069, 1073 (2011) (“there is a longstanding tradition within the elite tax bar that embraces the gatekeeping role”); BERNARD WOLFMAN, JAMES P. HOLDEN & KENNETH L. HARRIS, *STANDARDS OF TAX PRACTICE* § 101.2 (1999 5th ed.) (“The practitioner’s obligation to the client, however, is not unrestricted. The practitioner also owes a duty, albeit less well-defined, to the tax system as a whole.”); Franklin Green, *Exercising Judgment in the Wonderland Gymnasium*, 90 TAX NOTES 1691, 1692-93 (Mar. 19, 2001) (“[I]t has been a fundamental role of tax practitioners to identify for taxpayers those tax return positions that may be attempted and those that are beyond the pale.... In a real sense, the tax adviser is a gatekeeper who regulates the flow of issues into the system.... For self-assessment to be workable, tax advisers cannot fail to perform their gatekeeper function and cannot allow a floodtide of illegitimate issues to swamp the system. Accordingly, it is imperative that tax advisers apply professional standards with intellectual honesty in determining what positions have enough credibility to be able to be asserted.”); Deborah H. Schenk, *Book Review: Tax Ethics*, 95 HARV. L. REV. 1995, 2005 (1982). For a detailed compendium of the leading tax ethics commentators on this point from the 1945-1965 period, *see* Hatfield, *supra* note 8, at 15-28.

<sup>10</sup> That is, it was in the professional best interest of the practitioner to be seen by the taxing authorities as having high standards so that he would be in the best position to represent his client’s interests and to foster a less adversarial relationship between taxpayers and the government to everyone’s mutual benefit. *Id.* at 27-28.

<sup>11</sup> *See e.g.*, William H. Simon, *After Confidentiality: Rethinking the Professional Responsibility of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1457-58 (2007) (noting dichotomy within tax bar between tax shelter “formalists” and anti-tax shelter practitioners who assert a duty to the tax system); Richard Lavoie, *Deputizing the Gunslingers: Co-Opting the Tax Bar into Dissuading Corporate Tax Shelters*, 21 VA. TAX REV. 43 (2001) (discussing attorney complicity in tax shelter activity and advocating for a return to a tax lawyer gatekeeping function); Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77 (2006) (same); David J. Moraine, *Loyalty Divided: Duties to Clients and Duties to Others--the Civil Liability of Tax Attorneys Made Possible by the*

to insert itself into the attorney-client relationship by both implicitly and explicitly regulating and proscribing attorney behavior.<sup>13</sup> In the wake of these changes, but coinciding with the severe economic downturn since 2008, promoted tax shelter activity of the type prevalent in the 1990s and early 2000s appears to have subsided.<sup>14</sup>

However, tax shelter activity can take many forms. The factors that led to the decline of the tax bar's gatekeeping role in the 1970s and 1990s are still largely with us today

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*Acceptance of a Duty to the System*, 63 TAX LAW. 169 (2009) (advocating for the rejection of any tax practitioner duty to the system).

<sup>12</sup> In the tax context federal government action can take many forms, from Congressional legislation to administrative actions. On the administrative axis the Treasury Department has primary responsibility for interpreting and administering the tax laws. Primary responsibility for developing tax policy and reviewing tax regulations resides in the Treasury's Office of Tax Policy. However, the largest bureau within the Treasury Department is the Internal Revenue Service which has been delegated the responsibility for determining, assessing and collecting the revenue owed by taxpayers. Other Executive Branch agencies also have ancillary tax functions as well. For instance, the Tax Division of the Department of Justice handles most tax litigation functions for the government. This article will use the term "Government" to generally refer to the entire panoply of legislative and executive aspects of the federal government that can play a role in regard to regulating attorneys generally, and in particular tax practitioners. The Internal Revenue Service itself will sometimes be referred to as either the "IRS" or the "Service."

<sup>13</sup> See Part III, *infra*. See also, Rachele Y Holmes, *The Tax Lawyer as Gatekeeper*, 49 U. LOUISVILLE L. REV. 185 (2010) (advocating for the Government to do even more to formalize the gatekeeping functions of tax attorneys); Bret Wells, *Voluntary Compliance: "This Return Might Be Correct But Probably Isn't"*, 29 VA. TAX REV. 645 (2010) (advocating that a "more likely than not" tax return position standard be applicable for all taxpayers and advisors). For more generalized discussions of the evolving role of the Government in prescribing the ethical responsibilities of lawyers in various areas, see Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994); Daniel R. Coquillette and Judith A. McMorro, *Zacharias's Prophecy: The Federalization of Legal Ethics through Legislative, Court, and Agency Regulations*, 48 SAN DIEGO L. REV. 123 (2011); Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Profession in a Global Age*, 48 SAN DIEGO L. REV. 489 (2011).

<sup>14</sup> Tracy A. Kaye, *The Regulation of Corporate Tax Shelters in the United States*, 58 AM. J. COMP. L. 585, 604 (2010) (noting that while corporate tax shelter activity has decreased it is likely to return when the economy improves if the Government is not vigilant); Susan Cleary Morse, *The How and Why of the New Public Corporation Tax Shelter Compliance Norm*, 75 FORDHAM L. REV. 961 (2006) (arguing that compliance norms at large corporations were strengthened by the Government's responses to the most recent wave of corporate tax shelter activity).

despite recent Government actions. It remains to be seen whether the next economic upswing will reignite the tax shelter industry as well, despite the recently erected roadblocks.<sup>15</sup> If so, what role will tax practitioners play? Will they resume a strong gatekeeping role and act to quash these new tax shelter schemes in their infancy? Or, will they adhere to Lord Brougham's mantra and again plunge the tax system into disarray and confusion? If the latter, then the tax bar can expect the Government to place ever more draconian restrictions on them to dissuade their complicity in undermining the fairness and integrity of the tax system.

A central thesis of this article is that, it is in the self-interest of all the parties involved to take decisive action now to return to and strengthen the tax bar's historical gatekeeping function. The Government benefits by obtaining more accurate taxpayer reporting of transactions and avoiding the substantial distraction of dealing with yet another tax shelter crisis. Society benefits by having a stronger and fairer system of taxation that in turn bolsters the taxpaying commitment of all taxpayers.<sup>16</sup> Attorneys benefit by preserving their ability to self-regulate as a profession, maintaining their status as professionals, and preserving more latitude in assisting their clients in non-abusive tax situations.<sup>17</sup> Clients benefit from being able to receive freer tax advice in structuring ordinary course business motivated transactions (which advice might be curtailed inadvertently as a consequence of stricter governmental involvement in

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<sup>15</sup> Kaye, *supra* note 14, at 604; sources cited at *infra* note 106.

<sup>16</sup> See generally, Richard Lavoie, *Flying Above the Law and Below the Radar: Instilling a Taxpaying Ethos in Those Playing by Their Own Rules*, 29 PACE L. REV. 637 (2009).

<sup>17</sup> Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 167 (2006) ("if lawyers are unwilling to recommit themselves to the regulation of their profession and their responsibilities to society, one might expect additional regulations [regarding attorney behavior]."); David B. Wilkins, *Doing Well By Doing Good? The Role Of Public Service In The Careers Of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 83 (2004) ("such sacred cows as self-regulation and the attorney-client privilege are likely to come under great pressure if lawyers lose their reputation as a 'public profession' dedicated to the public interest.").



attorney regulation) and by avoiding the time, expense and angst of ultimately trying to defend abusive transactions before the Government and in the court of public opinion.<sup>18</sup>

While at one point the gatekeeping concept was thought to be *sui generis* to the realm of taxation, that position is no longer viable today. Over the years the legal environment has evolved from a broad constitutional and common law base into one increasingly focused on complex statutory schemes that are implemented and administered by regulatory agencies. Thus, the primary factor that prompted calls for tax gatekeeping (*i.e.*, the practical inability of the Government to comprehensively check and monitor adherence to the law, which thus necessitates a system of voluntary self-compliance by citizens) has emerged as a central reality in most regulatory contexts. The calls we see today for increased attorney gatekeeping functions in other areas of the law derive largely from the Government's recognition that it cannot effectively curtail unjustified citizen behavior without the help of the practicing lawyers working in that area to promote compliance by their clients. Just as in the field of taxation, if those attorneys fail embrace a gatekeeping function on their own initiative, the Government can be expected to impose one on them which may well not be to their, or their clients', liking. The primary lesson to be learned from the tax experience with gatekeeping, is the importance of preserving as much of the attorney-client relationship as possible by embracing self-regulation as a means of preempting more draconian changes that would otherwise be likely to occur.

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<sup>18</sup> See Michele Destefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259 (2009), Michele Destefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?*, 23 GEO. J. LEGAL ETHICS 1119 (2010) (advocating in favor of corporate attorneys providing advice regarding public opinion aspects of corporate transactions in light of results from empirical survey study). See also, Kathleen F. Brickey, *From Boardroom to Courtroom to Newsroom: The Media and the Corporate Governance Scandals*, 33 J. CORP. L. 625, 636 (2008); David M. Sudbury, *The Role of Corporate Counsel in the Criminal Environmental Case: Advice to Quench the Fire*, 3 VILL. ENV'T'L. L.J. 95, 110 (1992).

Part II of the article discusses the history, theory and practice of gatekeeping within the tax bar. Part III highlights the decline in such gatekeeping activity as evidenced by the rampant tax shelter activity in recent times, and identifies some of the key factors that led to the weakening, and apparent abandonment, of the tax bar's traditional gatekeeping role. Part IV examines the potential risks to all parties involved if the tax bar's gatekeeping role is not resurrected and discusses how a consensus in favor of an ethical gatekeeping norm can be forged despite the competitive and other pressures pushing the bar in the opposite direction. Part V notes that while the current legal landscape presents difficult terrain on which to foster a strong gatekeeping norm, a concerted effort by all concerned can successfully entrench this norm to the ultimate benefit of all involved. That Part then concludes by finding that the tax gatekeeping example is highly relevant to other areas of the law where commentators and the Government are suggesting an attorney gatekeeping function is appropriate.

## II. Tax Lawyers as Gatekeepers

### A. *What Does Tax "Gatekeeping" Entail?*

Lord Brougham's standard of zealous advocacy stakes out a clear threshold for the extent to which an attorney can ethically consider the consequences of his actions to those other than his client. In short, he can't.<sup>19</sup> However, once it is granted that an attorney may, or must, ethically consider consequences beyond those to his client, it introduces shades of gray into the interpretation of a lawyer's actions. What are the parameters which define the scope of the lawyer's gatekeeping role? Should the duty be found only in a general duty to work for the betterment of the law on his own time as a lawyer-citizen, or does the duty extend to specific

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<sup>19</sup> Of course, under even an extreme view of the zealous advocacy role, an attorney's actions are not completely unfettered. For instance, no one would claim that an attorney should be ethically

client representations? If so, does it reach only client actions that are clearly accepted as illegal under current law, or can it intrude into areas where reasonable minds might differ regarding the legal outcome? At the extreme, must an attorney limit his involvement to situations where the client's position is the clearly accepted one under current law?

Even once the relevant scope is identified, what action must or may an attorney take when weighing his client's interests against adverse consequences to others? Is it sufficient to merely bring the tension to the client's attention? Or must he counsel against the client's action? If the latter, must the practitioner actually withdraw from the representation if his counsel is ignored? Or does the obligation (especially if the harmed party would be the Government) run even deeper, compelling him to affirmatively bring the recalcitrant client's actions to the attention of the injured party despite his general duty of client confidentiality? Finally, to what extent should the gatekeeping function differ based on the legal context, both in terms of the field of law involved and in terms of the type of advocacy being undertaken?

In the tax field the answer to these questions has typically been driven by concerns about dissuading overly aggressive tax planning.<sup>20</sup> So, there is little dispute regarding a tax attorney's obligation to deal truthfully with the Government when responding to inquiries

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permitted to fabricate or destroy evidence, make false statements to a tribunal, or act to further an ongoing crime. *See e.g.*, Model Rules of Prof'l Conduct R. 3.3.

<sup>20</sup> Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 874 (2002) ("The difference between tax avoidance and tax evasion is that the latter is illegal, while the former is just smart tax planning. The boundary between the two is blurry."); Holmes, *supra* note 13, at 187 (2010) ("the line between legitimate tax planning . . . and overly aggressive or abusive reporting by taxpayers continues to get pushed."); Lavoie, *supra* note 11, at 49 ("The inherent tension between legitimate tax planning and the creation of abusive tax shelters presents [a] line drawing exercise: which transactions should the tax law dissuade and prohibit as abusive, and which transactions should the tax law permit as attempts to work within the statutory framework toward the goal of legitimate tax minimization?").

about underlying facts<sup>21</sup> and to advise his client against taking frivolous or patently improper tax positions.<sup>22</sup> Conversely, when a tax matter proceeds to actual litigation, the accepted view has been that a tax lawyer's obligations are the same as in any other type of litigation.<sup>23</sup> The questions become harder when a tax lawyer is consulted in the planning stages of a transaction, where the legal questions presented rarely have clear cut answers. The role of the tax lawyer is to sort through the extant authorities and utilize her experience and judgment in determining the legal strength of a given tax position.<sup>24</sup> The analysis is multifaceted, involving not just an

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<sup>21</sup> See, e.g., 31 C.F.R. section 10.20 (“A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.”); 31 C.F.R. section 10.51 (explicitly noting that a practitioner may be censured, suspended, or disbarred from practice before the IRS for “[g]iving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading.”). Of course ABA Model Rule 4.1 is also explicit that an attorney shall not knowingly make a false statement of any material fact to any party in representing a client. See also, ABA Formal Opinion 93-375 (Aug. 6, 1993) (an attorney representing a client in the context of a governmental agency investigation “may not under any circumstances lie to or mislead agency officials, either by affirmative misstatement or by omitting a material fact necessary to assure that statements made are not false or misleading.”).

<sup>22</sup> As discussed *infra* at Part III.A.1., even with its most liberal interpretation, the bar has maintained that a tax return reporting position must have at least a “reasonable basis” for a practitioner to advise in its favor. ABA Formal Opinion 314. While the “reasonable basis” standard used in that opinion was interpreted by some as requiring only a “colorable basis” for a position, the position still could not be completely frivolous. ABA Opinion 85-352 (explaining the need for clarifying the standard announced in Opinion 314). Again, this also accords with the acknowledged limits to the zealous advocacy norm generally. See Model Rules of Prof'l Conduct R. 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous”).

