Aggressive Tax Planning & the Ethical Tax Lawyer

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

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AGGRESSIVE TAX PLANNING & THE ETHICAL TAX LAWYER

Heather M. Field

Can a tax planner be both ethical and aggressive? When a client wants help with a transaction in which the lawyer thinks the tax benefits will probably not be sustained on the merits if challenged, what is the ethical response? How low should the tax adviser go? The rules of ethics and standards of tax practice generally do not answer these questions. And there is a dearth of guidance about what it means to behave ethically when making discretionary decisions about when and how to provide advice for aggressive tax planning. This article fills that gap and argues that a lawyer seeking to pursue a career as an ethical tax planner should identify and implement her philosophy of lawyering to help her make these difficult discretionary decisions in a principled way. Using, as an example, a U.S. multinational corporation that wants to invert and engage in other potentially aggressive cross-border tax reduction strategies that Congress and the Treasury have repeatedly tried to curtail, this article demonstrates that employing a philosophy of lawyering empowers a tax planner to determine how (and whether) to assist this client. Ultimately, this article helps a tax planner operationalize, on an individual basis and in a way that aligns with her values, both the general and tax-specific rules of professional conduct so that she can answer the questions posed above.

1 Professor of Law & Eucalyptus Foundation Chair, University of California Hastings College of the Law. I appreciate the opportunities to present this project at the University of Pittsburgh Tax Law Workshop, the Spring 2013 NorCal Tax Prof Roundtable, the 2013 Law & Society Association Annual Meeting, the University of Washington Symposium on Duties to the Tax System, the Tax Workshop at the University of Toronto Faculty of Law, the University of San Francisco Tax Colloquium, the Pepperdine Law School Tax Colloquium, the Bion Gregory Lecture at UC Hastings College of the Law, and at the "Advising Taxpayers in the 21st Century: Ethical Challenges" Program at the 2016 AALS Annual Meeting. I thank all participants for their feedback.
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I. INTRODUCTION

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 — positions that are potentially wrong, positions that the tax authority may want to challenge, and positions where the asserted tax treatment is likely not the proper analysis under the law.

Can an ethical tax lawyer provide this type of planning advice?²

This ethical tax lawyer provides this type of planning advice.

² This is similar to a tax-planning specific version of the question that Charles Fried asked in the first line of his article, Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060, 1060 (1976) (“Can a good lawyer be a good person?”).
contestable tax positions. She does not think that tax planning is inherently wrong. She agrees with the notion that "[a]ny 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." She respects that most of her clients do not want to take the most conservative (highest tax) approach when arranging their affairs. And she wants to pursue a career as a tax planner helping clients to arrange their affairs while reducing their taxes.

Yet she will not assist a client in committing fraud, and she is not interested in helping a client take advantage of under-enforcement of the tax law to get away with clear violations of the law. She does not want to be a "sheltering lawyer," like Paul Daugerdas (formerly of Jenkens & Gilchrist) and Raymond J. ("R.J.") Ruble (formerly of Brown & Wood), both of whom went to jail for their roles in tax shelters. And she does not want to be part of the next Mossack Fonseca, the law firm at the center of the Panama Papers scandal. Rather, she merely hopes to make a living as a tax planner, and she wants to do so in a way that maintains her personal integrity. Ultimately, she is concerned about staying on the right side of the

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3 The academic literature is rife with critiques of tax planning, and scholars argue that tax planning is complex, costly, wasteful, inequitable and, obviously, revenue reducing. See, e.g., David M. Schizer, Frictions as a Constraint on Tax Planning, 101 COLUM. L. REV. 1312, 1314 (2001); David A. Weisbach, Ten Truths About Tax Shelters, 55 TAX L. REV. 215, 222-25 (2002) (arguing that all tax planning is inefficient and "positively bad for society"). This article sets aside the critiques of tax planning in general and accepts the continuing role of tax planners. Indeed, a person who believes that tax planning is inherently wrong or who opposes tax planning because of the deadweight loss that it produces should probably choose not to be a tax planner, and thus would not be faced with the dilemma addressed by this article — how to behave ethically while undertaking potentially aggressive tax planning.

4 Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934).


7 Larry Neumeister, Chicago Lawyer Gets 15 Years in Big Tax Fraud Case, HOUSTON CHRON., June 26, 2014, at B2 (reporting that Daugerdas was sentenced to 15 years in jail and was "ordered to pay nearly a half-billion dollars in restitution and forfeit $164 million in cash and property"); Kara Scannell, How Lawyers Helped Drive the Boom in Tax Shelters, WALL ST. J., Aug. 18, 2004, at A1 (describing Ruble's role in promoting tax shelters); Three Tied to KPMG Sentenced, WALL ST. J., April 2, 2009, at C3 (reporting on Ruble's 78-month sentence).

8 William Hoke, 'John Doe' Explains Reasons for Leaking Panama Papers, 2016 TNT 89-25 (May 9, 2016) (quoting Doe's criticisms of the Panamanian law firm).
So what does it mean to be ethical when providing tax planning advice on potentially aggressive tax positions?

It clearly requires knowledge of the rules of ethics that govern the profession, whether those are the Model Rules of Professional Conduct or the variation thereon that applies in the jurisdiction in which the tax planner is authorized to practice. The tax planner must also understand the ABA Formal Opinions relevant to the provision of tax advice and the Circular 230 regulations that set out standards of practice for those individuals who “practice before the IRS,” which includes anyone who “render[s] written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion” (i.e., tax planners). The tax planner must know what actions could subject her to preparer penalties, particularly if she is likely to render advice both before and after the transaction. Further, if the tax planner advises with respect to reportable transactions, she must be familiar with the disclosure and list maintenance requirements and with the related penalties. The foregoing is not easy. Indeed, there is ample literature that discusses the meaning of both the rules of professional conduct that apply to all lawyers.

9 Monte A. Jackel, The Aggressive and the Meek, 137 TAX NOTES 77, 77 (Oct. 1, 2012) (describing as “mythical” that “line between what is legitimate taxpayer behavior and what is not”).


11 31 C.F.R. § 10.2 (2011) (hereinafter “Circular 230”). See generally Linda Galler, Special Rules for Tax Professionals: Return Preparer Penalties & Ethical Standards, in NUTS AND BOLTS OF TAX PENALTIES 2016: A PRIMER ON THE STANDARDS, PROCEDURES AND DEFENSES RELATING TO CIVIL AND CRIMINAL TAX, PRACTISING LAW INSTITUTE BASICS, ch. 4 (Bryan C. Skarlatos, chair, 2016) (discussing the Circular 230 rules). Circular 230’s impact has been reduced by recent cases, making tax advising slightly more of a self-regulated practice. See Dennis Drapkin, Loving and Ridgely: Implications for Practitioners, 148 TAX NOTES 319, 319 (July 20, 2015). This means that it is even more important than ever for individual tax advisers to do what is recommended by this article — to develop and implement a lawyering philosophy to guide their ethical practice.

12 I.R.C. §§ 6694, 7701(a)(36). See Kip Dellinger, Tax Advice: A Toolkit, 149 TAX NOTES 819 (Nov. 9, 2015) (“Tax planning advice is not necessarily subject to the preparer penalty provisions of the Internal Revenue Code if it is provided in the form of pre-transaction planning—unless the tax adviser reconfirms the advice in the return filing position or spends more than 5 percent of the total time involved in furnishing the advice on post-transaction services.”); see generally NUTS & BOLTS, supra note 11, at ch. 1-4.

13 See, e.g., I.R.C. §§ 6111, 6112, 6700, 6701, 6707A. See generally Megan L. Brackney, Reportable Transaction Penalties, in NUTS & BOLTS, supra note 11, at ch. 5.

and the specific rules that regulate tax practice.\textsuperscript{15}

Understanding these rules is necessary, but it is not sufficient because these rules leave many questions unanswered. The rules and standards do set some clear boundaries—for example, an ethical tax planner must be truthful, and she cannot help a client commit tax fraud.\textsuperscript{16} But the authorities regulating the profession leave tax planners with a tremendous amount of discretion on questions such as the following:\textsuperscript{17} 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? Should the lawyer-client relationship be one where the lawyer does what the client requests or should (and in what circumstances should) the lawyer try to persuade the client to do something else? Should the lawyer consider only the client's interests when advising the client or should the lawyer also consider interests of others?\textsuperscript{18}

Of course, ethical practice is not merely "a matter of individual conscience and therefore individual choice."\textsuperscript{19} Within the boundaries of the rules, however, there are many choices that individual practitioners must make. These issues of discretion and judgment are important in a wide variety of practice areas. And although scholars have discussed these questions extensively,\textsuperscript{20} there is no consensus about the answers.\textsuperscript{21} Further,

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., LINDA GALLER & MICHAEL B. LANG, REGULATION OF TAX PRACTICE (2010); NUTS & BOLTS, supra note 11; DONALD B. TOBIN ET AL., PROBLEMS IN TAX ETHICS (2009); BERNARD WOLFMAN ET AL., ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE (4th ed. 2008).
\item See Nathan M. Crystal, Developing a Philosophy of Lawyering, 14 NOTRE DAME J.L. ETHICS & PUB. POL’y 75, 77–83 (2000) [hereinafter Crystal, Philosophy] (discussing the range of discretionary decisions faced by practicing lawyers); Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. REV. 1, 26–30 (1988) (discussing lawyers’ options when exercising discretion about how to counsel a client about compliance); William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083 (1988) (arguing that "lawyers should exercise judgment and discretion in deciding what clients to represent and how to represent them. . . . [and that when] exercising this discretion, lawyers should seek to 'do justice.'").
\item The model rules generally allow discretion about the scope of issues considered when a lawyer advises a client, but this leaves to the lawyer’s discretion the degree to which the lawyer takes these issues into account. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR. ASS’N 2016).
\end{enumerate}
\end{footnotesize}
the literature has not effectively engaged these issues in the context of tax planning.22

This gap is glaring because these issues involving exercise of discretion and judgment are particularly important and challenging in the context of tax practice. This is for several reasons. First, tax planners are subject not only to the general rules of professional responsibility that apply to all lawyers, but are also subject to an additional set of tax-specific ethical rules, making the exercise of discretion more complex and fraught with minefields in the tax context. Second, both tax planning practice and the rules articulating the standards of practice for tax lawyers place a very heavy emphasis on the lawyer's degree of confidence in the strength of a client's position, thereby elevating the importance of the tax lawyer's judgment. Third, the tax-specific ethics rules and standards explicitly allow tax advisers to help clients take positions that are likely to be wrong (i.e., that are not more likely than not to be sustained on the merits if challenged). As a result, tax planners must determine whether and to what extent they are willing to assist on such matters. Fourth, tax practitioners have played a key role in tax-sheltering activities that have generated much public scorn, meaning that tax advisers have not always exercised their discretion in a way that comports with the public's view of right and wrong. Fifth, the IRS only audits a small percentage of taxpayers and is thus a weak enforcement

21 See, e.g., Shaffer & Cochrane, supra note 20 (presenting very different possible lawyering approaches); Crystal, Philosophy, supra note 17, at 76 (explaining that "[t]he discretionary nature of practice demands that lawyers adopt a philosophy of lawyering[, y]et the lack of professional consensus means that lawyers receive little guidance about how to go about developing such a philosophy.").

22 There is some literature on tax lawyering, but the discourse on tax professionalism and ethics has not effectively leveraged the huge literature on lawyering in general. Although tax shelter planning examples are "discussed regularly in legal ethics literature, but the responses to [these examples] have been somewhat unsatisfactory." W. Bradley Wendel, Civil Obedience, 104 COLUM. L. REV. 363, 397 (2004). But see W. Bradley Wendel, Professionalism as Interpretation, 99 NW. U. L. REV. 1167 (2005) (using tax shelters as an example when developing an argument about a theory of professionalism).
body, and tax compliance generally cannot be enforced through private rights of action. As a result, much depends on taxpayer self-reporting. This, in turn, makes the tax lawyer's advice particularly significant because of its strong influence on taxpayer behavior.

So how should a tax planner, who wants to engage in "permissible tax planning" but not cross the line over into "unethical loophole lawyering," exercise her discretion and judgment? This article argues that a lawyer seeking to pursue a career as an ethical tax planner 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 approach to tax lawyering, she should work to counteract the subtle factors that can skew her professional judgment.

This article focuses on the role of the individual, and how each individual tax lawyer should make difficult discretionary decisions within the existing boundaries of what is arguably allowable. By using the example of a U.S. multinational corporation that wants to invert and engage in other cross-border tax minimization strategies that Congress and the Treasury have tried to curtail, and by drawing on both the extensive literature on lawyering and professionalism and on social science literature about factors that lead to skewed decision-making, this article helps each tax planner operationalize, on an individual basis and in a way that aligns with her values, both the general and tax-specific rules of professional conduct.

This article contributes to the literature in three key ways. First, it focuses on the questions that the existing rules leave to the discretion of each tax practitioner, rather than helping tax advisers grapple with issues that the rules address. Second, it approaches the discussion from an individual lawyering perspective, rather than from a policymaking perspective.

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23 These are also features, at least to some degree, of other regulatory regimes. Thus, the discussion herein could be generalized to aggressive lawyering in those other regulatory regimes, to the extent that the planning lawyers in those regimes serve similar roles as tax planners. However, as mentioned in the text, there are multiple things that are unique about aggressive lawyering in tax, including the presence of a whole set of tax-specific ethical rules.

24 See Ken Devos, An Investigation into the Ethical Views and Opinions of Australian Tax Practitioners of Different Affiliations, 20 N.Z. J. TAX LAW & POL'Y 169 (2014) ("[T]ax practitioners are viewed as the link between both the taxpayer and the revenue agency.").

25 Wendel, Civil Obedience, supra note 22, at 399.

26 Ample resources help tax advisers determine how to comply with the rules. See supra note 15 and accompanying text.

27 There is some literature on how to give tax advice, but this literature is not enough to help the tax adviser figure out how to approach the role of tax advising or determine how to advise a client when faced with a difficult discretionary decision. See, e.g., Dellinger, supra note 12, at 819; see also Frederic G. Corneel, Guidelines to Tax Practice Second, 43
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Third, it provides actionable guidance to tax professionals about how to regulate their own behavior, rather than merely lamenting the decline in the professionalism of the tax bar and telling cautionary tales. Notably, this article does not advocate for one particular lawyering approach for individual tax planners. Rather, it presents a framework — with options, examples, and factors that would suggest different approaches — that each lawyer can use to identify and implement an approach to tax planning in potentially aggressive situations and in a way that aligns with her values.

The article proceeds as follows.

Part II provides background on the unique context for giving tax planning advice by (a) explaining tax opinions, which are a critical part of tax planning advice especially for aggressive positions, and (b) providing, as an example of potentially aggressive tax planning, a situation in which a lawyer is asked to help a U.S. multinational corporation reduce its U.S. tax burden through an inversion and other cross-border tax reduction strategies.

Part III explores different philosophies of lawyering and explains how each philosophy would alter what the tax adviser would (and would not) be willing to do to assist the U.S. multinational corporation with its potentially aggressive tax planning.

Part IV argues that selecting and implementing a lawyering philosophy increases the likelihood a tax planner will behave in an ethical manner, even in the context of aggressive planning.


There is also ample literature making recommendations about how the tax-related ethics rules (or their application) should be improved. See, e.g., Linda M. Beale, Tax Advice Before the Return: The Case for Raising Standards and Denying Evidentiary Privileges, 25 VA. TAX REV. 583 (2006) (arguing that a “taxpayer should not be able to take a position on a tax return, nor an advisor advise a position, unless it is considered to have a greater than fifty percent likelihood of success on the merits if litigated.”); John S. Dzienkowski & Robert J. Peroni, The Decline in Tax Adviser Professionalism in American Society, 84 FORDHAM L. REV. 2721 (2016) (arguing for “several changes that would delineate more clearly the tax professionals' duty to the system”); David M. Schizer, Enlisting the Tax Bar, 59 TAX. L. REV. 331 (2006) (arguing that changing tax-specific ethical rules applicable to lawyers can curtail tax shelter activity).

