7-3-2017

Tax Opinions & Probability Theory: Lessons from Donald Trump

Heather M. Field
UC Hastings College of the Law, fieldh@uchastings.edu

Tax Opinions & Probability Theory: Lessons From Donald Trump

by Heather M. Field

Heather M. Field

Heather M. Field is a professor of law at the University of California Hastings College of the Law, where she holds the Eucalyptus Foundation Chair. Field thanks Brad Borden, John Crawford, Jared Ellias, Harry Field, Daniel Lathrope, Stephanie Hunter McMahon, Alex Shapiro, Larry Stein, and Manoj Viswanathan for their input. All opinions and any errors are the author's.

In this report, Field uses tax opinions rendered to Donald Trump's enterprises in the early 1990s as a case study for examining the relevance of probability theory in multi-issue opinions in which each tax position must be correct for the desired benefits to be achieved. She also makes recommendations for incorporating probability theory into tax opinion practice.

Table of Contents

I. Introduction 61
II. A Case Study: Trump's Willkie Farr Opinions 63
A. The Overall Conclusions 63
B. The Issue-By-Issue (Conditional) Conclusions 63
C. Probability Theory Reveals an Inconsistency 63
D. Trying to Solve the Quandary 64
III. The Case Study's Significance in 2017 . 67
A. The Broad Relevance of Probabilistic Analysis 67
B. Understanding Today's Authorities . . 68
IV. Takeaways for Tax Opinion Practice . . . 72
A. Include an Overall Conclusion 72
B. Consider Incorporating a Probabilistic Analysis 72
C. Be Wary of Assuming Legal Conclusions 73
D. Carefully Evaluate Other Lawyers' Opinions 73
E. Know a Little About Probability Theory 74
F. Reflect on the Opinion Practice Rules . 74
G. Famous Clients May Bring Scrutiny . . 74
V. Conclusion 74

I. Introduction

Question: If you are on a game show and the host tells you that there is a 51 percent chance you will win a prize and then tells you that assuming you win a prize, there is a 40 percent chance it will be a new car, what are the chances you will win a new car?

Answer: Approximately 20 percent.

Common tax opinion practice does not incorporate this math lesson, at least explicitly. As a result, tax opinions may suggest higher chances of success than actually exist (or than the lawyer believes to exist) or provide internally inconsistent assessments about the likelihood of achieving a particular tax benefit. Those problems may lead taxpayers to be more aggressive than they intend to be (or than perhaps they should be allowed to be, at least without penalties).

Tax opinions publicly revealed shortly before the 2016 presidential election and rendered in the

early 1990s by Willkie Farr & Gallagher LLP to Donald Trump's enterprises in connection with casino restructurings[1] provide a case study. In analyzing this case study, I focus on a feature of the opinions that other commentators have not yet discussed[2]: Each opinion, after analyzing one legal issue and opining on it at a "more-likely-than-not" level, assumed that the first (uncertain) legal conclusion was true while assessing later issues' likelihood of success. When reaching "substantial authority" level opinions on later issues, the opinions did not appear to account for the above math lesson about conditional probabilities.

Therefore, the overall likelihood of success of at least some purported substantial authority tax positions discussed in the opinions was probably less than the approximately 40 percent chance typically associated with substantial authority opinions. For Trump, this means that at least some of his enterprises' tax positions were likely even more aggressive than a quick reading of the opinions would suggest.

But I am less interested in what the opinions reveal about Trump or Willkie Farr and more interested in what they reveal about tax opinion practice in general. The opinions highlight an important tax opinion practice question[3] that is still relevant:

> When an opinion analyzes multiple tax issues, each of which must be true for the overall tax benefits discussed in the opinion to be obtained, to what extent should the lawyer providing the tax opinion engage in a probabilistic analysis of the relationship among the issues in reaching the opinion's overall conclusion?[4]

This report explicitly raises that question and begins to answer it. The goals of this are fourfold. First, this report uses one of the Willkie Farr opinions as a lens for understanding the question and its importance. Second, it examines the extent to which current rules provide guidance on this question. Third, it encourages tax practitioners to reflect on, and possibly modify, their own tax opinion practices regarding multipronged analyses, and it provides some recommendations for those modifications. And fourth, it lays the foundation for future work about how the applicable ethical rules and standards of practice might be revised in light of the concerns discussed here.

Ultimately, this report argues that an important aspect of the Trump tax opinions — their failure to (at least explicitly) engage in a mathematical probabilistic analysis of the relationship among multiple interrelated issues critical to the desired tax benefits — may be a methodological flaw present in tax opinion practice in general. That flaw, which has received scant attention in the literature,[5] creates a risk that tax opinions, as a class of legal advice, undermine the accuracy of tax advice by overstating the strength of taxpayers' positions. This can harm clients who may not get the candid advice they need, and it can harm the fisc by hindering tax compliance.

Two important caveats are necessary at this point. First, this report does not address the substantive merits of the opinions or the tax positions that Trump's enterprises likely took based on the Willkie Farr opinions. Other

[1] David Barstow et al., "Donald Trump Used Legally Dubious Method to Avoid Paying Taxes," *The New York Times*, Oct. 31, 2016 (reporting on the revelation of the opinions); "Donald Trump's Lawyers' Warnings on Tax Maneuver," *The New York Times*, Oct. 31, 2016 (publishing Willkie Farr opinions dated June 5, 1991 (the 1991 opinion), and Jan. 10, 1992).

[2] *See, e.g.*, Samuel Brunson and David Herzig, "On Trump and Tax Opinions," The Surly Subgroup, Nov. 11, 2016; Daniel Shaviro, "Latest on Trump's Tax Scam," Start Making Sense, Nov. 1, 2016; and Barstow et al., *supra* note 1.

[3] They also raise the related question of whether it is appropriate for the analysis in a multi-issue opinion to be based on an assumption that a tax position previously analyzed in that opinion is correct. *See* Sections III.B.3 and IV.C (addressing the assumption issue as part of the larger question posed in the text).

[4] This report assumes that the opinion's analysis is based solely on the likelihood of success on the merits and does not consider the risk of audit, the odds that a particular issue will be raised on audit, or the personal aspects of the likely arbiter. *See* Bradley T. Borden and Sang Hee Lee, "The Prediction Model in Tax Law's Substantial Authority," at 7-21 (manuscript on file with author).

[5] *See* Shaviro, *supra* note 2; Borden and Dennis J. Ventry Jr., "Giving Legal Advice in the Face of Uncertainty," in Practising Law Institute, *Pocket MBA*, at 425 (Summer 2012); and Sarah B. Lawsky "Probably? Understanding Tax Law's Uncertainty," 157 *U. Pa. L. Rev.* 1017, 1021 (2009).

commentators address the substantive merits;[6] this report is about the opinions' methodological approach to multi-issue analyses. Second, this report is not intended to be a hatchet job on Willkie Farr or Trump. Regarding Trump, this report's focus is not on the taxpayers who take positions in reliance on tax opinions. Taxpayers generally reasonably rely on opinions rendered to them. This report's focus is on the practices of the authors of the tax opinions. Willkie Farr happens to be the author of the high-profile, publicly available Trump opinions, which provide a helpful case study. However, the concerns raised in this report are not primarily about Willkie Farr but are instead about tax opinion practice more broadly.

