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Tax Law:
The Ethics of Tax Lawyering

Heather M. Field¹

A core function of a tax planning lawyer is to help her client achieve non-tax economic objectives in a manner that minimizes the client's tax burden. Sometimes it is reasonably clear that a particular tax minimization opportunity complies with the law, but sometimes attempts to reduce tax involve more aggressive positions, including positions where the asserted tax treatment is likely *not* the proper analysis under the law.

So what does it mean to be ethical when providing tax planning advice on these potentially very aggressive tax positions?

It clearly requires knowledge of the rules of professional ethics, whether those are the Model Rules of Professional Conduct or the variation thereon that applies in the tax planner's jurisdiction. The tax planner must also understand the ABA Formal Opinions relevant to the provision of tax advice, the Circular 230 regulations that set out standards of practice for those individuals who "practice before the IRS,"² the tax penalty rules, and more.

Understanding these rules is necessary but not sufficient. The authorities leave tax planners with a tremendous amount of discretion on questions, including: Which matters will the lawyer agree to take on (and why)? How aggressive is the lawyer willing to be within the boundaries of what is allowed? To what extent will she merely take direction from her client and to what extent will she try to convince the client to take the approach she thinks is right?

Scholars have not meaningfully addressed these types of questions in the context of tax practice. To fill this gap, I argue that a lawyer should identify and implement her "philosophy of lawyering" to help her make difficult discretionary tax advising decisions in a principled way, and when implementing that philosophy to tax lawyering, she should work to counteract the subtle factors that can skew her professional judgment.

1. Summarized and excerpted from Heather M. Field, *Aggressive Tax Planning & the Ethical Tax Lawyer*, 36 VA. TAX REV. 216 (2017).

2. 31 C.F.R. § 10.2 (2011) (hereinafter "Circular 230").

1. What Are the Options for Tax Lawyering Philosophies?

A tax planner can adopt one (or more) of several different philosophies of lawyering.³

- *The Hired Gun* takes whatever actions are necessary to advance the client's goals as long as the action does not clearly violate laws or rules of ethics.
- *The Moralist* helps clients take only positions that the lawyer believes are morally just.
- *The Ideal Judge* follows the legal interpretations that a neutral, well-informed judge would make.
- *The Kantian* seeks to apply the law as society has agreed upon, treating the law, as enacted, as embodying society's collective moral judgment.
- *The Counselor* collaborates with the client and provides in-depth counseling in an effort to help the client make a well-considered decision, taking into account a wide variety of considerations, even if the client had not originally expressed interest in such matters.
- *The Egoist* acts to minimize the risk to herself of professional discipline, malpractice liability, loss of fee, or reputational damage.
- *The Hybrid* combines or modifies various approaches detailed above. For example, the Counselor is easily combinable with the Hired Gun, Ideal Judge, or Kantian.

No consensus in the literature deems one approach the "right" approach for lawyers, in general or in tax in particular. Different lawyering philosophies can sometimes (but not always) result in different advice, but any of the foregoing approaches (except the purely self-interested approach) reflects a reasonable guideline for ethical tax practice.

2. How Can Lawyering Philosophies Advance Ethical Practice?

Having a philosophy of tax lawyering is a key tool through which a tax planner can increase the likelihood that she will behave in an ethical

3. See generally THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (2d ed. 2009).

manner, even in the context of aggressive tax planning. This is for multiple reasons.

First, a lawyer who develops her philosophy of lawyering thoughtfully gives herself a framework for principled decision-making that she can use when responding to difficult clients and handling challenging decisions. This increases the likelihood that she makes difficult decisions in principled way that is aligned with the values that she wants to guide her practice.

Second, employing a philosophy of lawyering can help a tax planner serve her clients more effectively. By clarifying the lawyer's role and approach, a philosophy of lawyering can help the lawyer better identify clients whose needs she is most likely to be able to meet, and can help the lawyer to set and meet client expectations about the representation.