Part V helps tax planners select a lawyering philosophy by examining issues unique to tax planning that are likely to affect a tax planner's choice. Part VI addresses implementation by identifying major impediments to effectuating one's chosen tax planning philosophy and by making recommendations about how to overcome these barriers. Part VII concludes.

Ultimately, this article argues that an important part of being an ethical tax planner, particularly when dealing with contestable tax positions, includes both being deliberate about how one approaches the task of giving tax planning advice and being self-aware about the ways in which one exercises judgment. Given that the collective ethics of the tax planning profession reflect the sum of the choices made by individual practitioners, perhaps this article's guidance about the ethics of the tax planning can empower tax advisers to make better decisions about how they approach potentially aggressive tax planning. This, in turn, can strengthen the professionalism of the tax bar and help to rehabilitate the public image of tax lawyers.

II. UNDERSTANDING THE TAX PLANNING CONTEXT

An analysis of what it means to be ethical while assisting with potentially aggressive tax planning requires an understanding of the unique context for giving tax planning advice. Thus, this section provides two pieces of background. First, it explains tax opinion practice and why a tax adviser's opinion about the likelihood that a position will succeed on the merits if challenged is such a critical part of (potentially) aggressive tax planning. Second, it provides a tax planning example—where a lawyer has been asked to assist a U.S. multinational corporation reduce its U.S. tax burden through an inversion and other cross-border tax minimization strategies—to help illustrate a lawyer's role (and options) in potentially aggressive tax planning.

A. Tax Opinion Practice

All tax planning advice requires the adviser to assess the strength of a tax position that the client might adopt. The key judgment call that any tax planner must make is to determine the likelihood that a proposed position would succeed on the merits if challenged. The tax adviser's judgment on this issue is often reflected in a written tax opinion that the tax adviser renders to the client and on which the client and sometimes others rely. Tax opinions are common not only in tax shelter transactions, but in many other contexts, including most tax-intensive transactions (e.g., tax-free
reorganizations, financial instrument issuances) by public companies. Even if the lawyer’s judgment about the strength of the position is not memorialized in a written tax opinion, this judgment is typically conveyed to the client in order to help the client assess whether it wants to proceed with the proposed course of action.

1. Opinion Levels

Typical opinion thresholds include, in declining order of strength: “will,” “should,” “more likely than not,” “substantial authority,” and “reasonable basis.” An opinion might also be given at a “not frivolous” level. These are terms of art in tax practice. However, different levels of certainty are hard to quantify, and experts disagree as to the exact numbers. Rough approximations of the likelihood of success on the merits of the key opinion thresholds are as follows:

- Will – 95%+
- Should – 70%-75%
- More Likely Than Not – >50%
- Substantial Authority – 35%-40%
- Reasonable Basis – 20-25%
- Not Frivolous – 5-10%

Tax opinions are generally subject to many caveats and the level of certainty is sometimes qualified with phrases such as “although not free from doubt.” Thus, there is almost a continuum of certainty thresholds, and people sometimes refer to “strong” and “weak” versions of the certainty levels. This means that any errors in judgment could move the opinion standard slightly up or slightly down, perhaps turning a “more likely than not” opinion into a “weak should” opinion.

2. Consequences of Opinion Levels

For aggressive positions, a position’s likelihood of success on the merits is important for purposes of potential penalties to which the taxpayer

30 See Robert P. Rothman, Tax Opinion Practice, 64 TAX LAW. 301 (2011).
33 Id. at § 1.6662-4(d)(2) (2016).
34 Id. at § 1.6662-3(b)(3) (2016).
35 Id. at § 1.6694-2(c)(2) (2016).
could be subject.\textsuperscript{38} For example, a taxpayer will generally be able to avoid penalties for substantial understatement of tax if there was substantial authority for the position or if the taxpayer disclosed the position and there was reasonable basis for the position.\textsuperscript{39} For understatements with respect to particularly suspect transactions (generally referred to as a "tax shelter" or a "listed" or "reportable" transaction),\textsuperscript{40} the threshold is higher; avoidance of understatement penalties requires, among other things, disclosure, substantial authority for the position, and that the "taxpayer reasonably believed that such treatment was more likely than not the proper treatment."\textsuperscript{41} One way for a taxpayer to try to establish that the taxpayer had that "reasonable belief" is to demonstrate that the taxpayer "reasonably relie[d] in good faith on the opinion of a professional tax advisor [at a "more likely than not" level of confidence]."\textsuperscript{42} And for other underpayments, including certain valuation-related underpayments, a

\textsuperscript{38} See Rothman, supra note 30, at 389–403 (discussing the relevance of tax adviser opinions to the imposition of accuracy related penalties, substantial valuation misstatement penalties, the reasonable cause/good faith defense to penalties, and to penalties relating to reportable transactions). For penalty protection purposes, the substantive analysis of the strength of the position is at least as important as the actual opinion articulating the assessment. This is because when arguing for a reduction of accuracy-related penalties due to, for example, substantial authority, a taxpayer's ability to make the substantive case that there was substantial authority for the position is what is critical; it is not enough for the taxpayer to have an opinion in which an adviser says that she believes that there is substantial authority. I.R.C. § 6662(2)(B)(i); Treas. Reg. § 1.6662-4(d) (2016) ("Conclusion reached in treatises, legal periodicals, legal opinions or opinions rendered by tax professionals are not authority. The authorities underlying such expressions of opinion where applicable to the facts of a particular case, however, may give rise to substantial authority for the tax treatment of an item."). A taxpayer can also argue for a penalty reduction on the grounds that he reasonably relied in good faith on an adviser's opinion, but there are limits on the taxpayer's ability to rely on opinions. See Treas. Reg. 1.6664-4(c) (2016). That said, with the revision to the Circular 230 rules that eliminated the rules regarding "covered opinions," it is now easier to give an opinion that a taxpayer could use to assist with penalty protection. See T.D. 9668, 2014-27 I.R.B. 1 (eliminating the covered opinion rules in former Circular 230 §10.35, and revising Circular 230 §10.37 re: written advice).

\textsuperscript{39} I.R.C. §§ 6662(d)(2)(B), 6694(a)(2)(A); Treas. Reg. § 1.6662-4(d) (2016) (defining "substantial authority" as "an objective standard involving an analysis of the law and application of the law to relevant facts.") The substantial authority standard is less stringent than the more likely than not standard (the standard that is met when there is a greater than 50-percent likelihood of the position being upheld), but more stringent than the reasonable basis standard as defined in § 1.6662-3(b)(3).”); Treas. Reg. §1.6662-3(b)(3) (2016) (defining "reasonable basis"). The underpayment penalties for substantial valuation misstatement are separate. I.R.C. § 6662(e).

\textsuperscript{40} I.R.C. §§ 6662(d)(2)(C), 6662A(b)(2), 6707A.

\textsuperscript{41} Id. at §§ 6662A., 6664(d)(3).

taxpayer can reduce or eliminate penalties if the taxpayer acted with reasonable cause and in good faith.\(^{43}\) Reliance on professional advice can be a factor in determining whether the taxpayer meets the reasonable cause/good faith standard.\(^{44}\)

The determination of a position’s likelihood of success on the merits also affects the tax advisor directly. Penalties can apply to the tax adviser in addition to the taxpayer, and there are similar thresholds to those discussed above that can allow a tax adviser to avoid penalties if there was sufficient authority for the position that led to the underpayment.\(^{45}\) In addition, the standards of practice articulated in Circular 230 prohibit tax advisers from advising a client to take a reporting position unless either (1) there is substantial authority for the position, or (2) there is a reasonable basis and proper disclosure is made; in the case of a tax shelter or reportable transaction, Circular 230 prohibits a tax adviser from advising a client to take a reporting position unless “it is reasonable to believe that the position would more likely than not be sustained on its merits.”\(^{46}\) Violation of Circular 230 can, among other things, adversely affect a tax adviser’s ability to continue to practice.\(^{47}\)

Thus, a tax adviser’s assessment of the strength of a position is critically important as part of the tax planning process.\(^{48}\) Of course, the ultimate determination of whether any sanctions will be imposed depends not on the tax planner’s assessment of the likelihood of success on the merits, but rather on the Service’s and/or court’s adjudication of the strength of the position. If a tax planner advises a client that there is substantial authority for a position so that the client can take that position without disclosure, but the IRS/courts ultimately determine that substantial authority was lacking, then the taxpayer may be subject to an accuracy-related penalty that she did not anticipate,\(^{49}\) and the advisor might suffer penalties too.\(^{50}\) Thus, it is critical for the advisor’s professional judgment about the strength of a position to be as close as possible to the “actual”

\(^{43}\) I.R.C. § 6664(c).

\(^{44}\) Treas. Reg. § 1.6664-4(c) (2016).

\(^{45}\) I.R.C. § 6694.


\(^{47}\) Id. at §§ 10.50, 10.52.

\(^{48}\) A tremendous amount of work typically goes into the analytical process; it is critical that the tax adviser’s determination is not merely based on her “gut.” See Dennis J. Ventry, Jr. & Bradley T. Borden, Probability, Professionalism, & Protecting Taxpayers, 68 TAX LAW. 83, 96 (2014) (explaining how these standards of care reflected in opinion thresholds “helps practitioners render accurate advice while also helping taxpayers report accurate returns”).

\(^{49}\) I.R.C. § 6662(a)–(b).

\(^{50}\) Id. at § 6694(a)(3) (subject to reasonable cause exception).
strength of the position as it would be determined in a final adjudication.\footnote{51}

Even for more conservative positions, tax planners often need to make assessments of a position’s likelihood of success on the merits. This arises commonly in opinion practice, where the lawyer must distinguish between “will,” “should,” and “more-likely-than-not” level certainty. The “will” and “should” levels are not concepts derived from the statute, and they are not accompanied by the same penalty risks as the lower levels of certainty.\footnote{52} Nevertheless, the difference between these certainty thresholds can be important to clients because, for example, some clients need high-certainty legal opinions to help attract investors (and to do so at favorable prices),\footnote{53} to enable them to close transactions,\footnote{54} to meet federal securities laws, or for accounting purposes.\footnote{55}

B. An Example: Tax Planning for U.S. Multi-National Corporations

An example of a situation in which a tax adviser may be asked to opine about the efficacy of tax planning strategies is in the context of advising a multi-national corporation (an “MNC”) that is seeking to minimize its tax burden. This provides a good example for illustrating the impact of different lawyering philosophies because the tax planning strategies range from very conservative to quite aggressive, meriting very different types of opinions; because there is a quite a bit of controversy surrounding the propriety of the use of these strategies with people having dramatically different views about the “right” thing to do;\footnote{56} because recent high-profile

\footnote{51} That is, we should not try to judge a lawyer’s judgment against the “right” answer as would be determined by an omniscient and infallible being. Indeed, neither the Service nor the court is omniscient, and neither is infallible. Thus, we measure a lawyer’s judgment against the determination that the Service and courts would make in the particular facts and circumstances.

\footnote{52} Rothman, supra note 30, at 311–12.

\footnote{53} For example, in an issuance of a financial instrument that is intended to be treated as debt for federal income tax purposes, as the strength of the opinion about whether the instrument will be treated as debt declines, the risk associated with the transaction increases (e.g., because there is an increasing chance that the interest paid will not be deductible), and the higher the interest rate that will likely need to be offered to investors in order to place all of the debt.

\footnote{54} For tax-free reorganizations involving public companies, the industry standard is for there to be a “will” opinion; opinions given at lower levels of certainty can imperil a transaction.

\footnote{55} See Rothman, supra note 30, at 308–10.

\footnote{56} See generally Steven Davidoff Solomon, Corporate Inversions Aren’t the Half of It, N.Y. TIMES, Feb. 10, 2016, at B5 (“[T]he corporate runaways [engaging in inversions and earnings stripping] are winning — winning no good-American awards, but taking easy money out of the pockets of the United States taxpayer.”); Barack Obama, Remarks by the President on the Economy, WHITE HOUSE (July 24, 2014, 1:15 PM) https://www.whitehouse.
transactions\textsuperscript{57} have thrust tax planners into the spotlight for their role in helping clients use these strategies to avoid taxes;\textsuperscript{58} because there are U.S.\textsuperscript{59} and international efforts underway to reduce the opportunities for such tax planning;\textsuperscript{60} and because the deployment of such strategies may or may not be driven primarily by tax minimization motives.\textsuperscript{61} As a result of the

gov/the-press-office/2014/07/24/remarks-president-economy-los-angeles-ca (calling the ability to invert an “unpatriotic tax loophole”). \textit{But see} Michael J. de la Merced et al., \textit{Pfizer Chief Defends Merger With Allergan as Good for U.S.}, N.Y. \textit{TIMES}, Nov. 23, 2015 (Pfizer’s CEO explaining that the transaction “was actually good for the United States” because it would “give [Pfizer] more cash that it could invest in the United States and ultimately add jobs”); Doron Narotzki, \textit{The True Economic Effects of Corporate Inversions}, 151 \textit{TAX NOTES} 1819, 1819 (June 27, 2016) (using data from recent inversions to argue that “corporate inversions are not necessarily as harmful as they are portrayed to be” and that “as a result of these [inversion] transactions, business value increases, jobs are created, and . . . more earnings are repatriated to the United States.”).

\textsuperscript{57} See, e.g., Andrew Velarde, \textit{Johnson Controls Goes ‘Full Steam Ahead’ With Tyco Inversion}, 2016 \textit{TNT} 78-2 (Apr. 22, 2016) (discussing an inversion that is expected “to create $150 million in annual tax benefits”); Andrew Velarde, \textit{U.S. Treasury Finally KOs Pfizer Inversion}, \textit{TAX NOTES INT’L}, Apr. 11, 2016, at 145 (reporting that Pfizer and Allergan called off their planned $160 billion inversion deal); \textit{see also} MARPLES & GRAVELLE, infra note 63, at 11-12 (identifying several additional very recent inversion transactions).


\textsuperscript{59} In April 2016, the Treasury published temporary regulations intended to limit inversions and published proposed regulations addressing earnings stripping transactions often undertaken in connection with inversions. T.D. 9761, 2016-20 IRB 743; Treatment of Certain Interests in Corporations as Stock or Indebtedness, 81 Fed. Reg. 20912 (proposed Apr. 4, 2016) (to be codified at Treas. Reg. §1.385-1 to -4). Parts of these regulations were finalized in October 2016, and parts of these regulations were revised and issued as temporary (and proposed). T.D. 9790, 2016-45 I.R.B. 540. \textit{See also}, e.g., Protecting the U.S. Corporate Tax Base Act of 2016, H.R. 5261, 114th Cong. (2016); ‘Stop Corporate Inversions Act of 2014, H.R. 4679, 113th Cong. (2014).

\textsuperscript{60} \textit{See generally} Base Erosion and Profit Shifting, OECD, \url{www.oecd.org/tax/beps.htm} (last visited Feb. 26, 2016); Jeffrey M. Kadet, \textit{BEPS: A Primer on Where It Came From and Where It’s Going}, 150 \textit{TAX NOTES} 793, 793 (Feb. 15, 2016); Catherine G. Schultz, \textit{Update on OECD BEPS Project}, in \textit{PRACTISING LAW INSTITUTE BASICS OF INTERNATIONAL TAXATION} 2015, 561 (2015) (discussing the content and status of the OECD’s efforts to curtail base erosion and profit shifting, and providing “insight into the potential impacts of the BEPS Project on U.S. multinationals”).

\textsuperscript{61} \textit{See} Narotzki, \textit{supra} note 56, at 1829. (arguing that the “data presented in this report indicate that there are strong, nontax business reasons to participate in corporate inversions”).
foregoing, an adviser’s lawyering approach can dramatically affect whether and how a client pursues these strategies.

This section will provide a brief introduction to the following MNC tax minimization strategies: inversions, earnings stripping, and aggressive transfer pricing for intangibles. Then, the next section will identify different philosophies of tax planning and explain how tax planners would respond to being asked to assist an MNC in utilizing one or more of these strategies.