II. A Case Study: Trump's Willkie Farr Opinions

As was revealed approximately one week before the 2016 presidential election, Willkie Farr had drafted two opinion letters about the tax consequences of Trump's casino restructurings in the early 1990s. One opinion, addressed to Trump Taj Mahal Associates and to a nominee for that entity, was dated June 5, 1991, and the other opinion, addressed to Trump's Castle Associates Limited Partnership and to a nominee for that entity, was dated January 10, 1992. Both were long, complex opinions that involved multiple issues.

A. The Overall Conclusions

The body of each opinion begins with an introduction and a statement of the opinion's overall conclusion. For example, the 1991 opinion explains that the firm believes:

> it is *more-likely-than-not* that the New Bonds will be treated as debt of the Partnership for federal income tax purposes, as discussed below. In each of the other above instances [referring to a list of issues on which the firm is "unable to render an unqualified legal opinion"], we believe that there is *substantial authority* for the positions which the Partnership and the Company intend to take, as described more fully below.[7]

That is, the firm offered opinions at a more-likely-than-not not level on one issue and at a substantial authority level on all the other uncertain issues.

B. The Issue-By-Issue (Conditional) Conclusions

The 1991 opinion goes on to discuss the firm's analysis of each issue individually. The first issue is the classification of purported notes as debt or equity of particular entities. After a discussion about the first issue, the opinion concludes, consistently with the overall statement of opinion, that it is more-likely-than-not not that the desired tax position (treatment of new bonds as debt of the partnership) would succeed if challenged.[8]

The opinion then states that except when specifically noted to the contrary, the discussion of all the remaining issues assumes that the new bonds will be treated as debt of the partnership — that is, it will be assumed that the analysis of the first issue is correct.[9] Only after making that assumption[10] does the opinion proceed with the remainder of the analysis and conclude that there was substantial authority for specific tax positions discussed later, including, for example, whether the partnership could deduct interest-like payments made on the purported notes.[11]

C. Probability Theory Reveals an Inconsistency

Assuming that one issue is true for purposes of assessing the likelihood of success on a second issue means that the stated likelihood of success

[6] *See, e.g.*, Brunson and Herzig, *supra* note 2; Lee A. Sheppard, "Partnership COD Exception Suits Trump," *Tax Notes*, Nov. 7, 2016, p. 741; and Amy S. Elliott, "Trump's Tax Strategy Opinions Trigger Tax Lawyer Identity Crisis," *Tax Notes*, Nov. 7, 2016, p. 755.

[7] 1991 opinion, *supra* note 1, at 3 (emphasis added).

[8] *Id.* at 3, 5.

[9] *Id.* at 6.

[10] The discussion of each subsequent issue does not explicitly restate the assumption made earlier, but the assumption was, by its terms, applicable to the entire remaining analysis. Moreover, the assumption is crucial to at least portions of the subsequent analysis.

[11] *See, e.g.*, 1991 opinion, *supra* note 1, at 14. Not all the subsequent discussions use the term "substantial authority," and some seem to reach conclusions at different, possibly higher, levels of certainty. *See, e.g.*, *id.* at 21 ("if the Company's and Partnership's position that the Partnership is the sole obligor of the New Bonds is respected, the ability of the Partnership to deduct amounts attributable to OID on the New Bonds and the new Bonds delivered in payment of the Additional Amount *should* not be limited" (emphasis added)).

on the second issue provides only a conditional probability — the probability that the latter issue is correct assuming that the first issue is correct.[12] Thus, the unconditional or overall likelihood of success on the second issue is almost certainly lower than the stated conditional probability.[13] This is demonstrated by the game show example, in which the contestant wins the new car only if both contingencies are true — if she wins and if the prize for winning is a new car.

In other words, the risk associated with the first issue does not go away, even if you assume that it does. So the probability that the taxpayer will obtain the desired tax benefit discussed in the second part of the opinion is the probability that the analysis of the first issue (the assumption) and the analysis of the second issue are *both* correct — that the new bonds will be treated as debt of the partnership *and* that the partnership can take a deduction for interest-like payments on them. And, with few exceptions, the probability that both analyses are correct is less than the conditional probability that the analysis of the second issue is correct.

Using this understanding of conditional probability and putting some numbers to the Willkie Farr opinion, if more-likely-than-not means 51 percent, and substantial authority means 40 percent (common interpretations of these tax terms of art[14]), there would be an overall chance of approximately 20 percent that the tax benefits discussed in the second part of the analysis would be realized — that the contestant would win a new car on the game show, or that the partnership would be able to deduct the interest-like payments on the new bonds that were treated as debt.[15]

Although the term "substantial authority" refers to a range of success probabilities, it is highly unlikely that a lawyer would offer an opinion at a substantial authority level if he believed a position's chance of success on the merits was approximately 20 percent.[16] Thus, applying basic probability theory reveals that the overall likelihood of success (around 20 percent) implied by the conditional substantial authority opinion is arguably inconsistent with the unconditional substantial authority opinion rendered on the same issue at the beginning of the opinion.[17]

D. Trying to Solve the Quandary

If the probabilistically determined overall likelihood of success of a particular tax position was approximately 20 percent, how is it possible that the 1991 opinion reached an unconditional substantial authority opinion on that tax issue?

There are several possible explanations, some of which are less compelling than others.

First, the numbers used above for more-likely-than-not and substantial authority could be higher. The terms "more-likely-than-not" and "substantial authority" refer to a range of probabilities and not to precise numbers. If more-likely-than-not means 69 percent and substantial

[12] Eric W. Weisstein, "Conditional Probability," MathWorld.

[13] To put a little bit of math to this intuition, recall that $P(A \mid B) = P(A \cap B) / P(B)$. *Id.* $P(A \mid B)$ denotes the conditional probability that the second issue (A) is correct, assuming the first issue (B) is correct. $P(A \cap B)$ denotes the probability that both issues A and B are correct — *i.e.*, the overall probability of success. P(B) denotes the probability that the assumed issue (B) is correct. Thus, as long as B is not certain (100 percent) to be true, the overall probability that both issues are correct will be less than the conditional probability (*i.e.*, if $P(B) < 1$, then $P(A \cap B) < P(A \mid B)$).

[14] *See* reg. section 1.6662-4(d) (describing the substantial authority standard). Numerical translations of the different opinion levels vary somewhat, but experts estimate substantial authority to be in the 34 to 50 percent range, and they interpret "more-likely-than-not" to mean greater than 50 percent. *See* Robert P. Rothman, "Tax Opinion Practice," 64 *Tax Law.* 301, 327; Ventry and Borden, "Probability, Professionalism, and Protecting Taxpayers," 68 *Tax Law.* 83, 113 n.163 (2014); and Joseph M. Erwin, "Tax Opinions & Other Tax Advice — Preparation, Use & Reliance," 619-1st Tax Management Portfolio at VI.E.3. *See also generally* Borden and Lee, *supra* note 4, at 38-70 (deconstructing the definition of substantial authority).