<sup>23</sup> See Hatfield, *supra* note 8, at 52. Although, as noted earlier, in recent times commentators have begun to question the extent to which a strong zealous advocacy standard is appropriate even in pure litigation settings. See *supra* note 3.

<sup>24</sup> Richard Lavoie, *Analyzing the Schizoid Agency: Achieving the Proper Balance in Enforcing the Internal Revenue Code*, 23 AKRON TAX J. 1, 20 (2008); Frank J. Gould, *Giving Tax Advice - Some Ethical, Professional, and Legal Considerations*, 97 TAX NOTES 523 (2002); Jasper L. Cummings, Jr., *The Range of Legal Tax Opinions, with Emphasis on the “Should” Opinion*, 98

intimate understanding of the particular statutory and regulatory provisions involved, but a keen appreciation for the policy considerations underlying the rules, the non-tax related business motivations of the client, and the anticipated reaction of the judiciary if litigation ultimately ensues. However, despite this grounding, the lawyer's view of the advisability of a transaction may often appear to a layman as simply a "smell test" akin to an "I know it when I see it" obscenity-like standard.<sup>25</sup> The key however, is that the grounding of the analysis should create a commonality of approach that leads most practitioners to reach similar conclusions regarding the appropriateness of any given transaction.<sup>26</sup> So, as discussed in this article, the scope of tax gatekeeping is primarily centered on this grey area of aggressive tax-motivated planning.

Within that scope, determining how strong a position needs to be before it can be ethically advised has been a matter of debate over the years. Depending on the time period and the context, the answer has changed dramatically.<sup>27</sup> As discussed more fully in Part III below, the Government's return preparer penalty provisions now provide that, in essence,<sup>28</sup> a tax advisor needs a reasonable belief that an advised position *more likely than not* would be sustained if

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TAX NOTES 1125 (2003); Detlev F. Vagts, *Legal Opinions in Quantitative Terms: The Lawyer as Haruspex or Bookie?*, 34 BUS. LAW. 421 (1979).

<sup>25</sup> Dana L. Trier, *Beyond the Smell Test: The Role of Substantive Anti-Avoidance Rules in Addressing the Corporate Tax Shelter Problem*, 78 TAXES 62 (2000).

<sup>26</sup> Richard Lavoie, *Activist or Automaton: The Institutional need to Reach a Middle Ground in American Jurisprudence*, 68 ALBANY L. REV. 611, 625-6 (2005).

<sup>27</sup> See Part III.A., *infra* for a discussion of how return position standards have evolved over time.

<sup>28</sup> The statutory standard discussed here, section 6694, literally only applies to a person who prepares at least a substantial portion of a tax return or claim for refund for compensation. 26 U.S.C. § 7701(a)(36)(A). However, the Treasury Department's rules governing practice before the Internal Revenue Service ("Circular 230," codified at 31 C.F.R. Subtitle A, Part 10) are significantly broader and provide that "a practitioner may not willfully, recklessly, or through gross incompetence" advise a client to take a position on a tax return or claim for refund unless the section 6694 certainty standards are met. 31 C.F.R. § 10.31(a)(1)(ii). Additionally, the relevant penalty provisions applicable directly to taxpayers reflect substantially the same certainty standards as well, and thus the advice that a practitioner will provide to a taxpayer

there is either (1) *a significant purpose* of a plan or arrangement to avoid or evade federal income tax or (2) the transaction meets certain criteria causing it to qualify as a specifically reportable transaction.<sup>29</sup> If the underlying transaction does not have a significant tax avoidance purpose, then an undisclosed position still must be supported by “substantial authority”<sup>30</sup>, and a position that will be adequately disclosed by the taxpayer on his tax return must have a “reasonable basis.”<sup>31</sup> A tax return preparer that violates these guidelines is subject to penalty.<sup>32</sup> Tax attorneys who do not meet the requirements of a return preparer may still find themselves in violation of the Government’s rules for practice before the Internal Revenue Service.<sup>33</sup> In any event, an attorney violating these guidelines might be open to malpractice claims from his

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about the certainty of a position will obviously be shaped in the context of instructing the taxpayer regarding his own penalty exposure. 26 U.S.C. § 6662(d)(2)(B).

<sup>29</sup> 26 U.S.C. § 6694(a)(2)(C). Some commentators have advocated for adopting such a “more likely than not” standard generally for all tax advice. See Brett Wells, *Voluntary Compliance: This Return Might Be Right But Probably Isn’t*, 29 VA TAX REV. 645 (2010).

<sup>30</sup> 26 U.S.C. § 6694(a)(2)(A). The substantial authority standard is described in the relevant regulations as falling between the reasonable basis standard and the more likely than not standard. 26 C.F.R. § 1.6662-4(d). While assigning mathematical probabilities to such standards is fraught with peril, substantial authority has been pegged at roughly a 40 percent chance of success on the merits. Burgess Raby & William Raby, “*Reasonable Basis*” v. *Other Tax Opinion Standards*, 73 TAX NOTES 1209 (1996); Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111, 119 (2009); Linda M. Beale, *Tax Advice Before The Return: The Case For Raising Standards and Denying Evidentiary Privileges*, 25 VA. TAX REV. 583, 594 (2006); J. Timothy Philipps, *It’s Not Easy Being Easy: Advising Tax Return Positions*, 50 WASH. & LEE L. REV. 589, 606 (1993).

<sup>31</sup> 26 U.S.C. § 6694(a)(2)(B). Reasonable basis is defined in Treasury Regulation 1.6662-3 as “a relatively high standard of tax reporting, that is, significantly higher than not frivolous or not patently improper.” The regulations explain that it is not satisfied by a position that is “merely colorable” or “merely arguable.” However, if the position is based on one of the authorities set out in Treas. Reg. § 1.6662-4(d)(3)(iii) “(taking into account the relevance and persuasiveness of the authorities, and subsequent developments), the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard.” Most commentators peg the reasonable basis standard as indicating an approximately twenty percent (20%) or greater chance of success on the merits. See authorities cited in *supra* note 30.

<sup>32</sup> Section 6694 provides a penalty for tax return or refund claim equal to the greater of \$1,000 or 50 percent of the income derived by the return preparer from the subject return or claim. 26 U.S.C. § 6694(a)(1).

client.<sup>34</sup> As a result, if an attorney firmly believes a client's intended tax reporting of a transaction would violate these standards, it is unlikely that the attorney would continue to represent the client.

Nevertheless, in many such cases the decision regarding whether the relevant reporting standards would be violated will be a close one. In those situations, an attorney who views his role as a zealous advocate (or more cynically, whose economic interests are tied to allowing the client to proceed) might be more inclined to color her assessment of the transaction in the client's favor. This is where a strong gatekeeping ethical norm would encourage practitioners to hew to a more conservative view of the issue and thereby dissuade more questionable transactions at the margin. But, should tax attorneys undertake such a gatekeeping function when doing so is arguably detrimental to their clients' interests?

#### *B. Justifications for Tax Gatekeeping*

A number of arguments have been made to support a gatekeeping role for the tax attorneys. Some have argued that since taxes are used for the benefit of the society as a whole and taxpayers have an interest in seeing that taxes are paid, the relationship between taxpayer and government is not a truly adversarial one and therefore the zealous advocacy norms that would apply to a normal civil adversary should not apply.<sup>35</sup> Others have noted that tax

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<sup>33</sup> 31 C.F.R. § 10.31(a)(1)(ii). See discussion at *supra* note 28.

<sup>34</sup> Jay Soled, *Tax Shelter Malpractice Cases and Their Implications For Tax Compliance*, 58 AM. U.L. REV. 267, 269 (2008).

<sup>35</sup> Hatfield, *supra* note 8, at 16. Of course, it can be easily responded that while this is true in the abstract, once any particular tax dispute arises, the specific taxpayer involved will either pay more or less depending on the outcome and therefore, at least in a controversy setting the relationship between the taxpayer and the government is fully as adversarial as in any other litigation.

practitioners are subject to direct regulation by the Government,<sup>36</sup> and as such can be said to owe duties to the Government due to this special relationship.<sup>37</sup> A crasser justification is that gatekeeping helps lawyers maintain their personal reputation vis a vis the Government and therefore it is in their personal interest, as well as indirectly in the general interest of all their current and future clients.<sup>38</sup> However, the primary justification for a gatekeeping role in tax practice arises from the very nature of our tax system.

The hallmark of the U.S. income tax system is its self-assessment nature.<sup>39</sup> That is, taxpayers determine how the tax law applies to their particular situation and then calculate and pay their tax liability accordingly.<sup>40</sup> This puts the initial burden on taxpayers to apply the law

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<sup>36</sup> The Secretary of the Treasury has authority to regulate the conduct of, and to discipline, practitioners appearing before it. 31 U.S.C. § 330. Pursuant to this authority, Circular 230, codified at 31 C.F.R. Subtitle A, Part 10, sets forth detailed rules governing practice before the Internal Revenue Service and establishes a Director of the Office of Professional Responsibility to implement them and monitor practitioner compliance.

<sup>37</sup> Hatfield, *supra* note 8, at 18. Of course, Circular 230 technically only governs practice before the Internal Revenue Service. Consequently, prior to 2004, it was sometimes argued that practitioners providing tax planning advice were not covered by these rules since practice before the Internal Revenue Service only covered audit defense, tax controversy work and other direct dealings with Internal Revenue Service personnel. *See, e.g., Ben Wang, NOTE: Supplying The Tax Shelter Industry: Contingent Fee Compensation For Accountants Spurs Production*, 76 S. CAL. L. REV. 1237, 1266 (2003). Therefore any gatekeeping obligation arising from Circular 230 would be limited to those controversy related contexts. To address this issue Congress amended 31 U.S.C. § 330 in 2004 to add subsection (d) to explicitly bring “written advice with respect to any entity, transaction plan or arrangement, or other plan or arrangement, which is of a type which the Secretary determines as having a potential for tax avoidance or evasion” within the ambit of Circular 230. Pub. L. No. 108-357, § 822(b), 118 Stat. 1418, 1587 (2004). Additionally, in 2005 Circular 230 was amended to provide “aspirational” best practices for practitioners providing tax advice generally. 31 C.F.R. 10.33.

<sup>38</sup> Hatfield, *supra* note 8, at 27-28.

<sup>39</sup> *See, e.g., Flora v. United States*, 362 U.S. 145, 176 (1957) (“Our system of taxation is based upon voluntary assessment and payment, not upon distraint.”); Joseph J. Darby, *Confidentiality and the Law of Taxation*, 46 AM. J. COMP. L. 577, 577 (1998) (“The United States enjoys what is quite probably the most successful tax collection system in the world. It is based on the principle of voluntary self-assessment.”).

<sup>40</sup> Doran, *supra* note 30, at 113; Richard Lavoie, *Subverting the Rule of Law: The Judiciary’s Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 176 (2004).



correctly to their personal situation. Indeed, in filing their tax returns taxpayers must affirm under penalties of perjury their belief that the return is “true, correct and complete.”<sup>41</sup> Of course, our tax laws are complex and understanding them in concept, let alone how they apply and interrelate in a given fact pattern, is often unclear. Consequently, taxpayers look to, and the efficient functioning of the tax system relies on, the advice of tax practitioners to guide them as to the most appropriate interpretation of the law. Note that the taxpayer’s has the legal duty to report his correct tax based on his facts and the relevant law.<sup>42</sup> Consequently, this goal, reporting the correct tax, also should be the guiding principle for the tax adviser.<sup>43</sup>

However, the gatekeeping responsibility of the tax lawyer is not just premised on helping the client meet the legal obligation of arriving at the correct tax, but is also premised on the Government’s inability to adequately double check each taxpayer’s initial tax determination.

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<sup>41</sup> See, e.g., IRS, DEP’T OF THE TREASURY, Form 1040 (2011), available at <http://www.irs.gov/pub/irs-pdf/f1040.pdf>; IRS, DEP’T OF THE TREASURY, Form 1120 (2011), available at <http://www.irs.gov/pub/irs-pdf/f1120.pdf>. In addition to general perjury consequences, this jurat also subjects a taxpayer to potential felony prosecution if the taxpayer signs the jurat and “does not believe [the return] to be true and correct as to every material matter.” See 26 U.S.C. § 7206.

<sup>42</sup> United States v. Norton, 250 F.2d 902, 905 (5th Cir. 1958) (“Duty to return and pay the correct tax rests on the taxpayer”); Breland v. United States, 323 F.2d 492, 496 (5th Cir. 1963) (taxpayer has the obligation “to keep books and records of his income for the purpose of determining the correct amount of income taxes due and payable”); Conforte v. Commissioner, 74 T.C. 1160, 1178 (1980) (“the self-assessment system place the responsibility of maintaining records and substantiating claimed deductions upon the taxpayer.”). Of course, reasonable minds might differ regarding the extent to which a taxpayer can resolve legal uncertainties in his own favor in arriving at his decision regarding what his “correct” tax liability is. See, e.g., Calvin Johnson *‘True And Correct:’ Standards For Tax Return Reporting*, 43 TAX NOTES 1521 (1989); Beale, *supra* note 30, at 594.

<sup>43</sup> Myron C. Grauer, *What’s Wrong with This Picture?: The Tension Between Analytical Premises and Appropriate Standards for Tax Practitioners*, 20 CAP. U. L. REV. 353, 358 (1991) (practitioner’s duties derive from taxpayer’s duty to file true and correct tax return); Gwen Thayer Handelman, *Reply, Counseling Ordered Liberty*, 9 VA. TAX REV. 781, 781-86 (1990) (practitioner’s reporting position obligations derivative of the client’s duties to comply with the tax laws).

Each year the Government can audit only a small fraction of all taxpayer returns.<sup>44</sup> If taxpayers routinely report their taxes based on the most aggressive interpretation of the law, instead of based on an even-handed one, then the fisc will be harmed. Further, as the magnitude of such aggressive reporting increases, it breeds disrespect for the law and encourages others to push the envelope as well.<sup>45</sup> This would be a weight our tax system could not bear.

Further, when tax practitioners are involved in planning transactions, or assisting taxpayers in developing their reporting positions for a completed transaction, one can question whether such work is truly adversarial, as that term has been traditionally interpreted. Our adversarial system of justice contemplates a competition among equals that is intended to efficiently and fairly yield the “truth.”<sup>46</sup> Thus, having a taxpayer make colorable arguments regarding his proper tax burden is justifiable once the issue has been joined with the Government (either administratively or in litigation), but making those identical claims on an initial tax return, when no adversary has yet entered the ring, impedes the arrival at a fair result.