Readers familiar with these MNC tax minimization strategies may want to skip directly to the next section.

1. Inversions

One technique for reducing the U.S. tax burden of a U.S.-parented MNC is for the corporation to invert so that the parent company is a foreign corporation rather than a U.S. corporation. The tax benefits of this transaction have come primarily from the ability to avoid U.S. taxation on future earnings from foreign subsidiaries; "the ability to use intercompany borrowing (or intangible licenses) from a foreign affiliate to generate earnings-stripping payments from the U.S. corporate tax base; the use, directly or indirectly, of a U.S. group’s unrepatriated foreign earnings for the benefit of U.S. shareholder of the foreign parent corporation [e.g., through “hopscotch loans”]; [and] the ability to sell U.S.-located inventory into the U.S. market without U.S. tax."

There are other tax minimization strategies for MNCs, such as the use of hybrid entities and strategies involving foreign tax credits. See Jane G. Gravelle, Cong. Research Serv., R40623, Tax Havens: International Tax Avoidance and Evasion 14–16 (2015). However, the three strategies discussed in the text are among the most high-profile and costly. Id. at 22–23.


The U.S. generally taxes the worldwide income of U.S. corporations, subject to a regime that allows for the deferral of taxation on some earnings of foreign subsidiaries of U.S. corporations. Thus, an inversion removes part of the MNC’s operations out from under the U.S. corporation (or at least provides the MNC an opportunity to structure future foreign business activity through foreign subsidiaries owned by a foreign parent), reducing the U.S. income tax owed on the earnings of those foreign operations.

Stephen E. Shay et al., Treasury’s Unfinished Work on Corporate Expatriations, 150 Tax Notes 933, 935 (Feb. 22, 2016). Earnings stripping will be discussed below in Part II.B.2.
Congress enacted anti-inversion provisions in 2004\textsuperscript{66} that generally treat the inverted foreign parent corporation as a U.S. corporation—thereby eliminating the tax benefits of the inversion—if at least 80\% of the new foreign parent's stock is owned by the former domestic parent's shareholders.\textsuperscript{67} A lesser, but still significant, tax cost is imposed if there is between 60\% and 80\% continuity in the shareholders.\textsuperscript{68} These rules are subject to an exception if there is substantial business activity in the foreign country.\textsuperscript{69} The Treasury issued regulations in 2012,\textsuperscript{70} notices in 2014\textsuperscript{71} and 2015,\textsuperscript{72} and additional temporary, proposed, and final regulations in 2016,\textsuperscript{73} all further limiting inversions and their benefits. In addition, more action on inversions may be forthcoming under the new presidential administration, although this action may focus on disincentivizing inversions through fundamental changes to the U.S. tax regime rather than on curtailing inversions through specific legislation or regulations.\textsuperscript{74} Even with the recent regulations (assuming that they withstand the recent legal

\begin{footnotes}
\item[67] I.R.C. § 7874(b).
\item[68] Id. at § 7874(a).
\item[69] Id. at § 7874(a)(2)(B)(iii).
\item[70] T.D. 9592, 2012-28 I.R.B. 41 (increasing the threshold for the safe harbor for the substantial business activities test, which enables an inversion to avoid the adverse impact of Section 7874, from 10\% to 25\%, thereby making it harder for an inversion to meet the requirements for this exception).
\item[71] IRS Notice 2014-52, 2014-42 I.R.B. 712 (limiting techniques to avoid having 80\% shareholder continuity in an inversion so as to qualify for some tax benefits from inverting, and limiting tax-favorable post-inversion planning techniques, such as accessing the earnings of foreign subsidiaries of the former U.S. parent).
\item[72] IRS Notice 2015-79, 2015-49 I.R.B. 775 (imposing additional, but more limited, restrictions on inversions).
\end{footnotes}
challenge to their validity), there remain opportunities for U.S. MNCs to obtain tax benefits from inverting if they can navigate the restrictions.

Thus, U.S. MNCs could benefit from tax planning advice that would help ensure that there is sufficient foreign business activity or that the original U.S. shareholders own less than 80% (or, better, 60%) of the foreign parent post-inversion. Some strategies for achieving these goals are more aggressive than others. The most defensible strategy (given existing law, which could change, possibly with retroactive impact) for achieving one or both of these goals would be for a firm to invert by merging with a pre-existing foreign corporation (rather than by doing a “naked” inversion whereby a single U.S. MNC reshuffles its corporate structure) where the pre-existing foreign entity is large enough (and has enough nonpassive assets) to enable the shareholders of the former U.S. parent to own less than 80% of the foreign parent after the transaction.

2. Earnings Stripping

Another strategy for reducing U.S. taxation of MNCs is earnings stripping, meaning the allocation of debt or other expenses to the U.S. entity in order to increase deductions for the U.S. entity, while shifting income allocated to a foreign entity that is not subject to U.S. taxation (either currently or at all). This strategy can be used either alone or in conjunction with an inversion.

Recent regulations may curtail this by preventing some intercompany debt of MNCs from being treated as debt (and thus, from generating interest deductions). Further, for U.S. subsidiaries of foreign parents, thin-

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75 The U.S. Chamber of Commerce and the Texas Association of Business are challenging the validity of the 2016 temporary anti-inversion regulations. The complainants argue that the regulations were issued in violation of the Administrative Procedure Act. Business Groups File Suit Challenging Validity of U.S. Inversion Rule, 2016 WORLD TAX DAILY 151–23 (Aug. 4, 2016) (publishing the complaint); see also Andrew Velarde, Chamber of Commerce Files Suit Challenging U.S. Inversion Regs, 83 TAX NOTES INT’L 497 (Aug. 8, 2016).

76 See Marples & Gravelle, supra note 63, at 9 (noting that “the regulations do not prevent inversions via merger . . . although Treasury has indicated future action in this area”).

77 See id. at 10–13 (discussing this strategy and explaining the limits on this strategy after the recent Treasury actions on inversions).


79 T.D. 9790, 2016-45 I.R.B. 540 (issuing proposed, temporary and final regulations
capitalization rules limit the extent to which the U.S. entity can deduct interest. However, an advisor can help an MNC maximize the shifting of interest deductions to the U.S. entity within the boundaries of these rules. For example, a noninverted foreign-parented MNC can still (for now) use "hopscotch" loans to access earnings of a CFC without incurring current U.S. taxation, and a U.S.-parented MNC that borrows at the U.S. parent level and funds subsidiaries with equity may benefit from deferral.

3. Intangibles & Transfer Pricing

An additional strategy is aggressive transfer pricing in which an enterprise sets a low price for goods and services sold by affiliates in high-tax jurisdictions to affiliates in low-tax jurisdictions, or sets high prices for goods and services purchased by affiliates in high-tax jurisdictions from affiliates in low-tax jurisdictions. This strategy increases costs or lowers income of the affiliate in the high tax jurisdiction, thereby shifting profits to the lower tax jurisdiction.

Transfers of intangibles are often part of aggressive transfer pricing strategies, with businesses developing intellectual property in the U.S. where the business benefits from deductions and credits associated with the costs of development and then transferring (or licensing) the IP to a foreign affiliate for a very low price. There are other strategies (e.g., involving cost-sharing arrangements where the foreign affiliate contributes a very low amount as a buy-in payment), but all of the strategies generally involve a transfer, at a low price, of rights to intellectual property to an affiliate in a low-tax jurisdiction such that future profits from that intellectual property can be booked to that low-tax jurisdiction, thereby escaping U.S. taxation.

under I.R.C. 385 regarding debt/equity characterization and limiting opportunities for earnings stripping).

80 I.R.C. § 163(j); see also STAFF OF JOINT COMM. ON TAXATION, supra note 78, at 59–61.

81 See Andrew Velarde, Treasury Hasn't Ruled Out Inversion Regs Expansion, 2016 TNT 82-3 (Apr. 27, 2016) (acknowledging that, at this point, the rules limiting hopscotch loans are limited to inverted companies).

82 See GRAVELLE, supra note 62, at 10–11; STAFF OF JOINT COMM. ON TAXATION, supra note 78, at 57–59.


84 See GRAVELLE, supra note 62, at 12–13; STAFF OF JOINT COMM. ON TAXATION, supra note 78, at 53–55; Kochman & Wrappe, supra note 83 (discussing transfer pricing for tangible property separately from transfer pricing for intangible property).
Although there are extensive regulations articulating rules for transfer pricing and requiring such transactions to meet the arm's length standard,\(^85\) they are difficult to enforce because, among other reasons, (a) valuation is notoriously difficult and (b) advisers can help MNCs identify valuation experts that support (aggressively) low valuations, prepare documentation that supports those valuations, and time the transfers to maximize the shifting of future income.\(^86\) When the rules are enforced, however, an underpayment of tax attributable to a "substantial valuation misstatement" can trigger additional possible penalties.\(^87\)

III. APPLYING PHILOSOPHIES OF TAX LAWYERING

A tax adviser can take different approaches to advising and opining on tax minimization strategies such as the ones discussed above for MNCs. Although the ethical rules governing all lawyers and the standards of practice that apply to tax lawyers provide boundaries that constrain lawyer behavior, many decisions are left to the discretion of the lawyer.

Discretionary questions in the MNC advising context include: Should she represent the MNC? With which MNC tax reduction strategies will she assist and opine? How aggressive will she be? 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? Will she advise the MNC to take account of consequences to others? How, if at all, will she advise the MNC regarding audit risk?

This section argues that having a philosophy of tax lawyering will help a tax planner answer the above questions.

Thus, this section will briefly describe the lawyering philosophies commonly discussed in the literature, and for each lawyering philosophy, this section will explain what the philosophy would mean for the tax planner who is considering whether and how to assist an MNC with tax minimization. Although this section applies tax lawyering philosophies to the MNC tax reduction example, lawyering philosophies are equally relevant for a wide variety of difficult advising questions with which a tax planner might be faced. For example, lawyering philosophy is relevant for a tax lawyer advising on whether an individual should be classified as an employee or independent contractor for tax purposes, which is a difficult,


\(^86\) See Andrew Blair-Stanek, IP Law Solutions to Transfer Pricing Abuse, 143 TAX NOTES 1537 (June 30, 2014) (citing "leading commentators" who "have declared transfer pricing enforcement dead and intractable"); see also Brett Wells & Cym Lowell, Tax Base Erosion: Reformation of Section 482's Arm's-Length Standard, 15 FLA. TAX REV. 737 (2014).

\(^87\) I.R.C. § 6662(e).
but hot, topic in the sharing economy.  

The enormous literature on lawyering and professionalism discusses a variety of approaches to lawyering, and the below discussion of different approaches necessarily simplifies the voluminous and nuanced discourse in order to try to provide a survey of different approaches and explain what they would mean for a tax planner. While different commentators advocate for particular perspectives, there appears to be no consensus. Indeed, the "right" philosophy of lawyering likely depends on the practitioner, the practice area, the practice setting, and the sophistication and needs of the particular client. Thus, in tax planning, as in other areas of practice, the practitioner ought to consider carefully the approach that she takes. Later, Part V will discuss how a tax planner might select from among these choices. First, however, this section will survey the options.

A. Tax Lawyer as Hired Gun

1. In General

A lawyer may adopt a "client-centered approach" in which the lawyer generally implements the action directed by the client. Under this philosophy, which has been described as "the dominant view," "lawyers must take any action that will advance the client's interest so long as the action does not clearly violate a rule of ethics or other law (principle of professionalism)." In this way, "[t]he lawyer acts as hired gun, acting at the direction of the boss/client, taking no responsibility for injury to other people." This approach prioritizes the value of advancing client autonomy and views the lawyer as instrumental in empowering the client. Thus, the lawyer is "neutral" and "nonjudgmental" of the client's preferences.

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89 See supra note 20.
90 Wendel, Civil Obedience, supra note 22, at 368–69.
91 Nathan M. Crystal, Using the Concept of "Philosophy of Lawyering" in Teaching Professional Responsibility, 51 ST. LOUIS U. L.J. 1235, 1241 (2007) [hereinafter Crystal, Teaching]; see also, e.g., Pepper, Amoral, supra note 20, at 626 ("And if ‘the law’ is manipulable and without clear limits on client conduct, that aspect of the law should be available to the client."); Schwartz, supra note 20 (arguing that lawyers should act as “zealous advocates” on behalf of their clients).
92 SHAFFER & COCHRAN, supra note 20, at 3; see also O.W. Holmes, Path of the Law, 10 HARV. L. REV. 457 (1897) (reflecting on the law and the role of the lawyer from the perspective of the “bad man”).
93 Pepper, Amoral, supra note 20, at 633.
94 SHAFFER & COCHRAN, supra note 20, at 16–29; see also, e.g., Gerald J. Postema,
Given the lawyer's deference to the client's "self-rule," the lawyer is "not morally accountable for any actions that they take on behalf of clients in their professional role (the principle of nonaccountability)." 5

A hired-gun lawyer does not necessarily help clients pursue aggressive strategies. Rather, a tax planner adopting a hired-gun, client-centered approach would seek to effectuate the client's goals, whatever those goals are. 6 That is, the lawyer generally defers to the client about how aggressive the client wants to be in the client's effort to reduce taxes. Thus, a hired-gun tax planner representing a client who wants to be conservative in pursuing tax planning strategies would help the client pursue only those strategies that the tax planner concludes are more likely than not to succeed on the merits. On the other hand, if a client wants to minimize his tax burden in any way possible, then the tax planner would be as aggressive as the substantive and ethical rules would arguably allow. Indeed, the hired-gun approach to tax planning arguably "encourages lawyers to find loopholes" when representing aggressive clients. 7 Although a hired-gun lawyer might assist her client in pursuing aggressive strategies, there are limits; for example, even a hired-gun tax planner would be precluded from advising a client to take positions that are illegal or fraudulent. 8

Ultimately, a hired gun's approach is more about facilitating client autonomy rather than necessarily pushing aggressive tax planning. 9 However, the hired gun approach is often associated with aggressive tax planning because the tax planner's philosophical approach reflects a willingness to empower even aggressive taxpayers. 10 Thus, the client-
centered, hired-gun approach to lawyering has been criticized by many commentators, who advocate for alternate approaches.\textsuperscript{101}

2. In the U.S. MNC Tax Planning Context

If a hired gun tax planner is approached by a prospective client seeking aggressive assistance in reducing the U.S. tax burden of a U.S.-parented MNC, the tax planner would assist the client in pursuing all arguably allowable options.\textsuperscript{102}

This would include (a) helping the U.S. MNC to structure an inversion via merger (a technique not precluded by the recent authorities, but that could be targeted by future action) by finding a suitably large foreign merger partner with sufficient nonpassive assets to avoid the "cash box" rules;\textsuperscript{103} (b) identifying the maximum amount of assets that the U.S. MNC could distribute to its shareholders in order to "skinny down" before the proposed transaction (thereby increasingly the likelihood that the foreign merger partner is sufficiently large to enable the transaction to confer the desired tax benefits);\textsuperscript{104} (c) identifying any opportunities to increase the size of the foreign entity that are arguably allowable under the anti-stuffing rules;\textsuperscript{105} and (d) identifying nontax avoidance business purposes for these transactions.\textsuperscript{106} Further, the hired gun's advice could include putting as much debt on the U.S. entity as is arguably allowable under the rules and identifying any other income stripping opportunities that are not precluded

\textsuperscript{101} See, e.g., SIMON, supra note 20, at 26–76; RHODE, supra note 20.

\textsuperscript{102} Of course, even when helping the client pursue all arguably allowable options, the tax planner should not focus solely on the technical analysis under the law; she must also ensure that she understands the actual substance of the underlying facts to which the law is being applied. Jeffery M. Kadet & David L. Koontz, Profit-Shifting Structures: Making Ethical Judgments Objectively, 151 TAX NOTES 1831 (2016).


\textsuperscript{104} Temp. Treas. Reg. § 1.7874-10T (2016) (limiting "non-ordinary course distributions" to curtail the "skinny down" technique).