[15] The analyses in Willkie Farr's opinions were even more nested than the above suggests. For simplicity, I focus on the opinion's analysis of one assumed issue and one subsequent issue, but the opinion adds additional tiers, assuming the correctness of a second issue (which was based on the assumption that the first issue was correct) for analyzing a third issue, etc. *See, e.g.*, 1991 opinion, *supra* note 1, at 7 (making another assumption, this time about the correctness of a substantial authority conclusion that itself was premised on the original more-likely-than-not conclusion, for subsequent discussion and analysis).

[16] *See, e.g.*, Rothman, *supra* note 14, at 327 (estimating reasonable basis at 20 to 30 percent); and Ventry and Borden, *supra* note 14, at 113.

[17] One possible alternative to applying probability theory is to use the "lowest common denominator" approach. *See* Erwin, *supra* note 14, at VI.A.2. Under this approach, it would be acceptable to reach an overall substantial authority conclusion in the 1991 opinion as long as each required part of the analysis (including any conditional conclusions) had at least substantial authority. However, because I have been unable to find or devise a compelling argument for the lowest common denominator approach, this report rejects it in favor of an approach based on long-standing and well-accepted probability theory.

authority means 50 percent (basically the top of the range for each[18]), there would have been a 34.5 percent chance of overall success, which is at the very bottom of the range for substantial authority. These are awfully high probability estimates for these opinion levels, but Willkie Farr could have used these higher numbers, done a probabilistic analysis of the overall likelihood of success of the later issue, and concluded that a likelihood of success of 34.5 percent was enough for it to render an overall substantial authority opinion. As part of this process, the firm may have decided not to discuss the probabilistic analysis explicitly in the opinion.

Second, Willkie Farr may have been even more confident about the issue-by-issue analyses than the opinion stated. Perhaps the firm would have been willing to offer an opinion at should and more-likely-than-not levels rather than at more-likely-than-not and substantial authority levels, respectively,[19] but the client was satisfied with the lower-confidence conclusions and didn't want to pay the firm to either do the additional work required to provide formal opinions at higher levels[20] or to assume the additional risk associated with giving a higher-level opinion.[21] Then the probabilistic analysis would be even stronger (for example, 75 percent for should and 51 percent for more-likely-than-not, yielding an overall likelihood of success of approximately 38 percent), which would more safely support an overall substantial authority conclusion.

A problem with the first two possible answers is that for some tax benefits discussed in the opinion to be obtained, the analyses of more than two issues had to be correct. This report uses an example involving only two issues to simplify the discussion, but generally, the more variables that must be correct, the lower the overall probability that all will be true. So if a more-likely-than-not issue, a substantial authority issue, a will issue, and another issue on which the opinion seems to conclude at a weak should level[22] all must be true for a particular tax treatment to arise (as is the case in part of the 1991 opinion[23]), a probabilistic analysis causes the overall likelihood of success for that tax treatment to rapidly decline. Even using numbers very close to the top of the relevant ranges (69 percent for more-likely-than-not, 49 percent for substantial authority, 99 percent for will, and 89 percent for should[24]), the overall likelihood that the particular tax treatment will succeed is slightly below 30 percent. But for a tax consequence that depends on the analysis of only two issues, perhaps these first two explanations help to reconcile an unconditional substantial authority opinion with the low likelihood of success seemingly implied by a conditional substantial authority opinion.

Third, Willkie Farr may have concluded that the issues were largely correlated, meaning that the unconditional likelihood of success on the second issue might have been higher than around 20 percent.[25] However, correlation between the analyses is unlikely to be explanatory here because if Willkie Farr's conclusion in its issue-by-issue analysis of the second issue was truly conditional (that is, based on the assumption that the first issue was correct), the confidence

[18] *See supra* note 14 (regarding the top of the range for substantial authority). The top of the range for more-likely-than-not should be just below the bottom of the range for the next-highest opinion level — the "should" opinion — which commentators generally estimate to begin as low as 70 percent. *See* Erwin, *supra* note 14, at VI.E.3 (between 70 and 90 percent); and Rothman, *supra* note 14, at 327 (70 to 75 percent).

[19] This may be counterfactual, at least regarding the substantial authority issues, since, in the sentence that states the overall substantial authority opinion, the opinion states: "Because of the lack of controlling decisional or regulatory authority, we are unable to provide legal assurance that the probabilities are more-likely-than-not that such positions will be upheld if they are litigated." 1991 opinion, *supra* note 1, at 3.

[20] In some situations, additional analysis can enable the lawyer to give an opinion at a higher level. For example, if a lawyer determines that a financial instrument "should" be treated as debt, a client could ask the lawyer whether a revision to the terms of the instrument would allow him to give a "will"-level opinion.

[21] Tax opinions of this sort provide a form of tax insurance, so a higher opinion level increases the risk that the law firm might have to pay out on the "insurance" if the tax benefit was not sustained. Thus, understanding the legal fees paid to the lawyer to be at least somewhat akin to an insurance premium, a higher opinion level might merit a higher fee.

[22] 1991 opinion, *supra* note 1, at 8 ("While there is no authority resolving the point, in our opinion the better view is that the first alternative should control" the tax treatment).

[23] *Id.* at 7-8 (regarding the tax treatment of the exchange of old bonds for new bonds).

[24] *See* Rothman, *supra* note 14, at 327 (providing estimates for each type of opinion).

[25] When determining the probability that two events will occur, it is important to determine whether the events are independent or dependent. For dependent events, $P(A \cap B) = P(A \mid B) * P(B)$. For independent events (*i.e.*, when $P(A \mid B) = P(A)$), $P(A \cap B) = P(A) * P(B)$. Weisstein, "Independent Statistics," MathWorld.

expressed about the second issue already accounted for the relationship between the issues. Only when each issue is analyzed separately (that is, unconditionally) must one determine whether the issues are independent or dependent in determining the likelihood that both analyses will be true.

Perhaps the Willkie Farr opinion, despite making the explicit assumption about the first issue, intended to provide unconditional assessments of the likelihood of success on the subsequent issues, or perhaps the (seemingly) conditional analysis of the second issue otherwise did not fully reflect the relationship between the analyses.[26] In that case, the question of correlation between the issues could be relevant in determining the likelihood that both analyses are correct. Tax opinions generally do not discuss correlation, but it seems unlikely that each substantial authority issue in the Willkie Farr opinion was largely correlated with the more-likely-than-not issue, because the analysis for each issue was highly technical and involved different legal authorities.[27] Thus, even if there was some correlation between the issues (beyond that reflected in the seemingly conditional opinion about the second issue), the inconsistency between the issue-by-issue conclusion and the overall conclusion likely remains.

Fourth, perhaps the assumption was not actually critical to the analysis of every subsequent issue. In that case, the assumption would not undermine the strength of the overall conclusions on the issues when the assumption was irrelevant. But this explanation cannot fully resolve the disparity between the overall opinion level and the probabilistic analysis because the assumption was made globally and was indeed critically important for at least some of the subsequent issues. For example, it makes no sense to discuss the possibility of deducting interest-like payments on an instrument if the instrument is not classified as debt for federal income tax purposes. Thus, the assumption that the instrument was debt was clearly critical for the analysis of the deductibility of the payments.

