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

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

*Richard Lavoie\**

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

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And the LORD said unto Cain, Where is Abel thy brother? And he said, I know not: Am I my brother's keeper?

– Genesis 4:9

#### INTRODUCTION

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

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and *in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.*<sup>1</sup>

In modern times, Lord Brougham's admonition that a lawyer should not consider the societal consequences of zealously defending a client has been questioned.<sup>2</sup> More recently, some have gone even further and questioned whether lawyers generally have an affirmative obligation to act as gatekeepers to safeguard the structure and purpose of the law.<sup>3</sup> Such a gatekeeping role does not require lawyers to abandon their obligation to their clients and assume the role of government regulators,

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1. 2 TRIAL OF QUEEN CAROLINE 3 (1821) (emphasis added). To understand the full import of the emphasized language it is necessary to place Lord Brougham's statement in its historical context. Queen Caroline was popular with the masses, but had been charged with adultery. However, her husband King George IV also had a secret indiscretion. While he was heir-apparent, the King had secretly married a Catholic. If this fact became known, the King would have lost his own title pursuant to the Law of Settlement. The quoted language was part of Lord Brougham's opening statement in defense of Queen Caroline and represented a direct threat that Lord Brougham would not hesitate to produce this evidence against the King if required to defend his client, no matter the resulting confusion and tumult to the country. Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213, 1215 (2006).

2. See generally David Luban, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); DEBORAH RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000); Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

3. See generally JOHN C. COFFEE, JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* (2006); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986); Arthur B. Laby, *Differentiating Gatekeepers*, 1 BROOK. J. CORP. FIN. & COM. L. 119 (2006); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167 (2005). The gatekeeping role envisioned in these works goes well beyond the traditionally accepted notion that a lawyer is an "officer of the court," and therefore, among other duties, cannot knowingly make false statements to a tribunal or fail to disclose controlling adverse authority. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2011) and associated comments.

but it does envision attorneys taking an evenhanded approach to interpreting the law when advising clients. A gatekeeping function seeks to mitigate the excesses that can arise from zealously advancing client interests by requiring attorneys to counsel clients with an eye toward promoting respect for the law. While lawyers need not place themselves in the position of an impartial judge in providing client advice, they should recognize that they have a duty to uphold the law and promote its fair operation when assisting clients predisposed to taking a decidedly myopic view of law.<sup>4</sup> Indeed, in the realm of the securities laws, Congress and the Securities Exchange Commission (“SEC”) have moved to require lawyers to assume a proactive gatekeeping role in policing their clients’ actions via legislation,<sup>5</sup> regulations,<sup>6</sup> and prosecutions.<sup>7</sup>

While the idea that gatekeeping is a general obligation of all lawyers is relatively new, the tax bar in the United States has been debating whether it has a special gatekeeping obligation almost since the inception of the income tax.<sup>8</sup> Over most of the modern income tax era, the prevailing view of commentators has been that the unique nature of the tax system requires tax lawyers to have an ethical obligation to create, nurture, and promote a fair tax system.<sup>9</sup> Additionally, as a

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4. Wendel, *supra* note 3, at 1177–78.

5. *See, e.g.*, Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245 (2006) (directing the SEC to adopt certain rules of minimum professional conduct for attorneys); 15 U.S.C. § 78d-3(a) (2006) (allowing administrative actions against attorneys and accountants to censure, suspend, or bar them from appearing or practicing before the SEC).

6. *See* 17 C.F.R. §§ 205.1–205.7 (2012) (implementing section 307 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245 (2006), which deals with rules of professional responsibility for attorneys practicing before the SEC); 17 C.F.R. § 201.102(e) (2012) (allowing SEC to censure and bar attorneys from appearing or practicing before the SEC). *See also* Roger Cramton, George Cohen & Susan Koniak, *Legal and Ethical Duties of Lawyers after Sarbanes-Oxley*, 49 VILL. L. REV. 725, 740–41 (2004) (discussing required reporting under section 307 of Sarbanes-Oxley).

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

8. *See generally* Michael Hatfield, *Legal Ethics and Federal Taxes, 1945-1965: Patriotism, Duties and Advice*, 12 FLA. TAX REV. 1 (2012). Indeed, law review discussions regarding how far a tax practitioner can go in counseling tax reduction strategies to clients can be found as early as the 1920s. *See, e.g.*, John H. Sears, *Effective and Lawful Avoidance of Taxes*, 8 VA. L. REV. 77, 85 (1921).

9. *See* BERNARD WOLFMAN, JAMES P. HOLDEN & KENNETH L. HARRIS, *STANDARDS OF TAX PRACTICE* § 101.2 (5th ed. 1999) (“The practitioner’s obligation to the client, however, is not unrestricted. The practitioner also owes a duty, albeit less well-defined, to the tax system as a whole.”); Franklin Green, *Exercising Judgment in the Wonderland Gymnasium*, 90 TAX NOTES 1691, 1692–93 (2001) (“[I]t has been a fundamental role of tax practitioners to identify for

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

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taxpayers those tax return positions that may be attempted and those that are beyond the pale . . . . In a real sense, the tax adviser is a gatekeeper who regulates the flow of issues into the system . . . . For self-assessment to be workable, tax advisers cannot fail to perform their gatekeeper function and cannot allow a floodtide of illegitimate issues to swamp the system. Accordingly, it is imperative that tax advisers apply professional standards with intellectual honesty in determining what positions have enough credibility to be able to be asserted.”); Deborah H. Schenk, *Tax Ethics*, 95 HARV. L. REV. 1995, 2005 (1982) (reviewing BERNARD WOLFMAN & JAMES P. HOLDEN, *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* (1981)); William H. Simon, *Organizational Representation and the Frontiers of Gatekeeping*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1069, 1073 (2011) (“[T]here is a longstanding tradition within the elite tax bar that embraces the gatekeeping role . . .”). For a detailed compendium of the leading tax ethics commentators on this point from the period between 1945 and 1965, see Hatfield, *supra* note 8, at 15–28.

10. That is, it was in the professional best interest of the practitioner to be seen by the taxing authorities as having high standards so that she would be in the best position to represent her client’s interests and to foster a less adversarial relationship between taxpayers and the government to everyone’s mutual benefit. Hatfield, *supra* note 8, at 27–28.

11. See, e.g., Richard Lavoie, *Deputizing the Gunslingers: Co-Opting the Tax Bar into Dissuading Corporate Tax Shelters*, 21 VA. TAX REV. 43, 46–47 (2001) [hereinafter Lavoie, *Deputizing the Gunslingers*] (discussing attorney complicity in tax shelter activity and advocating for a return to a tax lawyer gatekeeping function); 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, 169 (2009) (advocating for the rejection of any tax practitioner duty to the system); Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 81 (2006) (suggesting that the organized tax bar’s law reform efforts can be understood as attempts to reinforce the professional authority of tax attorneys); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibility of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1457–58 (2007) (noting the dichotomy within the tax bar between tax shelter “formalists” and anti-tax shelter practitioners who assert a duty to the tax system).

12. This Article will use the term “Government” to generally refer to the panoply of legislative and executive aspects of the federal government that can play a role in regard to regulating attorneys generally, and in particular tax practitioners. The Internal Revenue Service itself will sometimes be referred to as either the “IRS” or the “Service.”

In the tax context, federal government action can take many forms, from Congressional legislation to administrative actions. On the administrative axis, the Treasury Department has primary responsibility for interpreting and administering the tax laws. Primary responsibility for developing tax policy and reviewing tax regulations resides in the Treasury’s Office of Tax Policy. However, the largest bureau within the Treasury Department is the IRS, which is responsible for determining, assessing, and collecting the revenue owed by taxpayers. Other Executive Branch agencies also have ancillary tax functions. For instance, the Tax Division of

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

Tax shelter activity can take many forms.<sup>15</sup> The factors that led to the decline of the tax bar's gatekeeping role in the 1970s and 1990s are still largely with us today despite recent Government actions. It remains to be seen whether the next economic upswing will reignite the tax shelter industry despite recently erected roadblocks.<sup>16</sup> If so, what

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the Department of Justice handles most tax litigation functions for the Government.

13. See *infra* Part III. See also Rachele Y. Holmes, *The Tax Lawyer as Gatekeeper*, 49 U. LOUISVILLE L. REV. 185, 210–12 (2010) (advocating for the Government to do even more to formalize the gatekeeping functions of tax attorneys); Bret Wells, *Voluntary Compliance: "This Return Might Be Correct but Probably Isn't,"* 29 VA. TAX REV. 645, 668–72 (2010) (advocating that a "more likely than not" tax return position standard be applicable for all taxpayers and advisors). For more generalized discussions of the evolving role of the Government in prescribing the ethical responsibilities of lawyers in various areas, see Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 338–44 (1994); Daniel R. Coquillette & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics through Legislative, Court, and Agency Regulations*, 48 SAN DIEGO L. REV. 123, 128–33 (2011); Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Profession in a Global Age*, 48 SAN DIEGO L. REV. 489, 514–23 (2011); Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers,"* 2008 J. PROF. LAW. 189, 193–205 (providing various examples of U.S. and foreign governments regulating attorney behavior).

14. See Tracy A. Kaye, *The Regulation of Corporate Tax Shelters in the United States*, 58 AM. J. COMP. L. 585, 604 (2010) (noting that while corporate tax shelter activity has decreased it is likely to return when the economy improves if the Government is not vigilant); Susan Cleary Morse, *The How and Why of the New Public Corporation Tax Shelter Compliance Norm*, 75 FORDHAM L. REV. 961, 1013 (2006) (arguing that compliance norms at large corporations were strengthened by the Government's responses to the most recent wave of corporate tax shelter activity).

15. Over the years the tax bar has proved tremendously adept at developing innovative tax shelter transactions despite Government attempts to stamp out such transactions. As Professor Martin Ginsberg famously noted, "The tax bar is the repository of the greatest ingenuity in America, and given the chance, those people will do you in." *Legislation Relating to Tax-Motivated Corporate Mergers and Acquisitions: Hearing before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 97th Cong. 90 (1982) (statement of Martin Ginsberg, Professor of Law, Georgetown University Law Center). Over the years Professor Ginsberg's sentiment has frequently been expressed by others as well. See generally JEFFERY L. YABLON, AS CERTAIN AS DEATH—QUOTATIONS ABOUT TAXES 223–59 (2010) (containing numerous quotes about tax evasion and planning, including: "Trying to control tax shelters is like stepping on Jell-O. It just squeezes out between your toes and the mess is worse than when you began." – Anonymous Congressional Staff Member; "What the low tax rate on capital gains does is spur a huge amount of unproductive tax sheltering. . . . Similarly, the highly talented people who dream up tax shelters could, in a better world, do productive work." – Leonard E. Burman; "At the heart of every abusive tax shelter is a tax lawyer or accountant." – Charles Grassley; and "As the tax laws get tighter, the tax lawyers get smarter." – Anonymous).

16. See Kaye, *supra* note 14, at 604. See also *infra* note 118 and accompanying text.

role will tax practitioners play? Will they resume a strong gatekeeping role and act to quash these new tax shelter schemes in their infancy? Or, will they adhere to Lord Brougham's mantra and again plunge the tax system into disarray and confusion?<sup>17</sup> If the latter, then the tax bar can expect the Government to place ever more draconian restrictions on them to dissuade their complicity in undermining the fairness and integrity of the tax system.

A central thesis of this Article is that it is in the self-interest of all the parties involved to take decisive action now to return to and strengthen the tax bar's historical gatekeeping function. The Government would benefit by obtaining more accurate taxpayer reporting of transactions and avoiding the substantial distraction of dealing with yet another tax shelter crisis. Society would benefit by having a stronger and fairer system of taxation that in turn bolsters the taxpaying commitment of all taxpayers.<sup>18</sup> Attorneys would benefit by retaining their ability to self-regulate as a profession, maintaining their status as professionals and preserving more latitude in assisting their clients in non-abusive tax situations.<sup>19</sup> Clients benefit from being able to receive freer tax advice in structuring ordinary business transactions (advice that might be inadvertently curtailed as a consequence of stricter governmental involvement in attorney regulation) and by avoiding the time, expense, and angst of ultimately trying to defend abusive transactions before the Government and in the court of public opinion.<sup>20</sup>

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17. See *supra* note 1 (contextualizing Lord Brougham's willingness to create a national controversy in his efforts to zealously represent and protect his client).

18. See generally Richard Lavoie, *Flying above the Law and below the Radar: Instilling a Taxpaying Ethos in Those Playing by Their Own Rules*, 29 PACE L. REV. 637 (2009) [hereinafter Lavoie, *Taxpaying Ethos*] (concluding that there is a sufficient understanding of "taxpaying ethos" to warrant testing the principles of this theory, in hopes of reducing noncompliance within a traditionally problematic part of society).

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

20. See Michele Destefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259, 1310 (2009). See also Michele Destefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?*, 23 GEO. J. LEGAL ETHICS 1119, 1195 (2010) (advocating in favor of corporate attorneys providing advice regarding public opinion aspects of corporate transactions in light of results from an empirical survey study); Kathleen F. Brickey, *From Boardroom to Courtroom to Newsroom: The Media and the Corporate Governance Scandals*, 33 J. CORP. L. 625, 636 (2008) (giving specific examples of media campaigns



While at one point the gatekeeping concept was thought to be *sui generis* to the realm of taxation, that position is no longer viable today. Over the years the legal environment has evolved from a broad constitutional and common law base into one increasingly focused on complex statutory schemes implemented and administered by regulatory agencies. Thus, the primary factor that prompted calls for tax gatekeeping (i.e., the practical inability of the Government to comprehensively check and monitor adherence to the law, which thus necessitates a system of voluntary self-compliance by citizens) has emerged as a central reality in most regulatory contexts. The calls we see today for increased attorney gatekeeping functions in other areas of the law derive largely from the Government's recognition that it cannot effectively curtail unjustified citizen behavior without the help of the practicing lawyers working in that area to promote compliance by their clients.<sup>21</sup> Just as in the field of taxation, if those attorneys fail to embrace a gatekeeping function on their own initiative, the Government can be expected to impose one on them that may well not be to their or to their clients' liking. The primary lesson to be learned from the tax experience with gatekeeping is the importance of preserving as much of the attorney-client relationship as possible by embracing self-regulation as a means of preempting more draconian changes that would otherwise likely occur.

In discussing the lessons that can be garnered from the tax bar's gatekeeping experience, this Article proceeds in three parts. Part I discusses the history, theory, and practice of gatekeeping within the tax bar. Part II highlights the decline in such gatekeeping activity as evidenced by the rampant tax shelter activity in recent times, and identifies some of the key factors that led to the weakening, and

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conducted by defendants and the methods these campaigns employed); David M. Sudbury, *The Role of Corporate Counsel in the Criminal Environmental Case: Advice to Quench the Fire*, 3 VILL. ENVTL. L.J. 95, 110 (1992) (suggesting that any defense attorney who tells his or her client to remain publicly silent should be fired).

21. See Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 ILL. L. REV. 887, 894 ("The rationale for enlisting private gatekeepers turns on the limits of public enforcers and the comparative advantages gatekeepers may enjoy in overseeing the primary wrongdoers."); Kraakman, *supra* note 3, at 61-66 (discussing the comparative advantage in enforcement obtained by creating gatekeepers to act as "chaperones" dealing one-on-one with prospective wrongdoers). By way of illustration, attorney gatekeeping functions have now become part of the Government's monitoring of compliance with the securities laws. See *supra* notes 5-7 (discussing how, through legislation, regulations, and prosecutions, Congress and the SEC have required lawyers to assume a gatekeeping role). Similarly, as discussed at note 198, *infra*, pressure has been mounting in recent years to impose strict gatekeeping requirements on attorneys to assist the Government in monitoring money laundering and terrorist financing activities.

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apparent abandonment, of the tax bar's traditional gatekeeping role. Part III examines the potential risks to all parties involved if the tax bar's gatekeeping role is not resurrected and discusses how a consensus in favor of an ethical gatekeeping norm can be forged despite competitive and other pressures pushing the bar in the opposite direction. The Article concludes by exhorting the tax bar to directly confront the difficult challenges presented by the current legal landscape and undertake a concerted effort to entrench a strong gatekeeping norm to the ultimate mutual benefit of the tax bar, its clients, and the Government. The Conclusion also observes that the tax gatekeeping example is highly relevant to other areas of the law where commentators and the Government are suggesting an attorney gatekeeping function is appropriate.