\textsuperscript{106} Having a non-tax avoidance business purpose could be relevant for various aspects of the analysis, including, for example, in the determination of whether property has been acquired with a principle purpose of avoiding section 7874, such that the property would be nonqualified property for purposes of the anti-stuffing rule. Temp. Treas. Reg. § 1.7874-4T(i)(7)(iv). Cf. Kadet & Koontz, supra note 102 (discussing the importance of deeply understanding the substance of the transaction, the actual facts, and the real business purpose for the transaction, rather than merely focusing on technical analyses of the rules, as part of making a sound analysis of the proposed transaction).
after the 2016 debt/equity regulations.\textsuperscript{107} In addition, if the client wanted to be particularly aggressive on transfer pricing, the hired gun tax planner would be willing to assist in making the case for potentially very low valuation for the transfer of assets in order to shift as much income as possible to the foreign jurisdiction.\textsuperscript{108} A tax planner might suggest these aggressive approaches, even though Congress and/or the Treasury may undertake future action to curtail some of the techniques, possibly with retroactive effect.\textsuperscript{109}

When determining what is “arguably allowable,” the tax planner would identify the planning techniques that she believes are likely to be sustained on the merits if challenged and which are not likely to be sustained on the merits if challenged.\textsuperscript{110} She would be willing to assist a client in undertaking both types (although she would not be likely to assist on strategies that she concludes constitute illegal tax evasion or fraud).\textsuperscript{111} For those strategies that she believes are not likely to be sustained if challenged (including those inversion and earnings stripping strategies that might be subject to future Treasury action with retroactive effect), she would identify the degree of risk associated with the strategy and the adverse consequences (e.g., interest and penalties) that would likely ensue if the approach is challenged and not sustained so that the client could make an informed decision about risk and rewards of pursuing a particular strategy.\textsuperscript{112}

When determining what strategies are arguably allowable, the hired gun tax planner might even consider strategies that are precluded by the recent regulations (e.g., additional efforts to “skinny down” the U.S. parent, structuring “hopscotch” loans to enable access to tax-deferred earnings of foreign subsidiaries of the U.S. parent) if she concludes that there is a strong enough argument that the regulations are invalid.\textsuperscript{113}

\textsuperscript{107} See supra notes 78–82 and accompanying text.

\textsuperscript{108} See Blair-Stanek, supra note 86 (discussing the strategic procurement and use of aggressive valuations); see generally supra Part II.B.3 (explaining the valuation strategy and its benefits).


\textsuperscript{110} See supra Part II.A. (explaining that, in order to advise clients in planning situations, tax lawyers generally need to assess the likelihood that a position would succeed on the merits if challenged).

\textsuperscript{111} See supra note 98 and accompanying text.

\textsuperscript{112} Heather M. Field, Giving Useful Tax Planning Advice, 134 TAX NOTES 1299, 1302-03 (Mar. 5, 2012) (explaining that the lawyer’s role involves advising the client about the risks and consequences of particular courses of action so that the client can decide how to proceed).

\textsuperscript{113} See supra note 75 and accompanying text; Mindy Herzfeld, Challenging U.S. Anti-Inversion Guidance, 82 TAX NOTES INT’L 627 (May 16, 2016) (explaining how a taxpayer could challenge the regulations); Kimberly S. Blanchard, Would a Court Uphold the
The hired gun tax planner would also probably be willing to answer client questions about the likelihood of audit,\(^{114}\) but even the hired-gun tax planner should not advise a client to take an aggressive position \textit{because} the risk of audit is low.\(^{115}\) Ultimately, if a client determined, after a cost/benefit analysis, that it wanted to undertake a nonfrivolous inversion/earnings stripping/transfer pricing tax minimization strategy that could potentially subject the client (and even the tax adviser) to penalties, the hired gun tax planner would likely be willing to assist with those transactions.

\section*{B. Tax Lawyer as Guru}

1. In General

As an alternative to the hired-gun approach, some commentators advocate for a philosophy of morality, in which the lawyer is guided by her moral choices. The "client defers to the lawyer, and the lawyer takes what he believes to be the right direction: The lawyer is concerned with others and is concerned that the client do the right thing. The lawyer acts as guru, making the moral choices for the client."\(^{116}\) Under a philosophy of morality, "lawyers are morally accountable for the actions that they take on behalf of their clients and must be prepared to defend the morality of what
they do."¹¹⁷ This lawyer is, and should be, driven by her own sense of morality.¹¹⁸ This view reflects the notion that personal values must play an important role in how a lawyer carries out the law and that the common good must be a key consideration guiding the lawyer’s actions.¹¹⁹

As a result, a lawyer adopting a philosophy of morality is likely to decline matters more frequently than the hired-gun lawyer because the “lawyer as guru” will not want to represent a client whose objectives are not in accord with the lawyer’s own view of morality. Similarly, this lawyer may try harder to persuade the client to take an action that the lawyer views as moral, and this lawyer may withdraw more frequently if she is unable to convince the client to take that moral action.¹²⁰

In tax planning, a philosophy of morality would likely reflect a strong ideological component. A strongly anti-tax lawyer might support any position that would reduce the amount of tax the client pays. This moralist tax planner might try to approach this (potentially extremely) aggressive tax minimization as a form of civil disobedience. On the other end of the ideological spectrum is a lawyer who views all tax reduction efforts as equivalent to tax shelters and thus concludes that all tax planning is morally repugnant. This lawyer, if adopting a philosophy of morality, would be quite unwilling to help a client rearrange his affairs to reduce taxes. Indeed, tax planning in private practice is probably not the right career for such a lawyer. Of course, there is a continuum of ideologies, both with respect to specific issues and with respect to our tax system in general, and a tax planner’s personal morality could lead her to be conservative or aggressive, depending on the particular issue.¹²¹

Further, a tax planner’s perspective on the responsibilities of the taxpayer and the role of the Service may dictate her willingness to discuss

¹¹⁷ Crystal, Teaching, supra note 91, at 1242; see also Simon, supra note 20, at 30.
¹¹⁸ LUBAN, supra note 20, at 118 (“[W]hen professional and moral obligation conflict, moral obligation takes precedence”); RHODE, supra note 20, at 58 (“Lawyers can, and should, act on the basis of their own principled convictions, even when they recognize that others could in good faith hold different views.”).
¹¹⁹ See SHAFFER & COCHRAN, supra note 20, at 3, 30–41.
¹²⁰ Crystal, Teaching, supra note 91, at 1242; David Luban, The Lysistratian Prerogative: A Response to Stephen Pepper, 11 AM. B. FOUND. RES. J. 637, 642 (1986) (suggesting withdrawal or declining the representation if the lawyer has a moral objection).
¹²¹ For example, a tax planner who was morally opposed to DOMA might have advised a same-sex couple married under state law to file using the “married filing jointly” filing status for federal income tax purposes before Windsor. U.S. v. Windsor, 113 S.Ct. 2675 (2013) (concluding that DOMA was unconstitutional). The tax adviser could have taken this approach even though, before Windsor, this position lacked substantial authority or a reasonable basis under federal income tax law; she could have argued that the position was not frivolous, on the grounds that it was a good faith challenge to the law. Infanti, supra note 29, at 610.
audit risk with her client. For example, a moralist tax planner who believes that taxpayers have a moral duty to comply with the law would likely not be willing to discuss audit risk with the client, lest the client factor that into the client's analysis.

Ultimately, tax planners adopting a philosophy of morality may render very different client advice, depending on the moral perspectives of the lawyers.  

2. In the U.S. MNC Tax Planning Context

A moralist tax planner’s response to the MNC tax planning situation would depend on the tax planner’s perspective on the morality of such tax planning.

Consider a moralist tax planner who believes that it is morally repugnant and un-American to shift profits overseas. She agreed with President Obama, who called inversions “unpatriotic” and “wrong” and with Senator Charles Grassley, who commented that “these expatriations aren’t illegal, but they’re sure immoral. During a war on terrorism, coming out of a recession, everyone ought to be pulling together.” This lawyer would not assist at all with any of these U.S. MNC tax planning strategies, even eschewing those strategies that are clearly legal, fairly-valued, and where the transactions are not tax-motivated. This lawyer would either decline to represent the client, or she would do everything in her power to convince the client that the client should not undertake the inversion, earnings stripping, or transfer pricing transactions. This lawyer, however, likely does have a duty to advise the client that these strategies are available, but she could also advise the client that she is unwilling to assist with implementing such strategies. If the U.S. MNC client is ultimately unwilling to refrain from undertaking these tax planning strategies, this moralist tax planner will likely need to withdraw.

On the other hand, a moralist tax planner who believes that it is inappropriate for the U.S. to tax on a worldwide, rather than territorial,

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122 See generally Katherine R. Kruse, Lawyers, Justice, and the Challenge of Moral Pluralism, 90 MINN. L. REV. 389 (2005) (contemplating the possibility that different, but reasonable, moral perspectives on the same issue, and grappling with what those differences mean for lawyers seeking to advise clients in manner consistent with the lawyer’s moral perspective).

123 Obama, supra note 56.


125 See, e.g., The President’s Advisory Panel on Federal Tax Reform, Simple, Fair, and Pro-Growth: Proposals to Fix America’s Tax System 102-05, 132-35 (2005) (endorsing a
basis but who believes that U.S. taxpayers have a duty to pay U.S. income tax on all income earned in the U.S. would assist with the inversion and with the transfer of assets abroad but would likely be much less willing to be aggressive with transfer pricing valuations or earnings stripping because she would want to ensure that the taxpayer is subject to U.S. tax on "correct" amount of income earned in the U.S. That is, she would help shift real foreign business operations out of the U.S. tax net, but she would likely not help with strategies that arguably understate or misprice the amount of income actually earned in the U.S. For example, she would assist with allocating to the U.S. entity the amount of debt needed by that entity, but she would not assist with allocating to the U.S. debt that would be more appropriately allocated to a foreign parent or foreign subsidiary (and thus, for which she believes there should be no interest deduction for U.S. tax purposes). That said, to the extent that the U.S. MNC is paying U.S. tax on earnings of foreign subsidiaries, this lawyer might be willing to be slightly more aggressive with earnings stripping and transfer pricing valuations to "balance out" the U.S. tax that the U.S. MNC is paying in accordance with worldwide taxation principles. This approach could create "rough justice" that is aligned with her perspective on the morality of taxation of MNCs — the U.S. MNC would be subject to U.S. tax, in the aggregate, that equals to the amount of tax that would be due if the U.S. adopted a territorial tax system and the MNC was taxed on all of (but no more than) the income earned in the U.S.

Even further down the ideological spectrum is a strongly anti-tax moralist tax planner. She would help the client take any and all available steps to shift income out of the U.S. This would include all of the strategies that the hired gun would take, and possibly even more aggressive strategies that are contrary to the existing ethical rules and standards of practice.

C. Tax Lawyer as Ideal Judge

1. In General

A "legalist" approach to lawyering should lead to much less variability in tax planning advice. Under this approach, "the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice," where "justice" is understood to mean internal legal merit.^{126} The lawyer should "adopt the perspective of an

^{126} Simon, supra note 17, at 1090, 1096–98 (the lawyer should "assume direct responsibility for the substantive validity of the decision"); Simon, supra note 20, at 9–10 (1998); see also Crystal, Teaching, supra note 91, at 1243 (citing Simon); Wendel, Civil Obedience, supra note 22, at 371–72 (same). Professor Simon also advocates for somewhat
unbiased, well-informed judge" and should act in accordance with "what a
good-faith interpretation of the legal rule would require in an ideal world
without problems of proof, political bias, or unequal wealth."\textsuperscript{127}

Under this approach, a tax planner should only assist the client in
taking actions that the tax planner believes are allowed under the best
interpretation of the law and are more likely than not to succeed on the
merits if challenged.\textsuperscript{128} The legalist lawyer would not defer to the client's
choices if the client wanted to take an aggressive position; she would work
to persuade the client to take the action that the lawyer views as having the
most legal merit and might want to withdraw if she is unable to persuade
the client. Preferably, the legalist tax planner would not take on the
representation of such an aggressive taxpayer. This suggests that the tax
planner should disclose her lawyering philosophy when talking to a
prospective client. Then the client can take the lawyer's legalist perspective
into account when deciding whether to engage the lawyer.

Closely related to the legalist philosophy is the conception of the tax
planner as an "officer of the court."\textsuperscript{129} Such a tax planner would generally
behave as the legalist tax planner except that she would likely be willing to
advise a client to take more aggressive positions (possibly down to
reasonable basis on non-shelter matters), on the condition that the more
aggressive position is clearly disclosed to the Service.\textsuperscript{130}

2. In the U.S. MNC Tax Planning Context

The legalist tax planner would help a U.S. MNC undertake those tax
minimization strategies that are more likely than not to be sustained on the
merits if challenged. She would be willing to assist with the planning of an
inversion, particularly if it is not tax-motivated, as long as the inversion
clearly complies with all articulated and foreshadowed guidance, including
the anti-abuse rules. She would not look for complex, technical strategies
to work around the literal language of the limitations on inversions (e.g.,

\textsuperscript{127} Ostas, supra note 5, at 516–18.
\textsuperscript{128} See Wendel, Civil Obedience, supra note 22, at 396–98 (coming to this conclusion
about the application of the legalist philosophy in tax shelters); Beale, supra note 28, at 593
(arguing that "a taxpayer should not be able to take a position on a tax return, nor an advisor
advise a position, unless it is considered to have greater than fifty percent likelihood of
success on the merits if litigated.").
\textsuperscript{129} See generally Eugene R. Gaetke, Lawyers as Officers of the Court, 42 Vand. L.
\textsuperscript{130} See id. at 87–90 (discussing disclosure, and thus a slight subordination of client's
interests, as part of what it could mean for a lawyer to be an "officer of the court").
she would not help the U.S. MNC “skinny down” at all, even if there is an interpretation of the existing guidance that would arguably allow for a “skinnying down” strategy). She would anticipate possible additional guidance from the IRS (e.g., re: inversions via merger)\textsuperscript{131} and seek to comply with what that is likely to be, and in her analysis, she would be wary of any strategy to which an anti-abuse rule could arguably apply, helping the client to pursue only those tax minimization strategies that are highly likely to be compliant with the law. She might assist with transferring intangibles abroad, but she would only do so at what she believes are fair (not aggressive) valuations that have factual and legal merit. She would also be conservative with any earnings/income stripping transactions to ensure that the client is paying its “correct” amount of taxes.

The legalist tax planner would seek to persuade the client of the merits of taking more conservative approaches to the U.S. MNC tax planning, and she would generally not discuss audit risk with the client because audit risk is irrelevant to the determination of the substantive merits of the tax planning strategy. However, she might raise audit risk with the client if audit risk is high and the lawyer wants to try to use that risk to persuade the client to be more conservative. Ultimately, the legalist tax planner may need to withdraw if the client wants to pursue more aggressive strategies in its U.S. MNC tax minimization planning than those with which the lawyer is willing to assist.

\textit{D. The “Authority Conception of Tax Law”}

1. In General

Another approach closely related to the legalist philosophy is the “authority conception of law,” pursuant to which the lawyer accepts the law as a reflection of society’s collective moral judgment. That is, the lawyer does not impose her own sense of morality, nor does the lawyer “treat the law instrumentally, as an obstacle to furthering the autonomy of their clients.”\textsuperscript{132} Rather, the lawyer “treat[es the law] as an inherently valuable achievement of a pluralistic democracy”\textsuperscript{133} and . . . seek[es] to implement the law as society has agreed upon.\textsuperscript{134}

While this approach has been characterized as equivalent to the legalist approach,\textsuperscript{135} the authority conception of law arguably allows lawyers more
leeway in the context of tax planning. This is because the authority conception of the law would arguably conceive of both the substantive tax law and the Circular 230 regulations reflecting standards of practice to reflect the collective moral judgment of society. That is, tax law contains substantive rules and meta-rules about how to comply with the substantive rules. The Circular 230 rules articulating standards for tax practice and the penalty/disclosure thresholds provide guidance about what the relevant community considers to be “within the range of plausibility.” As a result, a tax planner adopting an authority conception of the law can understand the rules regarding penalties and tax standards of practice to provide her with guidance about what society believes to be the outer bounds of ethical lawyering.