Fifth, Willkie Farr may have intended to provide only issue-by-issue analyses and opinions, without providing overall conclusions. The firm may have intended the introductory language, which I read to provide overall opinions, to be a mere summary of the later analyses. The introductory statements of opinions do not include the assumption, but if they are intended to be mere summaries of the rest of the analysis, perhaps the introductory language in the opinion means to incorporate the assumption by reference.[28] In the absence of any overall conclusion, there could be no inconsistency between the overall conclusion and the conditional issue-by-issue conclusions. However, this reading would leave the reader with only conditional substantial authority opinions, which suggest a likelihood of success on the issue (around 40 to 50 percent) that is higher than the probabilistically determined overall likelihood of success on the issue (around 20 percent). That is, although there would be no internal inconsistency, having only a conditional opinion may be misleading to a reader who fails to notice or appreciate the impact of the assumption.

Sixth, the lawyers may have concluded that a mathematical probability analysis was not required under the applicable ethics and penalty rules. Thus, they may have rationally chosen not to do this analysis, opting instead for more of a gut approach to determining the likelihood of success for both the individual conclusions and the overall conclusion.

Seventh, the lawyers simply may not have appreciated the relevance of a probabilistic analysis, and they may not have realized that the assumption on which an issue's analysis was premised undermined the opinion's overall (unconditional) conclusion regarding that issue.

There may be other explanations as well. Part of the point here is that we cannot tell from the face of the opinion if there is a reasonable explanation that would reconcile an overall substantial authority opinion on an issue with the

[26] I do not think this is the correct reading of the opinion, but I entertain this possibility here because it could be explanatory if correct.

[27] *See* Shaviro, *supra* note 2.

[28] Again, I do not think this is the better reading of the opinion, but I entertain it as a possibility here because this understanding could be partly explanatory.

probabilistic analysis explained above, which suggests that the overall likelihood of success on the merits of the same issue was only around 20 percent. Without that insight, readers of the 1991 opinion are left to wonder about Willkie Farr's view about the overall likelihood that the discussed tax benefits would be obtained, particularly on the issues for which the issue-by-issue analysis reaches only a conditional (assuming the correctness of the first issue discussed in the opinion) substantial authority conclusion.

III. The Case Study's Significance in 2017

Since the early 1990s, much has changed about the rules that regulate tax advisers and tax advice,[29] and there is little to be gained by dissecting how well Willkie Farr's opinions complied with the rules applicable more than a quarter-century ago. However, to learn from these opinions for the future of tax opinion practice, this section briefly explains the most relevant current authorities that bear on the extent to which a multi-issue tax opinion should engage in a mathematical probabilistic analysis[30] of the relationship between the issue-by-issue conclusions in reaching an overall conclusion about the likelihood of obtaining the tax benefit.

It is important, however, to first elaborate on the question presented to appreciate the role of probabilistic analysis in today's tax opinion practice.

A. The Broad Relevance of Probabilistic Analysis

The question discussed in this report is much broader than the example provided by Trump's Willkie Farr opinions. In the case study, the question about examining the interrelationship of multiple issues, all of which are relevant to the ultimate conclusion, arises because the correctness of one issue is assumed for purposes of the analysis on a subsequent issue. However, the question also arises in contexts without such an assumption, when multiple independently analyzed issues (that is, with no legal assumption) all must be true for the overall tax benefit to be obtained.[31] There are numerous situations like this.

For example, to offer an opinion that a transaction qualifies as a reorganization under section 368, the lawyer must conclude that the statutory requirements applicable to the particular structure are satisfied,[32] that there is sufficient continuity of business enterprise,[33] that there is sufficient continuity of interest,[34] and that there is a bona fide business purpose.[35] Although typical reorg opinions don't walk through the details of the analysis of each issue, a more uncertain (and thus more challenging) reorg opinion might. In this setting, affirmative conclusions would have to be reached on each of the issues for the overall benefit to be achieved (treatment of the transaction as a reorganization). Consider an example in which the lawyer is able to reach a will-level opinion on most of the requirements but only a should-level opinion on one of them. What opinion can be rendered on the overall qualification of the transaction as a reorganization? Certainly not a will-level

[29] *See generally* David Weisbach and Brian Gale, "The Regulation of Tax Advice and Advisers," *Tax Notes*, Mar. 14, 2011, p. 1279 (comparing the 2011 rules with those in place in 1990); and Ventry and Borden, *supra* note 14, at 129-182 (describing major developments from the past few decades in the rules regulating tax advisers).

[30] The discussion throughout this report uses mathematical probability analysis, and all references to probabilistic analysis (or any variant thereof) refer to this classic mathematical approach to probabilities. *Cf.* Alex Stein, "The Flawed Probabilistic Foundation of Law and Economics," 105 *Nw. U. L. Rev.* 199 (2011).

[31] Probability theory is also relevant in disjunctive analyses (*i.e.*, in which only one of multiple analyses must be correct for the overall tax treatment to be achieved). In that context, however, the likelihood that the overall tax treatment will be achieved is higher than the likelihood that any individual issue's analysis is correct. *See* Borden and Ventry, *supra* note 5, at 455. Given that this report is concerned about situations in which an opinion might overstate (rather than understate) the likelihood of success, I focus on the conjunctive rather than the disjunctive context.

[32] Section 368(a)(1).

[33] Reg. section 1.368-1(d).

[34] *Id.* at reg. section 1.368-1(e).

[35] *Id.* at reg. section 1.368-1(c).

opinion.[36] Maybe not even a should-level opinion.[37]

The top-level opinion about the overall tax benefit depends on the correctness of the opinions on each subissue. If any subissue fails, the tax treatment of the entire transaction fails. Thus, at most, the confidence level of the overall opinion can be no higher than the lowest level of confidence expressed regarding any required subissue.[38] When taking into account a mathematical probability analysis, the overall confidence level is likely even lower.[39]

Thus, the question illuminated by the case study is relevant not only when one issue is assumed to be true before a subsequent issue is analyzed, but also when a tax opinion involves a multi-pronged analysis and more than one of those prongs must be true for the relevant tax treatment to be achieved. The details of the probabilistic calculations may vary slightly depending on the specific context, but in both circumstances the lawyer must grapple with whether (and to what extent) he should engage in a probabilistic analysis of the relationship between the conclusions about the individual issues in determining the strength of his overall conclusion.

B. Understanding Today's Authorities

The professional rules and standards applicable to tax opinion practice come from several sources. They include the code's penalty provisions and related Treasury regulations,[40] Circular 230,[41] American Bar Association formal opinions,[42] and the ABA Model Rules of Professional Conduct (and state-adopted versions of the model rules). These sources provide guidance on how strong an opinion must be in different circumstances,[43] how to evaluate authorities in reaching particular degrees of confidence in an opinion,[44] and other requirements for rendering written advice.[45] But none of them provides a clear answer about whether, when, or how a tax opinion should analyze the relationship among multiple issues as part of reaching an overall conclusion about the likelihood of success of a tax position that depends on all those tax issues being true.[46]

Portions of these authorities do, however, provide some insight on this question. The relevant provisions include the requirement (in limited circumstances) to provide an overall evaluation of the likelihood that a tax benefit will be realized; the guidelines about communicating effectively with clients, including advising clients about the importance of the lawyer's advice; and the obligation to base opinions on reasonable assumptions.[47] Each will

[36] An overall will opinion in this situation exceeds even the should level of certainty that could be reached under the lowest common denominator approach, which this report rejects. *See supra* note 17.