## I. TAX LAWYERS AS GATEKEEPERS

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

Lord Brougham's standard of zealous advocacy stakes out a clear threshold for the extent to which an attorney can ethically consider the consequences of his actions to those other than his client. In short, he cannot.<sup>22</sup> However, once one grants that an attorney may, or must, ethically consider consequences beyond those to his client, shades of gray are introduced into the interpretation of a lawyer's actions. What are the parameters that define the scope of the lawyer's gatekeeping role? Should the duty be found only in a general duty to work for the betterment of the law on his own time as a lawyer-citizen, or does the duty extend to specific client representations? If so, does it only reach client actions that are clearly accepted as illegal under current law, or can it intrude into areas where reasonable minds might differ regarding the legal outcome? At the extreme, must an attorney limit his involvement to situations where the client's position is clearly acceptable under current law?

Even once the relevant scope is identified, what action must or may an attorney take when weighing his client's interests against adverse consequences to others? Is it sufficient to merely bring the tension to the client's attention? Or must he counsel against the client's action? If the latter, must the practitioner actually withdraw from the

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22. Of course, under even an extreme view of the zealous advocacy role, an attorney's actions are not completely unfettered. For instance, no one would claim that an attorney should be ethically permitted to fabricate or destroy evidence, make false statements to a tribunal, or act to further an ongoing crime. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (2011).

representation if his counsel is ignored?<sup>23</sup> Or does the obligation (especially if the harmed party would be the Government) run even deeper, compelling him to affirmatively bring the recalcitrant client's actions to the attention of the injured party despite his general duty of client confidentiality?<sup>24</sup> Finally, to what extent should the gatekeeping function differ based on the legal context, both in terms of the field of law involved and the type of advocacy being undertaken?

In the tax field, the answer to these questions has typically been driven by concerns about dissuading overly aggressive tax planning.<sup>25</sup> There is little dispute regarding a tax attorney's obligation to deal truthfully with the Government when responding to inquiries about underlying facts<sup>26</sup> and to advise his client against taking frivolous or

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23. Under present ethical norms, a mandatory withdrawal in this context is limited to situations where the continued "representation will result in violation of the rules of professional conduct or other law." *Id.* R. 1.16(a)(1). Should the client's rejection of a lawyer's gatekeeping advice be viewed as a violation of rules of professional conduct? Should the permissive right of a lawyer to withdraw in situations where "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement" be made mandatory to further backstop a gatekeeping ethical norm? *Id.* R. 1.16(b)(4).

24. Even after withdrawal, an attorney generally must maintain client confidentiality, notwithstanding the client's informed consent. *Id.* R. 1.6(a). The exceptions to this requirement are typically limited to situations involving a crime or fraud associated with a substantial financial or bodily injury. *Id.* R. 1.6(b). Should the ethical rules be expanded to encompass a client's rejection of gatekeeping advice associated with legally questionable, but not *definitively* illegal or fraudulent, client actions?

25. See Holmes, *supra* note 13, at 187 ("[T]he line between legitimate tax planning . . . and overly aggressive or abusive reporting by taxpayers continues to get pushed."); Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 874 n.153 (2002) ("The difference between tax avoidance and tax evasion is that the latter is illegal, while the former is just smart tax planning. The boundary between the two is blurry."); Lavoie, *Deputizing the Gunslingers*, *supra* note 11, at 49 ("The inherent tension between legitimate tax planning and the creation of abusive tax shelters presents [a] line drawing exercise: which transactions should the tax law dissuade and prohibit as abusive, and which transactions should the tax law permit as attempts to work within the statutory framework toward the goal of legitimate tax minimization?").

26. See, e.g., 31 C.F.R. § 10.20 (2011) ("A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged."); 31 C.F.R. § 10.51 (2011) (explicitly noting that a practitioner may be censured, suspended, or disbarred from practice before the IRS for "[g]iving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading"). Of course, the rules of professional conduct explicitly state that an attorney shall not knowingly make a false statement of any material fact to any party in representing a client. MODEL RULES OF PROF'L CONDUCT R. 4.1. See also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-375 (1993) (titled "The Lawyer's Obligation to Disclose Information Adverse to the Client in the Context of a Bank Examination," this opinion found that an attorney representing a client in the context of a governmental agency investigation

patently improper tax positions.<sup>27</sup> Conversely, when a tax matter proceeds to actual litigation, the accepted view has been that a tax lawyer's obligations are the same as in any other type of litigation.<sup>28</sup> The questions become harder when a tax lawyer is consulted in the planning stages of a transaction, where the legal questions presented rarely have clear-cut answers. The role of the tax lawyer is to sort through the extant authorities and utilize her experience and judgment in determining the legal strength of a given tax position.<sup>29</sup> The analysis is multifaceted, involving not just an intimate understanding of the particular statutory and regulatory provisions involved, but also a keen appreciation for the policy considerations underlying the rules, the non-tax business motivations of the client, and the anticipated reaction of the judiciary if litigation ultimately ensues. Despite this grounding, the lawyer's view of the advisability of a transaction may often appear to a layman as simply a "smell test" akin to an "I know it when I see it" obscenity-like standard.<sup>30</sup> The key, however, is that the grounding of the analysis should create a commonality in approach that leads most practitioners to reach similar conclusions regarding the appropriateness of any given transaction.<sup>31</sup> As discussed in this Article, the scope of tax

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"may not under any circumstances lie to or mislead agency officials, either by affirmative misstatement or by omitting a material fact necessary to assure that statements made are not false or misleading").

27. As discussed herein, even with its most liberal interpretation, the bar has maintained that a tax return reporting position must have at least a "reasonable basis" for a practitioner to advise in its favor. *See infra* at Part II.A.1 (discussing ABA Formal Opinion 314). While the "reasonable basis" standard used in that opinion was interpreted by some as requiring only a "colorable basis" for a position, the position still could not be completely frivolous. ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 85-352 (1985) (titled "Tax Return Advice: Reconsideration of Formal Opinion 314," this opinion explained the need for clarifying the standard announced in Opinion 314). Again, this also accords with the acknowledged limits to the zealous advocacy norm generally. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.").

28. *See* Hatfield, *supra* note 8, at 52 (describing several different professors who agree that tax lawyers, when engaged in adversarial litigation, are involved in a process much like that experienced by typical attorneys). As noted earlier, however, in recent times commentators have begun to question the extent to which a strong zealous advocacy standard is appropriate even in pure litigation settings. *See supra* note 2.

29. Jasper L. Cummings, Jr., *The Range of Legal Tax Opinions, with Emphasis on the "Should" Opinion*, 98 TAX NOTES 1125, 1125 (2003); Frank J. Gould, *Giving Tax Advice—Some Ethical, Professional, and Legal Considerations*, 97 TAX NOTES 523, 529 (2002); Richard Lavoie, *Analyzing the Schizoid Agency: Achieving the Proper Balance in Enforcing the Internal Revenue Code*, 23 AKRON TAX J. 1, 20 (2008); Detlev F. Vagts, *Legal Opinions in Quantitative Terms: The Lawyer as Haruspex or Bookie?*, 34 BUS. LAW. 421, 421 (1979).

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

31. Richard Lavoie, *Activist or Automaton: The Institutional Need to Reach a Middle Ground*

gatekeeping is primarily centered on this gray area of aggressive tax-motivated planning.<sup>32</sup>

Within that scope, determining how strong a position needs to be before it can be ethically advised has been a matter of debate over the years. Depending on the time period and the context, the answer has changed dramatically. As discussed more fully in Part III, the Government's return preparer penalty provisions now provide that, in essence,<sup>33</sup> a tax advisor needs a reasonable belief that an advised position *more likely than not* would be sustained if there is either (1) a *significant purpose* of a plan or arrangement to avoid or evade federal income tax or (2) the transaction meets certain criteria causing it to qualify as a specifically reportable transaction.<sup>34</sup> If the underlying transaction does not have a significant tax avoidance purpose, then an undisclosed position still must be supported by "substantial authority,"<sup>35</sup> and a position that will be adequately disclosed by the taxpayer on his tax return must have a "reasonable basis."<sup>36</sup> A tax

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*in American Jurisprudence*, 68 ALB. L. REV. 611, 625–26 (2005).

32. See *infra* Part II.A (discussing the decline of tax gatekeeping and the rise of lawyer-facilitated tax shelter activity).

33. The statutory standard discussed here, section 6694, only applies to a person who prepares at least a substantial portion of a tax return or claim for refund for compensation. 26 U.S.C. § 7701(a)(36)(A) (2006). However, the Treasury Department's rules governing practice before the Internal Revenue Service ("Circular 230," codified at 31 C.F.R. subtit. A, pt. 10 (2011)) are significantly broader and provide that "a practitioner may not willfully, recklessly, or through gross incompetence" advise a client to take a position on a tax return or claim for refund unless the section 6694 certainty standards are met. 31 C.F.R. § 10.31(a)(1)(ii) (2011). Additionally, the relevant penalty provisions directly applicable to taxpayers reflect substantially the same certainty standards as well, and thus the advice that a practitioner will provide to a taxpayer about the certainty of a position will obviously be shaped in the context of instructing the taxpayer regarding his own penalty exposure. 26 U.S.C. § 6662(d)(2)(B) (2006).

34. 26 U.S.C. § 6694(a)(2)(C) (2006). Some commentators have advocated for adopting a "more likely than not" standard generally for all tax advice. See Wells, *supra* note 13, at 645 (explaining the "more likely than not" standard with regard to the Affordable Health Care for America Act).

35. 26 U.S.C. § 6694(a)(2)(A) (2006), as amended by Pub. L. No. 110-343, 122 Stat. 3880 (2008). The substantial authority standard is described in the relevant regulations as falling between the reasonable basis standard and the more likely than not standard. 26 C.F.R. § 1.6662-4(d) (2012). While assigning mathematical probabilities to such standards is fraught with peril, substantial authority has been pegged at roughly a 40% chance of success on the merits. Linda M. Beale, *Tax Advice before the Return: The Case for Raising Standards and Denying Evidentiary Privileges*, 25 VA. TAX REV. 583, 594 n.27 (2006); Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111, 119 (2009); J. Timothy Philipps, *It's Not Easy Being Easy: Advising Tax Return Positions*, 50 WASH. & LEE L. REV. 589, 606 (1993); Burgess Raby & William Raby, "Reasonable Basis" v. Other Tax Opinion Standards, 73 TAX NOTES 1209, 1209 (1996).

36. 26 U.S.C. § 6694(a)(2)(B), as amended by Pub. L. No. 110-343, 122 Stat. 3880 (2008). Reasonable basis is defined as "a relatively high standard of tax reporting, that is, significantly higher than not frivolous or not patently improper." Treas. Reg. § 1.6662-3 (as amended in

return preparer that violates these guidelines is subject to penalty.<sup>37</sup> Tax attorneys who do not meet the requirements of a return preparer may still find themselves in violation of the Government's rules for practice before the Internal Revenue Service.<sup>38</sup> In any event, an attorney violating these guidelines might be open to malpractice claims from his client.<sup>39</sup> As a result, if an attorney firmly believes a client's intended tax reporting of a transaction would violate these standards, it is unlikely that the attorney would continue to represent the client.<sup>40</sup>

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

### *B. Justifications for Tax Gatekeeping*

A number of arguments have been made to support a gatekeeping role for tax attorneys. Some have reasoned that because taxes are used for the benefit of society and taxpayers have an interest in seeing that taxes are paid, the relationship between taxpayer and Government is not a truly adversarial one, and therefore the zealous advocacy norms that

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2003). The regulations explain that it is not satisfied by a position that is "merely colorable" or "merely arguable"; however, if the position is based on one of the authorities set out in section 1.6662-4(d)(3)(iii) (as amended in 2003) of the Treasury Regulations (taking into account the relevance and persuasiveness of the authorities, and subsequent developments), the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard. Most commentators peg the reasonable basis standard as indicating an approximately 20% or greater chance of success on the merits. *See supra* note 35 and accompanying text.

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

38. 31 C.F.R. § 10.31(a)(1)(ii) (2011). *See supra* note 33 (discussing the extension of the return prepare standards to advice regarding a return position under Circular 230).

39. Jay Soled, *Tax Shelter Malpractice Cases and Their Implications for Tax Compliance*, 58 AM. U. L. REV. 267, 268-69 (2008).

40. An attorney is generally permitted to withdraw from representing a client in a number of situations, including a situation where "the client insists upon taking action . . . with which the lawyer has a fundamental disagreement." MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2011).

would apply to a normal civil controversy should not apply in the tax law setting.<sup>41</sup> Others have noted that tax practitioners are subject to direct regulation by the Government,<sup>42</sup> and can therefore be said to owe duties to the Government due to this special relationship.<sup>43</sup> A crasser justification is that gatekeeping helps lawyers maintain their personal reputation vis-à-vis the Government and therefore gatekeeping is in their personal interest, as well as indirectly in the general interest of all their current and future clients.<sup>44</sup>

However, the primary justification for a gatekeeping role in tax practice arises from the very nature of our tax system. The hallmark of the U.S. income tax system is its self-assessment nature.<sup>45</sup> That is, taxpayers determine how the tax law applies to their particular situation and then calculate and pay their tax liability accordingly.<sup>46</sup> Taxpayers have the initial burden to apply the law correctly to their personal situations. Indeed, in filing tax returns, taxpayers must affirm under penalties of perjury their belief that the return is “true, correct and

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41. Hatfield, *supra* note 8, at 16. Of course, while this is true in the abstract, once any particular tax dispute arises, the specific taxpayer involved will either pay more or less depending on the outcome and therefore, at least in a controversy setting the relationship between the taxpayer and the Government, is fully as adversarial as in any other litigation.

42. The Secretary of the Treasury has authority to regulate the conduct of, and to discipline, practitioners appearing before it. 31 U.S.C. § 330 (2006). Pursuant to this authority, Circular 230, codified at title 31, subtitle A, part 10 of the Code of Federal Regulations, sets forth detailed rules governing practice before the IRS and establishes a Director of the Office of Professional Responsibility to implement them and monitor practitioner compliance.

43. Hatfield, *supra* note 8, at 18. Of course, Circular 230 technically only governs practice before the IRS. Consequently, prior to 2004, some argued that these rules did not cover practitioners providing tax planning advice because practice before the IRS only covered audit defense, tax controversy work and other direct dealings with IRS personnel. *See, e.g.*, Ben Wang, Note, *Supplying the Tax Shelter Industry: Contingent Fee Compensation for Accountants Spurs Production*, 76 S. CAL. L. REV. 1237, 1266 (2003) (arguing that Circular 230 is limited in scope and does not apply to tax planning advice). Therefore, any gatekeeping obligation arising from Circular 230 would be limited to those controversy-related contexts. To address this issue, Congress added Subsection (d) to 31 U.S.C. § 330 to explicitly bring “written advice with respect to any entity, transaction plan or arrangement, or other plan or arrangement, which is of a type which the Secretary determines as having a potential for tax avoidance or evasion” within the ambit of Circular 230. Pub. L. No. 108-357, § 822(b), 118 Stat. 1418, 1587 (2004). Additionally, in 2005 Circular 230 was amended to provide “aspirational” best practices for practitioners providing tax advice generally. 31 C.F.R. § 10.33 (2011).