As one commentator put it, the “fundamental role of tax practitioners [is] to identify for taxpayers those tax return positions that may be attempted and those that are beyond the pale. . . . In a real sense, the tax adviser is a gatekeeper who regulates the flow of issues into the system. . . . For self-assessment to be workable, tax advisers cannot fail to perform their gatekeeper function and cannot allow a floodtide of illegitimate issues to swamp the system. Accordingly, it is imperative that tax advisers apply professional standards with intellectual

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<sup>44</sup> Only 0.9 percent of all tax returns were subjected to audit in the Government’s 2011 fiscal year. INTERNAL REVENUE SERVICE, 2011 DATA BOOK, available at, <http://www.irs.gov/pub/irs-soi/11databk.pdf>.

<sup>45</sup> Lavoie, *supra* note 16, at 655-60

<sup>46</sup> Edward Barrett, *The Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME L. REV. 479, 479-80 (1962).

honesty in determining what positions have enough credibility to be able to be asserted.”<sup>47</sup> Of course, determining exactly how weak a position must be to trigger this gatekeeper intervention is a highly relevant question that has been the subject of much debate, but defining the relevant threshold is intellectually distinct from the question of whether there is a gatekeeping obligation at all.

### C. Arguments Against Tax Gatekeeping

While the existence of a tax gatekeeping obligation has traditionally been acknowledged by many in the tax bar,<sup>48</sup> there has always been a segment of the bar that rejected this proposition,<sup>49</sup> including some very well-known tax lawyers.<sup>50</sup> While there are variations of

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<sup>47</sup> Green, *supra* note 9, at 1692-93.

<sup>48</sup> BERNARD WOLFMAN ET AL., STANDARDS OF TAX PRACTICE § 101.2 (6th ed., 2004); Schenk, *supra* note 9, at 2005 (1982); Anthony Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 VA. TAX REV. 589, 606 (2003); David M. Schizer, *Enlisting the Tax Bar*, 59 TAX L. REV. 331, 338 (2007); John M. Maguire, *Conscience and Propriety in Lawyer's Tax Practice*, 13 TAX L. REV. 27, 36 (1957); Francis C. Oatway, *Motivation and Responsibility in Tax Practice: The Need for Definition*, 20 TAX L. REV. 237, 254 (1965); Thomas N. Tarleau, *Ethical Problems in Dealing with Treasury Representatives*, 8 TAX L. REV. 10, 11 (1952); Mortimer M. Caplin, *Responsibilities of the Tax Advisor - A Perspective*, 40 TAXES 1030, 1032 (1962); Frederic G. Corneel, *Guidelines to Tax Practice Second*, 43 TAX LAW. 297, 301-02 (1990); Michael C. Durst, *The Tax Lawyer's Professional Responsibility*, 39 U. Fla. L. Rev. 1027, 1028, 1031 n.9, 1050 n.81 (1987); Linda Galler, *The Tax Lawyer's Duty to the System*, 16 VA. TAX REV. 681, 687-98 (1997); Loren D. Prescott, Jr., *Challenging the Adversarial Approach to Taxpayer Representation*, 30 LOY. L.A. L. REV. 693, 715 (1997); Randolph W. Thrower, *Preserving the Integrity of the Federal Tax System*, 33 N.Y.U. INST. ON FED. TAX'N 707, 709-10 (1975); Johnnie M. Walters, *Ethical and Professional Responsibilities of Tax Practitioners*, 17 GONZ. L. REV. 23 (1981); Ann Southworth, *Note, Redefining the Attorney's Role in Abusive Tax Shelters*, 37 STAN. L. REV. 889, 891, 908-12, 918 (1985).

<sup>49</sup> See, e.g., David J. Moraine, *Loyalty Divided: Duties to Clients and Duties to Others-the Civil Liability of Tax Attorneys Made Possible by the Acceptance of a Duty to the System*, 63 TAX LAW. 169, 190 (2009); Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 KAN. L. REV. 847, 851, 871, 909 (1999); Camilla Watson, *Legislating Morality: The Duty to the Tax System Reconsidered*, 51 KAN. L. REV. 1197 (2003) [hereinafter, Watson, *Duty Reconsidered*]; Mark Johnson, *Does the Tax Practitioner Owe a Dual Responsibility to his Client and to the Government? – The Theory*, 15 U.S.C. INST. ON FED. TAX'N 25 (1963).

<sup>50</sup> Boris I. Bittker, *Professional Responsibility and the Preparation of Federal Income Tax Returns*, in PROFESSIONAL RESPONSIBILITY IN FEDERAL TAX PRACTICE 245, 270 (B. Bittker ed.,

degree, the primary argument against a gatekeeping role for tax attorneys grounded itself in the zealous advocacy norm. At the extreme, some expressed libertarian fears of the government acting as “Big Brother” through attorneys being required to report on their own clients.<sup>51</sup> For others the rejection of any gatekeeping role arose from blind allegiance to the concept that the role of a lawyer is purely to serve his client’s interests without any moral judgment.<sup>52</sup>

Others viewed any weakening of a strong zealous advocacy norm as holding out the prospect of creating intolerable conflicts of interest between attorneys and their clients due to the attorney’s competing obligation to the Government.<sup>53</sup> A more nuanced version of this claim was that a client’s knowledge of his attorney’s dual obligations would make the client less forthcoming with underlying facts and motivations, with the result that the lawyer’s legal advice would be skewed, or cause clients to not seek legal advice at all.<sup>54</sup> Viewed in this light, weakening the zealous advocacy norm, even in a planning context, in fact undermines the bedrock taxpayer compliance required for the self-assessment system to function.<sup>55</sup> Intriguingly this argument contains an internal contradiction. The argument maintains that a gatekeeping role will dissuade taxpayers from seeking legal advice (or hiding the true facts when seeking advice) and as a result taxpayers will take unjustified positions. The implication is that, in the absence of a gatekeeping obligation, taxpayers would get full unfettered pro-taxpayer advice and yet the

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1970); Randolph E. Paul, *The Lawyer as a Tax Advisor*, 25 ROCKY MTN. L. REV. 412, 429 (1953).

<sup>51</sup> Hatfield, *supra* note 8, at 22.

<sup>52</sup> Rick Taylor, *Rusty Pipes Is Simply Rusty, Says Tax Practitioner*, TAX NOTES TODAY, July 11, 1994, LEXIS 94 TNT 135-46 (“I will do everything that I can to be absolutely certain that my clients do not pay one dime more tax than is absolutely required! That is what I was trained to do and that is what my clients pay me to do. To accuse me or anyone else in the tax community of not “playing fair” and to demand that I somehow overlook planning ideas in the name of morals is, in the words of Judge Learned Hand, ‘mere cant.’”)

<sup>53</sup> Moraine, *supra* note 49.

<sup>54</sup> Johnson, *supra* note 50, at 30-31.

taxpayers would take *fewer* unjustified positions. Why would that be the case unless the presence of the attorney *in fact did* dissuade unwarranted taxpayer positions, implicitly recognizing that the attorneys must be performing at least some gatekeeping despite their purported zealous advocacy?

The interesting commonality between the traditional arguments for and against a gatekeeper role is that both sets of arguments largely devolve into a debate about the scope of the zealous advocacy norm and its appropriateness outside of a litigation or controversy context. Those resisting a special gatekeeping obligation for tax practitioners often grounded their opposition in part on the premise that the ethical obligations of attorneys should be the same regardless of their field.<sup>56</sup> As discussed earlier, this article, and the recent evolution in legal ethics generally, favor the contrary position; that it is appropriate to modify the zealous advocacy norm in non-adversarial contexts. So, the traditional arguments against a specific tax gatekeeping duty are weaker today than was true historically since the perception of the lawyer's role in non-adversarial contexts generally has undergone a transformation.

#### *D. The Practical Approach*

Beyond those actively arguing whether tax lawyers had a gatekeeping duty, a third segment of the tax bar historically took the position that the entire question was merely a matter of academic interest.<sup>57</sup> That is, the general obligation of taxpayers to file a correct return and other specific Government rules regarding factual disclosures by taxpayers and their representatives were sufficient to ensure taxpayer compliance with the self-assessment system without any need to imply any additional specific duty on tax practitioners. Further, it was

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<sup>55</sup> *Id.*

<sup>56</sup> Hatfield, *supra* note 8, at 22-24.

argued that as a matter of practical lawyering, most tax advisors would counsel their clients to act prudently in any event whether or not any specific gatekeeping obligation actually existed.

As one commentator stated:

[Y]ou are never really up against the gun to determine whether the practitioner does have dual responsibilities [to his client and to his government], but that it is just good business for you, for the client and for the government to try to minimize adversary aspects just as much as possible, and to increase the disclosure aspects just as much as possible, and thereby to improve relationships among the three of you as much as possible. . . . [It is a] mere academic exercise when we discuss the degree to which there is this dual relationship . . . [but] it is in our best interest to act as if there were a dual responsibility.<sup>58</sup>

Thus, as a practical matter, through the mid-1960s, many tax attorneys implicitly exercised a gatekeeping function, irrespective of whether they acknowledged an actual ethical obligation to do so.

### III. The Decline of Tax Gatekeeping

#### A. *The Rise of Lawyer Facilitated Tax Shelter Activity*

The prevailing gatekeeping norm in the tax bar began to noticeably weaken with the wave of tax shelters focused on individual taxpayers that swept the country in the 1970s and then dissipated further with the wave of corporate tax shelters that occurred in the 1990s. Both periods were characterized by the use of legal opinions to bless highly aggressive tax avoidance transactions. In both situations, the tax bar was unable, or unwilling, to stem the tax shelter tide and that failure resulted in increased regulation of tax opinion practice by the Government as well as changes to the statutory penalty provisions applicable to taxpayers. These tax shelter waves provide stark evidence of the abdication of their traditional gatekeeping function by a significant portion of the tax bar.

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<sup>57</sup> *Id.* at 27-8.

1. *The Tax Shelters of the 1970s*

Up through 1965 then, the prevailing (although by no means monolithic) position of the tax bar, as evidenced by the commentary of the time and actual prudent practice, was to endorse a gatekeeping function.<sup>59</sup> In 1965 the American Bar Association Ethics Committee, in Formal Opinion 314 (the “1965 Opinion”), seriously challenged this prevailing ethical norm.<sup>60</sup> The 1965 Opinion took the position that since disputes with the Government regarding a taxpayer’s tax liability were adversarial, and the taxpayer’s filing of a tax return was the first step in any ultimate dispute, a lawyer ethically should resolve doubts in favor of the client in pre-return tax planning.<sup>61</sup> Further, the 1965 Opinion refused to treat the Government as a “tribunal” to which a higher duty of disclosure would be required. The bottom line assessment in the 1965 Opinion was that a lawyer could ethically advise a client to take any position without any highlighting disclosure as long as there was a “reasonable basis” for the position.<sup>62</sup> In reaching its conclusion, the 1965 Opinion completely ignored the reality of the self-assessment system and the taxpayer’s legal obligation to report their correct tax liability. Given the low Government audit rate, a lawyer’s advice to take an extreme tax return position without specific disclosure to the Government would most often result in a de facto final determination that the position was correct, rather than merely indicating that the position would not be considered fraudulent or frivolous by a court in an ultimate litigation.<sup>63</sup> However, despite its logical flaws,

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<sup>58</sup> *Id.* at 27.

<sup>59</sup> *See generally, id.*

<sup>60</sup> ABA COMM. ON PROF’L ETHICS, Formal Op. 314 (1965), *reprinted in* 51 A.B.A. J. 671 (1965).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* While the “reasonable basis” standard was not specifically quantified in the 1965 Opinion, and arguably may have been misinterpreted by some practitioners at the time, over time the accepted view has become that a “reasonable basis” reflects approximately a 20 percent chance of success on the merits. *See supra* note 31.

<sup>63</sup> Gwen Thayer Handelman, *Constraining Aggressive Return Advice*, 9 VA. TAX REV. 77, 91-93 (1989).

the 1965 Opinion was in line with the popular conception of the tax law,<sup>64</sup> including by the courts,<sup>65</sup> to think of tax law interpretation as a completely objective economic calculus imbued with no moral, ethical or societal considerations.<sup>66</sup> Similarly, the pro-taxpayer stance in the 1965 Opinion coincided with a decrease in certain broader societal norms which had acted as a counterbalance to this amoral approach to taxpaying obligations.<sup>67</sup>

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<sup>64</sup> See, e.g., *Legal Tax-Dodging Upheld by Morgan*, N.Y. TIMES, June 8, 1937, at 27 (noting J.P. Morgan's statements that "taxation is a legal question . . . not a moral one" and that "Congress should know how to levy taxes and if it doesn't know how to collect them, then a man is a fool to pay the taxes").

<sup>65</sup> *Gregory v. Helvering*, 293 U.S. 465, 469 (1935) ("The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."); *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 395–96 (1930) ("The only purpose of the vendor here was to escape taxation . . . . The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it."); *Bullen v. Wisconsin*, 240 U.S. 625, 630–31 (1916) ("[W]hen the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."); *Commissioner v. Newman*, 159 F.2d 848, 850–51 (2d Cir. 1947) (Hand, J., dissenting) ("Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant."); *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935) ("[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.").

<sup>66</sup> For a defense of using patriotic and moral justifications in favor of tax compliance efforts, see generally, Richard Lavoie, *Patriotism and Taxation: The Tax Compliance Implications of the Tea Party Movement*, 45 LOY. L.A. L. REV. 39 (2011).