[37] The numerical probabilities associated with the will opinions would have to be close to 100 percent to conclude that there is should-level confidence that three will opinions and one should opinion are all true. For example, if the three will opinions are each 95 percent certain and the should opinion is 75 percent certain, the probability that all are correct (assuming that they are independent variables) is just above 64 percent, which is unlikely to merit an overall should. *See supra* note 18 (putting the bottom of the range for should opinions at 70 percent). If, in contrast, the three will opinions are each 99 percent certain and the should opinion is 80 percent certain, the probability that all are correct (assuming that they are independent variables) is above 77 percent, which would likely be sufficient to justify an overall should opinion.

[38] The lowest common denominator sets the upper boundary for the confidence level of the overall opinion. *See supra* note 17.

[39] *See, e.g.*, *supra* note 37.

[40] *See, e.g.*, sections 6662, 6664, and 6694; and reg. sections 1.6662-4 and 1.6694-1.

[41] 31 CFR section 10. Circular 230 contains the standards of practice for those practicing before the IRS, as broadly defined in 31 CFR section 10.2(a)(4).

[42] *See, e.g.*, ABA Committee on Professional Ethics, Formal Op. 85-352 (1985); and ABA Committee on Professional Ethics, Formal Op. 346 (1982).

[43] *See, e.g.*, reg. section 1.6664-4(f)(2)(B)(2) (as part of avoiding a substantial understatement penalty in connection with a tax shelter, the taxpayer can satisfy the "belief requirement" by relying on an opinion from a tax adviser that is rendered at a more-likely-than-not level of confidence).

[44] *See, e.g.*, reg. section 1.6662-4(d) (explaining what authority is required for a conclusion that there is substantial authority).

[45] 31 CFR section 10.37.

[46] Borden and Ventry, *supra* note 5, at 454 ("The law does not expressly dictate how an attorney should determine the likelihood of a particular outcome. In particular, the law does not state whether the likelihood is a quantitative measure or a qualitative measure.").

[47] There are many additional authorities that bear on tax opinions and other tax advice more generally, including, for example, the prohibition on taking audit risk into account when evaluating the likelihood that a client's position will succeed. *See, e.g.*, 31 CFR section 10.37(a)(2)(vi). *See also* Borden and Ventry, *supra* note 5, at 436-474 (discussing, more generally, ethical duties relevant when advising a client about the tax consequences of a transaction under conditions of legal uncertainty).

be addressed in turn, but as illustrated, the relevant authorities do not clearly require a mathematical probability analysis for multi-issue opinions.

1. Requirement (in limited circumstances) to provide an overall evaluation of the likelihood of success.

The professional rules and standards applicable to tax opinions generally do not require opinions that depend on multiple subissues to provide an overall conclusion in addition to issue-by-issue conclusions. Nor do the applicable rules and standards require those opinions to provide an analysis of the relationships of the multiple issues discussed in the opinion.

One key exception is ABA Formal Opinion 346 (1982), governing lawyers who issue tax shelter opinions. It requires that when possible, the lawyer "provide an opinion as to the likely outcome on the merits of the material tax issues" and "provide an overall evaluation of the extent to which the tax benefits in the aggregate are likely to be realized." The now-obsolete covered opinion rules of Circular 230 included a similar requirement that a covered opinion include the practitioner's opinion on each tax issue and provide an overall conclusion along with reasons for that conclusion.[48]

However, these authorities do not generally provide guidance on whether and how most tax opinions should evaluate the relationships among analyses of each issue in a multi-issue opinion. Covered opinions have been eliminated, so those rules no longer apply.[49] Further, ABA Formal Opinion 346, while technically still in effect, is limited to tax shelter opinions, which are narrowly defined to essentially include only opinions on syndicated shelters.[50] Most opinions are not tax shelter opinions, so the rules articulated in ABA Opinion 346 have limited reach.[51] For these other opinions, ABA Formal Opinion 85-352 (1985) applies, but it does not impose the same requirement about providing both issue-by-issue conclusions and overall conclusions.

Even if ABA Formal Opinion 346 and the old covered opinion rules applied to all opinions, those authorities still would not give practitioners enough guidance about how to handle opinions in which the overall tax benefit depends on the correctness of the analyses of multiple issues. Although opinions would have to provide both issue-by-issue conclusions and overall conclusions, the covered opinion rules did not elaborate on the requirement that the practitioner provide reasons for the overall conclusion (a requirement absent from Formal Opinion 346). Those reasons would not necessarily have to include either a probabilistic analysis of the relationship among the evaluations of the underlying issues or an explanation of how, given the level of confidence expressed regarding the individual issues, the opinion reaches the overall level of confidence regarding the aggregate tax benefits. Arguably, a qualitative-narrative explanation for the overall conclusion would be sufficient.

2. Importance of effective communication with clients, including about the import of conclusions.

A lawyer's obligations regarding effective communication with clients also bear on the content of multi-pronged tax opinions. Model Rule 1.4(b) requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,"[52] and Model Rule 2.1 requires that a lawyer "exercise independent professional judgment and render candid advice." Further, Circular 230 articulates as a best

[48] 31 CFR section 10.35(c)(3)(ii) and (c)(4) (before amendment by T.D. 9668, which eliminated the special rules for covered opinions). Note that ABA Formal Opinion 346 does not include an analogous requirement to provide reasons for the overall conclusion.

[49] T.D. 9668.

[50] *See* Weisbach and Gale, *supra* note 29, at III.B. (describing the scope of ABA Formal Opinion 346).

[51] *See* Rothman, *supra* note 14, at 359; and Weisbach and Gale, *supra* note 29, at III.B.

[52] Restatement (Third) on the Law Governing Lawyers, section 20 articulates similar obligations.

practice "advising the client regarding the import of the conclusions reached, including, for example, whether a taxpayer may avoid accuracy-related penalties under the Internal Revenue Code if a taxpayer acts in reliance on the advice."[53]

If a client's primary concern is the ability to avoid accuracy-related penalties for a particular position, an opinion that provides issue-by-issue conclusions may be sufficient to meet the above ethics requirements for effective communication, even if the opinion doesn't provide an overall conclusion or analyze the relationship among the issues in providing an overall conclusion about whether the aggregate tax benefit will be realized. If the lawyer explains the thresholds for the imposition of accuracy-related penalties and the opinion reaches a substantial authority-level conclusion, for example (even if it is a conditional substantial authority opinion), the lawyer's advice may give the client a candid assessment of the information it needs to understand the importance of the conclusion in the opinion and to make an informed decision about whether to proceed with the position discussed in the opinion.