Third, having a philosophy of lawyering also helps the lawyer maintain her "personal integrity [and] inner moral compass," thereby helping her to avoid decisions that she is likely to regret,⁴ which may ultimately make the practice of tax law a more sustainable and personally satisfying career.⁵

3. Which Lawyering Philosophy Should a Tax Planner Adopt?

Absent consensus about the "right" approach to tax lawyering, each tax lawyer must determine which approach best reflects her values. The identification of one's philosophy of tax lawyering is a very personal process, but there are some considerations uniquely relevant to tax planning that might affect a tax planner's choice of lawyering philosophy.

For example, limited government resources lead to a relatively weak enforcement mechanism for the tax system, which means that (a) the government cannot be presumed to be a reliable adversary to all taxpayers, and (b) the tax system relies heavily on self-assessment and taxpayers' willingness to comply with the law.⁶ A related, but somewhat broader, concept that might influence a practitioner's choice of lawyering philosophy is the notion that tax lawyers have a special duty to "protect

4. Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 530 (1994).

5. See, e.g., Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (2005) (arguing that practicing with integrity contributes to happiness and wellness, and citing research).

6. See Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111, 142–44 (2009).

the revenue,”⁷ meaning that tax lawyers “must balance the immediate demands of their clients against the public's interest in a sound tax system which operates in accord with policy judgments reached through a democratic process.”⁸

Further, the prospective planning context may influence a tax lawyer's choice of lawyering philosophy, perhaps away from a hired gun approach, and different lawyering approaches may also be warranted depending on whether the client's primary goal is the pursuit of non-tax business objectives or merely tax avoidance. A tax practitioner's lawyering philosophy may also be affected by the extent to which she is concerned about the historic role of tax lawyers in sheltering and evasion, the decline in professionalism of the tax bar, the erosion of public confidence in the tax system, anti-tax rhetoric, and the development of a broader “culture of tax avoidance” among taxpayers and their advisers.

None of these considerations is dispositive, and different factors may resonate more strongly with some practitioners than with others. Ultimately, each tax practitioner must determine what lawyering philosophy most resonates with her.

4. How Can a Tax Planner Effectively Implement Her Lawyering Philosophy?

Having a tax lawyering philosophy cannot serve as an effective tool to advance ethical practice unless the tax planner can *implement* her approach to lawyering. Implementation of a lawyering philosophy depends on the tax planner's ability to exercise independent, unbiased professional judgment, particularly as to the substantive merits of a particular tax position.

Unfortunately, tax advisors are unlikely to be immune from the systematic ways in which people make mistakes or (consciously or subconsciously) act dishonestly. Major impediments to effective implementation of a lawyering philosophy include: (a) institutional influences, (b) client influences, and (c) cognitive biases. Each can affect a tax planner's ability to exercise unbiased judgment, especially in ways that could lead a lawyer to be more aggressive than her lawyering philosophy would dictate or in ways that could lead the lawyer to

7. Michael C. Durst, *The Tax Lawyer's Professional Responsibility*, 39 U. FLA. L. REV. 1027, 1051 (1987).

8. Linda Galler, *The Tax Lawyer's Duty to the System*, 16 VA. TAX REV. 681, 688, 693 (1997).

conclude that a position is stronger than she would otherwise assess it to be.

Thus, a tax lawyer must develop strategies for overcoming these impediments in order to help her stay true to her lawyering philosophy—and thus to her values—in practice. A wide variety of strategies, drawn largely from the social science literature about decision-making biases, can assist. Strategies for counteracting impediments to ethical and unbiased decision-making are many and varied. A comprehensive plan for counteracting these biases is beyond the scope of both this excerpt and the article on which it is based, but acknowledging that there are threats to one's ability to exercise unbiased judgment is a critical first step in overcoming them.

Within the boundaries set by the rules and standards, each individual practitioner must determine what ethical tax practice means to her and what kind of tax planner she wants to be. She should use that vision to guide her through those difficult discretionary decisions as she tries to build a defensible, morally coherent tax planning career of which she can be proud.