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ETHICAL PROBLEMS OF THE TAX PRACTITIONER IN NEW JERSEY

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The author discusses the most frequently encountered ethical problems associated with the practice of tax law in New Jersey. Various aspects of tax practice, including the relationship between the tax practitioner and the general practitioner, the preparation of tax returns, practice before the Internal Revenue Service and advertising, are examined with reference to potential ethical difficulties.

INTRODUCTION

The area of tax practice is particularly susceptible to ethical problems because of the conflict between minimizing tax liability and paying the government its required share. Moreover, the increasing complexity of the tax law, which hinders the identification of proper behavior, may result in unintentional ethical violations. The lack of an ethical system designed specifically for tax practice further aggravates the tax practitioner's dilemma. Until an ethical code exclusively directed toward tax practice is promulgated, more general sources must be utilized to determine the appropriate ethical approach. By reference to such general sources as the ABA Code of Professional Responsibility, the ABA Formal Opinions, the Advisory Opinions of the New Jersey Supreme Court Advisory Committee on Professional Ethics, and proposals by various legal commentators, this article will identify those areas of tax practice which are most susceptible to ethical infractions. It will attempt to articulate the proper stance for the tax practitioner when confronted with an ethics problem.

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† As this article went to press, the Supreme Court of New Jersey promulgated new rules with respect to lawyer advertising. *See* 103 N.J.L.J. 13–14 (1979). For a discussion of this topic, see notes 2–12 and accompanying text.

PRELIMINARY CONSIDERATIONS: THE RELATIONSHIP BETWEEN THE TAX PRACTITIONER AND THE GENERAL PRACTITIONER

Specialization and the Problem of Client-Sharing

Although federal taxation is not included among the few formally designated specialties of legal practice in New Jersey,[1] it is, in fact, a highly specialized discipline. The designation "federal taxation" may adequately alert the potential client as to an individual attorney's general area of emphasis, but this broad designation is not of value to a general practice attorney seeking to associate a tax expert. Even though a tax specialist may actually concern himself only with planning aspects, reorganizations, refund litigation, or criminal tax fraud litigation, he would, nevertheless, be referred to under the general designation of tax attorney.

Historically, various restrictions have been placed on the right to advertise a specialty. Canon 46 of the ABA Canons of Ethics provided that a lawyer who "is engaged in rendering a specialized legal service directly and only to other lawyers" may advertise "in legal periodicals and like publications."[2] Canon 46 was subsequently construed by the New Jersey Supreme Court Advisory Committee on Professional Ethics in Opinion No. 108[3] to allow announcements limited to

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[1] *See* note 5 *infra* and accompanying text.

[2] ABA CANONS OF PROFESSIONAL ETHICS No. 46 [hereinafter cited as CANON No.]. The ABA Canons of Professional Ethics have been superseded by the ABA Code of Professional Responsibility which was adopted by the ABA House of Delegates on August 12, 1969. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY.

[3] N.J. ADVISORY COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 108, 90 N.J.L.J. 245 (1967) [hereinafter cited as ADVISORY OPINION No.].

New Jersey Court Rule 1:19 governs the promulgation of advisory opinions by the Advisory Committee on Professional Ethics, which is composed of 15 members appointed by the Supreme Court of New Jersey. N.J.R. 1:19-1. The committee receives inquiries from the state, county and local bar associations, from members of the New Jersey bar, N.J.R. 1:19-2, and from the Supreme Court of New Jersey, N.J.R. 1:19-5, "concerning proper conduct for a member of the legal profession under the Disciplinary Rules of The Code of Professional Responsibility of The American Bar Association As Amended by The Supreme Court and other rules of [the New Jersey supreme court] governing the practice of attorneys." N.J.R. 1:19-2. The inquiries must be in writing and must detail the factual situation. N.J.R. 1:19-3. Also, "a short brief or memorandum" must be included in the inquiry, "citing rules of court or canons of ethics involved and any other pertinent authorities" relevant to the inquiry. *Id.* Finally, a certificate stating that the committee's opinion will not affect the interests of any party in a pending action must accompany the inquiry. *Id.* Any inquiry which does affect the interests of such a party will not be accepted by the committee. N.J.R. 1:19-2. The committee has discretion to reject any inquiry without justification. *Id.*

Inquiries submitted by the supreme court are considered by the entire committee. N.J.R. 1:19-5. Other inquiries may be addressed by groups of not fewer than five members. N.J.R.

1:19-4. If the group cannot reach a unanimous opinion, the inquiry is considered by the committee as a whole, and its opinion must be "concurred in by 9 members." *Id.* The committee's opinions are presented in writing to the secretary, who provides the inquiring party with a copy, and arranges for publication at the request of the committee. *Id.* Opinions regarding inquiries submitted by the supreme court cannot be published without the court's prior consent. N.J.R. 1:19-5. Published opinions have precedential effect. N.J.R. 1:19-6. As far as practicable, the opinions do not identify the inquiring party. N.J.R. 1:19-4. Subject to approval by the supreme court, the committee can choose the methods and procedure it will follow in considering inquiries and presenting its opinions. N.J.R. 1:19-7. The advisory committee also has the discretion to "conduct a hearing on any inquiry." N.J.R. 1:19-4. Petitions for review must be filed within twenty days following publication of the opinion or "within 30 days after any final action of the Advisory Committee on Professional Ethics other than the publication of [the] opinion." N.J.R. 1:19-8(a). If the review is granted, the supreme court will review the formal opinion, the inquiry, the brief or memorandum entered by the inquiring party, "and any documents or other evidence or proof relied upon by the Advisory Committee on Professional Ethics in arriving at its determination." N.J.R. 1:19-8(c).

[4] ADVISORY OPINION No. 108, 90 N.J.L.J. 245 (1967).