However, if a client is also (or primarily) concerned about whether the aggregate tax benefit will be achieved,[54] an opinion that provides only issue-by-issue analyses may be insufficient. Without an overall conclusion, a client may not adequately understand the importance of the tax advice because it may not appreciate the likelihood that its desired overall tax benefit may be successfully challenged by the IRS. Although Circular 230's language about advising the client "regarding the import of conclusions reached" is only a voluntary best practice and not a mandatory requirement, failure to provide an overall conclusion may also prevent the lawyer from meeting his obligations to his client under the model rules. Including only issue-by-issue conclusions may lead a client to overestimate the likelihood that its desired tax benefit will be realized and may mean that the advice is insufficiently candid to enable the client to make an informed decision about proceeding with the particular tax strategy.

Even when an opinion provides an overall conclusion, there may be an inconsistency between the confidence expressed in the issue-by-issue conclusions and the confidence expressed in the overall conclusion, as with Willkie Farr's Trump tax opinions.[55] For example, the overall conclusion might fail to consider the probability of success of each underlying issue, fail to examine the relationship among those analyses, and fail to justify the overall level of confidence in light of the level of confidence expressed for each underlying issue. That type of inconsistency could make the opinion misleading because it could imply a higher level of confidence about the success of the overall tax strategy than is warranted based on a probabilistic analysis of the relationship among the individual issues.[56] Again, an opinion that is internally inconsistent and misleading in this way may not be sufficiently candid about the client's overall likelihood of success, may leave the client without a real appreciation of what the opinion means for the client's ability to achieve the desired tax benefit, and may fail to explain the matter to the client in a way that permits it to make an informed decision about whether to proceed with the particular tax strategy.[57]

Perhaps the foregoing reads too much into the lawyer's communication obligations. Or perhaps the lawyer who issues an opinion without an overall conclusion or with an overall conclusion that may be inconsistent with the underlying issue-by-issue conclusions meets his

[53] 31 CFR section 10.33(a)(3).

[54] *See* Robert W. Wood, "What Good Is a Tax Opinion, Anyway?" *Tax Notes*, Sept. 6, 2010, p. 1071 ("I do not believe most tax opinions are written primarily for purposes of penalty protection. . . . Clients want to win. They want to have their tax position upheld.").

[55] *See supra* Section II.C.

[56] Such an opinion may be misleading even if prepared with care and if technically correct. Donald W. Glazer, Scott T. FitzGibbon, and Steven O. Weise, *Glazer & FitzGibbon on Legal Opinions* 52 (2008). *See also id.* at 53 and 54. Although the focus of the treatise is on closing opinions for business transactions, the principles about good opinion practice and the duty to avoid misleading the opinion recipient are equally applicable in the tax opinion context. *Id.* at 50.

[57] Although an opinion that fails to do a probabilistic analysis for a multi-pronged issue and thus provides arguably inconsistent overall and issue-by-issue opinions may be misleading in the ways described in the text, that opinion would unlikely rise to the level of "incompetence or disreputable conduct" under Circular 230. *See* 31 CFR section 10.50(a)(13). This is partly because tax opinions do not typically provide (at least explicitly) probabilistic analysis, even when there are multi-pronged issues.

communication obligations to his client through oral conversations or written communications other than the opinion itself. However, at least when advising a client that cares about the likelihood of achieving the desired tax benefits and not merely about penalty protection, a lawyer would be well advised to include an overall conclusion in the opinion in addition to issue-by-issue conclusions, and he should ensure that the overall conclusion is justified given the conclusions on the underlying issues.

3. Obligation to base advice on reasonable assumptions.

Multiple authorities also require that tax opinions be based on reasonable assumptions (or not be based on unreasonable assumptions). For example, Circular 230 requires that a practitioner base written advice on "reasonable factual and legal assumptions."[58] Moreover, the code and regulations provide that taxpayers seeking a reasonable cause or good faith exception to section 6662 or 6662A penalties cannot rely on tax opinions that are based on "unreasonable factual or legal assumptions."[59]

On one hand, it may be reasonable to rely on an assumption that a legal conclusion is true if the opinion says that the legal conclusion is more-likely-than-not correct. That is, if a legal conclusion has a greater than 50 percent chance of success, it is reasonable[60] to assume that it will succeed. In this case, the assumption is arguably realistic,[61] and neither the taxpayer nor the lawyer would have any reason to believe that the legal conclusion is likely incorrect.

However, the weight of the commentary argues that "the tax opinion cannot assume the tax consequences at issue" and that "it is also inappropriate to assume any legal conclusion underlying the tax opinion."[62] There is no tax-specific authority directly on point.[63] The conclusion that a legal issue covered in the opinion may not be an appropriate subject for an assumption is largely based on opinion principles articulated for more general business law practices.[64] For example, the Legal Opinion Accord of the ABA states that a practitioner rendering an opinion "may rely, without investigation, upon [a list of assumptions] *unless in a given case the particular assumption states, directly or in practical effect, a legal conclusion expressed in the Opinion*."[65] The comments to the accord explain further that reliance on a particular assumption "is not appropriate if it essentially embodies a specific opinion issue with which the Opinion deals directly."[66]

Applying these opinion guidelines to tax opinions that require multi-prong analyses, as tax commentators have done,[67] suggests that a tax opinion should not assume the correctness of one issue analyzed in the opinion for purposes of analyzing the remaining issues. If an opinion is tasked with analyzing an issue, that analysis should be incorporated throughout the opinion, if and as relevant.

One practical exception to the foregoing is for a tax opinion that evaluates whether a particular tax status is achieved (such as reorganization treatment or debt-equity classification) and then analyzes the tax consequences of that status if indeed achieved. To render such an opinion, the second part of the analysis must, at least initially, assume the correctness of the first part. How can

[58] 31 CFR section 10.37(a)(2)(i).

[59] Section 6664(d)(4)(B)(iii); and reg. section 1.6664-4(c)(1)(ii).

[60] Reasonable is defined in the *Cambridge Dictionary* as "based on or using good judgment, and therefore fair and practical."

[61] Wood, "Debunking 10 Myths About Tax Opinions," *Tax Notes*, Aug. 17, 2015, p. 789.

[62] Wood and Donald P. Board, "Tax Opinions the SEC Way," *Tax Notes*, Dec. 7, 2015, p. 1307.

[63] There are, however, detailed tax-specific rules and commentary about when a practitioner can rely on advice or opinions provided by others. *See, e.g.*, 31 CFR section 10.37(b); New York State Bar Association Tax Section, "Report on Tax Opinions in Registered Offerings," at Part II(c)-(e) (Apr. 4, 2012); and Rothman, *supra* note 14, at 374 n.380. The omission of rules regarding when a practitioner can rely on assumptions about his own legal analysis and within his own expertise may support the conclusion that making those assumptions are generally not reasonable or appropriate.

[64] Erwin, *supra* note 14, at VI.B.2. (citing ABA Section of Business Law, Committee on Legal Opinions, "Third-Party Legal Opinion Report, Including the ABA Accord," 47 *Bus. Law.* 167 (1991); and TriBar Opinion Committee, "The Remedies Opinion — Deciding When to Include Exceptions and Assumptions," 59 *Bus. Law.* 1483 (2004)).