44. Hatfield, *supra* note 8, at 27–28.

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

46. Doran, *supra* note 35, at 113; Richard Lavoie, *Subverting the Rule of Law: The Judiciary’s Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 176 (2004) [hereinafter Lavoie, *Subverting the Rule of Law*].

complete.”<sup>47</sup> Of course, our tax laws are complex and understanding them in concept, let alone how they apply and interrelate in a given fact pattern, is often unclear. Consequently, taxpayers look to, and the efficient functioning of the tax system relies on, the advice of tax practitioners to guide them to the most appropriate interpretation of the law. Note that the taxpayer has the legal duty to report her correct tax based on the facts and relevant law.<sup>48</sup> Consequently, the goal of reporting the correct tax should also be the guiding principle for the tax adviser.<sup>49</sup>

The gatekeeping responsibility of the tax lawyer is not just premised on helping the client meet the legal obligation of arriving at the correct tax, but also on the Government's inability to adequately double-check each taxpayer's initial tax determination. Each year the Government can audit only a small fraction of all taxpayer returns.<sup>50</sup> If taxpayers routinely report their taxes based on the most aggressive interpretation of the law, instead of an evenhanded one, then the fisc will be harmed. Further, as the magnitude of such aggressive reporting increases, it breeds disrespect for the law and encourages others to push the

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47. See, e.g., IRS, DEP'T OF THE TREASURY, FORM 1040 (2012), available at <http://www.irs.gov/pub/irs-pdf/f1040.pdf> (illustrating the way in which taxpayers calculate their respective tax burdens); IRS, DEP'T OF THE TREASURY, FORM 1120 (2012), available at <http://www.irs.gov/pub/irs-pdf/f1120.pdf> (noting that U.S. Corporation Income Tax Returns require signature under penalty of perjury). In addition to general perjury consequences, this jurat also subjects a taxpayer to potential felony prosecution if the taxpayer signs the jurat and “does not believe [the return] to be true and correct as to every material matter.” 26 U.S.C. § 7206 (2006).

48. *Breland v. United States*, 323 F.2d 492, 496 (5th Cir. 1963) (stating that a taxpayer has the obligation “to keep books and records of his income for the purpose of determining the correct amount of income taxes due and payable”); *United States v. Norton*, 250 F.2d 902, 905 (5th Cir. 1958) (“[The] duty to return and pay the correct tax rests on the taxpayer.”); *Conforte v. Comm’r*, 74 T.C. 1160, 1178 (1980) (“[T]he self-assessment system place the responsibility of maintaining records and substantiating claimed deductions upon the taxpayer.”). Of course, reasonable minds might differ regarding the extent to which a taxpayer can resolve legal uncertainties in her own favor in arriving at a decision regarding her “correct” tax liability. See, e.g., Calvin Johnson, “*True And Correct: Standards for Tax Return Reporting*,” 43 TAX NOTES 1521, 1522–30 (1989) (considering various legislative proposals to clarify taxpayer positions and supporting self-assessment); Beale, *supra* note 35, at 594 (noting “the ambiguity of the existing rules regarding taxpayer’s obligation” to report their income and tax liabilities).

49. See Myron C. Grauer, *What’s Wrong with This Picture?: The Tension between Analytical Premises and Appropriate Standards for Tax Practitioners*, 20 CAP. U. L. REV. 353, 358 (1991) (opining that a practitioner’s duties derive from taxpayers’ duty to file true and correct tax returns); Gwen Thayer Handelman, *Counseling Ordered Liberty: Reply to a Commentary*, 9 VA. TAX REV. 781, 781–86 (1990) (explaining that a practitioner’s reporting position obligations are derivative of the client’s duties to comply with the tax laws).

50. Only 0.9% of all tax returns were subjected to audit in the Government’s 2011 fiscal year. IRS, 2011 DATA BOOK 22 (2011), available at <http://www.irs.gov/pub/irs-soi/11databk.pdf>.



envelope.<sup>51</sup> This byproduct would be a weight our tax system could not bear.

Moreover, when tax practitioners are involved in planning transactions or assisting taxpayers in developing their reporting positions for a completed transaction, it is questionable whether such work is truly adversarial, as that term has traditionally been interpreted. Our adversarial system of justice contemplates a competition among equals that is intended to efficiently and fairly yield the “truth.”<sup>52</sup> Thus, having a taxpayer make colorable arguments regarding his proper tax burden is justifiable once the issue has been joined with the Government (either administratively or in litigation), but making those identical claims on an initial tax return, when no adversary has yet entered the ring, impedes the arrival at a fair result.

As one commentator noted:

[The] fundamental role of tax practitioners [is] to identify for taxpayers those tax return positions that may be attempted and those that are beyond the pale . . . . In a real sense, the tax adviser is a gatekeeper who regulates the flow of issues into the system . . . . For self-assessment to be workable, tax advisers cannot fail to perform their gatekeeper function and cannot allow a floodtide of illegitimate issues to swamp the system. Accordingly, it is imperative that tax advisers apply professional standards with intellectual honesty in determining what positions have enough credibility to be able to be asserted.<sup>53</sup>

Of course, determining exactly how weak a position must be to trigger this gatekeeper intervention is a highly relevant question that has been the subject of much debate. But defining the relevant threshold is a question intellectually distinct from whether there should be a gatekeeping obligation at all.

### C. Arguments against Tax Gatekeeping

Although the existence of a tax gatekeeping obligation has traditionally been acknowledged by many in the tax bar,<sup>54</sup> there has

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51. Lavoie, *Taxpaying Ethos*, *supra* note 18, at 655–60.

52. Edward F. Barrett, *The Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME L. REV. 479, 479–80 (1962).

53. Green, *supra* note 9, at 1692–93.

54. BERNARD WOLFMAN ET AL., *supra* note 9, § 101.2; Mortimer M. Caplin, *Responsibilities of the Tax Advisor—A Perspective*, 40 TAXES 1030, 1032 (1962); Frederic G. Corneel, *Guidelines to Tax Practice Second*, 43 TAX LAW. 297, 301–02 (1990); Michael C. Durst, *The Tax Lawyer’s Professional Responsibility*, 39 FLA. L. REV. 1027, 1028, 1031 n.9, 1050 n.81 (1987); Linda Galler, *The Tax Lawyer’s Duty to the System*, 16 VA. TAX REV. 681, 687–98 (1997) (reviewing BERNARD WOLFMAN ET AL., *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* (1995)); Anthony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 VA. TAX

always been a segment of the bar that rejected this proposition,<sup>55</sup> including some very well-known tax lawyers.<sup>56</sup> While there are variations of degree, the primary argument against a gatekeeping role for tax attorneys is grounded in the zealous advocacy norm. At the extreme, some have expressed libertarian fears of the Government acting as “Big Brother” through attorneys being required to report on their own clients.<sup>57</sup> For others, the rejection of any gatekeeping role has arisen from blind allegiance to the concept that the role of a lawyer is purely to serve his client’s interests without any moral judgment.<sup>58</sup>

Others have viewed any weakening of a strong zealous advocacy norm as holding out the prospect of creating intolerable conflicts of interest between attorneys and their clients due to the attorney’s competing obligation to the Government.<sup>59</sup> A more nuanced version of this claim is that a client’s knowledge of his attorney’s dual obligations would make the client less forthcoming with underlying facts and

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REV. 589, 606 (2003); John M. Maguire, *Conscience and Propriety in Lawyer's Tax Practice*, 13 TAX L. REV. 27, 36 (1957); Francis C. Oatway, *Motivation and Responsibility in Tax Practice: The Need for Definition*, 20 TAX L. REV. 237, 254 (1965); Loren D. Prescott, Jr., *Challenging the Adversarial Approach to Taxpayer Representation*, 30 LOY. L.A. L. REV. 693, 715 (1997); Schenk, *supra* note 9, at 2005; David M. Schizer, *Enlisting the Tax Bar*, 59 TAX L. REV. 331, 338 (2006); Thomas N. Tarleau, *Ethical Problems in Dealing with Treasury Representatives*, 8 TAX L. REV. 10, 11 (1952); Randolph W. Thrower, *Preserving the Integrity of the Federal Tax System*, 33 N.Y.U. INST. ON FED. TAX'N 707, 709–10 (1975); Johnnie M. Walters, *Ethical and Professional Responsibilities of Tax Practitioners*, 17 GONZ. L. REV. 23, 24–26 (1981); Ann Southworth, Note, *Redefining the Attorney's Role in Abusive Tax Shelters*, 37 STAN. L. REV. 889, 891, 908–12, 918 (1985).

55. See, e.g., Mark Johnson, *Does the Tax Practitioner Owe a Dual Responsibility to his Client and to the Government?—The Theory*, 15 U.S.C. INST. ON FED. TAX'N 25 (1963) (arguing that a tax attorney’s primary responsibility is owed to his or her client); Moraine, *supra* note 11, at 190 (noting controversy over whether tax lawyers have a gatekeeping function); Camilla E. Watson, *Legislating Morality: The Duty to the Tax System Reconsidered*, 51 KAN. L. REV. 1197 (2003) [hereinafter Watson, *Duty Reconsidered*] (opining that if there is a duty to the tax system, clear normative expectations are necessary); Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 U. KAN. L. REV. 847, 851, 871, 909 (1999) (arguing that there is “no discrete duty owed by the lawyer *qua* lawyer either to society or to the tax system”).

56. E.g., Boris I. Bittker, *Professional Responsibility and the Preparation of Federal Income Tax Returns*, in PROFESSIONAL RESPONSIBILITY IN FEDERAL TAX PRACTICE 245, 270 (Boris I. Bittker ed., 1970); Randolph E. Paul, *The Lawyer as a Tax Advisor*, 25 ROCKY MTN. L. REV. 412, 429 (1953).

57. Hatfield, *supra* note 8, at 22.

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

59. Moraine, *supra* note 11, at 190.

motivations. As a result the lawyer's legal advice would be skewed. At the extreme clients concerned about the dual obligations might not seek legal advice at all.<sup>60</sup> Weakening the zealous advocacy norm, even in a planning context, undermines the bedrock taxpayer compliance required for the self-assessment system to function.<sup>61</sup> Intriguingly, this argument contains an internal contradiction. The argument maintains that a gatekeeping role will dissuade taxpayers from seeking legal advice (or hiding the true facts when seeking advice) and, as a result, taxpayers will take unjustified positions. The implication is that, in the absence of a gatekeeping obligation, taxpayers would get full, unfettered, pro-taxpayer advice, and yet the taxpayers would take *fewer* unjustified positions. Why would that be the case unless the presence of the attorney *in fact did* dissuade unwarranted taxpayer positions, implicitly recognizing that the attorneys must be performing at least some gatekeeping despite their purported zealous advocacy?

The interesting commonality between the traditional arguments for and against a gatekeeper role is that both sets of arguments largely devolve into a debate about the scope of the zealous advocacy norm and its appropriateness outside of a litigation or controversy context.<sup>62</sup>

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60. Johnson, *supra* note 56, at 30–31.

61. *Id.* at 30.

62. The theoretical underpinnings of the zealous advocacy norm have been the subject of extensive commentary since the 1970s. David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673, 673 (2012). An important contribution of this literature was the identification of three defining characteristics of the adversary system: (1) partisanship (zealously making all available arguments for your client); (2) neutrality (without regard to moral implications or possible injury to others); and (3) nonaccountability (and without moral censure to the attorney for doing so). *Id.* at 673–74. Identifying these factors led directly to observations regarding the central importance of having an independent arbiter involved as part of the adversary system. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 677–78 (1978). This insight prompted serious questions regarding the appropriateness of adhering to a zealous advocacy norm (and the concomitant lack of moral responsibility on behalf of attorneys) in contexts where an independent arbiter was lacking. LUBAN, *supra* note 3; Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613; Schwartz, *supra*, at 677–78. In recent years this discussion of the proper role of zealous advocacy outside traditional adversary system contexts has continued. *See generally* TIM DARE, *THE COUNSEL OF ROGUES? A DEFENSE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE* (2009) (arguing in favor of the use of zealous advocacy as a generally applicable norm); W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010) (arguing that, beyond traditional adversarial proceedings, attorneys should moderate zealous advocacy to uphold their duty to fairly apply the relevant law); Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 391–93 (2005) (developing a conflict of interest approach for resolving situations where an attorney's moral instincts run counter to his client's); Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 496 (2011) (recasting questions regarding the role of the adversary system in jurisprudential, rather than moral terms); Wendel, *supra* note 3, at 1169–70 (arguing that outside of traditional adversary settings attorneys should temper zealous advocacy norms in favor of upholding a duty

Those resisting a special gatekeeping obligation for tax practitioners often ground their opposition in part on the premise that the ethical obligations of attorneys should be the same regardless of their field.<sup>63</sup> As discussed earlier, this Article, and the recent evolution in legal ethics generally, favor the contrary position: that it is appropriate to modify the zealous advocacy norm in non-adversarial contexts.<sup>64</sup> Thus, the traditional arguments against a specific tax gatekeeping duty are weaker today than was true historically; the perception of the lawyer's role in non-adversarial contexts generally has undergone a transformation.

#### *D. The Practical Approach*

Beyond those actively arguing whether tax lawyers have a gatekeeping duty, a third segment of the tax bar has historically taken the position that the entire question is merely a matter of academic interest.<sup>65</sup> That is, the general obligation of taxpayers to file a correct return and other specific Government rules regarding factual disclosures by taxpayers and their representatives are sufficient to ensure taxpayer compliance with the self-assessment system without any need to imply any additional duty on tax practitioners.<sup>66</sup> Further, some have argued that as a matter of practical lawyering, most tax advisors would counsel their clients to act prudently in any event, whether or not any specific gatekeeping obligation actually existed. As one commentator stated:

[Y]ou are never really up against the gun to determine whether the practitioner does have dual responsibilities [to his client and to the government], but that it is just good business for you, for the client and for the government to try to minimize adversary aspects just as much as possible, and to increase the disclosure aspects just as much as possible, and thereby to improve relationships among the three of you as much as possible. . . . [It is a] mere academic exercise when we discuss the degree to which there is this dual relationship . . . [but] it is in our best interest to act as if there were a dual responsibility.<sup>67</sup>

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

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to the fair application of the relevant body of law).

63. Hatfield, *supra* note 8, at 22–24.

64. See *supra* notes 2–3.

65. Hatfield, *supra* note 8, at 27–28.

66. *Id.* at 31–32.

67. *Id.* at 27.

## II. THE DECLINE OF TAX GATEKEEPING

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

The tax bar's prevailing gatekeeping norm began to noticeably weaken with the wave of tax shelters focused on individual taxpayers that swept the country in the 1970s, and then dissipated further with the wave of corporate tax shelters that occurred in the 1990s. Both periods were characterized by the use of legal opinions to bless highly aggressive tax avoidance transactions.<sup>68</sup> In each situation, the tax bar was unable, or unwilling, to stem the tax shelter tide. This failure resulted in increased regulation of tax opinion practice by the Government, as well as changes to the statutory penalty provisions applicable to taxpayers. These tax shelter waves provide stark evidence of the abdication of the traditional gatekeeping function by a significant portion of the tax bar.

## 1. The Tax Shelters of the 1970s

Up through 1965, the prevailing (although by no means monolithic) position of the tax bar, as evidenced by the commentary of the time and actual prudent practice, was to endorse a gatekeeping function.<sup>69</sup> In 1965, the American Bar Association (ABA) Ethics Committee, in Formal Opinion 314 ("1965 Opinion"), seriously challenged this prevailing ethical norm.<sup>70</sup> The 1965 Opinion took the position that, since disputes with the Government regarding a taxpayer's tax liability were adversarial, and the taxpayer's filing of a tax return was the first step in any ultimate dispute, a lawyer ethically should resolve doubts in favor of the client in pre-return tax planning.<sup>71</sup> Further, the 1965 Opinion refused to treat the Government as a "tribunal" to which a higher duty of disclosure would be required.<sup>72</sup> The bottom line assessment in the 1965 Opinion was that a lawyer could ethically advise a client to take any position without any highlighting disclosure as long

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68. See generally Dennis J. Ventry, Jr., *Tax Shelter Opinions Threatened the Tax System in the 1970s*, 111 TAX NOTES 947 (2006) (describing the role of tax opinions in the tax shelters of the 1970s and 1980s); Rostain, *supra* note 11, at 92-94 (describing the use of tax opinions in the tax shelter transactions of the 1990s and 2000s).

69. See generally Hatfield, *supra* note 8 (describing legal ethics writings by tax lawyers promoting the gatekeeping function).