In construing Canon 46, the predecessor of DR2-105(A)(3), the Committee on Professional Ethics of the American Bar Association has severely limited the scope of "specialized legal services." Formal Opinion 145 deals with an attorney's announcement " 'Specialization in Legal Research—Preparation of Cases for Trial and Appeal—Trial and Appellate Briefing—Rendition of Written Opinions' " on business cards which the attorney mailed to other attorneys. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 145 (1935), [hereinafter cited as FORMAL OPINION No.]. The committee stated that such an announcement was not included in the category of "specialized legal service" employed by Canon 46. *Id.*

> All of the services listed in the above advertisement are rendered by every general practitioner. In fact practically the whole field of the practice of law, except for court appearances, is covered. Legal research and the preparation of briefs for the trial and appellate courts are not specialized services; in the larger law firms, such work is done by juniors or even law clerks.
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> We are of the opinion that the services enumerated cover too broad a range to come within the purview of the phrase specialized legal service as contemplated by Canon 46, and that the card in question constitutes improper advertising.

Id.

In Formal Opinion 175, an attorney announced " 'Practice in the following matters only: Corporations, Wills and Estates, Divorce Practice' " on a professional card. FORMAL OPINION No. 175 (1938). Although Formal Opinion 175 did not construe Canon 46 of the Code of Professional Ethics, it provided particular areas of practice which the Committee on Professional Ethics later held to be included in the "specialized legal service" provision of Canon 46. *See, e.g.*, FORMAL OPINION No. 194 (1939). The committee determined that Canon 27 (the predecessor of DR2-101), which deals with advertising, "d[id] not detail the matter which may be included in the 'simple professional card.' " FORMAL OPINION No. 175 (1938). Canon 27 provides for "[p]ublication in reputable law lists" and specifically allows such information as "a statement of the lawyer's names and the names of his professional associates, addresses, telephone numbers, cable addresses, [and] branches of the profession practiced." CANON No. 27. The committee concluded that the attorney's announcement was improper.

> We are of the opinion that it is not permissible to include in a simple professional card language indicating that the lawyer restricts his practice to any particular class of work not generally recognized as a specialty. Obvious examples of the latter are Admiralty and Patents, Trademarks and Copyrights. Any class of work which the average lawyer is equipped and willing to handle cannot be said to be a specialty despite the fact that a lawyer may restrict himself to such a class of work and acquire an unusual degree of proficiency and experience in handling the same. Any specification of particular types of work necessarily carries an inference that unusual ability or experience is asserted and consequently noticed or advertised. The fact

> that the motive may be to obviate the necessity of refusing other types of work does not avoid that inference.

FORMAL OPINION No. 175 (1938).

Formal Opinion 194 dealt with the issue of whether "[a]bstracting the title to real estate and rendering an opinion as to the legal status thereof may be a 'specialized legal service' within the meaning of Canon 46." FORMAL OPINION No. 194 (1939). In deciding this issue, the committee referred to Formal Opinion 175 and determined that "[t]he specialized legal services contemplated by Canon 46 must be distinguished from the special branches of the profession contemplated by Canon 27 as proper for designation in . . . an approved law list." *Id.* The committee stated that the availability of the particular service in the community is the determining factor in deciding the permissibility of the particular announcement. *Id.* The committee concluded:

> the service offered by the inquirer may or may not be a specialized legal service, depending upon the situation in the community in which he practices. If lawyers are not generally available who will both abstract the title to property and render an opinion thereon, the inquirer may be engaged in rendering a specialized legal service in doing such work.

Id.

Whether an attorney may advertise a specialization "in real estate matters or tax matters, or in trial work generally, or in a limited field, such as negligence" to other attorneys, was considered in 1943. FORMAL OPINION No. 251 (1943). The committee, after considering Canons 27 and 46, in addition to Formal Opinions 175 and 194, held that such announcements were prohibited. *Id.*

> The large number and variety of requests received by the committee to classify as specialized legal service, branches of the profession which lawyers in general practice, makes it entirely clear that if the Canons as heretofore construed are not adhered to, announcements of one kind or another will be used as a means of advertisement and solicitation. The argument that the announcement is proper because it states that the lawyer's field of practice is restricted seems to us without merit, for it simply is a reverse way of emphasizing the lawyer's appraisement of his own skill and ability in a particular subject and it needs no argument to lead one to the conclusion that, by and large, the senders of such announcements would not in fact restrict themselves to the specified field.

Id. It is therefore apparent that the Committee on Professional Ethics, although supposedly allowing announcements of any legal service sufficiently unavailable in the community, had so construed Canon 46 as to effectively limit announcements to the areas of Admiralty, Patents, Trademarks and Copyright.

The New Jersey Supreme Court Advisory Committee on Professional Ethics has interpreted Canon 46 similarly to the ABA Committee. Advisory Opinion 21 dealt with an announcement of appellate work through the mail and an announcement in the New Jersey Law Journal. ADVISORY OPINION No. 21, 86 N.J.L.J. 734 (1963). In construing Canon 46, the advisory committee held that the distribution of the announcement by mail was prohibited, but that publication in the New Jersey Law Journal was permissible. *Id.*

> As a general proposition, any type of advertising by a lawyer is prohibited. Canon 46 was designed, however, to permit lawyers rendering a specialized legal service to lawyers only to communicate that fact to other lawyers. The method of communication is also provided for in Canon 46. Since Canon 46 is a departure from the rigid standards of conduct set forth in Canon 27, its provisions should be strictly construed.

Id.