[65] ABA business law section, *supra* note 64, at section 4 (emphasis added).

[66] *Id.* at section 4.6.

[67] *See, e.g.*, Wood, *supra* note 61; and Wood and Board, *supra* note 62.

an opinion examine the tax consequences of a particular tax status without at least accepting arguendo the correctness of that status (for example, determining whether interest payments on a financial instrument are deductible without first concluding that the instrument constitutes debt rather than equity)?

Even accepting this practical reason to assume the correctness of a legal conclusion reached in the opinion, the concerns discussed above regarding a lawyer's ability to meet his obligations to communicate effectively with his client remain. This suggests that when a legal assumption is made for this practical purpose, it is important for the lawyer to put the pieces of the analysis together to provide an overall, and not merely conditional, assessment of the likelihood that the ultimate tax benefit will be realized.

IV. Takeaways for Tax Opinion Practice

A. Include an Overall Conclusion

The current rules generally do not explicitly require that a tax opinion provide an overall conclusion about the likelihood the tax treatment discussed in the opinion will be obtained. However, not providing that conclusion when the overall tax benefit depends on the correctness of multiple individual analyses may make the opinion appear misleading and prevent the lawyer from meeting her obligations to communicate effectively with her client.

As the Trump opinion case study shows, a substantial authority opinion that is rendered assuming the correctness of an earlier-discussed more-likely-than-not opinion is unlikely to have a 40 to 50 percent chance of success on the merits. The overall unconditional likelihood of success on the merits is much lower because of the assumption. Failure to include an overall assessment of the chances of success on that nominal substantial authority issue may prevent the client from understanding just how low the chances of success are. If the client cares only about penalty protection, perhaps this is not a big problem. But if the client hopes to achieve the tax treatment described in the conditional substantial authority opinion, it will probably want to know whether its chances of success on the merits are much closer to 20 percent than to 50 percent.

Clients are entitled to understand their adviser's opinion about the overall likelihood of success on the merits. Thus, when a tax benefit discussed in an opinion depends on the correctness of multiple issues, the opinion should do more than provide conclusions on each of the underlying issues. The opinion should also provide an overall conclusion about the likelihood of achieving the aggregate tax benefit. Indeed, I suspect (and hope) that most tax advisers' opinion practices already do this.

B. Consider Incorporating a Probabilistic Analysis

When an opinion's overall conclusion depends on its conclusions on multiple individual subissues, all of which must be true for the relevant tax benefit to be obtained, incorporating a mathematical probability analysis into the opinion writing process can help the lawyer determine whether his overall conclusion is justified. Thus, using a probabilistic approach reveals possible inconsistencies in the opinion. As a result, the lawyer can consider whether these problems can be reconciled through careful analysis, whether it is appropriate to revise the opinion, or whether he is comfortable proceeding with the opinion as drafted.

Regardless of the lawyer's response and regardless of whether he explicitly includes any discussion of probabilistic analysis in the text of the opinion, analyzing the relationship between multiple interrelated issues as part of reaching an overall conclusion enables him to better understand his own opinion. In turn, this allows the lawyer to be more confident that he is giving an opinion that he can justify, and this empowers him to more effectively advise his client about the significance of the opinion (including whether the client will get the desired tax treatment).

Practitioners should be warned, however, that incorporating a probabilistic analysis for multi-issue tax benefits may dramatically lower the lawyer's overall confidence level about whether the tax benefit will be obtained. This is true even if the opinion expresses relatively high levels of confidence on each subissue.[68] For example, if

[68] *See, e.g.*, Borden and Ventry, *supra* note 5, at 460 (providing an illustration).

there are four issues, all of which must be correct to obtain a particular tax benefit, and the opinion reaches separate should opinions on each, the overall probability that the tax benefit will be obtained (assuming each issue is independent and using 75 percent as the numerical representation for should-level opinions) is just under 32 percent. Maybe the lawyer will conclude that these issues are so highly correlated that he can still render an overall should-level opinion, but maybe he will decide that he can render the opinion only at a lower level of confidence. At the very least, explicitly and intentionally going through this probabilistic analysis adds rigor to the analysis and to the conclusion reached in the opinion.

Nevertheless, a probabilistic analysis may not be required for a penalty protection opinion, at least for the substantial understatement penalty for nonshelter positions. A probabilistic analysis is not required by the regulations defining substantial authority,[69] so an opinion that complies with those rules, makes only reasonable assumptions, and otherwise enables a taxpayer to meet the reasonable cause or good faith exception is arguably enough to assist with penalty protection. Thus, if a client cares only about penalty protection and really doesn't care about the likelihood of succeeding on the merits, including a probabilistic analysis may be less critical for a lawyer seeking to discharge his obligations to his client.

C. Be Wary of Assuming Legal Conclusions

Best practices for nontax business opinions argue against assuming an opinion's own legal conclusions for purposes of the opinion's analysis of other issues. That approach is equally compelling in the tax opinion context. If, however, such an assumption is made as a practical tool to enable the opinion to offer an opinion on the tax consequences that arise from an affirmative conclusion on the first issue, it becomes extremely important to put the parts of the analysis together and provide an overall unconditional assessment of the likelihood that those tax consequences will actually be obtained.

D. Carefully Evaluate Other Lawyers' Opinions

When evaluating an opinion rendered by another lawyer (for example, to assist the client to whom the opinion was rendered), look for legal assumptions and conditional conclusions. Assumptions can be easy to miss. The assumption in the 1991 Trump tax opinion was at the very bottom of page 6 of a 22-page single-spaced document.[70] But the few lines that stated the assumption had a large impact on the meaning of the rest of the opinion,[71] and a reader who missed the assumption likely misunderstood the true likelihood of success on issues discussed later.

Also, look for analyses of multiple related issues. When there are such issues (whether discussed independently or whether one issue is assumed to be true to analyze another issue), apply a mathematical probability approach to determine whether the overall conclusion is consistent with the level of confidence expressed for each of the underlying subissues. If there is a potential inconsistency, consider whether and how it could be reconcilable, as this report did regarding the Willkie Farr opinion.[72] Then consider whether any of those possible explanations are compelling. If an inconsistency is discovered (and especially when it is difficult to find a compelling explanation to reconcile the potential inconsistency), raise it with the client and together determine the extent to which the inconsistency matters to the client and what, if anything, should be done in response.

Thoroughly reading and analyzing another tax lawyer's opinion (including by applying a probabilistic approach when the overall conclusion depends on multiple subanalyses) enables you to help the client understand the significance of that opinion. In so doing, tax lawyers can help clients make more informed decisions about how to proceed given the tax consequences of particular actions. Further, tax lawyers can hold each other to high standards in

[69] Reg. section 1.6662-4(d); *see also* Borden and Ventry, *supra* note 5, at 454.

[70] 1991 opinion, *supra* note 1, at 6.

[71] *See supra* Section II.C.

[72] *See supra* Section II.D.

tax opinion practices, thereby elevating the quality of advice given throughout the profession.