70. ABA Comm. on Prof'l Ethics, Formal Op. 314 (1965), *reprinted in* 51 A.B.A. J. 671 (1965).

71. *Id.*

72. *Id.* At the time of the 1965 Opinion, the relevant ethical canons contained heightened ethical rules regarding certain disclosures and other matters applicable to attorney interactions with the courts. For the analogous modern rules regarding candor toward tribunals, see MODEL RULES OF PROF'L CONDUCT R. 3.3 (2011).

as there was a “reasonable basis” for the position.<sup>73</sup> In reaching its conclusion, the 1965 Opinion completely ignored the reality of the self-assessment system and the taxpayer’s legal obligation to report their correct tax liability. Given the low Government audit rate, a lawyer’s advice to take an extreme tax return position without specific disclosure to the Government would most often result in a de facto final determination that the position was correct, rather than merely indicating that the position would not be considered fraudulent or frivolous by a court in litigation.<sup>74</sup> Despite its logical flaws, the 1965 Opinion was in line with the popular conception,<sup>75</sup> including that of the courts,<sup>76</sup> of tax law interpretation as a completely objective economic

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73. Formal Op. 314, *supra* note 70. While the “reasonable basis” standard was not specifically quantified in the 1965 Opinion, and arguably may have been misinterpreted by some then-practitioners, over time the accepted view has become that a “reasonable basis” reflects approximately a 20% chance of success on the merits. See 26 U.S.C. § 6694(a)(2)(B) (2006) (providing the reasonable basis standard for disclosed positions).

74. Gwen Thayer Handelman, *Constraining Aggressive Return Advice*, 9 VA. TAX REV. 77, 91–93 (1989).

75. See, e.g., *Legal Tax-Dodging Upheld by Morgan*, N.Y. TIMES, June 8, 1937, at 27 (noting J.P. Morgan’s statements that “taxation is a legal question . . . not a moral one” and that “Congress should know how to levy taxes and if it doesn’t know how to collect them, then a man is a fool to pay the taxes”). To see that this sentiment retains currency today, one need merely note the reaction of the 2012 Republican presidential nominee, Mitt Romney, who responded to a question regarding his personal tax situation as follows: “My view is I have paid all the taxes required by law. I don’t pay more than are legally due and, frankly, if I had paid more than are legally due I don’t think I’d be qualified to become president. I’d think people would want me to follow the law and pay only what the tax code requires.” *Transcript: ABC News’ David Muir Interviews Mitt Romney*, ABC NEWS (July 29, 2012), <http://abcnews.go.com/Politics/transcript-david-muir-interview-mitt-romney/story?id=16881787#.UF-0w42PWS0>.

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

calculus imbued with no moral, ethical, or societal considerations.<sup>77</sup> Similarly, the pro-taxpayer stance in the 1965 Opinion coincided with a decrease in certain broader societal norms that had acted as a counterbalance to this amoral approach to taxpaying obligations.<sup>78</sup>

The reasonable basis standard set forth in the 1965 Opinion became the accepted standard used by tax practitioners in providing tax return advice for the next twenty years.<sup>79</sup> Tax shelter activity exploded during this period.<sup>80</sup> These tax shelters typically involved creating investment vehicles that promised investors large tax benefits.<sup>81</sup> Typically, the claimed tax benefits for the investments were justified based on tax opinions provided by tax lawyers involved in developing the underlying investment transaction.<sup>82</sup> Unfortunately for all involved, these opinions typically did not forthrightly address the relevant law, were based on

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

78. For instance, the Great Depression, and tax protests in the early 1930s, prompted national and local “pay your taxes” campaigns initiated by various interested parties to boost compliance at a time of great budgetary and national strain. See DAVID T. BEITO, TAXPAYERS IN REVOLT: TAX RESISTANCE DURING THE GREAT DEPRESSION 101–29 (1989) (describing the effect of the “pay-your-taxes” movement in response to the Chicago tax strike). Similarly, during World War II, the United States went so far as to have Walt Disney produce a cartoon featuring Donald Duck as a reluctant taxpayer who is ultimately swayed to pay his taxes in order to help defeat the Axis powers. Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax during World War II*, 37 BUFF. L. REV. 685, 716 (1989). Finally, in the postwar period, prominent lawyers highlighted patriotic reasons for paying taxes in order to support the Government, asserting it was a vital component in the effort to defeat the communist threat to capitalism. Hatfield, *supra* note 8, at 11–13. However, as the Cold War dragged on (eventually giving way to détente) and the public became disenchanted with the personal and financial toll of the Vietnam War, these societal forces (i.e., patriotic sentiment engendered by World War II and the Cold War) supporting tax adherence began to weaken.

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

80. George K. Yin, *Getting Serious about Corporate Tax Shelters: Taking a Lesson from History*, 54 SMU L. REV. 209, 210–15 (2001) (describing generally the scope of the tax shelter problem in the 1970s and 1980s).

81. Often these were real estate investment partnerships exploiting the use of nonrecourse debt financing made possible by a 1947 Supreme Court decision. See *Crane v. Comm’r*, 331 U.S. 1 (1947). See also Christian C. Day, *Commissioner v. Tufts: The Fall of Footnote 37; The Confirmation of The Functional Relationship*, 45 U. PITT. L. REV. 803, 803 (1984).

82. James Holden, *New Professional Standards in the Tax Marketplace: Opinions 314, 346 and Circular 230*, 4 VA. TAX REV. 209, 212–17 (1985) (illustrating the syndicated tax shelters of the period and the role of tax opinions in facilitating these transactions).

incorrect factual assumptions, or failed to actually state the likelihood of success if the transaction were questioned by the Government.<sup>83</sup> While the number of tax attorneys actually involved in drafting such opinions and promoting these tax shelters was relatively small, the broader tax bar failed to effectively dissuade both their colleagues from engaging in this activity and the public from pursuing these aggressive transactions.<sup>84</sup>

As a result of the failure of the tax bar to effectively curtail the creation and use of these tax shelter opinions, the Government was forced to intervene more directly. In the early 1980s, to address certain aspects of the tax shelter problem, the Government proposed, and ultimately adopted in modified form, specific provisions of Circular 230 regulating the content of tax opinions used in these tax shelter transactions;<sup>85</sup> enacted various tax penalty provisions;<sup>86</sup> sanctioned increased disclosure, reporting and procedural requirements;<sup>87</sup> and passed numerous substantive changes to the tax law.<sup>88</sup> Similarly, courts

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83. *Id.* See also SPECIAL COMM. ON THE LAWYER'S ROLE IN TAX PRACTICE, THE ASS'N OF THE BAR OF THE CITY OF N.Y., THE LAWYER'S ROLE IN TAX PRACTICE (1983), reprinted in 36 TAX LAW. 865 (1982–1983) (depicting generally the tax lawyer's role in syndicating tax shelters).

84. While the investments made by individuals in these syndicated tax shelters often would not be of sufficient magnitude to warrant investors seeking an independent opinion on the tax consequences, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 346 (revised) (1982), reprinted in 68 A.B.A. J. 471, 471 (1982), one would have expected the organized bar to take a more public stand regarding this type of shelter activity. While the bar ultimately did act to provide guidance in Formal Opinion 346, *id.*, that opinion came only after many years of tolerating this type of tax shelter activity and only after the Government had proposed amendments to Circular 230 to directly regulate practitioner behavior that the bar felt were overly strict. See Tax Shelters; Practice Before the Internal Revenue Service, 45 Fed. Reg. 58, 594 (1980) (proposed Aug. 29, 1980) (proposing standards for providing opinions promoting tax shelters); Holden, *supra* note 82, at 217–18 (describing proposals requiring practitioners to exercise due diligence and issue favorable overall opinions).

85. While the Government's initially proposed amendments to Circular 230 were viewed by many practitioners as too strict, the changes ultimately adopted ended up instead as essentially codifying the core ethical standards the bar had adopted in Formal Opinion 346. Holden, *supra* note 82, at 222–24; Amendments to Circular 230, 49 Fed. Reg. 6719 (1984) (reporting final regulations).

86. See, e.g., 26 U.S.C. § 6659 (2006) (valuation overstatement penalty); 26 U.S.C. § 6661 (2006) (the substantial understatement penalty); 26 U.S.C. § 6700 (2006) (penalty for promoting abusive tax shelters); 26 U.S.C. §§ 6707–6708 (2006) (penalty for failing to furnish information regarding tax shelters).

87. See, e.g., 26 U.S.C. § 6045(e) (2006) (real estate transaction reporting); 26 U.S.C. § 6111 (2006) (promoter registration of tax shelters); 26 U.S.C. § 6112 (2006) (maintenance of investor lists by organizers and sellers of tax shelters); 26 U.S.C. §§ 6221–6231 (2006) (partnership audit rules); 26 U.S.C. § 7408 (2006) (injunctive action against promoters of abusive tax shelters).

88. See, e.g., 26 U.S.C. § 1250 (2006) (depreciation recapture rules); 26 U.S.C. § 704(b) (2006) (partnership allocation rules); 26 U.S.C. § 163(d) (2006) (investment interest limitations); 26 U.S.C. § 465 (2006) (at-risk loss limit rules); 26 U.S.C. §§ 1092, 1256 (2006) (straddle rules).



actively fought against such tax shelter activity.<sup>89</sup> While this type of tax shelter activity dissipated in the years following these changes, their contribution to that result is unclear since it appears that an unrelated statutory change—the adoption of the passive activity loss rules in 1986<sup>90</sup>—was the primary factor in the demise of this type of tax shelter activity.<sup>91</sup>

## 2. The Tax Shelters of the 1990s

Contemporaneously with the widespread tax shelter activity in the 1970s and early 1980s, there was a marked decline in practitioner adherence to the 1965 Opinion's reasonable basis tax reporting standard.<sup>92</sup> As a result, the ABA revisited the question of the proper tax reporting certitude standard and adopted Formal Opinion 85-352 of the ABA's Committee on Ethics and Professional Responsibility ("1985 Opinion").<sup>93</sup> The 1985 Opinion restated the relevant ethical standard for an attorney to counsel a tax return position as one that had "some realistic possibility" of success if litigated.<sup>94</sup> While this standard was somewhat higher than the former reasonable basis benchmark, its underlying premise was essentially the same as that of the 1965 Opinion. Both opinions considered filing tax returns as an aspect of the adversarial process and gave no serious consideration to the very different context between an actually joined adversarial proceeding and the mere filing of a tax return, especially in light of the necessarily low

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89. See, e.g., *Estate of Franklin v. Comm'r*, 544 F.2d 1045, 1046 (9th Cir. 1976) (rejecting taxpayer's deductions); *Frank Lyon Co. v. United States*, 435 U.S. 561, 583–84 (1978) (holding that financial transaction cannot solely be shaped by tax avoidance); *Hilton v. Comm'r*, 74 T.C. 305, 369 (1980) (holding taxpayers could not deduct their distributive partnership losses), *aff'd per curiam*, 671 F.2d 316 (9th Cir. 1982), *cert. denied*, 459 U.S. 907 (1982); *Comm'r v. Tufts*, 461 U.S. 300, 317 (1983) (disallowing taxpayers to deduct certain partnership property); *Odend'hal v. Comm'r*, 748 F.2d 908, 913–14 (4th Cir. 1984) (holding that taxpayers could deduct interest only to the extent of their property income); *Rice's Toyota World, Inc. v. Comm'r*, 752 F.2d 89, 96 (4th Cir. 1985) (holding that sham transactions do not entitle taxpayer to depreciate deductions).

90. See 26 U.S.C. § 469 (2006).

91. See Yin, *supra* note 80, at 218–20; Christine Rucinski Strong & Susan Pace Hamill, *Allocations Attributable to Partner Nonrecourse Liabilities: Issues Revealed by LLCs and LLPs*, 51 ALA. L. REV. 603, 607 (2000).

92. Holden, *supra* note 82, at 235.

93. Formal Op. 85-352, *supra* note 79.

94. *Id.* Since most tax advice and tax opinion work by practitioners would not fall within the specific strictures of the syndicated tax shelter rules then embodied in Formal Opinion 346 and Circular 230, the "realistic possibility" certitude level set forth in the 1985 Opinion became the primary ethical consideration for practitioners following its adoption. David Weisbach & Brian Gale, *The Regulation of Tax Advice and Advisers*, 130 TAX NOTES 1279, 1285 (2011). Phrased in terms of percentages, a realistic possibility of success was considered to represent a 33% chance of success on the merits. See authorities cited in *supra* note 35.

Government audit rate and the intended functioning of the self-assessment system.<sup>95</sup> Thus, the relevant ethical guideline applicable to tax practitioners in planning situations was only marginally higher in the post-1985 period than it had previously been.<sup>96</sup>

Similarly, while the 1980s heralded some changes in the civil penalties faced by taxpayers, the basic penalty structure remained one that left significant room for taxpayers and their legal advisors to undertake aggressive tax-motivated transactions. In rendering planning advice in the early 1990s, a tax lawyer primarily needed to consider only whether the proposed transaction would expose the client to either a negligence penalty<sup>97</sup> or a substantial understatement penalty.<sup>98</sup> As a general matter, a taxpayer could avoid both of these penalties if he obtained and relied in good faith on an opinion of counsel supporting the claimed position.<sup>99</sup> If the underlying transaction giving rise to the claimed tax benefit was one in which “the” principal purpose was the evasion or avoidance of tax—a “tax shelter” under federal law<sup>100</sup>—then the opinion as a practical matter needed to find that the position was more likely than not correct.<sup>101</sup> However, since a tax shelter for purposes of the substantial understatement penalty only existed when the tax motive exceeded that of any other motive, transactions with business or profitmaking purposes would generally not be covered by this more likely than not standard. In those cases, a taxpayer avoided any penalty for taking the position so long as “substantial authority” existed for the position.<sup>102</sup> In non-tax shelter situations where

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95. Durst, *supra* note 54, at 1047.

96. Dennis J. Ventry, Jr., *Cooperative Tax Regulation*, 41 CONN. L. REV. 431, 470 (2008); Soled, *supra* note 39, at 291; Beale, *supra* note 35, at 628–29.

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

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

99. This was true both due to the operation of the specific penalty provisions and due to an overarching “reasonable cause” exception under then section 6664. That section provided that no penalty would be applied to a taxpayer that was found, based on all the facts and circumstances, to have made a good faith effort to determine his proper tax liability (which could be shown by reasonable reliance on an opinion of counsel).

100. Former 26 U.S.C. § 6662(d)(2)(C); former 26 C.F.R. § 1.6662-4(g)(2).

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

102. If no tax shelter were involved, then the substantial underpayment penalty would be

substantial authority was ultimately found lacking, the taxpayer could often escape penalty due to reliance on a tax opinion finding that substantial authority existed.<sup>103</sup>

Thus, at the start of the 1990s, a tax practitioner could ethically counsel in favor of taking any position for which there was a realistic possibility of success. In some cases, however, the adviser would also have to alert the client to the need for disclosure of the position to eliminate the risk of penalties. Further, by supplying the client with a tax opinion at a substantial authority level, or in tax shelter situations at a more likely than not level, the tax practitioner could effectively insulate the client from potential civil penalties for taking the position. This was the ethical and statutory backdrop for the wave of tax shelter activity that occurred in the 1990s and early 2000s.

Unlike the prior era of tax shelters, which focused on syndicating tax loss transactions to individual taxpayers based largely on abusing the non-recourse debt rules, the new wave of tax shelters was developed to exploit a wide variety of vagaries in the tax law and then confidentially marketed to corporations and wealthy individuals as tax savings templates that could be readily adapted to the particular client's situation.<sup>104</sup> The two periods were similar, though, in that aggressive tax opinions and advisors played a central role in both creating and failing to impede these aggressive transactions. Again, in the face of the bar's unwillingness or inability to regulate its own behavior, the Government was forced to intercede with specific rules regulating the furnishing of tax planning advice and significant changes to the civil penalty provisions applicable to taxpayers.

The Government significantly expanded the rules in Circular 230 regarding written tax advice well beyond the narrow rules applicable to the syndication tax opinions of concern in the 1970s and 1980s. Today, Circular 230 contains detailed guidelines governing a wide variety of

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inapplicable as long as either (1) substantial authority existed for the position, or (2) the position was non-frivolous and it was adequately disclosed on the tax return. Former 26 U.S.C. § 6662(b)(2) and former 26 C.F.R. § 1.6662-4. While a tax opinion concluding that substantial authority existed obviously would not be conclusive regarding whether substantial authority actually did exist, the taxpayer's reasonable reliance on such an opinion would generally allow him to escape a penalty under the good faith exception of section 6664 even if the tax opinion turned out to be incorrect.