In Advisory Opinion 107, an attorney sought to place an advertisement in the New Jersey Law Journal "'Tax Lien Foreclosure. In Rem or Personal. Attorney will handle for other attorneys.'" ADVISORY OPINION No. 107, 90 N.J.L.J. 245 (1967). The advisory committee decided that tax lien foreclosure was not a "specialized legal service within the meeting of . . . Canon 46." *Id.* Formal Opinions 175 and 194 were used by the committee to substantiate its decision.

availability for "specialized legal services such as 'Admiralty, Patents, Trademarks and Copyrights as distinguished from branches of the profession followed by the bar at large.' "[4] Opinion No. 108 and Canon 46 have been superseded by Disciplinary Rule 2-105 which permits an attorney who is "available to act as a consultant . . . in a particular branch of law" to distribute "a dignified announcement of such availability," but proscribes the "representation of special competence or experience."[5] Moreover, the frequency of such announcements is limited to annual distributions to other attorneys, although more frequent advertisement is permitted "in legal journals."[6]

In addition to the restrictions imposed on announcements of specialties among attorneys, further restrictions exist with respect to advertising to the public. The United States Supreme Court's decision in *Bates v. State Bar of Arizona*,[7] although permitting the legal profession to advertise fee information, specific services, and other matters, did not open the door to unfettered advertising, particularly concerning any implied or explicit statement as to quality.[8] Fur-

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The committee quoted Formal Opinion 194 in determining the scope of the term "specialized legal service." *Id.*

> [E]xcept in the case of branches of the profession which are universally considered as separate from the general practice, probably the test is the general availability in his community of the type of service offered by the lawyer as a specialized legal service. The exception to which we refer is best illustrated by the practitioners in Admiralty, or Patents, Trademarks and Copyrights.

Id. (quoting FORMAL OPINION NO. 194 (1939)). Thus, the four areas of specialized legal service sanctioned by the ABA were incorporated into New Jersey's interpretation of Canon 46.

Advisory Opinion 108 specifically addressed the issue of whether an attorney was permitted to announce specialization in the federal and state tax area to other attorneys. ADVISORY OPINION No. 108, 90 N.J.L.J. 245 (1967). Canon 46 was again interpreted by adopting the definition of "specialized legal service" in Formal Opinion 194. Thus, prior to the New Jersey supreme court's adoption of the ABA's Disciplinary Rules of the Code of Professional Responsibility, which superseded New Jersey's version of the ABA's Canons of Professional Ethics, announcements to attorneys of expertise in tax matters were clearly prohibited.

[5] ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A)(3) [hereinafter cited as DR]. In light of DR 2-105, substantial evidence exists to support the conclusion that any attorney may make announcements to other attorneys of availability in the area of tax specialization. The four areas of specialization approved by both the ABA and the New Jersey supreme court may now be advertised in letterheads and on office signs. Furthermore, the disciplinary rule talks in terms of "a particular branch of law" rather than "specialized legal service." *Id.* In view of the broad interpretation given to the designation "branch of law" by both ABA Canon 27 and Formal Opinion 251, the use of that designation in DR 2-105 can be viewed as including "branches of the profession followed by the bar at large." FORMAL OPINION No. 251 (1967). The area of tax specialization certainly falls within this category.

[6] DR 2-105(A)(3).

[7] 433 U.S. 350 (1977).

[8] In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Supreme Court addressed the issue of attorney advertising. In 1974, John Bates and Van O'Steen, both practicing attorneys and members of the State Bar of Arizona, established a legal clinic designed to provide legal

services for so-called routine matters "such as uncontested divorces, uncontested adoptions, simple bankruptcies, and changes of name." *Id.* at 354. In 1976, they placed an advertisement in a local newspaper listing the prices of their services in violation of DR 2-101(B), which had been adopted by the Supreme Court of Arizona. *Id.* at 354–55. The rule reads in part:

> A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so on his behalf. . . .

DR 2-101(B).

Following disciplinary actions taken against them by a Special Local Administrative Committee and the Board of Governors of the State Bar of Arizona, Bates and O'Steen requested review by the Supreme Court of Arizona. 433 U.S. at 356. They argued that DR 2-101 violated sections 1 and 2 of the Sherman Act by limiting competition and infringing first amendment rights. *Id.* The United States Supreme Court noted probable jurisdiction after the state court ruled against them. *Id.* at 358.

With respect to the alleged violation of the Sherman Act, the *Bates* Court relied primarily on Parker v. Brown, 317 U.S. 341 (1943), in which a raisin producer-packer brought an action against the state of California. *Id.* at 359. The plaintiff in *Parker* contended that a state program controlling the market price of raisins violated the Sherman Act by limiting competition among growers. *Id.* The *Parker* Court held that the Sherman Act did not prohibit state action. *Id.* The *Bates* Court concurred with the Arizona supreme court's designation of Disciplinary Rule 2-101 as constituting state action in that adoption of the rule was " 'an activity of the state of Arizona acting as sovereign.'" *Id.* at 357 (quoting *In re* Bates, 113 Ariz. 374, 397 555 P.2d 640, 643 (1976)). Thus, the *Bates* Court held that because DR 2-101 fell under the state action exemption of *Parker v. Brown*, the Sherman Act had not been violated. 433 U.S. at 363.