<sup>67</sup> For instance, the Great Depression, and tax protests in the early 1930s, prompted national and local "pay your taxes" campaigns initiated by various interested parties to boost compliance at a time of great budgetary and national strain. See DAVID T. BEITO, *TAXPAYERS IN REVOLT: TAX RESISTANCE DURING THE GREAT DEPRESSION* 101–29 (1989). Similarly, during World War II the United States went so far as to have Walt Disney produce a cartoon featuring Donald Duck as a reluctant taxpayer who is ultimately swayed to pay his taxes in order to help defeat the Axis powers. Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFF. L. REV. 685, 716 (1989). Finally, in the post-



The reasonable basis standard set forth in the 1965 Opinion became the accepted standard used by tax practitioners in providing tax return advice for the next 20 years.<sup>68</sup> During this period there was an explosion of tax shelter activity.<sup>69</sup> These tax shelters typically involved creating investment vehicles where investors were promised large tax benefits in connection with their investments.<sup>70</sup> Typically, the claimed tax benefits for the investments were justified based on tax opinions provided by tax lawyers involved in developing the underlying investment transaction.<sup>71</sup> Unfortunately for all involved, these opinions typically did not forthrightly address the relevant law, were based on incorrect factual assumptions, or failed to actually state the likelihood of success if the transaction were questioned by the Government.<sup>72</sup> While the number

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war period prominent lawyers highlighted patriotic reasons for paying taxes in order to support the government was a vital component in the effort to defeat the communist threat to capitalism. Hatfield, *supra* note 8, at 11-13. However, as the Cold War dragged on (eventually giving way to détente) and the public became consumed with the personal and financial toll of an unpopular war in Vietnam, the broader societal impetus supporting tax adherence for patriotic reasons was correspondingly weakened.

<sup>68</sup> It was not until 1985 that the ABA modified the reasonable basis standard out of concern that some practitioners were interpreting it to be a lower level of certitude than intended. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 85-352 (1985), reprinted in 39 TAX LAW. 631, 631 (1986) (“The Committee is informed that the standard of “reasonable basis” has been construed by many lawyers to support the use of any colorable claim on a tax return to justify exploitation of the lottery of the tax return audit selection process. This view is not universally held, and the Committee does not believe that the reasonable basis standard, properly interpreted and applied, permits this construction.”).

<sup>69</sup> George Yin, *Getting Serious About Corporate Tax Shelters: Taking a Lesson from History*, 54 SMU L. REV. 209, 211-16 (2001) (generally describing the scope of the tax shelter problem in the 1970s and 1980s).

<sup>70</sup> Often these were real estate investment partnerships exploiting the use of non-recourse debt financing made possible by the Supreme Court’s decision in *Crane v. Comm’r*, 331 U.S. 1 (1947). Christian C. Day, *Commissioner v. Tufts: The Fall of Footnote 37; The Confirmation of The Functional Relationship*, 45 U. PITT. L. REV. 803, 803 (1984).

<sup>71</sup> James Holden, *New Professional Standards in the Tax Marketplace: Opinions 314, 346 and Circular 230*, 4 VA. TAX REV. 209, 212-17 (1985) (describing the syndicated tax shelters of the period and the role of tax opinions in facilitating these transactions).

<sup>72</sup> *Id.* See also, 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*,

of tax attorneys actually involved in drafting such opinions and promoting these tax shelters was relatively small, the broader tax bar failed to effectively dissuade their colleagues from engaging in this activity and failed to dissuade the public from engaging in these aggressive transactions.<sup>73</sup>

As a result of the failure of the tax bar to effectively curtail the creation and use of these tax shelter opinions, the Government was forced to intervene more directly. In the early 1980s the Government proposed, and ultimately adopted in modified form, specific provisions in Circular 230 regulating the content of tax opinions used in these tax shelter transactions,<sup>74</sup> enacted various tax penalty provisions,<sup>75</sup> enacted increased disclosure, reporting and procedural requirements,<sup>76</sup> and passed numerous substantive changes to the tax law<sup>77</sup> all aimed at addressing aspects of the tax shelter problem. Similarly, the courts were active in the fight against such tax

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reprinted in, 36 TAX LAW. 865 (1982) (generally describing the tax lawyer's role in syndicating tax shelters).

<sup>73</sup> While the investments made by individuals in these syndicated tax shelters often would not be of sufficient magnitude to warrant investors seeking an independent opinion on the tax consequences (see, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 346 (revised) (1982), reprinted in 68 A.B.A. J. 471, 471 (1982)), one would have expected the organized bar to take a more public stand regarding this type of shelter activity. While the bar ultimately did act to provide guidance in Formal Opinion 346, *id.*, that opinion came only after many years of tolerating this type of tax shelter activity and only after the Government had proposed amendments to Circular 230 to directly regulate practitioner behavior which the bar felt were overly strict. *See Tax Shelters; Practice Before the Internal Revenue Service*, 45 Fed. Reg. 58,594 (1980) (proposed Aug. 29, 1980); Holden, *supra* note 71, at 217-18.

<sup>74</sup> While the Government's initially proposed amendments to Circular 230 were viewed by many practitioners as too strict, the changes ultimately adopted ended up instead as essentially codifying the core ethical standards the bar had adopted in Formal Opinion 346. *Id.* at 222-24. *See Amendments to Circular 230*, 49 Fed. Reg. 6719 (1984).

<sup>75</sup> *See e.g.*, 26 U.S.C. § 6659 (valuation overstatement penalty); 26 U.S.C. § 6661 (the substantial understatement penalty); 26 U.S.C. § 6700 (penalty for promoting abusive tax shelters); 26 U.S.C. §§ 6707, 6708 (penalty for failing to furnish information regarding tax shelters).

<sup>76</sup> *See e.g.*, 26 U.S.C. § 6045(e) (real estate transaction reporting); 26 U.S.C. § 6111 (promoter registration of tax shelters); 26 U.S.C. § 6112 (maintenance of investor lists by organizers and sellers of tax shelters); 26 U.S.C. §§ 6221-6231 (partnership audit rules); 26 U.S.C. § 7408 (injunctive action against promoters of abusive tax shelters).

shelter activity.<sup>78</sup> While this type of tax shelter activity dissipated in the years following these changes, their contribution to that result is unclear since it appears that an unrelated statutory change, the adoption of the passive activity loss rules in 1986,<sup>79</sup> was the primary factor in the demise of this particular type of tax shelter activity.<sup>80</sup>

## 2. *The Tax Shelters of the 1990s*

Contemporaneously with the widespread tax shelter activity in the 1970s and early 1980s, there was a marked decline in practitioner adherence to the reasonable basis tax reporting standard that the ABA had put forth in the 1965 Opinion.<sup>81</sup> As a result, the ABA decided to revisit the question of the proper tax reporting certitude standard and as a result adopted Formal Opinion 85-352 of the ABA's Committee on Ethics and Professional Responsibility (the "1985 Opinion").<sup>82</sup> The 1985 Opinion restated the relevant ethical standard for an attorney to counsel a tax return position as one that had "some realistic possibility" of success if litigated.<sup>83</sup> While this standard was somewhat higher than the former reasonable basis

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<sup>77</sup> See, e.g., 26 U.S.C. § 1250 (depreciation recapture rules); 26 U.S.C. § 704(b) (partnership allocation rules); 26 U.S.C. § 163(d) (investment interest limitations); 26 U.S.C. § 465 (at-risk loss limitation rules), 26 U.S.C. §§ 1092, 1256 (straddle rules).

<sup>78</sup> See, e.g., *Estate of Franklin v. Comm'r*, 544 F.2d 1045 (9th Cir. 1976); *Frank Lyon Co. v. U.S.*, 435 U.S. 561 (1978); *Hilton v. Comm'r*, 74 T.C. 305 (1980), *aff'd per curiam*, 671 F.2d 316 (9th Cir. 1982), *cert. denied*, 459 U.S. 907 (1982); *Comm'r v. Tufts*, 461 U.S. 300 (1983); *Odend'hal v. Comm'r*, 748 F.2d 908 (4th Cir. 1984); *Rice's Toyota World, Inc. v. Comm'r*, 752 F.2d 89 (4th Cir. 1985).

<sup>79</sup> 26 U.S.C. § 469.

<sup>80</sup> See, Yin, *supra* note 69, at 218-20 and sources cited therein; Christine Rucinski Strong & Susan Pace Hamill, *Allocations Attributable to Partner Nonrecourse Liabilities: Issues Revealed by LLCs and LLPs*, 51 ALA. L. REV. 603, 607 (2000).

<sup>81</sup> Holden, *supra* note 71, at 235.

<sup>82</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 85-352 (1985), reprinted in 39 TAX LAW. 631, 631 (1986).

<sup>83</sup> *Id.* Since most tax advice and tax opinion work by practitioners would not fall within the specific strictures of the syndicated tax shelter rules then embodied in Formal Opinion 346 and Circular 230, the "realistic possibility" certitude level set forth in the 1985 Opinion became the primary ethical consideration for practitioners following its adoption. David Weisbach and

benchmark, its underlying premise was essentially the same as that of the 1965 Opinion. Both opinions considered filing tax returns to be aspects of the adversarial process and gave no serious consideration to the very different context between an actually joined adversarial proceeding and the mere filing of a tax return, especially in light of the necessarily low Government audit rate and the intended functioning of the self-assessment system.<sup>84</sup> Thus, the relevant ethical guideline applicable to tax practitioners in planning situations was only marginally higher in the post-1985 period than it had been previously.<sup>85</sup>

Similarly, while the 1980s heralded some changes in the civil penalties faced by taxpayers, the basic penalty structure remained one that left significant room for taxpayers and their legal advisors to undertake aggressive tax motivated transactions. In rendering planning advice in the early 1990s, a tax lawyer primarily needed to consider only whether the proposed transaction would expose the client to either a negligence penalty<sup>86</sup> or a substantial understatement penalty.<sup>87</sup> As a general matter, a taxpayer could avoid both of these penalties if he obtained and relied in good faith on an opinion of counsel supporting the claimed position.<sup>88</sup>

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Brian Gale, *The Regulation of Tax Advice and Advisers*, 130TAX NOTES 1279, 1285 (Mar. 14, 2011). Phrased in terms of percentages, a realistic possibility of success was considered to represent a 33% chance of success on the merits. See authorities cited in *supra* note 30.

<sup>84</sup> Durst, *supra* note 48, at 1047.

<sup>85</sup> Dennis Ventry, Jr., *Cooperative Tax Regulation*, 41 CONN. L. REV. 431, 470 (2008); Soled, *supra* note 34, at 291; Beale, *supra* note 30, at 628-29.

<sup>86</sup> Former 26 U.S.C. § 6662(b)(1) and former 26 C.F.R. § 1.6662-3. The negligence penalty was inapplicable as long as a reasonable basis existed for the taxpayer's position (or a realistic possibility of success existed if the position was directly contrary to certain published authorities).

<sup>87</sup> Former 26 U.S.C. § 6662(b)(2) and former 26 C.F.R. § 1.6662-4. The substantial understatement penalty became applicable once an underpayment surpassed a threshold level, but, as discussed below, could be avoided if (provided a tax shelter transaction was not involved) the taxpayer had "substantial authority" for his reporting position or if the position was adequately disclosed.

<sup>88</sup> This was true both due to the operation of the specific penalty provisions and due to an overarching "reasonable cause" exception under then section 6664. That section provided that

If the underlying transaction giving rise to the claimed tax benefit was one in which “the” principal purpose was the evasion or avoidance of tax, a “tax shelter” under the statute,<sup>89</sup> then the opinion as a practical matter needed to find that the position was more likely than not correct.<sup>90</sup> However, since a tax shelter for purposes of the substantial understatement penalty only existed when the tax motive exceeded that of any other motive, transactions with business or profit making purposes would generally not be covered by this more likely than not standard. In those cases, a taxpayer avoided any penalty for taking the position as long as “substantial authority” existed for the position.<sup>91</sup> In non-tax shelter situations where substantial authority was ultimately found lacking, the taxpayer could often escape penalty due to reliance on a tax opinion finding that substantial authority existed.

Thus at the start of the 1990s a tax practitioner could ethically counsel in favor of taking any position for which there was a realistic possibility of success, although in some cases the adviser would also have to alert the client to the need for disclosure of the position to eliminate the risk of penalties. Further, by supplying the client with a tax opinion at a substantial authority level, or in tax shelter situations at a more likely than not level, the tax practitioner

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no penalty would be applied to a taxpayer that was found, based on all the facts and circumstances, to have made a good faith effort to determine his proper tax liability (which could be shown by reasonable reliance on an opinion of counsel).

<sup>89</sup> Former 26 U.S.C. § 6662(d)(2)(C); former 26 C.F.R. § 1.6662-4(g)(2).

<sup>90</sup> Technically, to avoid the penalty if a tax shelter was involved, the taxpayer need to show (1) that “substantial authority” existed for the position and (2) that the taxpayer had a reasonable belief that the position taken was “more likely than not” correct. *Id.* A taxpayer’s reasonable belief could be premised on a tax opinion stating a more likely than not conclusion. *Id.*

<sup>91</sup> If no tax shelter were involved, then the substantial underpayment penalty would be inapplicable as long as either (1) substantial authority existed for the position or (2) the position was non-frivolous and it was adequately disclosed on the tax return. Former 26 U.S.C. § 6662(b)(2) and former 26 C.F.R. § 1.6662-4. While a tax opinion concluding that substantial authority existed obviously would not be conclusive regarding whether substantial authority actually did exist, the taxpayer’s reasonable reliance on such an opinion would generally allow

could effectively insulate the client from potential civil penalties for taking the position. This was the ethical and statutory backdrop for the wave of tax shelter activity that occurred in the 1990s and early 2000s.

Unlike the prior era of tax shelters, which focused on syndicating tax loss transactions to individual taxpayers based largely on abusing the non-recourse debt rules, the new wave of tax shelters were developed to exploit a wide variety of vagaries in the tax law and then confidentially marketed to corporations and wealthy individuals as tax savings templates that could be readily adapted to the particular client's situation.<sup>92</sup> The two periods were similar though in the fact that aggressive tax opinions and advisors played a central role in both creating and failing to impede these aggressive transactions. Again, in the face of the bar's unwillingness or inability to regulate its own behavior, the Government was forced to intercede with specific rules regulating the furnishing of tax planning advice and significant changes to the civil penalty provisions applicable to taxpayers.

In terms of the regulation of tax advice, the Government significantly expanded the rules in Circular 230 regarding written tax advice well beyond the narrow rules applicable to the syndication tax opinions of concern in the 1970s and 1980s. Today Circular 230 contains detailed guidelines governing a wide variety of written advice provided in tax planning situations.<sup>93</sup> These rules were specifically intended to "send a strong message to tax

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him to escape a penalty under the good faith exception of section 6664 even if the tax opinion turned out to be incorrect.