The authority conception arguably allows the tax planner to advise clients to take more aggressive positions, and represent more aggressive clients, than does the legalist approach. For example, a taxpayer may take, and an adviser may advise clients to take (without the risk of penalty), a non-shelter position for which there is only substantial authority. However, a lawyer adopting an authority conception of law approach is unlikely to be willing to be as aggressive as a client-centered lawyer serving

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136 Professor Wendel does not explicitly reference these meta-rules that articulate standards of practice for tax practitioners, but he does “call upon lawyers to give effect to the settlement of the normative controversy that the tax laws represent,” explaining that “the authority conception recognizes that within the range of plausible meanings of a statutory provision the interpretative attitude taken by lawyers and judges toward statutes and common law decisions can have a great deal of beneficial or harmful effect on the capacity of those legal texts to enable collective action.” Wendel, Civil Obedience, supra note 22, at 399. He explains that “in order to settle the interpretive question, it seems that some kind of meta-statute is needed, specifying how statutes should be interpreted” and he believes that “it must be possible to derive principles of interpretation from the authority conception of legal ethics itself.” Id. at 400. The standards of practice articulated in Circular 230 and the penalty provisions in the Code provide the type of meta-rules that Professor Wendel desires because these rules provide guidelines about what society accepts as appropriate ways to interpret the substantive statute.

137 Professor Wendel explains that the “authority conception would require lawyers not to take advantage of an interpretation that lies outside the range of plausibility” and notes that “the meaning of plausible is highly contestable.” Id. at 396.

138 I.R.C. §§ 6662(d)(2)(B)(i), 6694(a)(2)(A); Treas. Reg. § 1.6662-4(d) (2016) (Defining “substantial authority” as “an objective standard involving an analysis of the law and application of the law to relevant facts. The substantial authority standard is less stringent than the more likely than not standard (the standard that is met when there is a greater than 50-percent likelihood of the position being upheld), but more stringent than the reasonable basis standard as defined in §1.6662-3(b)(3).”). There is a somewhat higher standard for avoiding penalties for reportable transactions and tax shelters. I.R.C. §§ 6662(d)(2)(C), 6664(d)(3). Practitioners advising with respect to such transactions should use this modified standard when understanding what the authority conception of the law would allow them to advise.
an aggressive client. A hired gun lawyer may be willing to assist a client in
taking a position that likely subjects the client to a penalty (if, on balance,
the position still has a positive net present value for the client), but a lawyer
adopting an authority conception of the law likely would not. This is
because the threshold at which the law imposes penalties can be
understood, under an authority conception approach, to be the outer limit of
society’s collective moral judgment about what interpretations of the law
are within the range of plausibility and are thus ethical.\textsuperscript{139}

2. In the U.S. MNC Tax Planning Context

When advising an aggressive U.S.-parented MNC, a lawyer adopting
the authority conception of law would be willing to be more aggressive than
the legalist lawyer but would be less aggressive than the hired-gun lawyer.
This tax planner would be willing to help a client take MNC tax planning
strategies that are, on balance, not likely to be sustained if challenged, as
long as the positions are supported by substantial authority. The
“substantial authority” threshold (or the “reasonable basis” threshold with
disclosure)\textsuperscript{140} would impose a limit on how aggressive this lawyer is willing
to be when assisting the U.S. MNC.

Although the lawyer who adopts the authority conception of the law
will be willing to be somewhat more aggressive than the legalist lawyer, she
will otherwise behave much like the legalist lawyer. Specifically, she will
(a) impose a limit on client autonomy, in that she will only be willing to
help a client undertake some subset of the arguably allowable tax planning
strategies that the hired gun tax lawyer would use, (b) be unlikely to discuss
audit risk with the client because audit risk is irrelevant when assessing the
likelihood that a position would be sustained on the merits if challenged,\textsuperscript{141}
and (c) she may need to withdraw if the client is determined to be more
aggressive than she is willing to be.

\textsuperscript{139} See Michael C. Durst, The Tax Lawyer’s Professional Responsibility, 39 U. FLA. L. REV. 1027, 1059–64 (1987) (discussing the possible characterization of tax law’s civil penalties as establishing a “normative” guideline for taxpayer and tax adviser behavior).

\textsuperscript{140} The standards for penalties for substantial valuation misstatements are slightly different than the standards for penalties due to substantial understatements. See I.R.C. § 6662(e). Thus, for the transfer pricing strategies, the lawyer would be willing to assist with any such strategy that would not trigger penalties.

\textsuperscript{141} Cf. Treas. Reg. § 1.6662-4(d)(2) (2015) (“The possibility that a return will not be audited or, if audited, that an item will not be raised on audit, is not relevant in determining whether the substantial authority standard (or the reasonable basis standard) is satisfied.”).
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E. Tax Lawyer as Friend/Counselor

1. In General

A lawyer may view herself as a "friend" or "counselor" to her client. Her primary guideline would be the needs of the client rather than the societal conception of propriety. Under the friend/counselor approach, the lawyer collaborates with the client and provides in-depth counseling in an effort to help the client make a well-considered decision, taking into account all relevant factors, including moral considerations. The lawyer-counselor "weigh[s] all interests and encourage[s] the client to be thoughtful in making the ultimate decision," and "become[s] actively involved in the client's affairs and to advise the client in the most general sense." Moreover, the lawyer-counselor has a "duty to examine the situation beyond the initial parameters as defined by the client to ensure that the client's decision was well thought out" and should "advise the client about these other interests [third party interests], even if the client is not initially concerned about such issues."

The tax planner-counselor takes the client's tax minimization preferences into account (just as the hired gun does), but she does not merely accept direction from the client. The friend/counselor raises any other considerations that the planner thinks ought to be part of the analysis. For example, when advising an aggressive tax-minimizing client, the lawyer takes into account the net present value of the tax minimizing opportunity. However, she also factors in the client's non-tax consequences, including things like adverse public relations or business reputation damage that could befall the client as a result of the tax choice.

Further, the counselor advises the client to take into account the impact on others, including on the fisc and on the overall taxing system (e.g., tax

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142 See, e.g., SHAFFER & COCHRAN, supra note 20, at 46-50; Thomas L. Shaffer, A Lesson from Trollope, 35 WASH. & LEE L. REV. 727, 734-35 (1978). Cf. Fried, supra note 2 (advocating for a "friend" approach that is very close to the hired gun approach).

143 See, e.g., Morgan, supra note 20; Wilkinson, supra note 96, at 376-78.

144 The "friend" and "counselor" are considered together here because both take a broader view of client advising in which non-legal considerations are taken into account and in which the lawyer engages in collaborative conversations with the client about a proposed course of action.

145 Wilkinson, supra note 96, at 376.

146 Id.; see also, e.g., Morgan, supra note 20, at 445-59 (arguing that a lawyer-counselor should respect, and help the client achieve, the client’s objectives, but should do so while helping the client respect third party interests and while sharing "the empathy, respect, and practical wisdom that the lawyer would offer a good friend").

147 This is allowed, but not required, under Model Rule 2.1. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS’N 2016).
morale). As with the philosophy of morality, this can have a strong ideological component, but unlike the morality approach (in which the lawyer is the primary decision-maker), the lawyer as friend/counselor approaches the decision-making process collaboratively; she raises issues with the client, and discusses the issues in an effort to help the client make the "right choice." 148

2. In the U.S. MNC Tax Planning Context

If a tax planner were to adopt a friend/counselor approach to advising a U.S. MNC that wants to undertake aggressive tax planning, the tax planner would likely be willing to undertake at least some of the aggressive strategies to inverting, earnings stripping, and transfer pricing discussed above. However, the friend/counselor lawyer would encourage the client to consider a variety of non-tax consequences of pursuing aggressive U.S. MNC tax planning strategies because, with international tax planning for U.S. MNCs, there is much more at stake than just a tax bill, as we have seen with other U.S. MNCs that have recently undertaken international tax planning. These considerations would likely include the strong public sentiment against expatriations and related tax planning; possible negative press that the company could receive; the adverse reputational impact with customers, investors, legislators, and regulators that such press could create; the company's business identity and concept of corporate social responsibility that the company pursues; and the possible impact that such tax planning could have on the client’s employees.

Moreover, there is a risk that, as in the Pfizer/Allergan transaction, a U.S. MNC tax minimization strategy could be aborted after being announced due to pressure arising from bad press and due to continued efforts by the Treasury to curtail these transactions. 149 Aborting the plan after announcement would mean that the MNC would suffer the adverse PR/reputational consequences and would have wasted money on tax planning, all without realizing the anticipated tax savings.

The friend/counselor tax planner would help the MNC take these considerations into account, which would likely temper, at least to some degree, the MNC’s appetite for aggressive tax minimization. Then, the lawyer would help the MNC undertake those aspects of the international tax structuring on which the lawyer and client collaboratively agreed.


149 See Velarde, supra note 57.
F. Philosophy of Tax Lawyer Self-Interest

1. In General

Some tax planners seek to promote their own self-interest. This can result in "defensive lawyering," where the lawyer gives advice and takes actions that minimize the risk that the lawyer would be subject to professional discipline, liability for malpractice, loss of fee or other economic loss, or damage to reputation.150 A tax planner following a philosophy of self-interest might be particularly concerned that she might be subject to penalties. On the other hand, a lawyer acting in her self-interest may be willing to be more aggressive if she believes that the business boon from serving aggressive clients outweighs potential monetary or professional sanctions she might face as a result of giving overly aggressive advice. The tax planner trying to make this cost/benefit analysis might consciously or subconsciously take into account the audit lottery; the lower the risk that the client will get audited, the lower the risk that the lawyer will be subjected to sanctions, meaning the more likely that the business generation benefits of being aggressive outweigh the costs of being aggressive.

Ultimately, this approach focuses on the lawyer's level of risk aversion or risk seeking, and this puts the interests of the lawyer ahead of the interests of the client, which is problematic under the general ethics rules applicable to all lawyers.

2. In the U.S. MNC Tax Planning Context

A purely self-interested lawyer advising an MNC would follow her preferences, helping the client pursue whatever tax minimization strategies would advance the lawyer's interest. Thus, for example, a self-interested lawyer who wants to build a reputation for aggressive tax minimization and attract more business from aggressive U.S. MNCs would advocate for an aggressive approach, tempered possibly by the lawyer's desire to avoid being personally subjected to penalties or other sanctions.

G. Combined Approaches

The foregoing approaches to lawyering are not the only possibilities. There are others.151

150 Crystal, Teaching, supra note 91, at 1244–45, 1254.
151 For example, there is also the lawyer as godfather approach. The lawyer may prefer a "godfather" approach, in which the "client turns the case over to the lawyer; the lawyer makes the choice he feels will help the client (and the lawyer) win." The lawyer... make
In addition, the approaches are not mutually exclusive; they can be combined. For example, a lawyer might adopt a client-centered approach, subject to a morality approach in limited situations. That lawyer would act as a hired gun except in limited situations where she finds the client’s direction to be so morally repugnant that the lawyer feels compelled to counsel the client to change views or the lawyer decides to withdraw.\textsuperscript{152}

There are a variety of combinations,\textsuperscript{153} and I suspect that many tax planners have a philosophy of lawyering that combines multiple approaches. The friend/counselor approach, in particular, is easily combinable with the hired gun, legalist, and authority conception approaches. With any of these combinations, the lawyer would take the friend/counselor approach as a primary guideline and then use the other approach to provide the outer limit on how aggressive the lawyer is willing to be (and why). Thus, if a client, after discussions with the friend/counselor, wants to pursue a strategy for which there is only substantial authority, the lawyer who uses a combination of the friend/counselor and hired gun approaches would likely assist, but the lawyer who uses a combination of the friend/counselor and legalist approaches would not.

\textbf{IV. USING TAX LAWYERING PHILOSOPHIES TO ADVANCE ETHICAL PRACTICE}

As illustrated in Part III, the choice of lawyering philosophy can be important because sometimes different philosophies will lead a tax planner to different outcomes. The legalist tax planner may decide not to represent a client that the hired gun represents. A hired gun lawyer may pursue an aggressive tax reduction strategy for a client who seeks to minimize tax, but the lawyer-counselor may raise non-tax considerations with the client to encourage the client to be more conservative.\textsuperscript{154} The self-interested lawyer

\begin{itemize}
  \item \textsuperscript{152} See Crystal, \textit{Teaching}, supra note 91, at 1245.
  \item \textsuperscript{153} Some approaches that seem contradictory can sometimes be reconciled, at least in certain circumstances. See Wilkinson, \textit{supra} note 96, at 387–92 (reconciling counselor/hired gun).
  \item \textsuperscript{154} George Cooper’s article, \textit{The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform}, provides a wonderful illustration about how different philosophies of lawyering can result in different approaches to the same situation. George Cooper, \textit{The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform}, 80 Colum. L. Rev. 1553 (1980). The article compares Mr. Younger, a client-centered hired-gun to Mr. Senior, who is primarily a legalist. Although the tax laws have changed such the details of
fearful of penalties levied against her may advise strongly against a position that is, according to the lawyer following an authority conception of the law, supported by substantial authority.

Sometimes, however, very different lawyering approaches can lead the lawyer to give the same advice to a client. For example, consider the self-interested lawyer who is more worried about monetary and professional sanctions than she is about attracting business from aggressive clients. She is likely to advise that clients only take positions that are more likely than not to succeed on the merits, just like the legalist. And both the hired gun and the tax planner who adopts an authority conception of the law approach may be equally willing to assist a client in taking a non-shelter position for which there is substantial authority.

Although lawyering philosophy does not always change the substance of the advice that a tax planner gives, lawyering philosophies still matter because 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 manner, even in the context of aggressive tax planning. This is because a philosophy of lawyering provides a framework for principled decision-making, improves the lawyer’s ability to discharge her duties to her client, and empowers the lawyer to pursue a practice that is in accord with her values.

A. A Framework for Principled Decision-Making

A lawyer who develops her philosophy of lawyering thoughtfully gives herself a set of guiding principles that she can use when responding to difficult clients and handling challenging decisions. As a result, she does not merely “muddle through, developing an ad hoc [approach]” to discretionary decision-making. Rather, she considers her conception of an ethical lawyer outside of the context of client pressure and the competitive market for business. This provides her with a framework for principled decision-making, helping to guide her as to what type of

the conversation would be different today, the perspectives expressed by the competing lawyers in the article show how dramatically a difference in lawyering philosophy can affect the advice provided to a client and the relationship the lawyer has with the client.

155 See Crystal, Philosophy, supra note 17, at 93; Crystal, Teaching, supra note 91, at 1240 (explaining that a “philosophy of lawyering” provides “a principle-based approach that lawyers can use to resolve the wide range of discretionary decisions that they will face related to the practice of law”).

156 See Ethan Burger et al., KPMG and “Abusive” Tax Shelters: Key Ethical Implications for Legal and Accounting Professionals, 31 J. LEGAL PROF. 43, 55 (2007) (citing former IRS Commissioner Charles O. Rossotti discussing the challenge tax professionals face from client and market pressure).
relationship she wants to have with her client, how aggressive she is willing to be when assisting clients, what factors she will consider when advising clients, and what circumstances might lead her to withdraw. Thus, she will be able to anticipate situations that might push up against her notion of an ethical tax planner, giving her the ability to consider, outside the context of client pressure, how she wants to handle those sorts of challenging situations.\(^{157}\)

Drawing these lines thoughtfully and prospectively will give her a deeper understanding and greater conviction about why these lines are the right lines to guide her practice. This perspective and strength will help make her more likely to be able to hold the lines that she wants to hold even in the face of significant external pressure, thereby increasing the likelihood that she will avoid decisions made in the heat of the moment that are contrary to her concept of an ethical tax planner.\(^{158}\) This is, in part, because having an articulated "professional identity"\(^{159}\) provides the lawyer with an internal "sense of self," which increases the likelihood that she will make discretionary decisions in a way that respects her lawyering philosophy in order to obtain "identity benefits" and avoid "identity costs."\(^{160}\)

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\(^{157}\) Jennifer K. Robbennolt & Jean R. Sternlight, \textit{Behavioral Legal Ethics}, 45 \textit{ARIZ. ST. L.J.} 1107, 1157-64 (2013) (recommending that, in order to overcome behavioral factors that lead to ethical lapses, lawyers should among other things "reflect regularly on core values" and "try to anticipate ethical dilemmas and to specifically plan and rehearse our responses ahead of time").