103. Weisbach & Gale, *supra* note 94, at 1288. See also *supra* note 99 (discussing the reasonable cause exception).

104. See generally Lavoie, *Deputizing the Gunslingers*, *supra* note 11, at 49–50; Joseph Bankman, *The New Market in Corporate Tax Shelters*, 83 TAX NOTES 1775, 1777 (1999); U.S. DEP'T OF TREASURY, OFFICE OF TAX POLICY, THE PROBLEM OF CORPORATE TAX SHELTERS (1999).

written advice provided in tax planning situations.<sup>105</sup> These rules were specifically intended to “send a strong message to tax professionals considering selling a questionable product to clients” and to “rein in practitioners who disregard their ethical obligations.”<sup>106</sup> Generally, the core requirements of these new rules for covered opinions are that tax advisors must be more vigilant in their factual inquiries, forthrightly deal with all the legal issues,<sup>107</sup> and explicitly reach a conclusion that the proposed tax treatment of an issue is at least more likely than not correct or, if there is only a lesser confidence level, explicitly disclose that the taxpayer cannot rely on the opinion for penalty protection purposes on that issue.<sup>108</sup>

In tandem with its direct regulation of practitioners’ written tax advice, the Government also made numerous changes in the relevant civil penalty provisions applicable to taxpayers. In general, these changes were aimed at making it more difficult for taxpayers to avoid penalties.<sup>109</sup> This goal was accomplished by increasing the certainty levels required to avoid the penalties, as well as by making it more difficult to use reliance on a tax opinion as a basis for exception from a penalty.<sup>110</sup> For instance, while the baseline requirement today for avoiding a substantial understatement penalty on non-tax shelter positions remains a substantial authority confidence level, the definition of “tax shelter” has been significantly expanded to include any plan or

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105. 31 C.F.R. §§ 10.35–10.37 (2011). The main rules related to “covered opinions.” A covered opinion is defined as any written advice regarding: (1) any transaction that is the same or substantially similar to abusive transactions specifically identified by the Government in published guidance (“listed transactions”); (2) any plan or arrangement where “the” principal purpose is tax avoidance or evasion, and most importantly; (3) any plan or arrangement where “a significant” purpose is tax avoidance or evasion if the opinion (a) expresses at least a more likely than not assessment on any issue in favor of the taxpayer (a “reliance opinion”), (b) is one the advisor knows, or has reason to know, will be used by the client or others to promote or market a transaction to taxpayers (a “marketed opinion”), or (c) is issued in conjunction with the adviser (i) agreeing to refund a portion of his fees if the taxpayer’s reporting position is not sustained or (ii) imposing a confidentiality requirement on the client. 31 C.F.R. § 10.35. Written advice not qualifying as a covered opinion is more lightly regulated under section 10.37.

106. IR-2004-152, 2004 IRB LEXIS 521 (I.R.S. Dec. 17, 2004), *available at* <http://www.irs.gov/irs/article/0,,id=132445,00.html>. (quoting then IRS Commissioner Mark W. Everson).

107. “Significant purpose” transactions can be limited to an examination of only certain issues, but market, listed, and principal purpose opinions must deal with all relevant tax issues.

108. For a more detailed review and explanation of the current Circular 230 rules on written tax advice, see David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 SEATTLE U. L. REV. 843, 850–67 (2006); Weisbach & Gale, *supra* note 94, at 1285–87.

109. Weisbach & Gale, *supra* note 94, at 1288.

110. *Id.* at 1288–89.

arrangement with a significant tax avoidance or evasion purpose.<sup>111</sup> If a substantial understatement of tax relates to such a tax shelter, then the penalty applies, despite the existence of substantial authority, unless the taxpayer can satisfy the general reasonable cause exception of 26 U.S.C. § 6664.<sup>112</sup> However, some uncertainty exists regarding the exact circumstances under which the reasonable cause exception is still available because the relevant regulations under section 6664 have not been updated to provide guidance regarding how the reasonable cause standard is to be applied to understatements on individual tax returns following the various amendments to section 6662.<sup>113</sup>

Finally, as in the 1980s, the Government and the courts moved to strike at the underlying nature of the tax schemes. In the 1980s this was accomplished through a wide variety of Governmental actions and court decisions.<sup>114</sup> In combating the more recent wave of tax shelters, the response included, *inter alia*, creating a new tax return schedule requiring certain corporations to specifically disclose uncertain tax positions,<sup>115</sup> codifying the economic substance doctrine (a judicial doctrine whose operation was previously subject to debate),<sup>116</sup> and courts utilizing common law anti-abuse concepts to strike down aggressive transactions.<sup>117</sup>

Following these Government and judicial actions, the latest wave of tax shelter activity seems to have subsided.<sup>118</sup> Nevertheless, while insufficient gatekeeping by the tax bar clearly contributed to the growth of such shelters, it is impossible to quantify the impact of the

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111. 26 U.S.C. § 6662(d)(2)(C) (2006).

112. Additionally, if the transaction is found to lack economic substance (within the meaning of 26 U.S.C. § 7701(o) (2006)) then the reasonable cause exception under section 6664 becomes inapplicable. Further, for certain reportable transactions incurring penalties under section 6662A, the requirements under section 6664 for showing reasonable cause are heightened. 26 U.S.C. § 6664(d) (2006).

113. 26 C.F.R. § 1.6664-4 (2011).

114. *See supra* notes 86–90.

115. *See* IRS, U.S. DEP'T OF TREASURY, FORM 1120 SCHEDULE UTP (2012), *available at* <http://www.irs.gov/pub/irs-pdf/f1120utp.pdf>.

116. 26 U.S.C. § 7701(o).

117. *See* ACM P'ship v. Comm'r, 157 F.3d 231, 253 (3d Cir. 1998); ASA Investorings P'ship v. Comm'r, 76 T.C.M. (CCH) 325 (1998), *aff'd*, 201 F.3d 505 (D.C. Cir. 2000); Black & Decker, 436 F.3d 431, 441–43 (4th Cir. 2006); Coltec Indus. v. United States, 454 F.3d 1340, 1360 (Fed. Cir. 2006); TIFD III-E, Inc. v. United States, 459 F.3d 220, 241 (2d Cir. 2006); Jade Trading, LLC v. United States, 65 Fed. Cl. 487, 491–93 (2005); Long Term Capital Holdings v. United States, 330 F. Supp. 2d 122, 171 n.68 (D. Conn. 2004), *aff'd*, 150 F. App'x 40, 2005-2 U.S.T.C. P 50,575 (2d Cir. 2005).

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

Government's increased direct regulation of tax practitioners in the waning use of these tax shelters.

*B. Factors Contributing to Weakened Gatekeeping*

The foregoing discussion demonstrated that while a gatekeeping function was historically an ethical norm to which the tax bar largely adhered (at least in practice, even if not specifically acknowledged), practitioners have increasingly rejected that norm over recent decades. It may be tempting for some to ascribe the tax shelter activity in modern times to the work of individual bad apples, or to bemoan the lack of individual moral character among modern day attorneys.<sup>119</sup> But this explanation misses the fact that it is not the intrinsic nature of the individuals involved that has changed. Individuals will always act in their own self-interest unless constrained by legal or societal constraints.<sup>120</sup> Despite the immutability of humankind, ethical norms do not remain static. What is currently ethically acceptable is primarily a function of society's prevailing moral framework, as adapted to the context of the particular subgroup to which the ethical norm is applicable.<sup>121</sup> So the question is not why individual practitioners today are "less" ethical than their predecessors, but rather, why does the tax bar no longer view a gatekeeping function as the appropriate ethical norm?

While numerous factors and changes over the recent decades have

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119. See Roger Colinvaux, *Charity in the 21st Century: Trending toward Decay*, 11 FLA. TAX REV. 1, 19 (2011); Morse, *supra* note 14, at 988; Joseph Bankman, *Tax Enforcement: Tax Shelters, The Cash Economy, and Compliance Costs*, 31 OHIO N.U. L. REV. 1, 9 (2005). However, the widespread nature of the tax shelter market in the 1990s and early 2000s belie the plausibility of merely ascribing the activity to "bad apple" taxpayers and tax practitioners. Lavoie, *Subverting the Rule of Law*, *supra* note 46, at 186.

120. See, e.g., THOMAS HOBBS, *LEVIATHAN* 91 (Richard Tuck ed., Cambridge University Press 1991) (1651); Evelyn Keyes, *The Just Society and the Liberal State: Classical and Contemporary Liberalism and the Problem of Consent*, 9 GEO. J.L. & PUB. POL'Y 1, 45 (2011) ("All laws are official societal constraints upon individual liberty and equality enforceable by the State. Laws officially determine who is equal to whom with respect to a given liberty or constraint and who is in a different position. They determine the boundaries, or scope, of the liberties we may exercise against each other and the penalties for their infringement. The enactment of legislation is thus integral to the generation and maintenance of the just society."); THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("If men were angels, no government would be necessary.").

121. Lavoie, *Subverting the Rule of Law*, *supra* note 46, at 126. See also Keyes, *supra* note 120, at 60 ("[T]he entire moral purpose of legislation, including both negative constraints and positive rights, is to enact and maintain through a moral and rational process those laws the people themselves deem both fair to each and conducive to the safety and happiness of all. When unfairness is perceived in the societal constraints upon negative or positive liberty or in the distribution of social goods, or when the need appears for legislation more conducive to fairness or prosperity, legislators are responsible for making equitable corrections to the law.").

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

### 1. Client Norms for Ethical Behavior

One of the key factors supporting the existence of a gatekeeping norm was the belief that by steering a client away from overly aggressive transactions, the tax lawyer was in fact acting in the client's best interest. Implicit in this position was the assumption that the client agreed that (1) a taxpayer has a duty to forthrightly pay its allocable portion of the nation's tax liability, and (2) the economic and public relations costs associated with defending questionable tax transactions outweighed the benefits from engaging in such transactions. Although this was the accepted perception in the 1950s, matters have changed drastically since then. While in the past business ethics were substantially coextensive with the prevailing morality of society, today there exists a schism where a businesswoman will think nothing of undertaking an action on behalf of her business that would not be condoned as a matter of personal behavior.<sup>122</sup> The creation of a separate business ethical culture has been driven by the idea that the proper focus of a corporation is the creation of profits for its owners.<sup>123</sup> As a result, while businesses may highlight their socially responsible actions as a public relations and marketing matter, shareholder profits remain king.<sup>124</sup> In such an environment, moral and ethical

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122. Lavoie, *Subverting the Rule of Law*, *supra* note 46, at 168–69.

123. See David Campbell et al., *Social Welfare, Positivism, and Business Ethics*, 11 BUS. ETHICS: A EUR. REV. 263, 268, 273 (2002) (discussing the ongoing conflict between business ethics and the drive for profits). See also Gordon Pearson, *Making Profits and Sweet Music*, 9 BUS. ETHICS: A EUR. REV. 191, 191 (2000) (noting that business ethics is a distraction that can lure a company away from its focus).

124. John Philip Jones, *Global Business: Oversight without Inhibiting Enterprise*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 262, 264 (2006) (“[Corporate social responsibility (“CSR”)] has little real influence on the operating policy of major companies. From a large sample of such companies, it was found for instance that their donations to charity account for less than 1 percent of their pretax profits. To such companies, CSR may have benefits from the public relations standpoint, but that is about all.”). Proponents of CSR often take the position that companies should place doing good for society above the bottom line. See, e.g., M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 581 (2009). However, many argue that, in practice, CSR efforts are merely co-opted by businesses for public relations and marketing purposes. Michael B. Runnels, Elizabeth J. Kennedy, & Rev. Timothy B. Brown, S.J., *Corporate Social Responsibility and the New*

considerations are perceived as at most window dressing and therefore they have no power to curb behavior harmful to society. As a result, the key constraints on any economically justified business behavior are almost exclusively those actually imposed by law.<sup>125</sup> But how are these legal constraints best applied? From a purely competitive vantage point, the goal of business is to minimize the impact of any legal constraints that do exist. Hence, the direction from clients to their lawyers is clear: interpret the law as narrowly as possible and without reference to moral or ethical considerations. The focus on the bottom line within the business world contributes to the perception that legal advisors serve merely as “hired guns” to further the goals of the client.<sup>126</sup> The function of lawyers, while more than mere scribes, became merely implementing exogenously determined business goals rather than being active participants in helping to shape, channel, modify, or (heaven forbid) question those announced goals. In the face of such clear client-driven directives to achieve legal conclusions consonant with the business bottom line, it became very difficult, if not impossible, for an attorney to justify a gatekeeping role as being in line with his client’s perceived best interests.

## 2. Legal Services Norms

As the prevailing business culture began to devalue the lawyer’s role as a counselor, lawyers themselves began to devalue that role.<sup>127</sup> This trend found a traditional antecedent in the historical place of zealous advocacy in litigation. Further, just as clients were succumbing to competitive pressures to focus solely on their bottom line profit, competitive pressures were building in the legal marketplace. Where lawyers practicing in law firm settings had traditionally provided legal services, there was a move by businesses to pull more legal talent in-house.<sup>128</sup> This development not only gave these in-house lawyers a

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*Governance: In Search Of Epstein’s Good Company in the Employment Context*, 43 AKRON L. REV. 501, 532 (2010); Edwin M. Epstein, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 AM. BUS. L.J. 207, 212 (2007).

125. Lavoie, *Subverting the Rule of Law*, *supra* note 46, at 169.

126. Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 381 (2001). *See generally* RICHARD L. ABEL, *AMERICAN LAWYERS* 247 (Oxford 1989) (“[L]awyers are hired guns: they know they are, their clients demand that they be, and the public sees them that way.”); MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 72 (3d ed. 2004) (describing the history of client-centered representation); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 2–3 (2005) (same).

127. Pearce, *supra* note 126, at 381.

128. *See also* JOHN C. COFFEE, JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE*



more myopic view of their role in serving the client, but also provided businesses with their own sophisticated legal capabilities. This movement towards in-house law practice both decreased the revenue flowing to law firms by taking away many run-of-the-mill legal questions<sup>129</sup> and provided clients with the ability to question legal advice and take a more active role in shaping the guidance ultimately provided by their outside counsel.<sup>130</sup>

Finally, lawyers began facing competition from accounting firms and consulting groups that added lawyers as employees and partners to provide expanded advice to their clients.<sup>131</sup> While these newly hired lawyers could not draft operative documents for clients without running into issues regarding the unauthorized practice of law by their non-licensed employers,<sup>132</sup> they could provide sophisticated tax planning advice tailored to their client's desires.<sup>133</sup> The expansion of accounting

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GOVERNANCE 195 (2006); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2071–72, 2113–14 (2010) (discussing the different roles and skill sets of in-house and outside counsel).

129. COFFEE, *supra* note 128, at 224. See also Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 324 (2011) (“The rise of in-house counsel has led to greater price transparency and opportunities to rationalize legal services, resulting in greater economic pressure on external attorneys.”).

130. Wilkins, *supra* note 128, at 2071 (“Due in large measure to the growth of in-house legal departments, corporate clients today have a far greater ability to hold their lawyer-agents to full-throated standards of partisan advocacy . . .”).

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

132. Since the time of the Great Depression, state bar associations have actively sought to prevent non-lawyers, especially accountants, from engaging in the unauthorized practice of law. Kathryn Lolita Yarbrough, *Multidisciplinary Practices: Are They Already among Us?*, 53 ALA. L. REV. 639, 641 (2002). These efforts led to the adoption of ethical rules effectively prohibiting lawyers from engaging in multi-disciplinary practices (MDPs) (essentially a firm in which lawyers and nonlawyers share their fees). *Id.* This approach continues today in the model rules, which provide that a “lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.” MODEL RULES OF PROF’L CONDUCT R. 5.4(b) (2011). Notwithstanding this limitation, accounting firms began claiming that their attorney partners and employees were not practicing law based on traditional (and federally sanctioned) exceptions allowing accountants to represent clients in federal tax matters. John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 110–12 (2000); Laurel S. Terry, *A Primer on MDPs: Should the “No” Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 881–82 (1999). The one function such firms typically eschewed was the actual drafting of contracts and other operative documents, since that activity carried a higher risk of being seen as the actual practice of law. Dzienkowski & Peroni, *supra*, at 111–12.