In addressing the alleged first amendment violation, Justice Blackmun, speaking for the majority, discussed the case of Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976). *Id.* In that case, the Court held a state statute which prohibited pharmacists from advertising prescription drug prices to be unconstitutional on the ground that the statute infringed upon free speech, although the information to be advertised was of a commercial nature. *Id.*

With regard to "whether lawyers also may constitutionally advertise the *prices* at which certain routine servies will be performed," *id.* at 367–68 (emphasis in original), the majority rejected appellee's arguments supporting the Disciplinary Rule. *Id.* at 382. The Court concluded "that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected." *Id.* at 383. Concerning the extent of an attorney's right to advertise, however, the Court "d[id] not hold that advertising by attorneys may not be regulated in any way." *Id.* Regulations may be promulgated to control "advertising that is false, deceptive, or misleading," and to restrict time, place and manner. *Id.*

On August 10, 1977, the ABA House of Delegates approved changes in Canon 2 of the Code of Professional Responsibility to conform with the guidelines suggested by *Bates*. Although the ABA Code of Professional Responsibility is not binding on the states, many states will rely upon it in drafting their own standards. Two proposals, entitled "A" and "B" have been suggested by the ABA. Although the proposals contain basically the same provisions, Proposal A dictates restrictions, whereas Proposal B merely suggests guidelines to attorneys. Both proposals provide:

> In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, PROPOSALS A & B. Furthermore, both proposals permit attorneys to advertise other areas of specialization. Proposal A provides that "[a] lawyer may . . . indicate in permitted advertising . . . a limitation of his practice or one or more

thermore, Disciplinary Rule 2-102(F),[9] a provision which permits attorneys to list their academic degrees, is not included in the New Jersey Code of Professional Responsibility.[10] The omission of Disciplinary Rule 2-102(F) clearly indicates that the use of "LL.M. (Taxation)" in advertisements, as well as on stationery and calling cards, is prohibited. Moreover, Disciplinary Rule 2-101(A)'s prohibition of "professionally self-laudatory statements calculated to attract lay clients"[11] can be interpreted so as to restrict the use of "LL.M. (Tax-

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particular areas or fields of law in which he practices." *Id.*, PROPOSAL A. Proposal B differs only in wording.

Prior to *Bates*, most states did not permit an attorney to hold himself out to the public as a tax specialist. *See, e.g.*, COLO. 1 (Comm. on Ethics & Grievances, Opinion 2, July 31, 1953); 27 FLA. B.J. 273 (1953); ILL. OPINION 132 (July 8, 1955); ILL. OPINION 205 (Nov. 10, 1961); ILL. OPINION 264 (June 28, 1965); KANSAS 33 (Opinion 2, May 10, 1952); 12 LA. B.J. 227 (1964) (Opinion 175); 38 MICH. S.B.J. 208 (May 1959) (Opinion 159, Nov. 1954). North Carolina, however, permitted "an attorney [to] advertise himself through various media as a tax consultant if he d[id] not hold himself out as an attorney and d[id] not attempt to secure tax work by reason of the fact that he h[eld] a law license." N.C. ST. B. 67 (Opinion 13, Jan. 14, 1944). Yet, even this did not permit the attorney to hold himself out as a "tax attorney." *Id.* In addition, Florida allowed advertising of twenty-three designated specialties. FLA. R. OF CT., art. XVII, § 13, schedule A (1978). Iowa was one of the first states to alter its rules on attorney advertising as a direct response to *Bates*. 1978 Iowa Legis. Serv. 32 (West). Both Florida and Iowa include tax as one of the designated specialties. FLA. R. OF CT., art. XVII, § 13, schedule A; IOWA DR 2-105 (1978).

Both states impose various restrictions on advertising the designated specialties. First, an attorney may advertise only three designated specialties. FLA. R. OF CT., art. XVII, § 4(d)(1978); IOWA DR 2-104(A)(2) (1978). Second, an attorney must be experienced in the areas of specialization for a specified period of time before he is eligible to advertise each specialty. FLA. R. OF CT., art. XVII, § 4(a),(b),(c) (1978); IOWA DR 2-105(A)(3)(a),(b) (1978). Both states require continuing legal education. In Florida, where the grant of permission to announce each specialty must be renewed every three years, 30 hours of approved continuing legal education is a condition of renewal. FLA. R. OF CT., art. XVII, § 9(a), (b) (1978). Iowa, however, mandates 10 hours of accredited study as a condition for the initial grant. IOWA DR 2-105 (A)(4)(b) (1978). Iowa has no provision for renewal. *See* IOWA DR 2-105 (1978). Finally, both states require that a notice to the public appear with any printed advertisement. Iowa's notice is as follows:

> "A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa."

IOWA DR 2-105(A)(3)(c) (1978). Florida's is nearly identical. FLA. R. OF CT., art. XVII, § 11(a) (1978).

These changes in the Code of Professional Responsibility in Florida and Iowa demonstrate a recognition of the problems created by legal specialization and by the public's need and right to know what an attorney has to offer. Public advertising by a tax attorney increases the probability of adequate representation of the client in a specialized area.

[9] DR 2-102(F). This rule provides "a lawyer [may] use, in connection with his name, . . . an earned degree or title . . . indicating his training in the law." *Id.*

[10] DR 2-102.

[11] DR 2-101(A).

ation)" under the "reasonable restrictions" exception to the *Bates* decision.[12]

After locating an appropriate tax specialist, an additional problem exists with respect to the general practitioner's fear of the possible loss of a client to an attorney to whom the general practitioner has referred a specialized problem.[13] This fear may tend to promote the incompetent handling of the matter by the non-expert and possibly lead to a malpractice suit.[14] While the client should have the right to choose his own attorney, "client-stealing" by a specialist desiring a more general practice seems most unfair. Such possible adverse consequences to both attorney and client are fostered by overly restrictive rules concerning attorney specialization.

It is common practice for many attorneys to "associate" an expert. Considering the extreme complexity of tax law, this practice may improve the quality of legal services rendered, while maintaining client contact. As referrals from non-tax practitioners to the one- and two-man tax firm increase, the decreased profitability of handling non-tax matters, and the need for continuing referrals, will minimize the realistic possibility of client-stealing.

Fee Problems

The General Practitioner and the Non-Attorney Tax Specialist

One method of insuring that an attorney will retain a client is to hire an enrolled agent,[15] or a certified public accountant,[16] to handle

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[12] 433 U.S. at 384.