<sup>92</sup> See generally, Lavoie, *supra* note , at 49-50; Joseph Bankman, *The New Market in Corporate Tax Shelters*, 83 TAX NOTES 1775, 1777 (June 21, 1999); OFFICE OF TAX POLICY, U.S. DEP'T OF TREASURY, TREASURY WHITE PAPER ON CORPORATE TAX SHELTERS, TAX NOTES TODAY, July 2, 1999, LEXIS 1999 TNT 127-12, 127-13.

<sup>93</sup> 31 C.F.R. §§ 10.35, 10.36 and 10.37. The main rules related to "covered opinions." A covered opinion is defined as any written advice regarding (1) any transaction that is the same or

professionals considering selling a questionable product to clients” and to “rein in practitioners who disregard their ethical obligations.”<sup>94</sup> Generally, the core requirements of these new rules for covered opinions are that tax advisors must be more vigilant in their factual inquiries, forthrightly deal with all the legal issues,<sup>95</sup> and explicitly reach a conclusion that the proposed tax treatment of an issue is at least more likely than not correct or, if there is only a lesser confidence level, explicitly disclose that the taxpayer cannot rely on the opinion for penalty protection purposes on that issue.<sup>96</sup>

In tandem with its direct regulation of practitioners’ written tax advice, the Government also made numerous changes in the relevant civil penalty provisions applicable to taxpayers. In general, these changes were aimed at making it more difficult for taxpayers to avoid penalties.<sup>97</sup> This was accomplished by increasing the certainty levels required to avoid the penalties, as well as by making it more difficult to use reliance on a tax opinion as a basis for

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substantially similar to abusive transactions specifically identified by the Government in published guidance (“listed transactions”), (2) any plan or arrangement where “the” principal purpose is tax avoidance or evasion, and most importantly (3) any plan or arrangement where “a significant” purpose is tax avoidance or evasion if the opinion (a) expresses at least a more likely than not assessment on any issue in favor of the taxpayer (a “reliance opinion”), (b) is one the advisor knows, or has reason to know, will be used by the client or others to promote or market a transaction to taxpayers (a “marketed opinion”), or (c) is issued in conjunction with the adviser (i) agreeing to refund a portion of his fees if the taxpayer’s reporting position is not sustained or (ii) imposing a confidentiality requirement on the client. Written advice not qualifying as a covered opinion is more lightly regulated under section 10.37.

<sup>94</sup> IR-2004-152 (Dec. 17, 2004), 2004 IRB LEXIS 521, also avail at <http://www.irs.gov/irs/article/0,,id=132445,00.html>. (quoting then IRS Commissioner Mark W. Everson).

<sup>95</sup> “Significant purpose” transactions can be limited to an examination of only certain issues, but market, listed and principal purpose opinion must deal with all relevant tax issues.

<sup>96</sup> For a more detailed review and explanation of the current Circular 230 rules on written tax advice, see David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 SEATTLE U. L. REV. 843, 850-67 (2006); Weisbach and Gale, *supra* note 83, at 1285-87.

<sup>97</sup> *Id.* at 1288.

exception from a penalty.<sup>98</sup> For instance, while the baseline requirement today for avoiding a substantial understatement penalty on non-tax shelter positions remains a substantial authority confidence level, the definition of tax shelter has been significantly expanded to include any plan or arrangement with a significant tax avoidance or evasion purpose.<sup>99</sup> If a substantial understatement of tax relates to such a tax shelter, then the penalty applies, despite the existence of substantial authority, unless the taxpayer can satisfy the general reasonable cause exception of section 6664.<sup>100</sup> However, the relevant regulations under section 6664 have not been updated to provide guidance regarding how the reasonable cause standard is to be applied to understatements on individual tax returns following the various amendments to section 6662, so some uncertainty exists regarding the exact circumstances under which reasonable cause exception is still available.<sup>101</sup>

Finally, as in the 1980s, the government and the courts also moved to strike at the underlying nature of the tax schemes. In the 1980s this was accomplished through a wide variety of Governmental actions and court decisions.<sup>102</sup> In the combating the more recent wave of tax shelters it took the form, among other things, of creating a new tax return schedule requiring certain corporations to specifically disclose uncertain tax positions,<sup>103</sup> codifying the economic

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<sup>98</sup> *Id.* at 1288-89.

<sup>99</sup> 26 U.S.C. § 6662(d)(2)(C).

<sup>100</sup> Additionally, if the transaction is found to lack economic substance (within the meaning of 26 U.S.C. § 7701(o)) then the reasonable cause exception under section 6664 becomes inapplicable. Further, for certain reportable transactions incurring penalties under section 6662A, the requirements under section 6664 for showing reasonable cause are heightened. 26 U.S.C. § 6664(d).

<sup>101</sup> 31 C.F.R. § 1.6664-4.

<sup>102</sup> *See supra* notes 75-79.

<sup>103</sup> Form 1120 Schedule UTP, available at, <http://www.irs.gov/pub/irs-pdf/f1120utp.pdf>.



substance doctrine (a judicial doctrine whose operation was previously subject to debate),<sup>104</sup> and courts utilizing common law anti-abuse concepts to strike down aggressive transactions.<sup>105</sup>

Following these Government and judicial actions the latest wave of tax shelter activity seems to have subsided.<sup>106</sup> However, while insufficient gatekeeping by the tax bar clearly contributed to the growth of such shelters, it is impossible to quantify the impact of the Government's increased direct regulation of tax practitioners in the subsiding of these tax shelters.

### *B. Factors Contributing to Weakened Gatekeeping*

The foregoing discussion has demonstrated that while a gatekeeping function was historically an ethical norm that the tax bar largely adhered to (at least in practice, even if not specifically acknowledged), that norm has been increasingly rejected by practitioners over recent decades. It may be tempting to some to ascribe the tax shelter activity in modern times to the work of individual bad apples, or to bemoan the lack of individual moral character among modern day attorneys.<sup>107</sup> But this explanation misses the fact that it is not the intrinsic nature of

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<sup>104</sup> 26 U.S.C. § 7701(o).

<sup>105</sup> See *ACM P'ship v. Comm'r*, 157 F.3d 231 (3d Cir. 1998); *ASA Investorings P'ship v. Comm'r*, 76 T.C.M. (CCH) 325 (1998), aff'd, 201 F.3d 505 (D.C. Cir. 2000); *Black & Decker*, 436 F.3d 431; *Coltec Indus.*, 454 F.3d 1340; *TIFD III-E, Inc. v. United States (Castle Harbors)*, 459 F.3d 220 (2d Cir. 2006); *Jade Trading, LLC v. United States*, 65 Fed. Cl. 487 (2005); *Long Term Capital Holdings v. United States*, 330 F. Supp. 2d 122, 171 n.68 (D. Conn. 2004), aff'd, 150 F. App'x 40, 2005-2 U.S.T.C. P 50,575 (2d Cir. 2005).

<sup>106</sup> Simon, *supra* note 9, at 1072; Andrea Monroe, *What's in a Name: Can the Partnership Anti-Abuse Rule Really Stop Partnership Tax Abuse?*, 60 CASE W. RES. 401, 461 (2010); Calvin H. Johnson & Lawrence Zelenak, *Codification of General Disallowance of Artificial Losses*, 122 TAX NOTES 1389, 1391 (2009)

<sup>107</sup> Roger Colinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 FLA. TAX REV. 1, 19 (2011); Morse, *supra* note 14, at 988; Joseph Bankman, *Tax Enforcement: Tax Shelters, The Cash Economy, and Compliance Costs*, 31 OHIO N.U.L. REV. 1, 9 (2005). However, the widespread nature of the tax shelter market in the 1990s and early 2000s belie the plausibility of

the individuals involved that has changed. Individuals will always act in their own self interest unless constrained by legal or societal constraints.<sup>108</sup> Yet despite the immutability of humankind, ethical norms do not remain static. What is currently ethically acceptable is primarily a function of the prevailing moral framework accepted by a society, as adapted to the context of the particular subgroup to which the ethical norm is applicable.<sup>109</sup> So, the question is not why individual practitioners today are “less” ethical than their predecessors, but rather, why does the tax bar no longer view a gatekeeping function as the appropriate ethical norm?

While numerous factors and changes over the recent decades have undoubtedly contributed to the shift in the ethical reality of tax practice, four overarching areas of change can be easily identified as highly significant in altering the ethical perceptions of the tax bar: (1) evolving client norms for ethical behavior, (2) increasing competitive pressures on legal service providers, (3) changing judicial approaches to statutory interpretation, and (4) a lessening imperative favoring taxpaying in society as a whole.

*1. Client Norms for Ethical Behavior*

One of the key factors supporting the existence of a gatekeeping norm was the belief that by steering a client away from overly aggressive transactions the tax lawyer was in fact acting in the client’s best interest. Implicit in this position was the assumption that the client agreed that (1) a taxpayer has a duty to forthrightly pay its allocable portion of the nation’s tax liability and that (2) the economic and public relations costs associated with defending questionable tax transactions outweighed the benefits from engaging in such transactions. While

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merely ascribing the activity to “bad apple” taxpayers and tax practitioners. Lavoie, *supra* note 40, at 186.

<sup>108</sup> See, e.g., THOMAS HOBBS, *LEVIATHAN* 91 (Richard Tuck ed., Cambridge University Press 1991) (1651).

this was the accepted perception in the 1950s, matters have changed drastically since then.<sup>110</sup>

While in the past business ethics were substantially co-extensive with the prevailing morality of society, today there exists a schism where a business person will think nothing of undertaking an action on behalf of his business that would not be condoned as a matter of personal behavior.<sup>111</sup>

This creation of a separate business ethical culture has been driven by the idea that the focus of a corporation is properly only the creation of profits for the owners of the business.<sup>112</sup> As a result, while businesses may highlight their socially responsible actions as a public relations and marketing matter, shareholder profits remain king.<sup>113</sup> In such an environment, moral and ethical considerations are perceived as at most window dressing and therefore they have no power to curb behavior harmful to society. As a result, the key constraints on any economically justified business behavior are almost exclusively those actually imposed by law.<sup>114</sup> But how are even these legal constraints to be applied? From a purely competitive vantage point, the goal of

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<sup>109</sup> Lavoie, *supra* note 40, at 126.

<sup>110</sup> *See supra* note 67.

<sup>111</sup> Lavoie, *supra* note 40, at 168-69.

<sup>112</sup> *See* David Campbell et al., *Social Welfare, Positivism, and Business Ethics*, 11 *BUS. ETHICS: A EUROPEAN REV.* 263 (2002) (discussing the ongoing conflict between business ethics and the drive for profits). *See also* Gordon Pearson, *Making Profits and Sweet Music*, 9 *BUS. ETHICS: A EUROPEAN REV.* 191 (2000).

<sup>113</sup> John Philip Jones, *Oversight without Inhibiting Enterprise*, 603 *ANNALS* 262, 264 (2006) (“[CSR] has little real influence on the operating policy of major companies. From a large sample of such companies, it was found for instance that their donations to charity account for less than 1 percent of their pretax profits. To such companies, CSR may have benefits from the public relations standpoint, but that is about all.”). Proponents of corporate social responsibility (“CSR”) often take the position that companies should place doing good for society above the bottom line. *See, e.g.,* M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 *COLUM. L. REV.* 571, 581 (2009). However, many argue that in practice CSR efforts are merely co-opted by businesses for public relations and marketing purposes. Michael B. Runnels, Elizabeth J. Kennedy, and Timothy B. Brown, *Corporate Social Responsibility and the New Governance: In Search Of Epstein’s Good Company In The Employment Context*, 43 *AKRON L. REV.* 501, 532 (2010); Edwin M. Epstein, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 *AM. BUS. L.J.* 27, 212 (2007).

business is to minimize the impact of any legal constraints that do exist. Hence, the direction from clients to their lawyers is clear, interpret the law as narrowly as possible and without reference to moral or ethical considerations. The focus on the bottom line within the business world contributes to the perception that legal advisors serve merely as hired guns to further the goals of the client.<sup>115</sup> The function of lawyers, while more than mere scribes, became merely implementing exogenously determined business goals, rather than being active participants in helping to shape, channel, modify, or heaven forbid, question those announced goals. In the face of such clear client driven directives to achieve legal conclusions consonant with the business bottom line, it became very difficult, if not impossible, for an attorney to justify a gatekeeping role as being in line with their client's perceived best interests.

## 2. *Legal Services Norms*

As the prevailing business culture began to devalue the lawyer's role as a counselor, lawyers themselves began to devalue that role.<sup>116</sup> This trend found a traditional antecedent in the historical place of zealous advocacy in litigation. Further, just as clients were succumbing to competitive pressures to focus solely on their bottom line profit, competitive pressures were building in the legal marketplace. Where legal services had traditionally been provided by lawyers practicing in law firm settings, there was a move to pull more legal talent in house at businesses.<sup>117</sup> This not only gave those in-house lawyers a more myopic view of their role in serving the client, but also provided businesses with sophisticated in-house legal

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<sup>114</sup> Lavoie, *supra* note 40, at 169.

<sup>115</sup> Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U CHI L SCH ROUNDTABLE 381, 381 (2001).

<sup>116</sup> *Id.*

capabilities. This served both to decrease the revenue flowing to law firms by taking away many run of the mill legal questions and tasks, but also provided clients with the ability to second guess legal advice and take a more active role in shaping the legal advice ultimately provided by their outside counsel.<sup>118</sup>

Finally, lawyers began facing competition from accountants and consulting groups that began hiring lawyers to provide expanded advice to their clients.<sup>119</sup> While non-law advisors could not draft operative documents without running into issues regarding the unauthorized practice of law, they could provide sophisticated tax planning advice tailored to their client's desires. This was further exacerbated by the international operations of many businesses and the integration of legal and accounting functions in many international jurisdictions.<sup>120</sup> Thus, tax lawyers were faced not just with competition from other law firms, but with competition from in-house legal functions and non-legal service providers. This coupled with clients who were both less loyal to their historical outside legal counsel<sup>121</sup> and more willing to take their business to the provider who would sanction their preferred interpretation of the law, inevitably led to a race to the bottom in legal services, where transactions were judged using the lowest common denominator of technical compliance with the literal terms of the law.<sup>122</sup>

### 3. *Judicial Norms of Statutory Interpretation*

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<sup>117</sup> See also JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 195 (2006); David B. Wilkins, *Team of Rivals? Toward a New Model of The Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2071-72, 2113-14 (2010).