\(^{158}\) \textit{Id.} at 1117-18, n. 59 (explaining that decisions made in the heat of the moment can lead to ethical lapses); \textit{see also} E. SCOTT FRUEHWALD, \textit{DEVELOPING YOUR PROFESSIONAL IDENTITY, CREATING YOUR INNER LAWYER} 36-38 (2015) (connecting identity and values to the ability to exercise "practical wisdom").

\(^{159}\) This notion of "[p]rofessional identity is, in essence, the individual's answer to questions such as, Who am I as a member of this profession? What am I like, and what do I want to be like in my professional role? And what place do ethical-social values have in my core sense of professional identity?" William M. Sullivan et al., \textit{CARNegie Found. For the Advancement of Teaching, Educating Lawyers: Preparation for the Profession of Law} 135 (2007) [hereinafter \"\textit{CARNegie Report}\")]; \textit{see also}, e.g., Martin J. Katz, \textit{Teaching Professional Identity in Law School}, 42 \textit{COLO. LAW.} 45 (2013) ("Professional identity is the way a lawyer understands his or her role relative to all of the stakeholders in the legal system, including clients, courts, opposing parties and counsel, the firm, and even the legal system itself (or society as a whole."). It can be challenging for students and junior lawyers to develop this sense of self, and law schools have been encouraged to do more to assist students with this. See \textit{CARNegie Report}, supra, at 14 (the "third apprenticeship" involves professional identity formation); \textit{see also} Heather M. Field, \textit{Fostering Ethical Professional Identity in Tax: Using the Traditional Tax Classroom}, 8 \textit{COLUM. J. TAX L.} (forthcoming 2017) (arguing that professors should foster professional identity development of students in traditional tax classrooms, and providing exercises for doing so).

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Of course, a tax planner’s lawyering approach may evolve over time. Indeed, “tax practitioners should constantly be asking themselves these questions [about the appropriate role of the tax planner].”\textsuperscript{161} There are “no easy answers,”\textsuperscript{162} but a tax planner who is deliberate and careful about how she conceives of her role, even as that thinking may evolve, helps herself to differentiate between legitimate tax planning with which she will assist and abusive tax planning with which she will not,\textsuperscript{163} and helps herself to make difficult decisions in a principled way.

\textbf{B. Discharging Duties to Clients Effectively}

Employing a philosophy of lawyering can help a tax planner serve her clients more effectively. This is because a lawyering philosophy defines the lawyer’s role and can guide both what a particular tax planner’s loyalty to a client entails and how the tax planner will discharge that duty of loyalty.

By clarifying the lawyer’s role and approach, a philosophy of lawyering can help set and meet client expectations about the representation. If the lawyer can explain to clients how she approaches the tax planning process and if she can understand what the client wants out of the lawyer-client relationship, she can better identify clients whose needs she is most likely to be able to meet. Where the lawyer’s philosophy is markedly different from the client’s preferences, the lawyer may want to decline the representation; at the very least, the lawyer should advise the client about the mismatch.\textsuperscript{164} Additionally, a tax planner who identifies her lawyering approach and discusses it with her client can help set client expectations for the representation and can help the client understand how to be a better consumer of her legal services, which in turn increases the likelihood that the client will be satisfied with the advice provided.

In addition, the choice of lawyering approach can affect how much the client trusts the lawyer and can affect the nature of the interaction that the client has with the lawyer during the course of the representation.\textsuperscript{165} The choice of lawyering approach affects the lawyer-client relationship, including the client’s opinion of the lawyer, the client’s perception about

\textsuperscript{161} Jackel, \textit{supra} note 9, at 79.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} See Wendel, \textit{Civil Obedience, supra} note 22, at 399; Slemrod, \textit{supra} note 124 (noting that how far “creative compliance” . . . “is pushed depends on an attitude, measured in units of aggressiveness”).
\textsuperscript{164} See Crystal, \textit{Philosophy, supra} note 17, at 93 (recommending that bar require statement of philosophy of lawyering and notification to clients about a lawyer’s approach).
\textsuperscript{165} See, \textit{e.g.}, Pepper, \textit{Amoral, supra} note 20, at 1601–07 (discussing the client experience with different types of lawyers).
whether the tax system is treating her fairly, the client's willingness to hire the lawyer for particular types of matters in the future, and the likelihood that the client will recommend the lawyer to others. A client surely cares, for example, whether his lawyer is motivated by the lawyer's desire to protect the lawyer or by the lawyer's desire to ensure that the client complies with the law, even if the substantive advice would be the same. Similarly, a client's experience with a hired gun is likely to be quite different from the client's experience with a counselor, even if the lawyer's ultimate advice is the same under both approaches. This is not to say that the client experience is better under one approach or another; which experience is better depends on the client, the matter, and the lawyer. Client satisfaction with the representation does not depend solely on the action that the client ultimately takes based on the advice. Client satisfaction and whether a lawyer has effectively met a client's needs also depend on the nature of the lawyer/client interaction, and thus, on the tax planner's philosophy of lawyering.

C. Practicing in Accordance with One's Values

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 and helping her to stay true to the type of lawyer she wants to be.\(^{166}\)

Because a philosophy of lawyering helps a lawyer practice in a way that reflects her values, it can empower the tax planner to more effectively withstand and counter external criticism for involvement in tax reduction planning. Being able to articulate her rationale for approaching tax planning as she does helps to form her identity as a lawyer\(^{167}\) and can also empower her to educate critics about what it means to behave with integrity as a tax planner. Moreover, practicing in a setting\(^{168}\) and in a way that is in


168 Lawyers may feel obligated to proceed in accord with the philosophy of their firms, rather than in accord with their own philosophies. See infra Part VI.A.1. However, if an associate has a strong sense about her philosophy of lawyering, she can make a well-
accord with her personal values may contribute to the tax planner's sense that she is doing something worthwhile with her time and expertise, which builds self-worth and which may ultimately make the practice of tax law a more sustainable and personally satisfying career.\textsuperscript{169}

\textbf{D. Lawyering Philosophy Is Not a Silver Bullet}

Of course, having a philosophy of lawyering does not guarantee that a lawyer, particularly when assisting with potentially aggressive tax planning, will meet the ethical ideal. This is for at least three reasons.

First, some may believe that one model of lawyering is the only way to behave ethically. Such an individual would conclude that a tax planner who adopts a different (and potentially more aggressive) philosophy of lawyering would not be advising appropriately. However, given the lack of consensus among commentators about which model of lawyering is "correct," this article takes a more inclusive approach and offers several different philosophies of tax planning, each of which (except the purely self-interested approach) can be the foundation for ethical practice. This article's approach will leave unsatisfied the commentator who believes there is only one right approach to ethical lawyering. That commentator can continue to try to persuade all of us of the rightness of her approach, but until there is consensus about the right model for ethical practice within the boundaries of the existing rules, each individual practitioner must determine what ethical practice means to her. Then, she can use that philosophy to guide her actions and help her to discharge her duties to her clients in a way that is consistent with her understanding of what it means to be an ethical tax planning practitioner. With this inclusive approach, a key challenge facing each individual lawyer is identifying which philosophy most considered decision about whether to go to work for a firm that adopts a different philosophy.

resonates with her. Only then can she develop guidelines to help her with difficult discretionary decisions, such as when advising a potentially very aggressive U.S. MNC.

Second, even if everyone agreed on one "right" approach to ethical tax planning, implementation of that philosophy of lawyering would remain a challenge. In any situation involving difficult discretionary decisions, there is no guarantee of making the "right" decision, even if one has a strong framework for principled decision-making. This is because humans are fallible and because even the best practitioners will be faced with various institutional and social impediments to good decision-making; there will be cognitive biases and other internal and external factors that influence the decisions that are made by even those with the best judgment. Thus, a tax planner who has identified her philosophy of lawyering may not meet her ethical ideals because of impediments to her ability to implement her philosophy of lawyering effectively.

Third, in difficult circumstances, a tax planner may choose to compromise her values and proceed in a way that is contrary to her philosophy of lawyering. The third challenge is not something with which this article can meaningfully assist, but the next two parts of this article address the first two challenges listed above. Part V discusses selection of a philosophy of lawyering for tax planners and offers some insight into considerations that might lead a tax planner to opt for one model rather than another. Part VI discusses how to cope with barriers to effective implementation of one's chosen philosophy of lawyering.

V. SELECTING A LAWYERING PHILOSOPHY FOR TAX PLANNING

The identification of one's philosophy of tax lawyering is a very personal process, and philosophies of lawyering will vary from lawyer to lawyer. Scholars continue to debate in extensive literature about which lawyering approach is "right." Considerations include the nature of the

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170 Even if she does so, there is still value in having a philosophy of lawyering because it helps to prevent inadvertent compromise. If compromising oneself, this choice should be deliberate rather than inadvertent, and the lawyer should understand, and decide to accept, the consequences of compromise.

171 See supra note 20 and accompanying text. One way to think more broadly about the choice of lawyering philosophy is suggested by Professors Thomas Shaffer and Robert Cochran, who frame the choice of philosophy as one that depends on what the lawyer wants for his client—"client victory, client autonomy, client rectitude, [or] client goodness"—which will then dictate whether the lawyer or the client controls the representation and whether any interests other than the client's are taken into account. SHAFFER & COCHRAN, supra note 20, at 3.
relationship between the lawyer and client, the relevance of values, the relationship of the lawyer to the system that created the law, and the impact of human nature, among other issues.

Query whether one or more approaches are particularly appropriate or inappropriate in the context of a lawyer who engages in tax planning. This section addresses that question by analyzing issues unique to tax planning that might affect the tax planner's selection of a lawyering philosophy. Considerations specific to tax planning include limited enforcement resources and the reliance on taxpayer self-assessment, the notion of a "duty to the revenue system," the prospective planning context, whether a transaction is primarily tax-motivated, and the public perception of the tax system and tax lawyers. Each, and its potential impact on a tax planner's choice of lawyering philosophy, will be discussed in turn.

A. Government/Taxpayer Resource Imbalance, Weak Enforcement & Reliance on Taxpayer Self-Assessment

Our tax system suffers from an insufficiency of government enforcement resources. Lack of resources leads 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 who may take aggressive positions, and (b) the tax system relies heavily on self-assessment and taxpayers' willingness to comply with the law.

These concerns may suggest conservatism among tax advisers. Thus, some commentators argue that a legalist approach is appropriate for tax planning advice. This is because in the absence of an effective

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173 For example, only approximately 0.7 percent of all 2014 tax returns were audited by the IRS. INTERNAL REVENUE SERV. 2015 DATA BOOK, at 21, https://www.irs.gov/pub/irs-soi/15databk.pdf. And the government enforcement mechanism for the tax system is not backstopped by private rights of action, as enforcement is in other areas such as securities regulation and environmental regulation.


175 See, e.g., Beale, supra note 28, at 593 (arguing that the ethical rules should tax planning should be subject to a MLTN standard); Rachelle Holmes Perkins, The Tax Lawyer as Gatekeeper, 49 U. LOUISVILLE L. REV. 185, 210 (2010) (arguing that tax lawyers should serve as gatekeepers imposing a MLTN standard); Richard Lavoie, Am I My Brother’s Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession, 44 LOY. U. CHI. L.J. 813, 827 (2013) (self-assessment system means that “goal of reporting the correct tax should also be the guiding principle for the tax adviser”).
counterparty to challenge aggressive positions and ensure that the tax is assessed in compliance with the law, the lawyer cannot act in a purely partisan way, advocating for anything that is arguably legal for her client to do. Rather, given that she knows that there is unlikely to be a challenge to the position, she must temper that zealousness in order to help ensure that her client is, on balance, more likely than not to be complying with the tax laws, lest she enable a client to get away with under-reporting or under-payment.

A legalist approach might be further limited by combining it with a moralist approach on the grounds that "the less reliable the procedures and institutions, the more direct responsibility [the lawyer] needs to assume for substantive justice."[176] With this approach, not only would the lawyer work to ensure that the taxpayer’s positions are more likely than not to succeed on the merits, the lawyer would also limit her assistance to clients taking positions that she believes reflect good tax law (or at least the tax law as Congress intended it to be).

However, taking a conservative approach because of the government/taxpayer resource imbalance does not necessarily require a legalist approach. Rather, it may mean adopting a lawyer-as-counselor approach and highlighting for the client the resource imbalance and the importance of compliance. Further, the lawyer-as-counselor could encourage the client to be more conservative both because of the tax system’s reliance on self-assessment and because of the impact that overly aggressive approaches may have on revenue collection, the ability of government to function effectively, and the public’s perception of fairness of the tax system.[177] This friend/counselor approach does not ensure that a taxpayer advised by the particular lawyer is more likely than not to be complying with the tax laws, but it could reduce the need for IRS enforcement actions because it may enable a lawyer to influence clients to be more likely to take positions with the most substantive merit.

Alternatively, the government resource concern may lead a tax planner to take an officer-of-the-court approach or to adopt an authority-conception approach.[178]

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[176] Simon, supra note 20, at 140. A related concern relates to problems within our democratic system, and particularly with our tax law/regulation writing process. See Schizer, supra note 28, at 338–39 (discussing the mismatch between the government and the private sector). This concern has been used to support arguments that that our laws may not be good enough to allow lawyers to act as hired gun or even to use an authority conception of the law; rather lawyers need to take a more conservative, justice-promoting approach such as a legalist or possibly moralist. On the other hand, others argue that the lawyer should be deferential to the choices and actions legislators and regulators, and not overlay the lawyer’s own views on the law; this perspective supports a hired gun or authority conception approach.

[177] See e.g., Lavoie, supra note 175, at 826–28, 856–58.
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philosophy. Under these approaches, the tax planner would advise disclosure for any position less certain than more-likely-than-not, or at least for any position that lacks substantial authority. These approaches do not reduce the need for government enforcement, but by highlighting for the IRS positions that the IRS might want to investigate, these approaches may enable more efficient use of limited IRS enforcement resources. This arguably “levels the playing field” between the taxpayer and the IRS.\(^{178}\)

Notwithstanding the foregoing, the tax planner may conclude that the resource concern ought not to dictate her selection of a philosophy of lawyering. She may conclude that her actions are sufficient as long as she does not factor in the IRS’s limited enforcement ability when advising a client to take a particular position (i.e., by not advising a client to take position based on the likelihood of audit). By not taking advantage of the client/government resource imbalance, she arguably fulfills her responsibility to “act[] fairly and with integrity in practice before the IRS,”\(^{179}\) even if she takes a hired gun approach to her role as a tax planner.

B. Duty to the Revenue System

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 the revenue system. Whether such a duty exists has long been the subject of debate. Some argue that tax lawyers have duties to “protect the revenue”\(^{180}\) and to the “laws and system of administration that comprise our nation’s revenue raising process” and thus “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.”\(^{181}\) These commentators argue that this duty is derived in part from the resource imbalance and self-assessment considerations discussed above, but it is broader in that some proponents of such a duty argue that it also comes in part from “the special nature of the government as an opponent,”\(^{182}\) and from a sense of reciprocity toward the system that facilitates the lawyer’s livelihood.\(^{183}\) That is, the “tax

\(^{178}\) Crystal, *Teaching*, supra note 91, at 1243 (citing William Simon’s work).

\(^{179}\) Circular 230 § 10.34(a)(4) (2014).