133. The effective ability of accounting firms to engage in MDPs in the tax realm led the ABA to reconsider its historic prohibition on MDPs in the late 1990s. However, the ABA’s House of Delegates rejected the proposed relaxation of the MDP prohibition. See generally Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP*

and consulting firms into the tax law market was further exacerbated by the international operations of many businesses and the integration of legal and accounting functions in many international jurisdictions.<sup>134</sup> Thus, tax lawyers were faced not just with competition from other law firms, but also with competition from in-house legal functions and non-legal service providers. In turn, such competition, coupled with clients who were both less loyal to their historical outside legal counsel<sup>135</sup> and more willing to take their business to the provider who would sanction their preferred interpretation of the law, inevitably led to a race to the bottom in legal services,<sup>136</sup> where transactions were judged using the lowest common denominator of technical compliance with the literal terms of the law.<sup>137</sup>

### 3. Judicial Norms of Statutory Interpretation

A related factor in attorney perceptions regarding the appropriateness of a tax gatekeeping role derived from the judiciary's attitude toward tax avoidance and statutory interpretation.<sup>138</sup> This factor is particularly significant because it directly contributes to the dynamic encouraging the previously discussed factors. Historically, the judiciary took a non-literal approach to interpreting tax statutes and developed numerous judicial anti-abuse doctrines aimed at curbing overly aggressive taxpayer positions.<sup>139</sup> Even as courts formally endorsed the position that structuring transactions to minimize taxation was permissible, they

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*Debate in America*, 78 FORDHAM L. REV. 2193 (2010) (providing a history of the MDP debate). The prospect for relaxation of the MDP prohibition was recently raised in the context of the ABA's Ethics 20/20 initiative, but the Ethics 20/20 committee has recently announced that it will not propose any change to the nonlawyer ownership prohibition. Press Release, ABA Comm'n on Ethics 20/20, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120416\\_news\\_release\\_re\\_nonlawyer\\_ownership\\_law\\_firms.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf).

134. Dzienkowski & Peroni, *supra* note 132, at 113–17; Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multidiscipline Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 190–94 (1997).

135. See COFFEE, *supra* note 128, at 194–96 (discussing the change in the economic relationship between corporate lawyer and client and how this led to a decrease in loyalty by corporate clients to their outside counsel).

136. Simon, *supra* note 9, at 1072–73 (noting that ideology and self-interest could equally lead business lawyers to either a “gladiator” or “gatekeeper” model, and that under the “gladiator” approach, “we would expect lawyers . . . to compete for clients in terms of their relative willingness to assist in the evasion or frustration of costly regulation through aggressive planning and litigation . . . and to embrace, or at least tolerate, a race to the bottom”).

137. Beale, *supra* note 35, at 597; Lavoie, *Deputizing the Gunslingers*, *supra* note 11, at 55–59.

138. Lavoie, *Subverting the Rule of Law*, *supra* note 46, at 183.

139. *Id.* at 177–78 (and cases cited therein).

typically rejected the particular tax-motivated transaction in the case before them.<sup>140</sup> Thus, while the law created a line between acceptable and unacceptable behavior, the edges of that line were often ill-defined.

In creating a level of uncertainty regarding the exact boundaries of the law, courts fashioned an atmosphere conducive to an efficient and fair self-assessment system. When taxpayers and practitioners knew that courts could be expected to reject legal positions based on unintended literal interpretations of the law or to reach results at odds with the tax policy underlying the law, they were encouraged to be more circumspect and evenhanded in their initial tax positions. Taxpayers were less inclined to view the law as merely a system of specific rules to be gamed by clever artifice since such attempts could be expected to fail. Similarly, practitioners were on stronger footing in dissuading a taxpayer from undertaking a tax-motivated transaction since the likelihood of the transaction withstanding judicial scrutiny was greatly reduced. Thus, a strong judicial norm of dynamic interpretation of tax statutes promoted a gatekeeping function by effectively aligning the interests of both clients and practitioners. Expanding the area of uncertainty regarding the exact reach of the tax law restored some of the legal constraints on overly aggressive planning and created room for attorneys to assert ethical considerations as relevant when navigating the zone of legal uncertainty, thereby allowing both ethical and legal considerations to act as constraints on aggressive taxpayer actions.<sup>141</sup>

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

141. Lavoie, *Subverting the Rule of Law*, *supra* note 46, at 179.

As the judiciary moved away from this traditional approach to tax cases, it created uncertainty regarding how the law should be viewed and forced practitioners to directly face the conflict between representing their clients zealously and their role in maintaining a fair and efficient functioning of the self-assessment system.<sup>142</sup> Corporate taxpayers who saw the judiciary upholding the aggressive tax transactions of their competitors felt compelled to engage in such activity themselves.<sup>143</sup> This was both a competitive necessity and a breaking down of the moral norm of paying one's fair share of the country's tax burden. By giving full voice to JP Morgan's view that taxation was a purely legal matter devoid of moral concerns,<sup>144</sup> rather than mere lip service, the judiciary bolstered the emerging business focus on profits and cost-benefit analysis as the only legitimate constraints on behavior. In turn, business clients generally had no patience for attorneys who attempted to dissuade desired transactions based solely on ethical or anti-abuse notions. Lawyers not acceding to this new reality found themselves at a distinct disadvantage.

Further, even lawyers who traditionally would have advised against aggressive transactions based on non-literal legal interpretations and anti-abuse notions had to question the validity of their own legal reasoning. At its core, the job of a lawyer is to predict the future for his clients. As courts muddied the water regarding how they would approach the application of tax statutes, the attorney's job became much more difficult. Even if a particular attorney believed a tax-motivated transaction was too good to be true, one that she would not uphold if she were a judge, she would know that a judge with a more literalist disposition might well condone the transaction.<sup>145</sup> How could the attorney in good conscience advise a client against a transaction when an identified segment of the judiciary would likely find the transaction perfectly legal? Given the lawyer's clear ethical duty to assist her client and the undeniable competitive pressure facing her, it is little wonder that even practitioners predisposed to undertaking a gatekeeping function chose to abandon that older ethical norm as a viable standard for ongoing behavior.

#### 4. Decreased Societal Impetus toward Taxpaying

Finally, broader changes in American society influenced the tax bar's view of its gatekeeping role. Historically, there was a moral component

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142. *Id.* at 190–91.

143. *Id.* at 181–82.

144. *See supra* note 75.

145. Lavoie, *Subverting the Rule of Law*, *supra* note 46, at 182–83.

to taxpaying in the United States.<sup>146</sup> While this began to give way in the 1930s,<sup>147</sup> World War II saw a renewed patriotic impetus toward taxpaying.<sup>148</sup> Even after the War, the United States found itself locked in an ideological struggle with Communism that supported a taxpaying impetus on the public.<sup>149</sup> However, as society moved beyond these periods of crisis,<sup>150</sup> the viewpoint that taxation was purely a forced extraction of wealth from citizens without any moral or ethical component began to reassert itself.<sup>151</sup>

Since the mid-1960s, the country has seen a general decline in the level of respect for, and trust in, government and other institutions.<sup>152</sup> The portion of Americans who responded that the federal government can be trusted “to do what is right” most of the time or just about always fell from 76% in 1964 to 30% in 2008.<sup>153</sup> This general decline in trust had a direct impact on tax compliance.<sup>154</sup> As society moved further

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146. See, e.g., JOHN S. WISE, *A TREATISE ON AMERICAN CITIZENSHIP* 74 (1905) (depicting tax evasion as unpatriotic and faithless).

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

148. See Jones, *supra* note 78, at 716 (discussing income tax propaganda in American films during World War II).

149. Hatfield, *supra* note 8, at 11–13.

150. John R. Alford, *We’re All in This Together: The Decline of Trust in Government, 1958–1996*, in *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* 28, 45–49 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001) (suggesting that in the United States a low level of trust in the government is the norm, and that external threats to the country cause that trust to increase temporarily).

151. Lawrence Zelenak, *Justice Holmes, Ralph Kramden, and the Civic Virtues of a Tax Return Filing Requirement*, 61 *TAX L. REV.* 53, 65–69, 78–79 (2007) (noting the decline in media perceptions of taxpaying obligations from strong portrayals of honest taxpayers in the 1950s and 1960s, to mixed messages in the early 1970s, to apparent endorsements of tax cheating in the 1990s; and linking this decline in part to societal changes during that period that have weakened public trust in government to tax and spend wisely).

152. SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP: BUSINESS, LABOR AND GOVERNMENT IN THE PUBLIC MIND* 15 (Johns Hopkins University Press rev. ed. 1987) (1983) (“[T]he early 1960s turned out to be a high-water mark in the history of the American public’s attitudes toward their key social, political and economic structures.”); Anthony King, *Distrust of Government: Explaining American Exceptionalism*, in *DISAFFECTED DEMOCRACIES* 74, 95–97 (Susan J. Pharr & Robert D. Putnam eds., 2000) (noting as causes of increased distrust of government, among other things, the public reaction to the Vietnam War and Watergate, the resurgence of federalism, and the increased polarization and declining civility of political discourse).

153. *THE AM. NAT’L ELECTION STUDIES, THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR* tbl.5A.1 (2010), available at [http://electionstudies.org/nesguide/toptable/tab5a\\_1.htm](http://electionstudies.org/nesguide/toptable/tab5a_1.htm).

154. See Kornhauser, *supra* note 25, at 873–75 (noting that distrust of government has increased markedly since the mid-1960s and highlighting the linkage between such decreased trust and decreased taxpayer compliance with the law); Lavoie, *Taxpaying Ethos*, *supra* note 18,

away from the ideal that taxpaying was a moral and patriotic duty, the role of tax attorneys in advising their clients shifted as well. Indeed, these same societal forces can be seen behind the general decline in respect for attorneys since the mid-1960s.<sup>155</sup>

### III. THE FUTURE OF TAX GATEKEEPING

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

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

This Article takes the position that we should care and that it is worthwhile to resurrect a gatekeeping function for the tax bar. The main rationale in support of this view is that an attorney's role as a zealous advocate should and must be circumscribed to ensure that the self-assessment system functions properly and that taxpayers continue to perceive the tax system as fair. A breakdown in respect for the tax system could well lead to widespread tax avoidance and a collapse of the stable taxpaying ethos in the United States.<sup>156</sup> A strong gatekeeping norm within the tax bar can help forestall this possibility and promote the rule of law.

The historical argument that an ethical gatekeeping norm was unnecessary because it was sufficiently covered by an attorney's general ethical obligations<sup>157</sup> has clearly been refuted by the waves of tax shelter activity in recent decades. At the same time, the very existence of this tax shelter activity can be utilized to argue against continuing to assert a gatekeeping norm.<sup>158</sup> This argument uses the failure of the

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at 650–55.

155. Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 811–16 (1998) (noting 1960 as a possible high point for public respect for lawyers, which was followed by a marked descent in media portrayals of attorneys from “unalloyed” heroes to “flawed” and “morally ambiguous” figures).

156. See generally Lavoie, *Taxpaying Ethos*, *supra* note 18, at 660–71 (arguing that trust in Government and other taxpayers supports tax compliance).

157. Hatfield, *supra* note 8, at 22–24, 31–32.

158. Watson, *Duty Reconsidered*, *supra* note 55, at 1198, 1236–37 (arguing against the traditional “duty to the system” standard and for legislatively creating a normative standard to which tax practitioners must adhere “because it is now painfully clear that relying on an ideological “‘duty to the system’ has not worked”). A gatekeeping ideal “should be a normative one in which clear expectations are firmly established, and the ability of all tax practitioners to comply is feasible in practice. But this has not been the case, and that has led to our present

historical gatekeeping norm to prevent past tax shelter waves as evidence that the traditionally articulated gatekeeping obligation was too ill-defined to serve as an enforceable normative guide for actual practitioner actions.<sup>159</sup> Therefore, according to this argument, advocating for a gatekeeping function is a misguided effort that will never stand up to the competitive pressures practitioners face and thus can never serve as a realistic constrain on aggressive taxpayer behavior.

It is undoubtedly true that practitioners abysmally failed as gatekeepers during periods of tax shelter activity in the past forty years. However, this observed failure is most likely due to the rejection of gatekeeping as a legitimate ethical norm by a majority of practitioners, despite the legal academy routinely asserting during this period that a gatekeeping role existed for tax lawyers.<sup>160</sup> As discussed earlier, ethical behavior is ultimately determined by the specific culture (or sub-culture) creating the norm.<sup>161</sup> Merely stating that any particular norm should exist in a society is nonsense, and attempting to impose a norm from the outside, without the means and will to enforce it, is an exercise in futility.<sup>162</sup> To be effective, an ethical norm must reflect the consensus of those to whom it applies and be subject to effective internal enforcement.<sup>163</sup> While gatekeeping within the tax bar has often been proclaimed as the accepted ethical norm, at least since the 1965 Opinion, that has never been the ABA's formal opinion.

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

An alternative response may be that Government actions have already interceded to such a degree that recognizing an ethical norm of gatekeeping is irrelevant and unnecessary today. Following the Government's recent changes to Circular 230,<sup>164</sup> the civil penalty

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problems." *Id.* at 1198.

159. *Id.* at 1220–22.

160. See *supra* notes 9 and 11 and accompanying text (discussing commentators' belief that tax attorneys have an obligation to promote a fair system and the rejection of this obligation by tax attorneys in recent decades).

161. See *supra* note 121 and accompanying text (noting that the prevailing moral framework in society determines what is ethically acceptable).

162. Lavoie, *Subverting the Rule of Law*, *supra* note 46, at 136–38.

163. *Id.* at 138.

164. See *supra* notes 105–08 and accompanying text (discussing the current Circular 230 and

provisions,<sup>165</sup> the codification of the economic substance doctrine,<sup>166</sup> and its efforts to increase taxpayer disclosure of questionable transactions,<sup>167</sup> there is little discretion left to tax advisors to promote abusive transactions or assist their clients in pursuing such schemes.<sup>168</sup> In effect, the failure of the bar to come to a consensus and enforce an ethical gatekeeping norm has led the Government to impose the functional equivalent as a matter of law—as evidenced by the recent downturn in tax shelter activity.<sup>169</sup>

Of course, if this position is correct, then the bar should have no problem formally adopting and embracing an ethical gatekeeping norm that merely confirms the existing legally imposed reality. Unfortunately, we see no impetus to conform the ABA's formally announced standards to this supposed new reality.<sup>170</sup> Further, the nature of a legally imposed rule is that it applies only in the specific circumstances covered, and we have seen how adept the tax bar can be in finding loopholes in structures of legally imposed rules.<sup>171</sup> If there is no ethical standard to backstop the Government's imposed rules, then there is no incentive to prevent attorneys from exploiting any areas not specifically governed by the legally imposed rules. In these gap areas, tax attorneys would be free to pursue the same destructive tax shelter activity that has occurred in recent decades.

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the ethical obligations it imposes on written tax advice given by tax attorneys).

165. *See supra* notes 109–13 and accompanying text (discussing changes to civil penalty provisions that make it more difficult for taxpayers to avoid penalties associated with tax-avoidance transactions).

166. *See supra* note 116 and accompanying text (summarizing this judicial doctrine that was codified to combat the most recent wave of tax shelter activity).

167. *See supra* note 115 and accompanying text (discussing Form 1120 Schedule UTP that requires certain corporations to disclose uncertain tax positions).

168. *See, e.g.,* Watson, *Duty Reconsidered*, *supra* note 55, at 1237 (noting that legislation would allow fewer opportunities for tax attorneys to promote aggressive positions).

169. *See supra* note 14 and accompanying text (suggesting that the 2008 economic downturn also played a role in slowing tax shelter activity).

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

171. *See supra* note 15 (quoting various legal professionals describing the tax bar's ability to develop tax shelters).



While it may turn out that the current set of rules provides an all-inclusive barrier to attorney participation in tax shelter activity, there is reason to be skeptical of this conclusion. After the amendments to Circular 230 in the 1980s and the adoption of statutory rules to curtail tax shelter transactions, tax shelter activity dropped for a few years before new tax shelter schemes arose in the 1990s.<sup>172</sup> While the Government's actions spelled the demise of certain types of tax shelters, the drop off in activity may have merely resulted from the retooling of the industry. Conversely, the decline in present day tax shelter activity may be due more to the fact that taxpayers have less income and gain to shelter as a result of the worst economic downturn in the United States since the Great Depression.<sup>173</sup> When the economy turns around in the coming years, it is likely that we will once again see more pressure for tax shelter transactions. Whether the Government's current rules will effectively contain that pressure remains to be seen.