[13] ABA Code of Professional Responsibility EC 2-22 provides that "a lawyer should not associate in a particular matter another lawyer outside his firm . . . [w]ithout the consent of his client." ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-22 [hereinafter cited as EC]. Thus, in the situation where the client does not deal directly with the specialist, the referring attorney must at least disclose the fact of the referral. This disclosure may lead to the loss of the client by the referring attorney, due to the client's desire to deal directly with the specialist.

[14] ABA Code of Professional Responsibility DR 6-101(A)(1), which was not adopted by the New Jersey supreme court, specifically prohibits such conduct in providing that "[a] lawyer shall not . . . [h]andle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." DR 6-101(A)(1).

[15] Treasury Department Circular 230 states that "[t]he Commissioner [of the Internal Revenue Service] may grant enrollment . . . by written examination administered by the Internal Revenue Service." 31 C.F.R. § 10.4(a) (1977). The applicant must not have "engaged in any conduct which would justify the suspension or disbarment of any attorney, certified public accountant, or enrolled agent." *Id.* An enrolled agent must be a citizen of the United States and over twenty-one years of age. *Id.* § 10.4(c) (1977). Rule 200(a)(3) of the Rules of Practice and Procedure of the United States Tax Court provides that any citizen is entitled to practice before the Tax Court if they pass the examination administered by the court. *Id.*

[16] A certified public accountant is defined in Treasury Department Circular 230, which governs practice before the IRS, as "any person who is duly qualified to practice as a certified

the tax aspects of a transaction. The Disciplinary Rules prohibit a lawyer from sharing legal fees with a non-lawyer,[17] and from forming a partnership with a non-lawyer.[18] Therefore, such an arrangement designed to represent clients in tax matters would be prohibited.[19] This prohibition also makes sharing office space with an accountant, enrolled agent or other businessman impractical, since the attorney would not be permitted to accept referrals from them.[20]

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public accountant in any State, possession, territory, Commonwealth, or the District of Columbia." *Id.* § 10.2(c) (1977).

[17] DR 3-102(A) enumerates only three instances where a lawyer or law firm may share legal fees with non-lawyers. One exception permits an agreement between a lawyer and his firm, partner, or associate to pay money to his estate or other specified person for a reasonable time after his death. DR 3-102(A)(1). Another allows an attorney who completes unfinished legal work of a deceased lawyer to pay to the estate of the deceased lawyer the portion of the fee attributable to the services of the deceased. DR 3-102(A)(2). Finally, non-lawyers may be included in a retirement plan even though it is based on a profit sharing arrangement. DR 3-102(A)(3).

In the New Jersey supreme court case of In re Bregg, 61 N.J. 476, 295 A.2d 360 (1972), the court temporarily suspended a lawyer for sharing legal fees with a non-lawyer. *Id.* at 479, 295 A.2d at 361. In *Bregg*, a Cuban lawyer who had not been admitted to the New Jersey bar, advertised in Spanish language newspapers that he was a lawyer and was prepared to render legal services. *Id.* at 477, 295 A.2d at 360. The Cuban attorney "then referred many of those who responded to this solicitation to Bregg," a New Jersey attorney. *Id.* at 478, 295 A.2d at 360. For this service, Bregg paid a referral fee to the Cuban lawyer. *Id.* at 478, 295 A.2d at 361. This resulted in a three-month suspension of the attorney. *Id.* at 479, 295 A.2d at 361. The court based this disciplinary ruling not only on DR 3-102, but also on DR 2-103 which proscribes the payment of any type of compensation to a person or organization recommending an attorney's employment by a client. *Id.* at 478, 295 A.2d at 361. In addition, a lawyer may not request a person or organization to recommend or promote the use of his services, or those of any attorney affiliated with him. *Id.* Exceptions are made for legal service activities and lawyer referral services that are approved by a bar association.

[18] DR 3-103(A) provides that "[a] lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." DR 3-103(A).

[19] The inquiry in Advisory Opinion 228 concerned the propriety of an attorney forming a partnership with an accountant and an insurance agent. ADVISORY OPINION No. 228, 15 N.J.L.J. 70 (1972). The proposed partnership was to provide accounting, insurance, and legal advice to subscribers of the service package. *Id.* The committee held this partnership arrangement to be a clear violation of DR 3-103(A). *Id.* In discussing the prohibition contained in DR 3-103(A), the Advisory Opinion traced the history of this sanction. *Id.*

> This prohibition is not new. Under the former Canons of Professional Ethics, Canon 33, partnerships between lawyers and members of other professions or non-professional persons were not permitted where any part of the partnership's employment consisted of the practice of law.

Id. The committee also referred to Formal Opinion 239 of the ABA Committee on Professional Ethics in which

> it was held that a partnership between a lawyer and a certified public accountant to act as consultant in federal tax matters and to represent taxpayers before the Bureau of Internal Revenue and the Board of Tax Appeals was improper and a violation of Canon 70.

Id.

[20] ADVISORY OPINION No. 129, 91 N.J.L.J. 365 (1968). In Advisory Opinion 129, "[a]n [attorney] inquired as to the propriety of accepting fees from . . . clients and . . . strangers who

Another difficulty inherent in the relationship between the general practitioner and the accountant or enrolled agent concerns fee itemization and billing procedure. If the attorney reviews the work of the other professional, he should be allowed to bill the client directly for the accountant's or enrolled agent's fee and separately for his own work. Without actually reviewing the work, however, it would seem unethical to charge the client in excess of the actual cost of the accountant's or enrolled agent's fee.