\(^{180}\) Durst, *supra* note 139, at 1051.


practitioner ethics play an important role in the government’s ability to collect taxes efficiently, and therefore, play an important role in helping pay for a civilized society and in upholding the democratic social consensus embodied in the tax system.”

Others counter that tax lawyers have no special duty to the tax system beyond the general duty to “obey and uphold the law” and that if the tax lawyer adheres to the rules of law and ethics, there is “no separate duty owed either to the tax system or to society.” Among other reasons, this is because of the potential impact that a duty to the system would have on the lawyer/client relationship.

A lawyer who believes that the “tax lawyers’ duty to uphold the law is comparable to their duty toward clients” would likely adopt a legalist approach to tax planning, advising clients to take positions only if they are more likely than not to succeed. Or perhaps such a tax lawyer might take an even more restrictive approach — as a moralist, bounded by a legalist approach. That is, helping clients take a position that the lawyer believes both reflects a morally appropriate tax rule for our revenue system and is more likely than not to succeed on the merits.

On the other hand, a tax lawyer could conclude that the penalty provisions set forth the normative boundary for establishing her duty to the system, such that she meets that duty if she employs an authority conception of the law approach. Or perhaps, a lawyer could conclude that her duty to system is really about “contribut[ing] to improvement of the tax laws and administration,” meaning that she discharges this duty through work other than client service, such as by commenting on the law and making recommendations for improvements. In this case, she might adopt an authority conception approach or the even (possibly) more aggressive hired-gun approach for her work representing clients.

Alternatively, a tax lawyer may be unpersuaded that she owes a special duty to the revenue system, in which case she would use other considerations to help guide her in identifying her lawyering philosophy.

186 See, e.g., id. at 848; 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, 170 (2009).
187 Beale, supra note 28, at 639; Dzienkowski & Peroni, supra note 28, at 2743 (advocating for a MLTN threshold except in limited cases); Perkins, supra note 175, at 229 (advocating for gatekeeper role at MLTN threshold).
188 See Durst, supra note 139, at 1059–64.
189 Corneel, supra note 27, at 301.
190 Id. at 312–13.
C. Prospective Planning Context

A lawyer’s choice of lawyering philosophy may also be influenced by the role that she serves when representing clients. A tax planner provides prospective advice and has the opportunity to help shape the relevant transactions. In contrast, a litigator becomes involved after the relevant transactions have occurred and must do her best with the facts she is given.

As a result, some commentators have argued that a hired gun approach, which may be appropriate for a lawyer serving in a litigation or advocacy role, may be less appropriate for a lawyer serving as a planner or adviser. They argue that tax planning is not truly adversarial, and thus, a transactional lawyer should serve as a gatekeeper, limiting client access to those benefits that are “more likely than not” to be compliant with the law. This argument may be particularly compelling when coupled with the weak enforcement mechanism provided by the taxing system.

On the other hand, client autonomy, which is the central focus of the hired gun approach, is an important value to advance regardless of whether it is exercised in a prospective planning context or in a retrospective litigation posture. Indeed, the tax policy norm of neutrality would suggest that the tax laws should distort business decisions as little as possible, and if a client believes that its business goals would be furthered by undertaking a particular transaction, then a hired gun approach — taking direction from the client and helping the client to plan that transaction that the client believes is warranted — would advance autonomy and possibly efficiency. This may be socially beneficial even if the transaction is tax minimizing and even if the tax consequences are not likely to be sustained on the merits if challenged.

D. Primarily Tax-Motivated Transactions

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 minimization. “[T]he advisor role [could be

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191 The model rules distinguish between roles. MODEL RULES, supra note 18, at preamble par. 2. See also Schwartz, supra note 20, at 678–95 (arguing for different professionalism norms to apply to the nonadvocate lawyer).

192 See, e.g., WOLFMAN, supra note 15, at 3; Beale, supra note 28, at 632–33; Ostas, supra note 5, at 518–20.

193 See, e.g., Beale, supra note 28, at 632–33; Lavoie, supra note 175, at 828.

194 See, e.g., Schwartz, supra note 20, at 678–95 (distinguishing counseling vs. advocacy context, given lack of counterparty).


196 See Theodore C. Falk, Tax Ethics, Legal Ethics, and Real Ethics: A Critique of ABA
subdivided] into two categories: (1) advice on how best from a tax standpoint to carry out a non-tax motivated transaction that the client has already determined to pursue, and (2) advice on how to save taxes as an end in itself, without any particular transactional objectives in mind."

A tax planner should arguably be particularly cautious of taking a hired gun approach in the latter situation because there is greater risk of crossing the line. The absence of non-tax economic business objectives for the transactions means that there is little meaningful constraint, other than the lawyer's good character, on the "artful construction of transactions" and "whatever [illegitimate tax manipulations one] can get away with."

On the other hand, perhaps even when advising on tax-motivated transactions, the philosophy need not be different as long as the lawyer is executing the philosophy rigorously. That is, even the hired gun approach requires the lawyer to make an assessment of the position's likelihood of success on the merits. That assessment is likely to differ based on what kind of planning the client is pursuing. The economic substance doctrine, among other anti-abuse doctrines, makes it less likely that a purely tax-motivated position will succeed. If the planner's assessment accurately takes account of the additional risk of the tax-motivated position, then the planner arguably should not feel compelled to adopt a more conservative philosophy for a tax-motivated transaction than she would for a non-tax motivated transaction with the same likelihood of success on the merits.

E. Public Perception of Tax Lawyers & the Tax System

A tax practitioner's lawyering philosophy may also be influenced 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. If she wants to try to be an agent of culture change from within the tax system in response to one or more of these


197 Cooper, supra note 154, at 1581.

198 Id. at 1582.

199 This, of course, can be difficult to do. See infra Part VI.

200 See generally Rostain, supra note 6, at 88–94; ROSTAIN & REGAN, supra note 6.

201 See, e.g., Infanti, supra note 29.


203 See Michael Hatfield, Tax Lawyers, Tax Defiance, and the Ethics of Casual Conversation, 10 FLA. TAX REV. 841, 844–51 (2011).

concerns, she may opt for a more conservative approach, such as a legalist approach, rather than a hired-gun approach. Or she might embrace a moralist or friend/counselor role, trying to educate clients about these concerns in an effort to encourage them to take conservative positions that reflect greater social responsibility and that embody a culture of tax compliance instead of avoidance. On the other hand, she may determine that the way she personally represents clients ought not to be affected by these concerns and that to the extent that she wants to help counteract these issues, it is better to do so through system-wide initiatives, such as efforts to raise the standards of practice applicable to all practitioners.

**F. A Personal Choice**

None of these considerations is dispositive, and different factors may resonate more strongly with some practitioners than with others. My personal approach, as reflected in prior work, is that the tax planner should provide “informative and understandable advice that comprehensively addresses the client’s objectives (including tax objectives) and gives the client an appreciation of the benefits and risks of a decision, thereby putting the client in a position to make an educated choice.” That is, I take a view that combines the counseling and hired gun approaches.

Despite my personal view, I believe that all of the philosophies of lawyering discussed above (except for the purely self-interested approach) are plausible approaches for tax planners. Each tax planner must decide for herself what lawyering approach is most aligned with her values.

**VI. IMPLEMENTING A PHILOSOPHY OF TAX LAWYERING**

To be an ethical tax lawyer, it is not enough to understand the relevant ethics rules and have a lawyering philosophy. The tax planner must be able to implement her approach to lawyering. Otherwise, having a lawyering philosophy cannot serve as an effective tool to help advance ethical practice. 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.

This is true regardless of a tax planner’s philosophy. The lawyer who adopts an authority conception of the law is only willing to advise on positions that are strong enough not to subject the client to penalties. Thus,

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205 See Dzienkoski & Peroni, supra note 28, at 2735 (explaining that notions of corporate social responsibility “include good faith compliance with the tax laws”); Roxanne Bland, Aggressive Tax Planning and Corporate Social Responsibility, 81 ST. TAX NOTES 877 (Sept. 12, 2016).

206 Field, supra note 112, at 1299 n.1.
she must be able to determine which positions are more likely than not to succeed (for tax shelters and reportable transactions), which positions have substantial authority, and which have a reasonable basis. The self-interested lawyer, friend/counselor, legalist, and hired gun must be able to make these same determinations, though each for a different reason.

Inability to make these judgment calls effectively can cause a tax planner to cross a line she did not intend to cross. Indeed, I suspect that some tax planners, such as the attorneys from Jenkins & Gilchrist (who famously brought down their entire firm by giving overly aggressive tax planning advice), thought they were acting as hired gun tax planners, but because of flaws in their judgment about the strength of particular tax positions, ended up — perhaps unwittingly — crossing lines that they did not want to cross.

Of course, the exercise of professional judgment is a skill that is developed over the course of a career, but there are systematic ways in which people err. Although I suspect that every tax planner believes that she exercises solid professional judgment, that may be product of a blind spot. Tax advisors are unlikely to be immune from the systematic ways in which people make mistakes or (consciously or subconsciously) act dishonestly. “The reality is that important decisions made by intelligent, responsible people with the best information and intentions are sometimes hopelessly flawed.”

Thus, this section draws on insights into the realities of tax practice and on social science literature about flawed decision-making in order to identify a few ways in which tax planners are likely to err when exercising their professional judgment. This section discusses a few major impediments to the successful implementation of a philosophy of lawyering, and then discusses strategies for overcoming these impediments in order to help a lawyer stay true to her lawyering philosophy—and thus to her values—in practice.

A. Impediments to Implementation — Biases from Institutions, Clients, & Self

Any factor that can bias a lawyer’s independent judgment can prevent

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her from adhering to her lawyering philosophy and can thus lead to unethical behavior. This section focuses on three major impediments to effective implementation of a lawyering philosophy: institutional influences (i.e., law firm, other practice setting, professional community, and social community), the influences wielded by clients, and cognitive biases. This section briefly describes how 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 conclude that a position is stronger than she would otherwise assess it to be.

These influences could also lead a lawyer to be more conservative than she otherwise would be, but the focus here is on factors that could lead to more aggressive advising because it is when a lawyer is more aggressive than she would otherwise be that she risks crossing ethical lines. Note that the factors described herein are not the only influences that can adversely impact a lawyer’s ability to implement her lawyering philosophy effectively, and the below is not an all-inclusive discussion of this complex and nuanced topic. Further, these factors affect lawyerly decision-making for many types of lawyers, not just tax advisers, and thus, the discussions are rarely tax-specific. However, this section is intended to highlight important factors that could impede a tax planner from using her lawyering philosophy to help her be ethical while advising on potentially aggressive matters.

1. Institutional Influences on Decision-Making

Ample literature documents that organizations and communities of which a person is a part can wield significant influence over the person’s individual decision-making and over the decision-making of groups in which the person participates. These institutional influences can affect lawyers across disciplines and tax planners in particular. This section will discuss three key institutions that can skew a tax adviser’s ability to exercise independent judgment when advising a client: the lawyer’s firm or other practice setting, the lawyer’s professional community outside of the firm, and the lawyer’s social community.

a. Firm or Other Practice Setting

A tax planner’s practice setting is “among the most powerful,

209 Perhaps an influence that leads a lawyer to be more conservative than she would otherwise be could also be problematic, for example, for a moralist lawyer who is pressured to do something that contradicts her principles because it is more likely to succeed on the merits than the approach that aligns with her principles.
contextual factors shaping enactments of professionalism” and is thus likely
to have significant influence over the decisions that the individual tax
planner makes.210

This influence on the exercise of judgment can be explicit or implicit.
Firms often set explicit monetary or other incentives for particular behavior
such as bringing in clients, and firms establish guidelines for career
advancement. The firm’s influence can also be more subtle in that the firm
has a particular identity or culture about the way it approaches client
advising and representation.211 Junior lawyers, in particular, can be
influenced by these cultural norms212 because more senior lawyers who
practice in accordance with these norms serve as mentors and team
members. These more senior lawyers within the firm model
professionalism, and working with these senior lawyers can be a formative
experience in shaping a junior lawyer’s inchoate professional values.213

A planner’s judgment may be skewed by these incentives and
influences. She may consciously or subconsciously take these guidelines
into account when determining how to advise a client.214 The desire to
bring in business, keep one’s job, earn bonuses, and gain respect within the
firm can be extremely powerful, particularly in the current era of tight job
markets for junior lawyers and enormous law school debt. These
considerations can easily lead a lawyer to be more aggressive than she
wants to be or to conclude that a position is stronger than she would have
otherwise judged it to be. Certainly, none of this is unique to tax planning,

210 Douglas N. Frenkel et al., Introduction: Bringing Legal Realism to the Study of
Ethics and Professionalism, 67 FORDHAM L. REV. 697, 704 (1998); see also MICHAEL J.
KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 19 (1994);
Deborah L. Rhode, Institutionalizing Ethics, 44 CASE W. RES. L. REV. 665 (1994); Patrick J.
Schiltz, Attorney Well-Being in Large Law Firms: Choices Facing Young Lawyers, 52

211 Robbennolt & Sternlight, supra note 157, at 1146–48, 1166–67 (“The ethical culture
of a firm, company, agency, or practice group is an important determinant of how ethically
the attorneys within that entity will behave.”).

212 See Victor Fleischer, Options Backdating, Tax Shelters, and Corporate Culture, 26
VA. TAX REV. 1031, 1046, 1050–51 (2007) (discussing the potential impact of corporate
culture on employee behavior).

213 See id.; Robert Granfield & Thomas Koenig, It’s Hard to Be a Human Being and a
Lawyer: Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice,
105 W.VA. L. REV. 495 (2003); Tanina Rostain, Waking Up from Uneasy Dreams:
Professional Context, Discretionary Judgment, and the Practice of Justice, 51 STAN. L. REV.
955, 964–66 (1999) (discussing conformist behavior particularly in “ethically ambiguous
situations”).

214 See Francesca Gino et al., Contagion and Differentiation in Unethical Behavior: The
Effect of One Bad Apple on the Barrel, 20 PSYCHOL. SCI. 393 (2009) (“[I]ndividuals’
ethicability . . . depends on the social norms implied by the dishonesty of others.”).
but firm/practice setting culture\textsuperscript{215} has been an important factor in enabling the tax shelter industry to flourish.\textsuperscript{216}

\textit{b. Professional Community}

A lawyer’s larger professional community outside her particular practice environment can also influence her ability to exercise unbiased independent judgment. This is because lawyers often engage with their peers in practice outside of their firm by conversing with opposing counsel, attending conferences and CLE programs, and reading publications authored by members of that larger community. These interactions, during which participants often discuss new laws and regulations and strategies in response to those new developments, expose a lawyer to professional norms within the community. And these interactions inform a lawyer about the “currencies” that are valued within the professional community, such as number, size and types of clients represented, profits per partner, creativity in devising tax minimization strategies, and frequency of success with aggressive positions.

Although the larger professional community does not wield as much direct control over a lawyer’s future as does her own firm, the professional community establishes norms that help her understand what professionalism means within her field,\textsuperscript{217} and that could inform her firm’s norms about approaches to client representation, both of which could skew her ability to exercise independent judgment.\textsuperscript{218} Further, to the extent that the lawyer might want to move to another firm or get referrals from other firms, her reputation within, and ability to meet the norms of, this larger professional community can affect her career success. These indirect influences can inform and may skew a lawyer’s independent judgment.

\textsuperscript{215} This discussion generally references lawyers at firms, but the influence of practice setting is equally powerful in other practice settings. See, e.g., Susan Cleary Morse, \textit{The How and Why of the New Public Corporation Tax Shelter Compliance Norm}, 75 FORDHAM L. REV. 961, 964–74 (2006) (discussing the impact of organizational tax compliance norms within a public corporation).

\textsuperscript{216} ROSTAIN & REGAN, supra note 6; see also Pollack & Soled, supra note 6 (blaming the allure of money as partially explaining the “bad behavior” of tax professionals).