As a final point in favor of attempting to refine and reassert a tax gatekeeping norm, it should be noted that reaching consensus on such a norm is in the best long-term interest of both the bar and clients. The changes to Circular 230 and the penalty provisions in response to the tax shelter wave in the 1990s have placed significant additional burdens on practitioners and their clients.<sup>174</sup> These rules have clearly put real constraints on the relationship between clients and their attorneys and arguably dissuade the provision of some legitimate tax advice and planning.<sup>175</sup> Should lawyer-assisted tax shelter activity become rampant again, the bar should expect the Government to impose even more draconian restrictions on it. Taking concrete steps today to prevent future abuses and thereby forestall any further potentially overbroad and restrictive government intrusions into the attorney-client relationship should be supported as in the best interest of all involved.

### *B. Creating an Accepted and Sustainable Gatekeeping Norm*

If a gatekeeping norm is desirable in the tax area, but appears to no longer exist, what can be done to create one anew? Most commentators in the last few decades have maintained that tax practitioners do in fact

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172. The tax shelters of the 1970s and 1980s fell out of use following the adoption of the passive activity loss restrictions in 1986. *See supra* note 91 and accompanying text.

173. Kaye, *supra* note 14, at 604. For a detailed discussion of the economic downturn, see JERRY M. ROSENBERG, *THE CONCISE ENCYCLOPEDIA OF THE GREAT RECESSION 2007-2010* (2010).

174. *See generally* Weisbach & Gale, *supra* note 94, at 1279–80 (discussing the changes to the regulatory structure in response to the proliferation of tax shelters in the 1990s).

175. Charles A. Rose, Note, *The Tax Lawyer's Dilemma: Recent Developments Heighten Tax Lawyer Responsibilities and Liabilities*, 2011 COLUM. BUS. L. REV. 258, 260–62.

have an ethical gatekeeping obligation.<sup>176</sup> This Article has demonstrated that while, as a tax policy matter, such an ethical obligation should exist—and did exist at least for a time—the modern reality of tax shelter activity belies its continued survival. The problem is that ethical rules, and for that matter even rules of law, are worthless if they are not truly accepted and internalized by the group governed by such rules. Thus, if a gatekeeping norm is desirable, merely proclaiming its existence will by itself do little to bring that norm into actual existence. This is especially true when powerful forces, both internal and external to the group, push members of the group toward retaining the existing norm.<sup>177</sup> Reestablishing a gatekeeping norm within the tax bar requires changing the existing culture of the tax bar, which in turn requires altering or exploiting various elements of the broader societal milieu in which the tax bar operates.

### 1. Reaching Consensus and Announcing a Standard

The imposition of an ethical rule on a group does not guarantee that the rule will be followed. To achieve a practical reality, the rule must be generally accepted as correct by those subject to it,<sup>178</sup> and be subject to effective enforcement mechanisms to dissuade non-compliant behavior.<sup>179</sup> Essentially, there must be a consensus regarding the rule for it to have legitimacy. Consequently, internally debated and

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176. See *supra* notes 9 and 11 (listing various recent legal articles that advocate for a gatekeeping function within the tax bar).

177. See Maggi Carfield, *Participatory Law and Development: Remapping the Locus of Authority*, 82 U. COLO. L. REV. 739, 770 (2011) (“It is undeniable that cultures are dynamic and change over time. But . . . [u]nless there is some internally driven desire to change, reformers will likely encounter a great deal of resistance. Change is likely to be a more organic and incremental process.”); Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1321 (1998) (“[P]rofessional norms that comprise the zealous advocate ideal may work against attempts to deter lawyers from conduct that harms the legal framework. Put simply, a lawyer may value her reputation as a ‘scorched-earth, take-no-prisoners’ litigator and be willing to risk even severe legal sanctions to maintain it. In conceding a role for social norms, regulatory legal ethics ultimately forsakes its original project of developing an account of a regulatory regime to cover an abstract ‘bad’ lawyer—a lawyer stripped down to a maximizer of short-term financial self-interest. In its place, a regulatory approach must embark on a more ambitious program. At the very least, it needs a thicker empirical account of social norms and their interactions with legal norms and market forces.”).

178. Rostain, *supra* note 177, at 1340 (“For [ethical] regulation to be effective, it needs to be undergirded by widespread commitments among lawyers to the values reflected in the regulatory enterprise. A central concern of legal ethics scholarship must be to investigate, articulate, and shore-up such collective commitments in the context of law practice.”); Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT L. REV. 693, 729–30 (2006) (“What the . . . study suggests . . . is that lawyers will be more likely to obey new rules regarding professional behavior if the rules reflect values that are moral in their content and are legitimate in the sense that they are supported by a consensus within the bar.”).

179. Lavoie, *Subverting the Rule of Law*, *supra* note 46, at 117.

democratically adopted norms are likely to be obeyed, even by those who did not originally favor the adopted norm.<sup>180</sup> Of course, establishing consensus around an ethical standard is immeasurably harder when there is a preexisting standard to the contrary.

This is unfortunately the predicament facing a renewed tax gatekeeping norm. While the extant literature maintains that practitioners have such an ethical obligation, and the Government informally concurs, the ABA's pronouncements in the 1965 Opinion and the 1985 Opinion are premised on treating tax practice as an adversarial endeavor.<sup>181</sup> Despite the proliferation of tax shelter activity in the 1990s and the significant changes to Circular 230 and the civil penalty provisions, the ABA has not revisited the 1985 Opinion. Further, the broader legal profession has long embraced an all-encompassing zealous advocacy norm that is only slowly changing.

The first step in reviving a tax gatekeeping norm is to withdraw the 1985 Opinion and replace it with one explicitly endorsing a gatekeeping role in tax planning. On its face this presents a "which came first" problem, since announcing the new ethical norm would help promote consensus around it, but consensus regarding the norm is presumably an essential element in adopting the new norm in the first place. However, consensus is often formed through open discussion. Even though the required consensus may be presently lacking, if the ABA were to undertake a new study on the provision of tax advice to clients, a new consensus could well emerge. Indeed, there are a number of changes in recent years that could be brought to bear in favor of adopting a gatekeeping norm, including (1) the growing academic acceptance that restraining the zealous advocacy norm outside of (and sometimes even

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180. See, e.g., James Alm, Betty R. Jackson & Michael McKee, *Fiscal Exchange, Collective Decision Institutions and Tax Compliance*, 22 J. ECON. BEHAV. & ORG. 285, 301–02 (1993) (finding higher compliance when a matter is voted on and when the outcome has wide support). Accord T.R. TYLER, *WHY PEOPLE OBEY THE LAW* 19–57, 161–78 (1990) (arguing that people generally comply with the law if they perceive the process that leads to this law as fair). See also James Alm, Gary H. McClelland & William D. Schulze, *Changing the Social Norm of Tax Compliance by Voting*, 52 KYKLOS 141, 163 (1999) (concluding that individual compliance behavior can be effected by the outcome of a vote on the strength of an enforcement regime for a fiscal system); Bruneo Feld & J.R. Tyran, *Tax Evasion and Voting: An Experimental Analysis*, 55 KYKLOS 197, 218 (2002) (finding that tax compliance is higher on average when subjects are allowed to approve or reject the proposal because such a vote indicates legitimacy); Benno Torgler & Christoph A. Schaltegger, *Tax Amnesties and Political Participation*, 33 PUB. FIN. REV. 403, 426 (2005) (finding strong evidence that individuals are more compliant when they have the opportunity to vote and communication among group members occurs prior to the vote); Benno Torgler, *What Do We Know about Tax Morale and Tax Compliance?*, 48 INT'L REV. ECON. & BUS. 395, 395–412 (2001) (surveying literature on political participation and compliance).

181. See text accompanying *supra* notes 70–78 and 93–96.

inside of) litigation is legitimate;<sup>182</sup> (2) the reality of recent direct regulation of tax practice by the Government;<sup>183</sup> and (3) the risk of even more draconian Government regulation in the future if the bar's failure to effectively self-regulate results in yet another wave of lawyer-assisted tax shelter activity.

Still, while beginning a real discussion of the proper role of advisors within the tax bar is a crucial first step if an effective gatekeeping norm is to be established, there is no guarantee that such discussions would result in that consensus. Despite the fact that restraining its own behavior is in the best interest of the tax bar (and its clients) because it would avoid more Government regulation, powerful forces push the tax bar in the other direction. These include, among others: (1) competitive pressures that force attorneys to compete for clients based on tax results rather than sound advice; (2) outside pressure from clients who engage in a collaborative approach to obtaining legal advice; and (3) increased uncertainty regarding the judicial demeanor toward tax planning and statutory interpretation. If these forces are to be overcome, some countervailing forces must be put in play to nudge the tax bar toward a gatekeeping consensus.

## 2. Seizing the Power of Individual Actions

Changing a cultural norm is not an easy task. Generally, such norms remain stable and resistant to change. When change occurs, however, it typically does so quickly rather gradually.<sup>184</sup> This tipping-point nature

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182. See generally, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); DEBORAH L. RHODE, IN *THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29. See also Wendel, *supra* note 3, at 1181–82 (describing the concept of zealous advocacy norm as a “shopworm aphorism”); Wilkins, *supra* note 128, at 2067–73 (arguing that necessity of ethical and regulatory changes that promote the role of attorneys as gatekeepers within modern day corporate-attorney relationships); David B. Wilkins, *Making Context Count: Regulating Lawyers after Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1147–51 (1993).

183. See *supra* notes 105–13 and accompanying text (discussing various recent instances where the Government has directly intervened with the method in which the tax bar practices, and where the Government has imposed various restrictions and penalties associated with questionable tax transactions and advice).

184. Social groups tend to be resistant to social norm change because the internal cohesion of the group is based in part on a shared belief that is then internally enforced among group members. However, as greater numbers begin to break free of these internal enforcement mechanisms and flout the norm, it causes others to question whether the norm to which they are adhering is truly shared by the group. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 160–61 (1984). Once this happens, members of the group tend to change their belief to the new norm to remain attached to their group, with a resulting cascade effect towards the adoption of the new norm. See Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1228 (1997). See also Natalie S. Glance &

of cultural norms highlights an unexpected vehicle for prompting rapid change, *individual action*.<sup>185</sup> On its face, it may seem absurd to assert that the actions of an individual, or a small cadre of individuals, could lead to a cultural change; but even small changes to a social norm can precipitate dramatic and rapid changes given the right conditions.<sup>186</sup> This insight builds on modern theories of disease transmission that model how viruses spread at an exponential rate through a susceptible population once the number of infected individuals reaches a critical mass.<sup>187</sup> Essentially, human behaviors can themselves be contagious.<sup>188</sup> In this way, if even a small group of people reject an existing norm, others seeing their action may decide that they themselves should adopt it and start an informational or reputational cascade effect.<sup>189</sup> Such

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Bernardo A. Huberman, *The Dynamics of Social Dilemmas*, SCI. AM., Mar. 1994, at 76, 78–79 (using borrowed methods from statistical thermodynamics to study the evolution of social cooperation, and finding that in such a model there are generally two highly stable minima representing widespread cooperation and widespread defection, separated by a highly unstable barrier from which the system slides away to one of the two minima very quickly if ever such a maximum is reached); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 343 (1984) (explaining how question framing demonstrates preferences that violate the dominance requirement of rational choice); Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 3 (1992) (arguing that because humans are social animals, they constantly compare themselves to others and strive to comport and compete so as to achieve heightened social status).

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

186. See David Hirshleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, in *THE NEW ECONOMICS OF HUMAN BEHAVIOR* 209 (Mariano Tommasi & Kathryn Ierulli eds., 1995); Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 993 (1992); Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1586–89 (2000) (describing how peer-to-peer influences can result in sometimes dramatic shifts in compliance equilibria); Harvey Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q.J. ECON. 183, 206–07 (1950).

187. See generally M. Choisy, J.F. Guegan & P. Rohani, *Chapter 22: Mathematical Modeling of Infectious Diseases Dynamics*, in *ENCYCLOPEDIA OF INFECTIOUS DISEASES: MODERN METHODOLOGIES* 379 (Michel Tibayrenc ed., 2007) (discussing the various mathematical models used to analyze epidemic outbreaks based on the critical mass of infected individuals, the number of susceptible individuals, and other factors).

188. GLADWELL, *supra* note 185, at 6.

189. An information cascade occurs when individuals decide that others have superior information and the individuals adopt the position of others on the assumption that they have superior information. See generally Hirshleifer, *supra* note 186. Reputational cascades occur when trend setters adopt a new norm and others follow suit either to curry favor or avoid censure. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685–87 (1999).

snowballing effects draw their strength from the fact that most social groups strive for homogeneity.<sup>190</sup> This tipping-point effect can apply both in the context of endorsing a new social norm, as well as condemning an old one.<sup>191</sup>

The same principle applies to ethical situations. While one individual cannot singlehandedly change the world, he can influence those around him in ways that ultimately have profound consequences.<sup>192</sup> Imagine a crowd of people gathered for a peaceful protest. One individual's unilateral act of violence does not convert the protesters into a mob. However, the way that others respond might. If no one objects to the violence, then that sends a message to others in the crowd that the group finds violence acceptable, and the peaceful protest may quickly cascade into mayhem. Conversely, if members of the crowd censure and act against the initial violence, the peaceful purpose of the group is reaffirmed and cohesion to the original norm is maintained. One individual cannot unilaterally impose an ethical change on a group, but his example can prompt others to question their views.<sup>193</sup> When a person takes a principled stand in the face of a contrary norm, the present has been changed for those around him and good may ultimately result.

This Article presents a plea to practitioners to raise concerns with clients even when it is uncomfortable to do so. Even if an attorney feels constrained to provide zealous advice to a client, she should note that there is still both a moral and purely legal dimension to the question.<sup>194</sup>

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190. See ELLIOT ARONSON, *THE SOCIAL ANIMAL* 6–7 (Richard C. Atkinson et al. eds., 7th ed. 1995) (discussing the tendency of most individuals to want to conform their behavior); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352–61 (1997) (discussing social conformity as an element of deterrence).

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

192. See, e.g., Kuran & Sunstein, *supra* note 189, at 688–89 (discussing the wide variety of social movements evidencing cascade theory).

193. Or to tap into the pop culture wisdom of Star Trek: “‘One man cannot summon the future.’ ‘But one man can change the present!’” *Star Trek: Mirror Mirror* (NBC television broadcast Oct. 6, 1967) (discussion in which Captain Kirk urges an alternate-universe Mr. Spock to work from within to change the brutal Empire he is sworn to defend), *quoted in* SUSAN SACKETT, FRED GOLDSTEIN & STAN GOLDSTEIN, *STAR TREK SPEAKS* 113 (1979).

194. It is important to note that nothing in the zealous advocacy norm in fact prevents lawyers from raising moral, ethical, or other concerns with clients. To the contrary, the ABA Model Rules acknowledge that these factors can be incorporated into client advice. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2011) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may

By standing up for a duty to the system and noting the harm a tax avoidance transaction presents to the system, the practitioner may give her client or other attorneys dealing with the transaction the strength to question their own views about the appropriateness of their actions (even if they are technically legal). By doing so, the attorney not only impacts the group dynamic within the business ethics context, but serves as an example that can be the tipping point for other tax lawyers to question the true ethical norms in play. This is not to say that speaking out is easy—as it may cause risks for those who do it—but the more frequently it is done, the better.<sup>195</sup>

Outside specific client settings, it is especially important that high-profile tax practitioners and academics take up the cause and publically advocate for a strong gatekeeping norm since these trendsetters will have an oversized impact on the behavior of others.<sup>196</sup> Consequently, anything that can be done to make it easier for attorneys to follow their conscience should be done to promote individual action and the importance of individual action itself should not be easily dismissed.

### 3. Encouraging Gatekeeping

Hastening a consensus regarding tax gatekeeping will require the creation of incentives for individual attorneys, and the bar as a whole, to willingly assume a gatekeeping function.<sup>197</sup> One means of achieving this is to appeal to their self-interest. As discussed earlier, one element of self-interest—avoiding future Government regulation of the

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be relevant to the client's situation.”).