E. Know a Little About Probability Theory

The probability theory discussed in this report is fairly basic, but the insights it provides are powerful. As people in the business of making predictions about the likelihood that a particular result will come to pass, tax advisers should appreciate the process of probabilistic decision-making.[73]

Indeed, as Dennis J. Ventry Jr. and Bradley T. Borden have observed, "the standard of care for tax lawyers . . . reflects a branch of probabilistic decision theory known as Bayesian reasoning."[74] However, a tax lawyer need not be an expert in probability theory to discharge his duties, in part because the rules regarding a tax lawyer's duties already largely incorporate Bayesian inference — that is, updating one's assessment of the probability of a particular result as new information becomes available.[75] That said, because "that standard of care requires tax lawyers to render probability assessments as to the likelihood of success on the merits of a client's reporting position or transaction (and to reduce the assessment to a numerical range),"[76] the tax lawyer must understand how to make those assessments when more than one issue is critical to the overall success of a particular tax position.

At the very least, a tax lawyer should know enough about probability theory that he can help a client understand what a multi-pronged tax opinion means for the client's chances of obtaining a desired tax result. Without that understanding, the tax lawyer may not be meeting his client's needs.

F. Reflect on the Opinion Practice Rules

Should the ethical rules, penalty provisions, or standards of tax practice be revised to address multi-issue opinions and the relevance of probability theory? Maybe. Perhaps the implementation of the lessons discussed above should not be left to each practitioner's discretion and should instead be incorporated into the rules governing opinion practice. But I leave for another day recommendations about exactly how to revise the applicable opinion practice rules.

G. Famous Clients May Bring Scrutiny

This is particularly true when a client becomes a high-profile politician. I regret the extent to which this report adds to the scrutiny Willkie Farr has faced because of the opinions it rendered a quarter-century ago to enterprises of a man who was then just a real estate mogul and tabloid celebrity.[77] However, using these opinions as a case study provides a wonderful lens into how probability theory is and should be incorporated into tax opinion practice.

V. Conclusion

Predictions are tricky. This is especially true for tax opinions, in which predictions are based on judgment and belief rather than actual observations of the frequency with which the exact same event has yielded particular results in the past.[78]

But at least when a client cares about a tax opinion not only for penalty protection but also for determining the likelihood that the desired tax benefits will actually be realized, incorporating a probabilistic analysis when providing an opinion involving multiple related issues adds rigor to the prediction.

Some may not be persuaded that incorporating a probabilistic approach is appropriate. This may be because of a resistance to turning tax lawyers into mathematicians or

[73] This is true even though tax opinions reflect a "subjectivist interpretation of probability rather than a frequentist interpretation" — that is, confidence levels expressed in tax opinions "are best understood as a reflection of the speaker's belief, rather than as a description of the number of times a given event will occur out of the number of times that it could occur over the long run." Lawsky, *supra* note 5, at 1017.

[74] Ventry and Borden, *supra* note 14, at 83.

[75] *See generally id.* at 94, 105-129 (explaining Bayesian reasoning and providing examples of how it is incorporated in the tax lawyer's standard of care).

[76] *Id.* at 90.

[77] *See, e.g.*, Susan Mulcahy, "Confessions of a Trump Tabloid Scribe," *Politico* (May/June 2016) (describing the Page-Six-type coverage of Trump before he entered politics).

[78] *See, e.g.*, Lawsky, *supra* note 5, at 1026-1031; and Scott A. Schumacher, "*MacNiven v. Westmoreland* and Tax Advice: Using 'Purposive Textualism' to Deal With Tax Shelters and Promote Legitimate Tax Advice," 92 *Marq. L. Rev.* 33, 70-71 (2008).

statisticians.[79] Perhaps tax lawyers should not be in the business of predicting success. Indeed, some commentators have argued that the standard of care for opinions should not be about predicting a numerical probability that a particular position will succeed if challenged but rather should be based on persuasiveness of the reasoning articulated in the opinion.[80] This is a fair critique of tax opinion practice, but today's reality is that until the applicable penalty provisions and ethics rules change, tax lawyers are responsible for predicting the likelihood of success on the merits. If this is what we do, we should do it as accurately and carefully as possible.

Perhaps a concern is that incorporating a probabilistic approach would lead to dramatically lower overall opinion levels, which clients would not accept. This is certainly possible, but if the real likelihood of success on the merits of a multi-issue opinion is quite low, isn't it better for a client to know?

Ultimately, there are risks if an opinion does not incorporate a probabilistic analysis or if an opinion otherwise ignores the interrelationship of multiple issues that are all required for success of the desired tax benefit — risk that the client might make a decision based on an overstated understanding of its chances of success, risk that the lawyer might not be appropriately discharging her duties to her client, and risk that the lawyer may be unintentionally undermining tax compliance.

How big are these risks? It depends on the facts and circumstances. And, like many other assessments of tax-related risk, it's hard to predict. But my opinion is that it is at least more-likely-than-not that these risks can be mitigated by incorporating a probabilistic analysis into tax opinions. ■

[79] *See* Detlev F. Vagts, "Legal Opinions in Quantitative Terms: The Lawyer as Haruspex or Bookie," 34 *Bus. Law*. 421 (1979).

[80] *See, e.g.*, Ventry and Borden, *supra* note 14, at 183; Schumacher, *supra* note 78, at 73-74; and Sheppard, "New Preparer Penalties Sweep Away Circular 230," *Tax Notes*, Feb. 4, 2008, p. 597, at 602.

COMING SOON

A look ahead to planned commentary and analysis.

Tax Notes

The distinction between partnership debt and partnership equity. J. William Dantzler Jr. discusses what distinguishes partnership debt from partnership equity by examining relevant case law and making comparisons to corporate debt and corporate equity.

Unclaimed deductions at criminal tax sentencing. Joseph Rillotta and Alison Agnew analyze how criminal tax sentencing has been affected by the U.S. Sentencing Commission's 2013 amendment of a tax fraud provision that in some cases ordered judges to consider unclaimed deductions.

State Tax Notes

Arizona companies win preferential tax treatment for solar panels. David Burton, Amy Nogid, and Isaac Maron discuss the Arizona Court of Appeals' ruling in *SolarCity Corp.*, which upheld the constitutionality of a state law allowing leased solar panels to have zero value when property tax is assessed.

State conformity to federal income tax provisions: Exploring the variances. Mike Porter et al. consider the various degrees to which state income tax regimes conform to or diverge from the federal income tax regime and, consequently, how the state tax implications of a transaction may differ significantly from the federal income tax characterization.

Tax Notes International

France's 3 percent corporation tax surcharge on dividends. Philippe Derouin discusses recent court rulings that have extended the exemption from France's 3 percent surcharge on dividends distributed by French corporations previously reserved for members of a French tax consolidated group and that have also reduced the taxable base used to calculate the surcharge because of a conflict with EU law.

Taxpayer rights: Privacy and transparency. Ali Noroozi examines the competing issues of privacy and transparency in the context of cross-border exchange of information, drawing in large part from his review of the Australian Taxpayers' Charter and taxpayer protections during his time as Australia's Inspector-General of Taxation.