<sup>118</sup> *Id.*

<sup>119</sup> Matthew A. Melone, *The Patenting of Tax Strategies: A Patently Unnecessary Development*, 5 DEPAUL BUS. & COMM. L.J. 437, 478-79 (2007); Rostain, *supra* note 11, at 88-92.

<sup>120</sup> *Id.*; Gianluca Morello, *Note, Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multidiscipline Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 190-94 (1997).

<sup>121</sup> See Coffee, *supra* note 117, at 194-196.

<sup>122</sup> Beale, *supra* note 30, at 597; Lavoie, *supra* note 11, at 55-58.

A related factor in attorney perceptions regarding the appropriateness of a tax gatekeeping role derived from the judiciary's attitude toward tax avoidance and statutory interpretation.<sup>123</sup> This factor is particularly significant since it directly contributes to the dynamic encouraging the previously discussed factors. Historically the judiciary took a non-literal approach to interpreting tax statutes and developed numerous judicial anti-abuse doctrines aimed at curbing overly aggressive taxpayer positions.<sup>124</sup> Even as the courts formally endorsed the position that structuring transactions to minimize taxation was permissible, they typically would nevertheless proceed to reject the particular tax motivated transaction in the case at hand.<sup>125</sup> Thus, while the law created a line between acceptable and unacceptable behavior, the edges of that line were often ill defined.

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<sup>123</sup> Lavoie, *supra* note 40, at 183.

<sup>124</sup> *Id.* at 177-78 (and cases cited therein).

<sup>125</sup> For illustration, the following, seemingly pro-taxpayer, quotations all come from cases where the taxpayer nevertheless lost. *See, e.g.*, Gregory v. Helvering, 293 U.S. 465, 469 (1935) (“The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.”). Superior Oil Co. v. Mississippi, 280 U.S. 390, 395-96 (1930) (“The only purpose of the vendor here was to escape taxation. . . . The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it.”); Bullen v. Wisconsin, 240 U.S. 625, 630-31 (1916) (“When the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.”); Comm.’r. v. Newman, 159 F.2d 848, 850-51 (2d Cir. 1947) (Hand, J., dissenting) (“Over and over again courts have said that there is nothing sinister in so arranging one’s affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.”); Gregory v. Helvering, 69 F.2d 809, 810 (2d Cir. 1934), *aff’d*, 293 U.S. 465, 469 (1935) (“[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one chooses, to evade, taxation. Any one [sic] may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.”).

Creating a level of uncertainty regarding the exact boundaries of the law created an atmosphere conducive to an efficient and fair self-assessment system. When taxpayers and practitioners knew that courts could be expected to reject legal positions that were based on unintended literal interpretations of the law or reached results at odds with the tax policy underlying the law, they were encouraged to be more circumspect and even-handed in their initial tax positions. Taxpayers would be less inclined to view the law as merely a system of specific rules to be gamed by clever artifice since such attempts could be expected to fail. Similarly, practitioners would be on a stronger footing in dissuading a taxpayer from undertaking a tax motivated transaction since the likelihood of the transaction withstanding judicial scrutiny would be greatly reduced. Thus, a strong judicial norm of dynamic interpretation of tax statutes promoted a gatekeeping function by effectively aligning the interests of both clients and practitioners. Expanding the area of uncertainty regarding the exact reach of the tax law both made the legal constraint on overly aggressive planning more expansive and created room for attorneys to assert ethical considerations as relevant to navigating the zone of legal uncertainty, thereby allowing both ethical and legal considerations to act as constraints on aggressive taxpayer actions.<sup>126</sup>

As the judiciary began to move away from this traditional approach to tax cases, it created uncertainty regarding how the law should be viewed and forced practitioners to directly face the conflict between representing their clients zealously and their role in maintaining a fair and efficient functioning of the self-assessment system.<sup>127</sup> Taxpayers who saw the judiciary upholding the aggressive tax transactions of their competitors, felt compelled to engage in such

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<sup>126</sup> Lavoie, *supra* note 40, at 179.

<sup>127</sup> *Id.* at 190-91.

activity themselves.<sup>128</sup> This was both a competitive necessity and a breaking down of the moral norm that there was an obligation to pay one's fair share of the country's tax burden. By giving full voice to JP Morgan's view of taxation, rather than mere lip service, the judiciary bolstered the emerging business focus on profits and cost benefit analysis as the only legitimate constraints on behavior. In turn, such business clients had no patience for attorneys who attempted to dissuade desired transactions based solely on ethical or anti-abuse notions. Lawyers not acceding to this new reality found themselves at a distinct disadvantage.

Further, even lawyers who traditionally would have advised against aggressive transactions based on non-literal legal interpretations and anti-abuse notions had to question the validity of their own legal reasoning. At its core, the job of a lawyer is to predict the future for his clients. As courts muddied the water regarding how they would approach the application of tax statutes, the attorney's job became much more difficult. Even if a particular attorney believed a tax motivated transaction was too good to be true and he would not uphold it were he the judge, he would know that a judge with a more literalist disposition might well condone the transaction.<sup>129</sup> How could the attorney in good conscience advise a client against a transaction when an identified segment of the judiciary would find the transaction perfectly legal? Given the lawyer's clear ethical duty to assist his client and the undeniable competitive pressure facing him, it is little wonder that even practitioners pre-disposed to undertaking a gatekeeping function would chose to abandon that older ethical norm as a viable standard for ongoing behavior.

#### 4. *Decreased Societal Impetus Toward Taxpaying*

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*



Finally, the change in the tax bar's view of their gatekeeping role was also influenced by broader changes in American society. Historically, there was a moral component to taxpaying in the United States.<sup>130</sup> While this began to give way in the 1930s<sup>131</sup>, World War II saw a renewed patriotic impetus toward taxpaying.<sup>132</sup> Even after the war, the United States found itself locked in an ideological struggle with Communism that supported a taxpaying impetus on the public.<sup>133</sup> However, as society moved beyond these periods of crisis,<sup>134</sup> the viewpoint that taxation should be viewed as a purely a forced extraction of wealth from citizens without any moral or ethical component to the obligation began to reassert itself.<sup>135</sup>

This period also saw a general decline in the level of respect for and trust in government and other institutions.<sup>136</sup> The portion of Americans who responded that the federal

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<sup>130</sup> See, e.g., JOHN S. WISE, *A TREATISE ON AMERICAN CITIZENSHIP* 74 (1906) (depicting tax evaders as unpatriotic and faithless).

<sup>131</sup> See Assaf Likhovski, *The Duke and the Lady: Helvering v. Gregory and the History of Tax Avoidance Adjudication*, 25 *CARDOZO L. REV.* 953, 997–1000 (2004) (discussing the changing judicial, legal, economic, and political views on taxation and tax avoidance that began to emerge in the 1920s, and the shift from moral to “amoral discourse on tax avoidance”).

<sup>132</sup> See Jones, *supra* note 67, at 716.

<sup>133</sup> Hatfield, *supra* note 8, at 11-13.

<sup>134</sup> John R. Alford, *We're All in This Together: The Decline of Trust in Government, 1958-1996*, in *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001) (suggesting that in United States low level of trust in government is the norm and that external threats to the country cause that trust to increase temporarily).

<sup>135</sup> Lawrence Zelenak, *Justice Holmes, Ralph Kramden, and the Civic Virtues of a Tax Return Filing Requirement*, 61 *TAX L. REV.* 53, 65-70, 78-79 (2007) (noting the decline in media perceptions of taxpaying obligations from strong portrayals of honest taxpayers in the 1950s and 1960s, to mixed messages in the early 1970s, to apparent endorsements of tax cheating in the 1990s; and linking this decline in part to societal changes over the period that have weakened public trust in government to tax and spend wisely).

<sup>136</sup> SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP: BUSINESS, LABOR AND GOVERNMENT IN THE PUBLIC MIND*, 15 (Rev'd ed., Johns Hopkins University Press, 1987) (1983) (“the early 1960s turned out to be a high-water mark in the history of the American public's attitudes toward their key social, political and economic structures.”); Anthony King, *Distrust of Government: Explaining American Exceptionalism*, in *DISAFFECTED DEMOCRACIES* 74, 95 (Susan J. Pharr & Robert D. Putnam eds., 2000) (noting as causes of increased distrust of

government can be trusted “to do what is right” most of the time or just about always fell from 76% in 1964, to 30% in 2008.<sup>137</sup> This general decline in trust has been demonstrated to have a direct impact on tax compliance.<sup>138</sup> As society moved farther away from the ideal that taxpaying was a moral and patriotic duty, the role of tax attorneys in advising their clients shifted as well. Indeed, these same societal forces can be seen behind the general decline in the respect for attorneys generally since the mid-1960s.<sup>139</sup>

#### IV. The Future of Tax Gatekeeping

##### A. *Whither (or Wither) Tax Gatekeeping?*

The foregoing discussion has reviewed the historical arguments for and against a gatekeeping norm in the tax arena and shown that a gatekeeping norm existed in the past, but has been largely abandoned today. In this Part the question is: Should we care? And if so, what can be done to reinvigorate and reestablish a gatekeeping norm within the tax bar?

This article takes the position that we should care and that it is worthwhile to resurrect a gatekeeping function for the tax bar. The main rationale in support of this view is the same one expressed earlier in this article, that an attorney’s zealous advocacy role should and must be circumscribed to ensure that the self-assessment system functions properly and that

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government, among other things, the public reaction to the Vietnam War and Watergate, the resurgence of federalism, and the increased polarization and declining civility of political discourse).

<sup>137</sup> THE AMERICAN NATIONAL ELECTION STUDIES, The ANES Guide to Public Opinion and Electoral Behavior (tbl.5A.1) , available at, [http://electionstudies.org/nesguide/toptable/tab5a\\_1.htm](http://electionstudies.org/nesguide/toptable/tab5a_1.htm).

<sup>138</sup> Kornhauser, *supra* note 20, at 873-75 (noting that distrust of government has increased markedly since the mid-1960s and highlighting the linkage between such decreased trust and decreased taxpayer compliance with the law); Lavoie, *supra* note 18, at 650-55.

<sup>139</sup> Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 811-16 (1998) (noting 1960 as a possible high water

taxpayers continue to perceive the tax system as fair. A breakdown in respect for the tax system could well lead to widespread tax avoidance and a breakdown of the stable taxpaying ethos in the United States.<sup>140</sup> A strong gatekeeping norm within the tax bar can help forestall this possibility and promote the rule of law.

While the historical argument that an ethical gatekeeping norm was unnecessary as sufficiently covered by an attorney's general ethical obligations, has clearly been refuted by the waves of tax shelter activity in recent decades, the existence of that very tax shelter activity can be utilized to argue against continuing to assert a gatekeeping norm.<sup>141</sup> This argument uses the failure of the historical gatekeeping norm to prevent past tax shelter waves as evidence that the traditionally articulated gatekeeping obligation was too ill-defined to serve as an enforceable normative guide for actual practitioner actions.<sup>142</sup> Hence, under this argument, advocating for a gatekeeping function is a misguided effort that will never be able to stand up to the competitive pressures facing practitioners and therefore can never serve as a realistic constrain on aggressive taxpayer behavior.

It is undoubtedly true that practitioners failed abysmally as gatekeepers during the periods of tax shelter activity in the past 40 years. However, this observed failure is most likely due to the rejection by a majority of practitioners of gatekeeping as a legitimate ethical norm,

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mark for public respect for lawyers and noting their marked descent in media portrayals of attorneys from “unalloyed hero[s]” to “flawed” and “morally ambiguous” figures).

<sup>140</sup> See generally, Lavoie, *supra* note 16.

<sup>141</sup> Watson, *Duty Reconsidered*, *supra* note 50, at 1236-37, 1198 (arguing against the traditional “duty to the system” standard and for a legislatively creating a normative standard to which tax practitioners must adhere “because it is now painfully clear that relying on an ideological “duty to the system” has not worked.”) (A gatekeeping ideal “should be a normative one in which clear expectations are firmly established, and the ability of all tax practitioners to comply is feasible in practice. But this has not been the case, and that has led to our present problems.”).

<sup>142</sup> *Id.*

despite the legal academy routinely asserting during this period that a gatekeeping role existed.<sup>143</sup> As discussed earlier, ethical behavior is ultimately determined by the specific culture or sub-culture creating the norm. Merely stating that any particular norm should exist in a society is nonsense and attempting to impose a norm from outside, without the means and will to enforce it from outside as well, is an exercise in futility.<sup>144</sup> To be effective, an ethical norm must reflect the consensus of those to whom it applies and be subject to effective internal enforcement.<sup>145</sup> While gatekeeping within the tax bar has often been proclaimed as the accepted ethical norm, at least since the 1965 Opinion that has never been the formal opinion of the American Bar Association.

So, it is disingenuous to suggest that the tax bar should not attempt to reach a consensus in favor of a gatekeeping role merely because a true consensus with formal adoption by the bar has not existed in recent times. The goal of this article is to propose a means by which the bar may be encouraged to shoulder this burden on its own initiative in a manner that will give both form and reality to an ethical gatekeeping norm that, in fact, has not existed in recent memory.

An alternative response might be that Government actions have already interceded to such a degree that recognizing an ethical norm of gatekeeping is irrelevant and unnecessary today. Following the Government's recent changes to Circular 230, the civil penalty provisions, the codification of the economic substance doctrine and its efforts to increase taxpayer disclosure of questionable transactions, there is little discretion left to tax advisors to

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<sup>143</sup> *See supra* notes 9 and 11.

<sup>144</sup> Lavoie, *supra* note 40, at 136-38.

<sup>145</sup> *Id.*

promote abusive transactions or assist their clients in pursuing such schemes.<sup>146</sup> In effect, the failure of the bar to come to a consensus and enforce an ethical gatekeeping norm has led the Government to impose the functional equivalent as a matter of law. As proof of this fact, one can point to the apparent downturn in tax shelter activity in recent years.<sup>147</sup>

Of course, if this position is correct, then the bar should have no problem formally adopting and embracing an ethical gatekeeping norm since it merely confirms the existing legally imposed reality. Yet we see no impetus to conform the ABA's formally announced standards to this supposed new reality.<sup>148</sup> Further the nature of a legally imposed rule is that it will only apply in the specific circumstances covered, and we have seen how adept the tax bar can be in finding loopholes in structures of legally imposed rules.<sup>149</sup> If there is no ethical standard to backstop the Government's imposed rules, then there is no disincentive for attorneys to exploit any areas not specifically governed by the legally imposed rules. In these gap areas

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<sup>146</sup> See e.g., Watson, *Duty Reconsidered*, *supra* note 50, at 1237.