195. Speaking out in this manner may also hold a silver lining in terms of relieving an attorney's personal angst regarding his role in past questionable transactions and his anxiety over the psychic costs he will incur struggling with such transactions in the future if nothing changes.

196. See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 *CARDOZO L. REV.* 1, 37–38 (2010) (“But oftentimes change is only possible through the facilitation of specific types of individuals, variously known as ‘change agents,’ ‘opinion leaders,’ and ‘norm entrepreneurs,’ whose native abilities and social positions can encourage others to adopt a new norm. They may have extensive and diverse personal relationships that allow the rapid spread of new ideas. They may have knowledge about a vast array of issues or a technical expertise that gives credibility to the information and opinions they provide. They may be especially convincing in their arguments and possess a high ‘social intelligence’ that lets them recognize the value of change. Or they may have a combination of these and other attributes.”).

197. Of course, internal motivations are also important. One's internal self-image may be linked to being an honest person and acting ethically in all their affairs. Consequently, the importance of general indoctrination into the ethical nature of gatekeeping should not be overlooked. For instance, tax LL.M. programs might consider making a tax ethics course a required element of their degree. Based on the author's research, currently only one (Boston University) of the top six tax LL.M. programs (New York University, Georgetown University, University of Florida, Northwestern University, Boston University, and Miami University) makes ethics a required course.

profession—is already present.<sup>198</sup> Other factors, however, discourage attorneys from counseling clients against aggressive positions, including a fear that raising concern about technically legal transactions would result in losing that client's future business. To change this dynamic, it is necessary to (1) create a conflict of interest that requires attorneys to raise the broader ethical considerations despite general business distain for such considerations, and/or (2) change the prevailing business norms to be more receptive to considerations other than profit maximization and strict legal compliance.

One way of creating such a conflict of interest would be for the Government to pursue a more public and targeted enforcement effort that focuses on clients who previously participated in an aggressive

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198. The ABA's recent experience with efforts to subject lawyers to increased money laundering and terrorist funding reporting is a case in point. The Financial Action Task Force ("FATF") is an international organization focused on combatting money laundering and terrorist financing. Laurel S. Terry, *An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance*, 2010 J. PROF. LAW. 3, 5–6. The FATF has made a number of recommendations in this regard (the "FATF 40+9 Recommendations") which cover the gatekeeping obligations of various intermediaries (including lawyers) who could inadvertently facilitate money laundering and terrorist financing activity. See FIN. ACTION TASK FORCE, FATF 40 RECOMMENDATIONS (2003), available at <http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-2040%20Recommendations%20rc.pdf>; FIN. ACTION TASK FORCE, 9 SPECIAL RECOMMENDATIONS (SR) ON TERRORIST FINANCING (TF) (2004), available at <http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf>. More recently, the FATF issued specific guidance for lawyers regarding the FATF 40+9 Recommendations. FIN. ACTION TASK FORCE, RBA GUIDANCE FOR LEGAL PROFESSIONALS (2008), available at <http://www.fatf-gafi.org/dataoecd/5/58/41584211.pdf>. FATF members (including the United States) are charged with implementing the FATF 40+9 Recommendations. Terry, *supra*, at 6–7. The FATF 40+9 Recommendations include gatekeeper guidelines regarding, among other matters, customer due diligence, recordkeeping, and the obligation to report suspicious transactions (without tipping off clients). *Id.* at 10. While in some jurisdictions these gatekeeping recommendations have been implemented by applying them in a fulsome manner to attorneys, the United States has yet to do so. *Id.* at 36. Instead, the ABA has been involved in proactive efforts to shape any anti-money laundering obligations that might eventually be imposed on U.S. attorneys and is pursuing increased self-regulation regarding these matters. See generally Kevin L. Shepherd, *The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for U.S. Lawyers*, 2010 J. PROF. LAW. 83 (discussing the current and proposed U.S. implementation of the FATF 40+9 Recommendations and the ABA's responses). Significantly, in 2010 the ABA House of Delegates adopted a set of best practices guidelines in this area. ABA, VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2010), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/116.authcheckdam.pdf>. Hopefully, such self-regulation efforts can avoid the need for more intrusive direct government regulation. Letter from ABA President Stephen Zack (Apr. 8, 2011), available at [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011apr08\\_goodpractices\\_o.aucthecheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011apr08_goodpractices_o.aucthecheckdam.pdf) ("[B]y following the Voluntary Guidance, lawyers and the legal profession can help eliminate the need for federal legislation or agency regulations that could conflict with existing state bar ethical rules, interfere with and undermine the confidential attorney-client relationship, and adversely affect client service.").



transaction. This effort would have a two-pronged effect: when advising a particular client who is seeking aggressive advice, the practitioner would need to consider not only the interests of the current client, but also the interests of his other clients and his own future livelihood. If being overly zealous for one client puts other clients at a higher risk for audit, then that conflict of interest could prompt the attorney to temper his advice. Acceding to the aggressive advice desired by a client would also potentially jeopardize the attorney's future earnings since other clients would be less inclined to hire a representative who would draw heightened scrutiny to them. Indeed, such publicized enforcement activity can help reduce the competitive pressures that lead to a legal race to the bottom. A taxpayer who knows that aggressive tax planners serve as audit lightning rods has an incentive to seek out practitioners who have a good reputation with the Government, and presumably are more evenhanded in their legal conclusions.<sup>199</sup>

The Government could also take a more direct approach to intentionally create conflicts of interest between tax lawyers and their clients. For instance, the Government could modify the attorney-client privilege<sup>200</sup> in tax situations or override normal client confidentiality rules<sup>201</sup> by legally requiring certain disclosures to the Government of specified client actions.<sup>202</sup> Indeed, in promulgating regulations dealing

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

200. In 1975, Congress adopted the Federal Rules of Evidence (Pub. L. No. 93-595, 88 Stat. 1926 (1975)), which consciously left the law of evidentiary privileges to common law development. Federal Rules of Evidence Rule 501 provides that the federal common law of privileges applies to federal question and federal criminal cases, while state law privilege rules are applicable to cases in federal courts where state law is at issue. FED. R. EVID. 501. Consequently, the federal common law attorney-client privilege is applicable for federal income tax issues absent future Congressional action to circumscribe the privilege. Significantly, client identity is generally not protected under the attorney-client privilege, even in tax shelter situations. Richard Lavoie, *Making a List and Checking It Twice: Must Tax Attorneys Divulge Who's Naughty and Nice?*, 38 U.C. DAVIS L. REV. 141, 202-04 (2004).

201. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2011) (limiting attorney confidentiality if disclosure otherwise required by law).

202. For instance, as part of implementing the FACTA 40+9 Recommendations, some countries have explicitly subjected attorneys to their strict anti-money laundering laws. Terry, *supra* note 198, at 29-36. Such direct Government action raises the real risk of overreaching by the Government. Government interventions in the attorney-client relationship should therefore be narrowly tailored to address targeted situations where attorney driven self-regulation has been shown to be insufficient to address the Government's legitimate interests. Some have questioned the appropriateness of applying money laundering and terrorist funding reporting obligations to

with the disclosure of certain reportable transactions, the Government, perhaps inadvertently, created just such a conflict of interest.<sup>203</sup> Of course, at the extreme, the Government could potentially eliminate all privilege or confidentiality for tax planning matters and then even require practitioners to report aggressive client activity.<sup>204</sup> But this is exactly the type of Government interference with the profession that most everyone would agree would be detrimental to all involved. However, targeted Government actions touching on these matters at the margins could be effective in encouraging attorneys to generally distance their legal considerations from their client's business goals and highlighting in a tangible way the real risk to the tax bar associated with a continued unwillingness to effectively self-regulate.

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

Another way to encourage attorneys to question the advisability of aggressive but arguably legal transactions is to make such considerations more germane to clients, and thereby relieve some of the outside pressures acting to suppress a gatekeeping function. A primary reason why tax lawyers hesitate to raise issues regarding aggressive tax planning is that their clients are unlikely to be receptive to such "non-legal" advice coming from their legal advisors.<sup>205</sup> Businesses in the United States are focused primarily on their bottom line and consequently view the law as merely a system of rules to be gamed for the sole goal of profit maximization.<sup>206</sup> Under this approach, as long as a transaction is technically "legal" then it should be pursued to obtain the expected economic benefit irrespective of any non-financial considerations.<sup>207</sup> This perception is compounded by the conventional

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attorneys on the ground that lawyers are only infrequently implicated in such activities. Terry, *supra* note 198, at 12. Conversely, when it becomes apparent that the bar is integrally involved in facilitating actions legitimately disfavored by the Government (like the two tax shelter waves previously discussed), direct regulation of the attorney-client relationship can be more easily justified.

203. 26 C.F.R. § 301.6112-1 (2011). This regulation requires any material advisor to a reportable transaction (as defined in 26 C.F.R. § 1.6011-4(b)(1) (2011)) to maintain a list of investors involved in such transaction which must be furnished to the Government upon request.

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

205. Wilkins, *supra* note 128, at 2075–76.

206. William Bradford, *Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights*, 26 NORTE DAME J. L. ETHICS & PUB POL'Y 141, 148 (2012).

207. Jill E. Fisch, *The "Bad Man" Goes To Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1602 (2006).

wisdom that taxpaying is an area of purely legal inquiry, devoid of any moral considerations,<sup>208</sup> and by general societal trends that weaken the taxpaying norm.<sup>209</sup> A tax lawyer's ability to counsel against this approach is made almost impossibly difficult when the judiciary actually endorses such a literalistic approach to interpreting the tax laws.<sup>210</sup> Given the uncertainty today regarding judicial attitudes, a lawyer may find it extremely difficult to refuse to advise against an aggressive transaction where a literalist court may uphold the transaction. Consequently, clarifying the proper method of statutory interpretation in tax cases is absolutely crucial to reestablishing a tax gatekeeping norm.<sup>211</sup> While recent court decisions have moved back toward traditional anti-abuse notions in scrutinizing tax-motivated transactions, the underlying schism within the judiciary and the tax academy regarding the interpretation of statutes remains.<sup>212</sup> While the Government has taken an important step toward clarifying this matter by codifying the economic substance doctrine, more should be done to solidify judicial approaches in this area and thereby reduce the uncertainty for practitioners in predicting the likely judicial response to an aggressive transaction.

There are several mechanisms by which this could be accomplished. First, a general anti-abuse rule could be statutorily adopted.<sup>213</sup> This has been done in several countries with generally positive effects, despite practitioner criticism.<sup>214</sup> Alternatively, given the long history of judicially created anti-abuse doctrines in the United States, a simpler

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208. See *supra* notes 75–76 (discussing how courts and public figures do not believe that moral considerations are in any way implicated when an individual uses the law to avoid paying taxes).

209. See *supra* Part III.B.4 (illustrating the general trend in distrust for the government and the accompanying shift in seeing taxpaying as an extraction of wealth rather than a patriotic duty).

210. Lavoie, *Subverting the Rule of Law*, *supra* note 46, at 190–92.

211. *Id.*

212. *Id.* at 195–99.

213. *Id.* at 195.

214. See, e.g., Benjamin Alarie, *Trebilcock on Tax Avoidance*, 60 U. TORONTO L.J. 623, 624–25 (2010) (noting how a prolific author on tax law criticized the idea of an effective general anti-avoidance rule (“GAAR”) and believed that courts will continue to strictly interpret tax codes indefinitely); Julie Cassidy, “To GAAR or Not to GAAR—That is the Question:” *Canadian and Australian Attempts to Combat Tax Avoidance*, 36 OTTAWA L. REV. 259, 259, 312–13 (2004) (depicting how both Canada and Australia have enacted GAAR rules and how the Canadian GAAR has certain provisions that are especially helpful for preventing tax evasion through aggressive tax planning); Graeme S. Cooper, *International Experience with General Anti-Avoidance Rules*, 54 SMU L. REV. 83, 84 (2001) (reviewing how many countries around the world have enacted GAAR rules); Tim Edgar, *Building a Better GAAR*, 27 VA. TAX REV. 833, 836 (2008) (expounding how in countries that have not enacted GAARs there is a continuous debate about enacting a GAAR because judicially made anti-avoidance doctrines are seen as ineffective).

approach would be to merely statutorily reaffirm the appropriateness of courts continuing to apply such doctrines, and to eschew literal interpretations of the tax code that are at odds with the intended purpose and scope of the subject provisions.<sup>215</sup>

Another approach for making businesses more receptive to cautionary advice from their attorneys would be to alter the business culture of their clients using public censure.<sup>216</sup> In the past, public outcry over corporations expatriating to avoid U.S. taxes was used to question, or try to reverse, a number of such transactions.<sup>217</sup> Today, many corporations pay very low effective tax rates.<sup>218</sup> Exposing such rates might well create a public outcry demanding that corporate citizens pay their fair share of the tax burden.<sup>219</sup>

#### CONCLUSION

This Article has demonstrated that the tax bar's failure to effectively constrain its actions on behalf of clients has forced the Government to impose constraints on the tax bar through direct regulation. As has happened with securities lawyers, this direct Government regulation

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215. Lavoie, *Deputizing the Gunslingers*, *supra* note 11, at 62–63.

216. Joshua D. Blank, *What's Wrong with Shaming Corporate Tax Abuse*, 62 TAX L. REV. 539, 539 (2009); Sandeep Gopalan, *Shame Sanctions and Excessive CEO Pay*, 32 DEL. J. CORP. L. 757, 758–59 (2007); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1812 (2001).

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

218. See *Citizens for Tax Justice Says 'No-Tax' Corporations Continue to Avoid Taxes*, TAX NOTES TODAY, Apr. 10, 2012, LEXIS 2012 TNT 69-19 (noting a report showing that twenty-six large U.S. corporations paid no U.S. taxes in 2011); CITIZENS FOR TAX JUSTICE, CORPORATE TAXPAYERS AND CORPORATE TAX DODGERS 2008–10, at 3 (2011), available at <http://www.ctj.org/corporatetaxdodgers/CorporateTaxDodgersReport.pdf> (finding the average effective corporate tax rate in 2009 and 2010 for 280 large U.S. corporations was 17.3%, with a quarter of the companies studied paying below 10%).

219. See, e.g., Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?*, 18 CAN. J.L. & JURISPRUDENCE 95, 104–05 (2005) (“Publicity strengthens penalties because it increases the chance of getting caught (since members of the public, especially tax experts, can study returns) and it increases chances of public shaming for non-compliance.”); Marc Linder, *Tax Glasnost' for Millionaires: Peeking behind the Veil of Ignorance along the Publicity-Privacy Continuum*, 18 N.Y.U. REV. L. & SOC. CHANGE 951, 975 (1990) (advocating for the publication of millionaires' tax returns); Stephen W. Mazza, *Taxpayer Privacy and Tax Compliance*, 51 U. KAN. L. REV. 1065, 1144 (2003) (“Empirical research and compliance theories also support this position, suggesting that publicity can play a positive role in discouraging noncompliant behavior and increasing the public's commitment to the tax system.”); Paul Schwartz, *The Future of Tax Privacy*, 61 NAT'L TAX J. 883, 895–96 (2008) (noting how corporate tax information is publically available through SEC's online EDGAR database); Joseph J. Thorndike, *Show Us the Money*, 123 TAX NOTES 148, 148–49 (2009) (discussing how public disclosure of individuals' tax returns could prompt tax reform).

could become even more onerous if the tax bar fails to embrace a strong gatekeeping function on its own.<sup>220</sup> In order to preserve the traditional and important tax planning role of attorneys in business and personal situations, the bar must be willing to curb its support for aggressive tax planning techniques. This will require a departure from traditional notions that every client must be represented zealously without consideration of ancillary adverse consequences to society or third parties (including the attorney himself). This standpoint is in line with both the historical approach to practicing tax law, as well as emerging trends arguing in favor of a general obligation of attorneys to counterbalance their zealous advocacy for a client against a duty to support and strengthen the substantive body of law in which they practice.

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

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

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220. See *supra* notes 5–7 and accompanying text (illustrating the various forms of Government regulation that have already been levied against the tax bar).