The Tax Attorney

Disciplinary Rule 2-107 prohibits a lawyer from "divid[ing] a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office unless . . . the division is made in proportion to the services performed and responsibility assumed by each."[21] Additionally, direct referral fees are not permitted.[22] In associating a specialist-attorney, there is no referral fee problem, per

come to . . . [his] firm's office for help with their income tax returns and for other legal service." *Id.* The committee stated that such an arrangement did not "in itself . . . involve . . . impropriety." *Id.* The inquirer's law firm maintained its office in a one-story building that was shared with a real estate and insurance business. *Id.* A common receptionist and secretarial services were used by the law firm and real estate agency. *Id.* The advisory committee recognized that the attorneys were not actually participating in the real estate and insurance businesses, but an argument was made that under the facts of this case, an impression would be made upon the public that the attorneys did have an interest in those businesses. *Id.* This led to the committee's conclusion that "any advertising or other promotional activity on the part of the real estate and insurance business will inevitably result to the benefit of the law practice and the association is improper." *Id.*

Although the committee did not impose a blanket prohibition on attorneys engaging in separate businesses, it recognized that such outside interests must be distinct from the practice of law. *Id.* An attorney could, for example, simultaneously practice accounting and law, but must completely separate each practice from the other so that "one . . . would [not] be regarded as a feeder for [the] law practice." *Id.* Thus, for example, the use of a common office would be prohibited.

[21] DR 2-107(A)(2). A lawyer is also allowed to "divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm" in other instances. DR 2-107(A)(1), (3), (4). The fee division is allowed if "[t]he client consents to employment of the other lawyer after a full disclosure that a division of fees will be made." DR 2-107(A)(1). In addition, if "[t]he total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client," a division of fees would also be permitted. DR 2-107(A)(3).

In *In re* Diamond, 72 N.J. 139, 368 A.2d 353 (1976), a Deputy Surrogate referred individuals, who were contesting the disposition of an estate, to another attorney. *Id.* at 140, 368 A.2d at 353. Upon settlement of the estate, the legal fees were split between the Deputy Surrogate and the attorney to whom the parties were referred. *Id.* The Supreme Court of New Jersey held that both the Deputy Surrogate and the attorney had violated DR 2-107(A)(2), *id.* at 141, 368 A.2d at 354, and reprimanded them. *Id.* at 142, 368 A.2d at 354.

[22] *In re Bregg, supra* note 17, involved a referral fee between an attorney and a non-attorney. *In re Diamond, supra* note 21, concerned a referral fee between two attorneys. For a discussion of *In re Bregg*, see note 17 *supra*; for a discussion of *In re Diamond*, see note 21 *supra*.

se. However, it is unconscionable to charge a client in excess of the actual cost of the associated specialist, without rendering a substantive service. It has been suggested that a young attorney, in order to build a practice, could charge a low rate to other attorneys, who would presumably bill it to the client at their normal rate.[23] This does not appear to be proper.

Another aspect of the fee problem concerns the permissibility of the use of a contingent fee. In criminal cases, Disciplinary Rule 2-106(C) prohibits contingent fees which are "substantially contingent upon the result."[24] New Jersey has a maximum contingent fee based on the amount of the recovery,[25] but the rule contains no specific prohibition against the use of contingent fees in tax practice. In tax practice, the contingent fee arrangement is acceptable in instances such as a tax refund suit, where the "successful prosecution of the claim produces a *res* out of which the fee can be paid."[26] A contingent fee for tax planning services seems impractical, however, because of the difficulty in determining the amount of tax saved by an attorney's action, and since saving a potential tax does not produce a res, it would seem that only refund suits could properly be subject to a contingent fee compensation arrangement.

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[23] G. SINGER, HOW TO GO DIRECTLY INTO SOLO LAW PRACTICE WITHOUT MISSING A MEAL § 47 (1976).

[24] DR 2-106. DR 2-106 provides that "[a] lawyer shall not enter an arrangement for, charge, or collect a fee for representing a defendant in a criminal case which is substantially contingent upon the result." DR 2-106(C).

[25] N.J.R. 1:21-7(c) provides that in a tort case, an attorney may not charge a fee in excess of:

(1) 50% on the first $1000 recovered;
(2) 40% on the next $2000 recovered;
(3) 33-⅓ % on the next $47,000 recovered;
(4) 25% on the next $50,000 recovered;
(5) 20% on the next $150,000 recovered;
(6) 10% on any amount recovered over $250,000; and
(7) where the amount recovered is for the benefit of a client who was an infant or incompetent when the contingent fee arrangement was made and the matter is settled without trial, the foregoing limits shall apply, except that the fee on any amount recovered up to $50,000 shall not exceed 25%.

N.J.R. 1:21-7(c).

[26] EC 2-20. EC 2-20 states that "[c]ontingent fee arrangements in civil cases have long been commonly accepted in the U.S." *Id.* The Ethical Consideration describes the two "historical bases" which were responsible for the acceptance of contingent fee arrangements:

> (1) [Contingent fee arrangements] . . . often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid.

Id.

RESPONSIBILITY TO THE CLIENT AND THE INTERNAL REVENUE SERVICE IN PREPARING TAX RETURNS

The practice of law involves an inherent conflict between the fundamental principles of promoting the client's interests and upholding the law.[27] Disciplinary Rule 7-101 articulates this dichotomy by

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EC 2-20 further states that although a lawyer should avoid the use of a contingent fee arrangement with a client who is able to pay the required fee, the lawyer "where justified by the particular circumstances of a case, [may] enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement." *Id.* With respect to practice before the Internal Revenue Service, the Ethical Consideration states that "in administrative agency proceedings, fee contracts should be governed by the same consideration as in other civil cases." *Id.* Since EC 2-20 fails to describe what "particular circumstances of a case" would justify the use of a contingent fee arrangement, it appears that if the client consents, a contingent fee arrangement would be allowed in tax refund litigation based upon the possible production of a res. *Id.*