<sup>147</sup> See *supra* note 14.

<sup>148</sup> Neither the ABA's general nor its Section of Taxation, Standards of Tax Practice Committee have scheduled projects to reconsider the continued viability of the 1985 Opinion, the 1965 Opinion or tax attorney ethical standards generally in light of the recent legislative and Circular 230 changes. See also, Michael Hatfield, *The Tax Section's Ethics Debate -- Historical Reflections*. TAX NOTES TODAY, Sept. 7, 2011, LEXIS 2011 TNT 173-9 (noting a debate held at the May 2011 ABA Section of Taxation meeting over whether Circular 230 should incorporate the reporting standards set forth in the Section 6694 return preparer penalty standards (as the Government subsequently did) or retain the "realistic probability" standard that the ABA had adopted in the 1985 Opinion (as the Tax Section was advocating), and summing up the debate by noting that attendees remained closely divided on the issue and concluding that "there continues to be ambivalence in the tax bar about the transformation of professional ethics into professional regulation.").

<sup>149</sup> As Professor Martin Ginsberg famously noted, "The tax bar is the repository of the greatest ingenuity in America, and given the chance, those people will do you in." LEGISLATION RELATING TO TAX-MOTIVATED CORPORATE MERGERS AND ACQUISITIONS: HEARING BEFORE THE SUBCOMM. ON SELECT REVENUE MEASURES OF THE HOUSE COMM. ON WAYS AND MEANS, 97th Cong. 90 (1982) (statement of Martin Ginsberg, Professor of Law, Georgetown University Law Center).

tax attorneys would be free to pursue the same destructive tax shelter activity that occurred in recent decades.

While it may turn out that the current set of rules provides an all inclusive barrier to attorney participation in tax shelter activity, there is reason to be skeptical of this conclusion. After the amendments to Circular 230 in the 1980s and the adoption of statutory rules to curtail tax shelter transactions, there was a drop off in tax shelter activity for a few years before new tax shelter schemes arose in the 1990s.<sup>150</sup> While the Government's actions spelled the demise of certain types of tax shelters, the drop off in activity may have resulted merely from the retooling of the industry. Conversely, the drop off in present day tax shelter activity may be due more to the fact that taxpayers have less income and gain to shelter currently as a result of the worst economic downturn in this country since the Great Depression.<sup>151</sup> When the economy turns around in the coming years, it is likely we will see more pressure for tax shelter transactions. Whether the Government's current rules will effectively contain that pressure remains to be seen.

As a final point in favor of attempting to refine and reassert a tax gatekeeping norm, it should be noted that reaching consensus on such a norm can be seen as in the best long term interest of both the bar and clients. The changes to Circular 230 and the penalty provisions in response to the tax shelter wave in the 1990s have placed significant additional burdens on practitioners and their clients.<sup>152</sup> These rules clearly have put real constraints on the relationship between clients and their attorneys and arguably dissuade the provision of some legitimate tax

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<sup>150</sup> The tax shelters of the 1970s and 1980s fell out of use following the adoption of the passive activity loss restrictions in 1986. *See supra* note 80.

<sup>151</sup> Kaye, *supra* note 14, at 604.

<sup>152</sup> *See generally*, Weisbach and Gale, *supra* note 83.

advice and planning.<sup>153</sup> Should lawyer assisted tax shelter activity become rampant again in the future, the bar should expect the Government to impose even more draconian restrictions on them. Taking concrete steps today to prevent future abuses and thereby forestalling any further potentially overly broad and restrictive Government intrusions into the attorney client relationship should be supportable as in the best interest of all involved.

*B. Creating an Accepted and Sustainable Gatekeeping Norm*

If a gatekeeping norm is desirable in the tax area, but appears to no longer exist, what can be done to create one anew? Most commentators in the last few decades have maintained that tax practitioners do have an ethical gatekeeping obligation.<sup>154</sup> This article has demonstrated that while, as a tax policy matter, such an ethical obligation should exist, and it appears to in fact to have existed at least for a time, the modern reality of tax shelter activity belies its continued existence. The problem is that ethical rules, and for that matter even rules of law, are worthless if they are not truly accepted and internalized by the group governed by such rules.<sup>155</sup> So, if a gatekeeping norm is desirable, merely proclaiming its existence will do little, by itself, to bring that norm into actual existence. This is especially true when powerful forces, both internal and external to the group, push members of the group in the opposite direction. Re-establishing a gatekeeping norm within the tax bar requires changing the existing culture of the tax bar, which in turn requires altering or exploiting various elements of the broader societal milieu in which the tax bar operates.

*1. Reaching Consensus and Announcing a Standard*

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<sup>153</sup> Charles A. Rose, *Note, The Tax Lawyer's Dilemma: Recent Developments Heighten Tax Lawyer Responsibilities and Liabilities*, 2011 COLUM. BUS. L. REV. 258, 260-62 (2011).

<sup>154</sup> *See supra* notes 9 and 11.

<sup>155</sup> Lavoie, *supra* note 40, at 136-38.

The imposition of an ethical rule on a group does not guarantee that the rule will be followed. To achieve a practical reality, the rule must be generally accepted as correct by those subject to it, as well as being subject to effective enforcement mechanisms to dissuade non-compliant behavior.<sup>156</sup> Essentially, there must be a consensus regarding the rule for it to have legitimacy. Consequently, internally debated and democratically adopted norms are the ones most likely to be obeyed, even by those who did not originally favor the adopted norm.<sup>157</sup> Of course, establishing consensus around an ethical standard is immeasurably harder when there is a pre-existing standard to the contrary.

This is unfortunately the predicament facing a renewed tax gatekeeping norm. While the extant literature maintains practitioners have such an ethical obligation, and the Government informally concurs, the ABA's pronouncements in the 1965 Opinion and the 1985 Opinion are premised on treating tax practice as an adversarial endeavor.<sup>158</sup> Despite the proliferation of tax shelter activity in the 1990s and the significant changes to Circular 230 and the civil penalty provisions, the ABA has not seen fit to revisit the 1985 Opinion. Further, the broader legal profession has long embraced an all encompassing zealous advocacy norm that is only slowly changing.

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<sup>156</sup> *Id.*

<sup>157</sup> See, e.g., James Alm, Betty R. Jackson & Michael McKee, *Fiscal Exchange, Collective Decision Institutions and Tax Compliance*, 22 J. ECON. BEHAV. & ORG. 285 (1993) (finding higher compliance when a matter is voted on and when the outcome has wide support). Accord T.R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (arguing that people comply with the law in general if they perceive the process that leads to this law as fair); James Alm, Gary H. McClelland & William D. Schulze, *Changing the Social Norm of Tax Compliance by Voting*, 52 KYKLOS 141, 163 (1999); Bruneo Feld & J.R. Tyran, *Tax Evasion and Voting: An Experimental Analysis*, 55 KYKLOS 197, 218 (2002); Benno Torgler & C. A. Schaltegger, *Tax Amnesties and Political Participation*, 33 PUB. FIN. REV. 403 (2005); Benno Torgler, *What Do We Know about Tax Morale and Tax Compliance?*, 48 INT'L REV. ECON. & BUS. 395 (2001) (surveying literature on political participation and compliance).

<sup>158</sup> See text accompanying *supra* notes 60-67 and 82-85.



The first step in reviving a tax gatekeeping norm is to withdraw the 1985 Opinion and replace it with one explicitly endorsing a gatekeeping role in tax planning. On its face this presents a “which came first” problem, since announcing the new ethical norm would help promote consensus around it, but consensus regarding the norm is presumably an essential element in adopting the new norm to begin with. However, consensus is often formed thru open discussion. Even if the required consensus is presently lacking, if the ABA were to undertake a new study on the provision of tax advice to clients, a new consensus could well emerge from that dialogue. Indeed, there are a number of changes in recent years that could be brought to bear in such a discussion in favor of adopting a gatekeeping norm, including, (1) the growing academic acceptance that restraining the zealous advocacy norm outside of (and sometimes even inside of) litigation is legitimate<sup>159</sup> and (2) the reality of recent direct regulation of tax practice by the Government, and the risk of even more draconian Government regulation in the future if the bar fails to effectively self-regulate.

Still, while beginning a real discussion of the proper role of advisors within the tax bar is a crucial first step if an effective gatekeeping norm is to be established, there is no guarantee that such discussions would result in that consensus. Despite the fact that restraining its own behavior is in the best interest of the tax bar (and their clients) to avoid more Government regulation, powerful forces push the tax bar in the other direction. These include, among others, (1) competitive pressures which force attorneys to compete for clients based on tax result rather than sound advice, (2) outside pressure from clients who engage in a

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<sup>159</sup> See e.g., Wilkins, *supra* note 117; Wendel, *supra* note 4; David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000); Robert W. Gordon, *The Independence of*

collaborative approach to obtaining legal advice, and (3) increased uncertainty regarding the judicial demeanor toward tax planning and statutory interpretation. If these forces are to be overcome, some countervailing forces must be put in play to nudge the tax bar toward a gatekeeping consensus.

## 2. *Seizing the Power of Individual Action and Example*

Changing a cultural norm is not an easy task. Generally such norms remain stable and resistant to change. However, when change occurs, it typically does so quickly rather than based on a gradual shift.<sup>160</sup> This tipping point nature of cultural norms highlights an unexpected vehicle for prompting rapid change, *individual action*.<sup>161</sup> On its face it may seem absurd to assert that the actions of an individual, or a small cadre of individuals, could lead to a cultural change, but even small changes to a social norm can precipitate dramatic and rapid changes

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*Lawyers*, 68 B.U. L. REV. 1 (1988); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

<sup>160</sup> Social groups tend to be resistant to social norm change since the internal cohesion of the group is based in part on the shared belief which is then internally enforced among group members. However, as greater numbers begin to break free of these internal enforcement mechanisms and flout the norm, it causes others to question whether the norm they are adhering to is truly shared by the group. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 160-61 (1984). Once this happens, members of the group tend to change their belief to the new one to remain attached to their group with a resulting cascade effect to the adoption of the new norm. See Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225 (1997). See also Natalie S. Glance & Bernardo A. Huberman, *The Dynamics of Social Dilemmas*, SCI. AM., Mar. 1994, at 76, 78-79; Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984); Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992).

<sup>161</sup> The concept of “tipping points” in group behavior was first developed by sociologist Morton Grodzins who used it to examine the “white flight” phenomenon occurring when levels of minority residence begin to rise in historically white neighborhoods. Morton Grodzins, *Metropolitan Segregation*, SCI. AM., Oct. 1957, at 24. However, the tipping point concept has far broader implications in explaining how singular events or trendsetter actions can swiftly overturn pre-existing social norms in a wide variety of settings. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000).

given the right conditions.<sup>162</sup> This insight builds on modern models of disease transmission where once viruses reach a critical mass they spread at an exponential rate. Essentially, human behaviors can themselves be contagious.<sup>163</sup> In this way, if even a small group of people reject an existing norm, others seeing their action may decide that they themselves should adopt it and start an informational or reputational cascade effect.<sup>164</sup> Such snowballing effects draw their strength from the fact that most social groups strive for homogeneity.<sup>165</sup> This tipping point effect can apply both in the context of endorsing a new social norm, as well as condemning one.<sup>166</sup>

The same principle applies to ethical situations. While one individual cannot singlehandedly change the world, he can influence those around him in ways that ultimately have profound consequences.<sup>167</sup> Imagine a crowd of people gathered for a peaceful protest. One

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<sup>162</sup> David Hirshleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, in *THE NEW ECONOMICS OF HUMAN BEHAVIOR* 188 (Mariano Tommasi & Kathryn Ierulli eds., 1995); Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 *J. POL. ECON.* 992 (1992); Harvey Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 *Q.J. ECON.* 183 (1950); Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 *VA. L. REV.* 1577, 1586-89 (2000) (describing how peer-to-peer influences can result in sometimes dramatic shifts in compliance equilibria)

<sup>163</sup> Gladwell, *supra* note 161, at 6.

<sup>164</sup> An information cascade occurs when individuals decide that others have superior information then they have and adopt the position of others on the assumption that they have superior information. *See supra* note 162. Reputational cascades occur when trend setters adopt a new norm and others follow suit either to curry favor or avoid censure. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 *STAN. L. REV.* 683, 685-87 (1999).

<sup>165</sup> *See* ELLIOT ARONSON, *THE SOCIAL ANIMAL* 6-7 (W.H. Freeman 7th ed 1995) (discussing the tendency of most individuals to want to conform their behavior); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *VA. L. REV.* 349 (1997) (discussing social conformity as an element of deterrence).

<sup>166</sup> Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 *U. CHI. L. REV.* 607, 614 (2000) (“Individuals are also more likely to view conduct as worthy of condemnation when they know that others condemn it. Indeed, studies suggest that the opinions of one’s peers more significantly influence one’s moral attitudes toward various forms of conduct than does the status of those forms of conduct under the law.”)

<sup>167</sup> *See, e.g.*, Kuran & Sunstein, *supra* note , at 688-89 (discussing the wide variety of social movements evidencing cascade theory).

individual's unilateral act of violence does not convert the protesters into a mob. However, the way that others respond might. If no one objects to the violence, then that sends a message to others in the crowd that the group finds violence acceptable, and the peaceful protest may quickly cascade into mayhem. Conversely, if members of the crowd censure and act against the initial violence, the peaceful purpose of the group is reaffirmed and cohesion to the original norm is maintained. One individual cannot unilaterally impose an ethical change on a group, but his example can prompt others to question their views.<sup>168</sup> When a person takes a principled stand in the face of a contrary norm, the present has been changed for those around him and who knows what good may ultimately arise in the future as a result.

So, this article presents a plea to practitioners to raise concerns with clients even when it is uncomfortable to do so. Even if an attorney feels constrained to provide zealous advice to a client, they should note that there is still a moral dimension to the question as well as a purely legal one. By standing up for a duty to the system and noting the harm a tax avoidance transaction presents to the system, the practitioner may give his client or other attorneys dealing with the transaction, the strength to question their own views about the appropriateness of their actions, even if technically legal. By doing so, the attorney not only impacts the group dynamic within the business ethics context, but serves as an example that can serve as the tipping point for other tax lawyers to question the true ethical norms in play. This is not to say that speaking out is easy, as it may cause risks for those who do it, but the more it is done the better.