\textsuperscript{217} Information gleaned from these interactions can suggest that others behave more aggressively than they actually do, and thus, potentially encouraging us to mimic that approach and be more aggressive than is warranted. See generally Bert I. Huang, \textit{Shallow Signals}, 126 HARV. L. REV. 2227 (2013) (discussing situation where one party’s actions might appear to be illegal but have a critical feature, hidden from view, that allows the action, and where another party takes the first party’s actions as a signal about how to behave).

\textsuperscript{218} ERICH KIRCHLER, \textit{THE ECONOMIC PSYCHOLOGY OF TAX BEHAVIOUR} 64–70 (2007) (discussing the impact of social norms on tax compliance behavior).
These influences may be particularly powerful in the tax advising context, in part because the tax bar has a recent history of having two distinct groups: the regular tax bar and the tax shelter bar. While this distinction may have waned since the heyday of shelters and given the arguable convergence between the groups, there remains a subset of tax professionals that embrace a more aggressive approach. Being part of the more aggressive segment of the tax professional community can affect a lawyer’s baseline for judging which positions are arguably legal. Further, even within the “regular” tax bar, some commentators have argued that there is a professional norm that “celebrates” innovative tax minimization strategies, which can create subtle pressure on a lawyer to conclude that a position is stronger than it really is.

c. Social Community

Similarly, a tax adviser’s social community (i.e., outside of the firm and outside of the professional community) can also impact the adviser’s judgment because of cultural norms within that larger community. Tax advisers may encounter casual conversations in which friends and acquaintances articulate views about the tax system; this is particularly common once the friends and acquaintances know what the tax adviser does for a living. These conversations, and even offhand remarks by those in the tax adviser’s social community, inform the tax adviser about the attitudes toward taxation within the lay community of which the lawyer is a part, thereby creating social norms. A tax adviser might internalize those attitudes and unintentionally take them into account when carrying out her job, as part of seeking approval (or avoiding social sanctions) within her social community.

219 Peter C. Canellos, A Tax Practitioner’s Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters, 54 SMU L. Rev. 47, 55–57 (2001); see also Joseph Bankman, The Business Purpose Doctrine and the Sociology of Tax, 54 SMU L. Rev. 149, 150 (2001); cf. Wendel, Professionalism as Interpretation, supra note 22, at 1215 n.168 (“Nancy Staudt suggested in conversation that this informal sociology of the profession may not be entirely accurate.”).

220 Ordower, supra note 204, at 111–25 (discussing convergence between the cultures of tax avoidance and tax evasion).

221 Id. at 87–94 (discussing the role of the tax bar in tax planning trends).


223 See Hatfield, supra note 203, at 844–51 (discussing anti-tax rhetoric that tax lawyers may encounter in casual conversations).

224 KIRCHLER, supra note 218, at 64–70 (discussing the influence of social norms on behavior); see also, e.g., James Aim, Testing Behavioral Public Economics Theories in the Laboratory, 63 Nat’l Tax J. 635, 646–47 (2010) (discussing literature regarding the impact of social norms on tax compliance).
This influence can subtly push in favor of a more aggressive or more conservative approach, depending on the particular social circle. This influence on lawyerly decision-making, however, is likely to be less powerful than the influence of the firm or the professional community. Nevertheless, norms within a tax adviser’s social community, along with broader societal norms about taxpaying, still have the potential to skew a lawyer’s ability to exercise unbiased judgment as part of implementing her lawyering philosophy.

2. The Impact of Clients

Clients can wield significant influence over a lawyer’s ability to exercise the unbiased independent judgment required to effectively implement the lawyer’s philosophy of lawyering.226

Even without any pressure from the client, the mere fact that an individual represents a particular client can make her biased in favor of the client’s interests.227 And although some clients are truly looking for unbiased advice from counsel, many clients often have specific expectations or desires about the outcome of the advice.228 Thus, the lawyer is pressured, either overtly or out of a desire to please the client, to reach the outcome that the client wants.229 This can have a powerful impact on a lawyer’s ability to exercise independent judgment, particularly given competitive market pressures to keep clients happy, get additional referrals, and bring in more business.230 Moreover, advisers tend to identify more

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225 KIRCHLER, supra note 218, at 70–71.
226 See, e.g., Burger, supra note 156, at 55; Devos, supra note 24, at 177 (reviewing studies about the impact of client risk orientation on tax adviser behavior); Jackel, supra note 9, at 77–78 (competitive market pressures). This is true both at the individual-client level and at the aggregate level. That is, not only can an individual client influence how a lawyer makes decisions in a particular situation, but repeated representation of a particular set of clients with similar objectives and perspectives can also color a lawyer’s overall approach to the particular field of law. See, e.g., Robert Nelson, Ideology, Practice, and Professional Autonomy, 37 STAN. L. REV. 503 (1985).
227 See, e.g., Max H. Bazerman et al., Why Good Accountants Do Bad Audits, HARV. BUS. REV., Nov. 2002 (discussing role-conferred bias among auditors).
229 See, e.g., Bazerman, supra note 227 (arguing that service providers “have strong business reasons to remain in clients’ good graces and are thus highly motivated to [reach the outcome the client desires]”); Leslie C. Levin, The Ethical World of Solo and Small Law Firm Practitioners, 41 Hous. L. REV. 309, 337 (2004); Lin Mei Tan & Valerie Braithwaite, Agreement with Tax Practitioners’ Advice Under Tax Law Ambiguity, 17 N.Z. J. TAX. L. & POL’Y 267, 285 (2011) (reporting on a study finding that aggressive advice can be demand-driven by aggressive taxpayers).
230 See, e.g., Kay J. Newberry et al., An Examination of Tax Practitioner Decisions: The
closely with their clients over time, thereby increasing the extent to which their judgment reflects what the client wants it to be.\textsuperscript{231} Thus, continued representation can skew judgment toward client-favorable outcomes, even if the client does not exert explicit pressure.

Also, a client might have a very different concept of how it envisions the nature of lawyer/client relationship than does the lawyer. A client who wants a hired gun lawyer may be unhappy with a lawyer who takes a moralist, legalist, or friend/counselor approach. This lawyer might be well-advised to withdraw from the representation particularly if it involves aggressive positions or positions that the lawyer believes are unwise or morally dubious. As long as the lawyer is representing the client, however, the lawyer may be influenced to change her approach to lawyering to satisfy the client, which means changing whether and/or how she assists with transactions on which she would otherwise not choose to assist or that she would otherwise handle differently.

3. Cognitive Biases & Behavioral Factors

Rich social science literature discusses cognitive biases and other behavioral factors that affect decision-making\textsuperscript{232} and the exercise of judgment, and research demonstrates that taxpayers are subject to these biases.\textsuperscript{233} But tax advisers are also likely to be susceptible to these biases, meaning that they can affect a tax adviser's ability to exercise unbiased independent judgment in accordance with her lawyering philosophy.\textsuperscript{234}

This impact can occur in many ways. For example, the self-serving bias\textsuperscript{235} and the tendency "to be overconfident in or about our abilities and

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\textsuperscript{232} See, e.g., RICHARD H. THALER \& CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH \& HAPPINESS (2009).

\textsuperscript{233} KIRCHLER, supra note 218, at 129–51 (surveying the behavioral economics literature, particularly as applied to taxpayer behavior).

\textsuperscript{234} Robbennolt \& Sternlight, supra note 157; JENNIFER K. ROBBENNOLT \& JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS (2012) (providing insights into the challenges of acting in accordance with one's professional and personal values); see also Alice Woolley \& W. Bradley Wendel, Legal Ethics \& Moral Character, 23 GEO. J. LEGAL ETHICS 1065, 1069–75 (2010) (discussing how psychological factors can influence ethical decision-making among lawyers).

\textsuperscript{235} See, e.g., Bazerman, supra note 227.
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Aggressive Tax Planning

prospects\textsuperscript{236} can lead a tax adviser to overestimate the likelihood of success of an argument or position that she has devised. Confirmation bias\textsuperscript{237} and bias toward the status quo\textsuperscript{238} can lead a lawyer to reach the same result in a new matter without adequately analyzing the details of the new matter to ensure that the result really should be the same as in the prior matter. Difficulty in perceiving the importance and cumulative impact of small changes\textsuperscript{239} can lead a tax adviser to conclude that a new position has the same likelihood of success as an earlier position even though several small changes have been made and even though the tax adviser would not have assessed the new position to be as strong had the tax adviser examined the new position in isolation. The tendency to discount future events\textsuperscript{240} can cause a tax adviser to inadvertently take the audit lottery into account, meaning that she may overvalue tax savings today as compared to potential costs in the future, overestimate the likelihood of success of a position, and/or underestimate the potential costs of an audit in the future. Loss aversion\textsuperscript{241} (for both the client and the lawyer) can cause an individual to be more risk-seeking when facing a potential net "loss," as some view taxes to be.\textsuperscript{242} And fatigue,\textsuperscript{243} to which many lawyers are subject due to the demands of practice, can make it harder to make good decisions and resist the organizational and client influences discussed above. These are just a handful of the ways in which cognitive biases and behavioral factors can impact a lawyer's judgment and decisions, her ability to stay true to her desired lawyering philosophy, and her ability to hold ethical lines.

B. Planning to Counteract Decision-Making Biases

Although there may be many impediments to a tax planner's ability to

\textsuperscript{236} Robbennolt & Sternlight, \textit{supra} note 157, at 1116–17 (discussing overconfidence as contributing to ethical blindspots, and citing research regarding overconfidence).


\textsuperscript{239} Robbennolt & Sternlight, \textit{supra} note 157, at 1118–19 (discussing, and citing other work regarding, the psychology of slippery slopes).


\textsuperscript{241} Kahneman, \textit{supra} note 238, at 199–203.

\textsuperscript{242} James Alm & Carolyn J. Bourdeaux, Applying Behavioral Economics to the Public Sector, 206 REV. PUB. ECON. 91, 107 (2013).

\textsuperscript{243} See, e.g., Nicole L. Mead et al., Too Tired to Tell the Truth: Self-Control Resource Depletion and Dishonesty, 45 J. EXPERIMENTAL SOC. PSYCHOL. 594 (2009) (concluding that "dishonesty increases when people's capacity to exert self-control is impaired" by factors such as fatigue).
exercise independent judgment and to thus implement her lawyering philosophy, the risk of impediments to implementation should not prevent a tax lawyer who is seeking to behave ethically when assisting with potentially aggressive tax planning from using a lawyering philosophy to guide her. The impediments described above can be mitigated.

Acknowledging that there are threats to one’s ability to exercise unbiased judgment is a critical first step in overcoming them. If a tax planner is sensitive to the ways that biases can affect her exercise of independent judgment, she gives herself the opportunity to counteract the effects of those biases. Understanding and planning for the biases can help increase the quality of the tax planner’s judgment. In turn, this increases the likelihood that the tax planner will serve her client to the best of her abilities, will implement her philosophy of lawyering effectively, and will fulfill her vision of being an ethical tax planner.

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 this article, but this section highlights some approaches to consider.

1. Be Explicit

Being explicit about one’s lawyering philosophy can increase the salience of guidelines for ethical decision-making. This means a tax planner should explicitly identify her lawyering philosophy, the lawyering philosophy of her firm/practice setting, and the lawyering philosophy of the professional community with which she regularly engages. This means openly discussing lawyering approaches with colleagues. The tax adviser should also explicitly discuss her lawyering philosophy with prospective clients at or before the beginning of the representation; this enables the tax adviser to understand what the client is seeking from the representation, to be clear with the client about what she will and will not do, and to determine whether the client’s perspective (and likely influence) is aligned with the lawyer’s preferred approach.

244 Robbennolt & Sternlight, supra note 157, at 1156–57 (encouraging individuals and firms to “recognize their susceptibility to bounded ethicality and to have an awareness of the factors that can influence ethical decision-making” and to “take affirmative steps to minimize the likelihood that they will behave unethically”).

245 Id. at 1158–59.

246 See, e.g., Corneel, supra note 27 (providing a sample statement of a firm’s guidelines to practice, which reflect a firm-level lawyering philosophy); Robbennolt & Sternlight, supra note 157, at 1168–71; Linda K. Trevino et al., Behavioral Ethics in Organizations: A Review, 32 J. MGMT. 951, 967 (2006).
2. Choose Wisely

A tax adviser should try to choose employers, matters, and clients carefully, taking her lawyering philosophy into account. This means selecting a practice setting that is as likely as possible to embrace a lawyering philosophy that is consistent with the tax adviser's preferred approach, and this means considering whether to try to find a new supervisor or new job if the lawyer discovers that differences between her approach to lawyering and her supervisor's or firm's are skewing (or are threatening to skew) her judgment. Further, choosing wisely means being willing to decline to represent a client or to withdraw from a representation if client pressure is adversely affecting her ability to exercise independent judgment.

3. Create Reliable Processes

Reliable processes can also help a tax adviser implement her lawyering philosophy. Examples include (a) having an otherwise uninvolved colleague (perhaps a designated ethics counsel) review the analysis, particularly for aggressive or difficult determinations; (b) having a colleague assigned to play the role of the IRS as the analysis is undertaken, and (c) having a policy against making final determinations late in the evening when she is more likely to be fatigued.

4. Beware of Red Flags

There are many red flags that should lead a lawyer to pause and reconsider whether she is upholding the standards to which she subscribes. A tax adviser should be attuned to phrases or sentiments such as "just this once," "the [other] firm did it," "if we don't, the client will fire us," "that's what we concluded last time, and this is pretty similar," and "it's so close, maybe it doesn't really make a difference." These red flags do not mean that a lawyer is doing (or about to do) something unethical, but each should heighten the lawyer's awareness of the risk that she could be crossing the line into an action that violates her lawyering philosophy. By using these red flags as triggers to reconsider the analysis before proceeding, she may

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247 This is not always possible to do, in which case, the lawyer must devise strategies for resisting the influence on her judgment while remaining in the situation for as long as is necessary.

248 Kimberly Kirkland, Ethical Infrastructures and De Facto Ethical Norms at Work in Large US Law Firms: The Role of Ethics Counsel, 11 LEGAL ETHICS 181 (2008); see also Dzienkowski & Peroni, supra note 28, at 2751 (discussing firm-level strategies for ensuring ethical behavior).
be able to avoid unintentional lapses in judgment.

5. Reflect Regularly

Professional growth requires an iterative process of reflection and response. Thus, it is important for a practitioner to set aside time regularly to reflect on whether she is making the discretionary decisions in a way that furthers her lawyering philosophy, whether she might make different choices if faced with the same decision again, and if so, how she can learn from the prior situation and make responsive changes that strengthen her ability to adhere to her lawyering philosophy. Perhaps small changes to firm processes and client conversations are sufficient, but perhaps more dramatic changes—to her practice specialty or practice setting—are warranted in order to enable her to build a tax planning career that aligns with her values.

She should also reflect on whether her experiences change her perspective on the type of tax adviser she wants to be. Lawyering philosophies may evolve over time, so it is important to continue to reflect on whether a choice made in the past about guiding principles for practice continue to reflect the lawyer’s vision of the ethical tax planner she wants to be.

6. Cope with the Realities of Practice

Admittedly, the foregoing can be challenging given the realities of law practice, particularly for junior attorneys. Lack of expertise and seniority may make it hard to create changes within a firm if the lawyer finds herself practicing in a way that is contrary to her lawyering philosophy, and a tight job market and student debt may make it difficult for her to find a new job that better matches her lawyering approach. Responses to these situations may vary, but mentors (both in and outside the lawyer’s organization) who share the lawyer’s approach to lawyering can help her devise strategies for overcoming or at least mitigating the ethical mismatches she experiences.²⁴⁹

VII. CONCLUSION

So can an ethical tax practitioner be an aggressive tax planner?

It depends on the practitioner. The rules of professional responsibility and tax-specific standards of practice allow practitioners to assist with aggressive tax planning. But, within the boundaries set by those rules and standards, each individual practitioner must determine what ethical tax

²⁴⁹ I discuss such strategies in greater detail in a separate article. Field, supra note 159, at Part IV.C.2.ii.
practice means to her and what kind of tax planner she wants to be. Then she can determine whether and to what extent facilitating aggressive tax planning fits with her vision of ethical practice. 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.