[27] Former Commissioner of the Internal Revenue Service, Mortimer M. Caplin, has discussed the conflicting responsibilities of the tax advisor. Caplin, *What is Good Tax Practice: A Statement of the Problems and the Issues Involved,* in N.Y.U. PROCEEDINGS OF THE 21ST ANN. INST. ON FED. TAX. 9 (H. Sellin ed. 1963) [hereinafter cited as *Good Tax Practice*]. The first responsibility of the tax advisor is to "represent his client well: he must give him undivided fidelity; he must bring honesty and skill to the job." *Id.* at 16. The next responsibility involves adherence to an ethical scheme: "the practitioner must function within his own canons of ethics—whether they be those of a professional society or of some other organized group with which he is associated—and within the bounds of Treasury Circular 230." *Id.* Finally, the tax practitioner's social responsibility "to see that the tax system is meeting the needs of the government, and that it is functioning honestly, fairly and smoothly." *Id.* at 17.

This conflict has been addressed by Professor Freedman in *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) [hereinafter cited as *Freedman*] and by Professor David G. Bress in *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966) [hereinafter cited as *Bress*]. Both professors deal with three specific questions which delineate the attorney's conflict between upholding the law and representing the client. The first question asks whether it is proper to cross-examine an adverse witness to discredit him or her when the cross-examiner knows that the adverse witness is telling the truth. *Compare Freedman, supra* at 1469 *with Bress, supra* at 1494. Both professors answer this question in the affirmative, but according to different rationales. *Compare Freedman, supra* at 1474–75 *with Bress, supra* at 1494. Professor Freedman bases his conclusion on the attorney's duty to protect client confidences, *Freedman, supra* at 1474–75, whereas Professor Bress emphasizes the adversarial system as the truth-finding process. *Bress, supra* at 1494. Thus, for Professor Bress, information as to the credibility of an adverse witness obtained other than from cross-examination may not be utilized. *Id.*

The second question asks whether "it [is] proper to put a witness on the stand when you know he will commit perjury." *Compare Freedman, supra* at 1475 *with Bress, supra* at 1495. Professor Freedman has concluded that if the attorney refused to allow the defendant to take the stand, the attorney has thereby violated the rule of confidentiality, since the attorney is acting against his client's interests on information obtained from the client. *Freedman, supra* at 1475–78. Professor Bress urges that the client should not be allowed to testify if the client would lie on the witness stand. *Bress, supra* at 1495–96.

The final question inquires "whether it is proper to give [a] client legal advice when [the attorney] ha[s] reason to believe that the knowledge [the attorney] give[s] [the client] will tempt

providing that a lawyer must represent his client zealously, and must not intentionally "[f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules."[28] This duty is limited by the lawyer's obligation to uphold the law, and "[i]n his representation of a client, a lawyer may . . . refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal."[29] Professional responsibility is designed to protect society, as well as to provide a system of ethics which can maintain a level of professional conduct.[30]

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him to commit perjury." *Freedman* at 1469. *Compare Freedman, supra* at 1469 *with Bress, supra,* at 1496. Freedman submits that

> the client is entitled to have this information about the law and to make his own decision as to whether to act upon it. To decide otherwise would not only penalize the less well-educated defendant, but would also prejudice the client because of his initial truthfulness in telling his story in confidence to the attorney.

Freedman, supra at 1481–82. Bress, however, has concluded that although the attorney

> owes loyalty to his client . . . he cannot be disloyal "to the law whose ministers we are," because "the place of justice is a hallowed place." Furthermore, a lawyer who condones perjury does not advance the cause of justice. Whether he is acquitted or convicted, an accused who sees his lawyer employ unethical tactics will emerge from his trial filled with justifiable contempt for the law, for his own unscrupulous counsel, and perhaps for the entire legal profession.

Bress, supra at 1497. Thus, it is evident that in attempting to resolve the attorney's conflict between representing a client and upholding the law, Professor Freedman considers the confidentiality of the attorney-client relationship to be the determining factor, whereas Professor Bress relies on the integrity of the judicial adversarial fact-finding process.

[28] DR 7-101(A)(1). Disciplinary Rule 7-101 also provides that "[a] lawyer shall not knowingly . . . [f]ail to carry out a contract of employment entered into with a client for professional services . . . [or] [p]rejudice or damage his client during the course of the professional relationship." DR 7-101(A)(2),(3).

[29] DR 7-101(B)(2). Disciplinary Rule 7-101(B) also states that "in represent[ing] . . . a client, a lawyer may . . . [w]here permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." *Id.*

In a panel discussion on the ethics of tax practice held at the Twenty-First Annual Institute on Federal Taxation, the propriety of representing a client who has suggested a marginally lawful tax scheme was discussed. *What Is Good Tax Practice: A Panel Discussion,* in N.Y.U. PROCEEDINGS OF THE 21ST ANN. INST. ON FED. TAX. 23, 35–36 (H. Sellin ed.1963) [hereinafter cited as *Panel Discussion*]. One panelist submitted that "[a]lthough you may lose this client by attempting to dissuade him from going into a scheme, you would in the long run enjoy your practice more by being able to do the constructive work that you believe in." *Id.* at 36. Another panelist argued that if the plan put forth by the client is lawful, simply because that plan is repugnant to the attorney's personal standard of fairness, strict ethics would not obligate the lawyer to dissuade the client. *Id.* at 36.