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<sup>168</sup> Or to tap into the pop culture wisdom of Star Trek: “‘One man cannot summon the future.’ ‘But one man can change the present!’” Star Trek: Mirror Mirror (original air date Oct. 6, 1967) (discussion in which Captain Kirk urges an alternate universe Mr. Spock to work from within to change the brutal Empire he is sworn to defend), also quoted in SUSAN SACKETT, FRED GOLDSTEIN & STAN GOLDSTEIN, STAR TREK SPEAKS 113 (1979); Memory Alpha Wiki, Mirror, Mirror episode entry, [http://en.memory-alpha.org/wiki/Mirror,\\_Mirror\\_\(episode\)](http://en.memory-alpha.org/wiki/Mirror,_Mirror_(episode)).

Further, outside specific client settings, it is especially important that high profile tax practitioners and academics take up the cause and publically advocate for a strong gatekeeping norm since these trend setters will have an outsized impact on the behavior of others.<sup>169</sup> Consequently, anything that can be done to make it easier for an attorney to follow their conscience should be done to promote individual action and the importance of individual action should not be easily dismissed.

### 3. *Encouraging Gatekeeping*

Hastening a consensus regarding tax gatekeeping will require the creation of incentives for individual attorneys, and the bar as a whole, to willingly assume a gatekeeping function.<sup>170</sup> One means of achieving this is to appeal to their self-interest. As discussed earlier, one element of self-interest, avoiding future Government regulation of the profession, is already present. However, other factors discourage attorneys from counseling clients against aggressive

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<sup>169</sup> Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 *CARDOZO L. REV.* 1, 37-38 (2010), noting:

But oftentimes change is only possible through the facilitation of specific types of individuals, variously known as “change agents,” “opinion leaders,” and “norm entrepreneurs,” whose native abilities and social positions can encourage others to adopt a new norm. They may have extensive and diverse personal relationships that allow the rapid spread of new ideas. They may have knowledge about a vast array of issues or a technical expertise that gives credibility to the information and opinions they provide. They may be especially convincing in their arguments and possess a high “social intelligence” that lets them recognize the value of change. Or they may have a combination of these and other attributes.

<sup>170</sup> Of course, internal motivations are also important. So, one’s internal self-image may be linked to being an honest person and acting ethically in all their affairs. Consequently, the importance of general indoctrination into the ethical nature of gatekeeping should not be overlooked. For instance, tax LL.M programs might consider making a tax ethics course a required element of their degree. Currently, only one (Boston University) of the top six tax LL.M programs (New York University, Georgetown University, University of Florida, Northwestern University, Boston University, Miami University) make ethics a required course.

positions; including a fear that raising concern about technically legal transactions would result in losing that client's future business. To change this dynamic, it is necessary to (1) create a conflict of interest that requires attorneys to raise the broader ethical considerations despite general business distain for such considerations, and/or (2) change the prevailing business norms to be more receptive to considerations other than profit maximization and strict legal compliance.

One way of creating such a conflict of interest would be for the Government to pursue a more public and targeted enforcement effort on the clients of practitioners who advised on an aggressive transaction in the past. This would have a two pronged effect. When advising a particular client who is seeking aggressive advice, the practitioner would need to consider not only the interests of the current client, but the interests of his other clients and his own future livelihood. If being overly zealous for one client puts other clients at higher risk for audit, then that conflict of interest could prompt the attorney to temper his advice. Further, acceding to the aggressive advice desired by a client would potentially jeopardize the attorney's future earnings since other clients would be less inclined to hire a representative who would draw heightened scrutiny to them. Indeed, such publicized enforcement activity can help reduce the competitive pressures that lead to a legal race to the bottom. A taxpayer who knows that aggressive tax planners serve as audit lightning rods have an incentive to seek out practitioners who have a good reputation with the Government (and presumably are more even handed in their legal conclusions).<sup>171</sup>

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<sup>171</sup> An alternative means to achieve this impact would be to require taxpayers to disclose on their tax return that they received *negative* advice regarding a particular transaction or position taken on the return. Thus, even if they were able to ultimately shift to a lawyer with a more lenient bent, they would still need to disclose the earlier negative advice. Thus, a lawyer potentially issuing negative advice would have more sway to persuade the client to pursue a less aggressive course rather than merely having the client simply shop for more lenient advice.

The Government could also take a more direct approach to intentionally create conflicts of interest between tax lawyers and their clients. For instance, the Government could modify the attorney-client privilege in tax situations or override normal client confidentiality rules by legally requiring certain disclosures to the Government of specified client actions.<sup>172</sup> Indeed, in promulgating regulations dealing with the disclosure of certain reportable transactions, the Government, perhaps inadvertently, created just such a conflict of interest.<sup>173</sup> Of course at the extreme the Government could potentially eliminate all privilege or confidentiality for tax planning matters and then even require practitioners to report aggressive client activity.<sup>174</sup> But this is exactly the type of Government interference with the profession that everyone would agree would be detrimental to all involved. However, Government actions touching on these matters at the margins could be effective in both encouraging attorneys to generally distance their legal considerations from their client's business goals and highlight in a tangible way the real risk to the tax bar associated with a continued unwillingness to effectively self-regulate.

As discussed in the next section, the other way to encourage attorneys to question the advisability of aggressive but arguably legal transactions is to make such considerations more germane to the clients being served by the attorney and thereby relieve some of the outside pressures acting to suppress a gatekeeping function.

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<sup>172</sup> For instance, client identity is generally not protected under the attorney-client privilege, even in tax shelter situations. Richard Lavoie, *Making a List and Checking It Twice: Must Tax Attorneys Divulge Who's Naughty and Nice?*, 38 UC DAVIS L. REV. 141 (2004).

<sup>173</sup> 26 C.F.R. § 301.6112-1. This regulation requires any material advisor to a reportable transaction (as defined in 26 C.F.R. § 1.6011-4(b)(1)) to maintain a list of investors in such transaction which must be furnished to the Government on request.

<sup>174</sup> See e.g., Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 269-72 (1992) (noting that the attorney-client privilege is essentially a matter of court and legislative grace which could be eliminated, except in certain narrow criminal situations where the privilege might claim a Constitutional basis).

#### 4. *Relieving the Anti-Gatekeeping Pressure*

A primary reason tax lawyers hesitate to raise issues regarding aggressive tax planning is that their clients are unlikely to be receptive to such “non-legal” advice coming from their legal advisors.<sup>175</sup> Businesses in the United States are focused primarily on their bottom line and consequently view the law as merely a system of rules to be gamed for the sole goal of profit maximization.<sup>176</sup> Under this approach, as long as a transaction is technically “legal” then it should be pursued to obtain the expected economic benefit irrespective of any non-financial considerations.<sup>177</sup> This is compounded by the conventional wisdom that taxpaying is an area of purely legal inquiry, devoid of any moral considerations<sup>178</sup> and by general societal trends that weaken the taxpaying norm.<sup>179</sup> A lawyer’s ability to counsel against this approach to applying the tax laws is made almost impossibly difficult when the judiciary actually endorses such a literalistic approach to interpreting the tax laws.<sup>180</sup> Given the uncertainty today regarding judicial attitudes, a lawyer may be hard pressed to refuse to advise against an aggressive transaction where a literalist court may well uphold the transaction. Consequently, clarifying the proper method of statutory interpretation in tax cases is absolutely crucial to reestablishing a tax gatekeeping norm.<sup>181</sup> While recent court decisions have moved back toward traditional anti-abuse notions in scrutinizing tax motivated transactions, the underlying schism within the judiciary and the academy regarding the interpretation of statutes remains.<sup>182</sup> While the

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<sup>175</sup> Wilkins, *supra* note 117, at 2075-76.

<sup>176</sup> William Bradford, *Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights*, 26 ND J. L. ETHICS & PUB POL’Y 141, 148 (2012).

<sup>177</sup> Jill E. Fisch, *The “Bad Man” Goes To Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1602 (2006).

<sup>178</sup> *See supra* notes 64-65.

<sup>179</sup> *See supra* Part III.B.4.

<sup>180</sup> Lavoie, *supra* note 40, at 190-92.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 195-99.



Government has taken an important step toward clarifying this matter by codifying the economic substance doctrine, more should be done to solidify judicial approaches in this area and thereby reduce the uncertainty for practitioners in predicting the likely judicial response to an aggressive transaction. There are several mechanisms by which this could be done. First, a general anti-abuse rule could be statutorily adopted.<sup>183</sup> This has been done in several countries with generally positive effect, despite practitioner criticism.<sup>184</sup> Alternatively, given the long history of judicially created anti-abuse doctrines in the United States, a simpler approach would be to merely statutorily reaffirm the appropriateness of courts continuing to apply such doctrines and to eschew literal interpretations of the Code that are at odds with the intended purpose and scope of the subject provisions.<sup>185</sup>

Another approach for making businesses more receptive to cautionary advice from their attorneys would be to alter the business culture of their clients using public censure.<sup>186</sup> In the past, public outcry over corporations expatriating to avoid US taxes was brought to bear to question, or try to reverse, a number of such transactions.<sup>187</sup> Today many corporations pay very

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<sup>183</sup> *Id.* at 195.

<sup>184</sup> See e.g., Graeme S. Cooper, *International Experience with General Anti-Avoidance Rules*, 54 SMU L. REV. 83, 84 (2001); Tim Edgar, *Building a Better GAAR*, 27 VA. TAX REV. 833, 836 (2008); Benjamin Alarie, *Trebilcock on Tax Avoidance*, 60 U. TORONTO L.J. 623, 624-25 (2010); Julie Cassidy, “*To GAAR or Not to GAAR - That is the Question:*” *Canadian and Australian Attempts to Combat Tax Avoidance*, 36 OTTAWA L. REV. 259 (2004).

<sup>185</sup> Lavoie, *supra* note 11, at 62-63.

<sup>186</sup> Joshua D. Blank, *What’s Wrong with Shaming Corporate Tax Abuse*, 62 TAX L. REV. 539 (2009); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1812 (2001); Sandeep Gopalan, *Shame Sanctions And Excessive CEO Pay*, 32 DEL. J. CORP. L. 757 (2007).

<sup>187</sup> Orsolya Kun, *Corporate Inversions: The Interplay of Tax, Corporate, and Economic Implications*, 29 DEL. J. CORP. L. 313, 344 (2004); *Developments in the Law – Jobs and Borders: VI. Drawing Lines Around Corporate Inversion*, 118 HARV. L. REV. 2270, 2274-75 (2005).

low effective tax rates.<sup>188</sup> Publicizing such rates might well create a public outcry demanding that corporate citizens pay their fair share of the tax burden as well.<sup>189</sup>

## V. Conclusion

This article has demonstrated that the tax bar's failure to effectively constrain its actions on behalf of clients has forced the Government to impose constraints on the tax bar through direct regulation. As has happened with securities lawyers, this direct Government regulation could become even more onerous if the tax bar fails to embrace a strong gatekeeping function on its own. In order to preserve the traditional and important tax planning role of attorneys in business and personal planning situations, the bar must be willing to curb its support for aggressive tax planning techniques. While this will require a departure from traditional notions that every client must be represented zealously without consideration of ancillary adverse consequences to society or third parties (including the attorney himself), it is in line with both the historical approach to practicing tax law and emerging trends arguing in favor of a general

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<sup>188</sup> *Citizens For Tax Justice Says 'No-Tax' Corporations Continue To Avoid Taxes*, TAX NOTES TODAY, Apr. 10, 2012, LEXIS 2012 TNT 69-19 (noting report showing 26 large U.S. corporations paid no U.S. taxes in 2011) ; CITIZENS FOR TAX JUSTICE, CORPORATE TAXPAYERS AND CORPORATE TAX DODGERS 3, available at <http://www.ctj.org/corporatetaxdodgers/CorporateTaxDodgersReport.pdf> (finding the average effective corporate tax rate in 2009 and 2010 for 280 large U.S. corporations was 17.3 percent, with a quarter of the companies studied paying below 10 percent)

<sup>189</sup> See, e.g., Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?*, 18 CAN. J.L. & JURISPRUDENCE 95, 104-05 (2005) ("Publicity strengthens penalties because it increases the chance of getting caught (since members of the public, especially tax experts, can study returns) and it increases chances of public shaming for non-compliance."); Stephen W. Mazza, *Taxpayer Privacy and Tax Compliance*, 51 U. KAN. L. REV. 1065, 1144 (2003) ("Empirical research and compliance theories also support this position, suggesting that publicity can play a positive role in discouraging noncompliant behavior and increasing the public's commitment to the tax system."); Marc Linder, *Tax Glasnost' for Millionaires: Peeking Behind the Veil of Ignorance Along the Publicity-Privacy Continuum*, 18 N.Y.U. REV. L. & SOC. CHANGE 951 (1990-1991) (advocating for the publication of millionaires' tax returns); Paul Schwartz, *The Future of Tax Privacy*, 61 NAT'L TAX J. 883, 895-96 (2008); Joseph J. Thorndike, *Show Us the Money*, 123 TAX NOTES 148, 148-49 (2009).

obligation of attorneys to counterbalance their zealous advocacy for a client against a duty to support and strengthen the substantive body of law in which they practice.

The tax bar should begin a forthright discussion of these issues immediately, with the goal of reaching a strong consensus in favor of adopting a formal ethical gatekeeping norm. Achieving this consensus will require weakening the competitive and other forces which align attorneys too closely with a client's profit maximization goals, but with sufficient resolve on the part of a cadre of attorneys who see the stakes involved, these forces can be overcome.

Looking beyond the tax bar, the implications of how the degradation of a gatekeeping norm in the tax area has impacted tax practitioners should serve as a warning to all lawyers to heed calls for a gatekeeping function in their particular fields. While historically it has been argued that the tax field is unique in this regard due to the self-assessment nature of the income tax, that uniqueness is less true today. As the United States moves ever closer to a regulatory state where more and more individual and business action is circumscribed by detailed statutory and regulatory frameworks, attorneys will be increasingly called on to promote adherence to these rules. A zealous advocacy norm will promote game playing with these frameworks and ultimately harm the rule of law. Additionally, many of the forces described herein that have caused tax practitioners to eschew their historical gatekeeping function find direct analogues in other practice areas. The tax experience provides a cautionary tale for the entire bar on the importance of affirmatively embracing a gatekeeping function as a means of saving a zealous advocacy norm that otherwise could be completely swept away.