Mortimer M. Caplin has stated that the practitioner must adopt his own canons of ethics and consistently function within such boundaries. *Good Tax Practice, supra* note 27, at 16. However, the attorney's personal ethical standards must be compatible with the mandates of Treasury Department Circular 230. *Id.*

[30] Corneel, *Ethical Guidelines for Tax Practice,* 28 TAX L. REV. 1, 5 (1972). Professor Corneel, recognizing the importance of professional responsibility, stated:

Tax Return Preparation

In the area of tax return preparation, there is a tendency for the attorney to approach the fine line between tax minimization and tax avoidance, due to the desire to serve his client and, in addition, to afford the client the greatest protection from the encroaching hand of government. The complexity of the tax law creates additional difficulties in determining what the state of the law actually is.[31] In addition to the confusion surrounding the substance of tax law, no ethical standards have been promulgated which directly address the tax practitioner with respect to return preparation.[32] However, several sources of guidance are available to an attorney faced with an ethical question involving the preparation of a tax return.

The Code of Professional Responsibility offers some basic guidelines which are applicable to tax return preparation. Disciplinary Rule 1-102(4) provides that "[a] lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[33] This rule clearly prohibits an attorney from intentionally falsifying a client's tax return, but does not address the more subtle aspects of proper return preparation. Disciplinary Rule 2-110(C)(1)(b) permits an attorney to withdraw from his representation of a client when the client seeks to pursue an illegal course of conduct.[34] This rule would be

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> It is important to remember that "professional ethics" is a composite of (1) rules designed to provide society with a service it has a right to expect, that is, the service generally provided by members of the profession, and (2) aspirations for improvement in the level of professional conduct.

Id.

[31] Professor Corneel has suggested that due to the complexity of the tax law, it is virtually impossible for the tax specialist to avoid ethical conflicts. *Id.* at 36.

> [A] direct result of the complications of the tax law is a conflict of true ethics with professional ethics: A law so filled with special rules, elections, exceptions and exceptions to exceptions which hide its true import and cause it to operate as an ex post facto law is not a just law. To close the discussion of one subject by opening another: Tax lawyers can make no greater contribution to the ethical aspects of tax practice than by working for improvement and simplification of the tax laws.

Id. (footnote omitted).

[32] Former I.R.S. Commissioner Caplin has perceived a need for an ethical system responsive to the frequent changes in tax law. *Good Tax Practice*, *supra* note 27, at 1142. He suggests written guidelines directed toward developing a more uniform level of conduct within the tax field. *Id.* at 11. Such a statement of "Good Tax Practice" could specifically identify practices "not technically unethical but which are looked upon askance in the profession . . . as 'things that are not done.' " *Id.* at 12. If such guidelines were set out, Caplin argues, they could help to simplify the tax administration process by removing competitive pressures and improving the level of professional conduct. *Id.*

[33] DR 1-102(A)(4).

[34] DR 2-110(C)(1)(b). An interesting anecdote relevant to a discussion of illegal conduct suggested by the client is contained in the comments of an editor of the *Tax Law Review* at its 1952 banquet.

applicable, for example, if a client attempted to provide the Internal Revenue Service with false information. Whether this rule of withdrawal should apply in the situation where a client seeks a multiple-step transaction that will surely fail, is not articulated.[35]

Frederick Corneel, in his article *Ethical Guidelines for Tax Practice*, explores many areas in which the correct behavior is not agreed upon by the members of the bar.[36] He proposes a list of practical guidelines for dealing with ethical problems in tax practice.[37] The first principle is that the attorney should sign all returns he actually

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> About thirty years ago my father came home one night and was in an obviously happy mood. When he was happy, he showed it in a stereotyped fashion: he had a rich, resonant voice and he knew only one song, and it was to the effect that he "stood on the bridge at midnight when the clock was striking the hour." He could accompany himself on the Steinway to this song, but only in chords, and he would sit there and throw his head back, the way you feel when you are in the shower, and let out his exuberance, and then, after he had sung this song, he would go mix himself the very best of Sazerac cocktails.
>
> Observing this, I asked him whether he had won a particularly good case that day. He rubbed his hands together and said, "I won the biggest case a lawyer can win. I threw a rich client out of my office for asking me to do something wrong."
>
> You can imagine what that meant to a sixteen-year-old boy who hoped to become a lawyer, and I looked forward to the day when I could have that same thrill. Unfortunately, for years after I began to practice law, no rich client ever asked me to do anything wrong. Then, after the lapse of some time, they started, once in a while, asking me to do something wrong, but the first nine or so of them conformed obediently when I told them they couldn't do that and indicated the proper thing to do. I had to wait for the tenth rich man who wanted to do something wrong before I succeeded in throwing him out of the office and having the belated celebration.
>
> But I want to say that in the meantime there must have been half a dozen not-so-rich men who had to be thrown out for the same reason.

Address by Edmond Cahn, Tax Law Review 1952 Banquet, *reprinted in Ethical Problems of Tax Practitioners*, 8 TAX L. REV. 1, 3–4 (1953) [hereinafter cited as *Tax L. Rev. Banquet*].

[35] It has been suggested that a multiple step transaction, designed to misrepresent the actual facts, should be dealt with in the same manner as a similarly deceptive single-step transaction. Address by Jerome R. Hellerstein, *Tax L. Rev. Banquet, supra* note 34, at 6. Hellerstein provides an example in which a corporate client seeks legal advice with an eye toward avoiding the payment of dividends. *Id.* Although the corporation is not actually considering expanding its operations, the officers prepare a report stating that capital and inventory are below anticipated future needs. *Id.* By seemingly committing itself to future expansion, which will never be actually undertaken, the corporation can justify the retention of capital and thus avoid the payment of dividends. *Id.* Hellerstein argues that the attorney's ethical decision to withdraw from representation of a client who has suggested such a complex scheme is no more difficult than the decision to withdraw from representing a client who has proposed a questionable single step transaction, such as back-dating a bill of sale. *Id.* In a single step transaction, the "obviousness of the distortion of facts" is much greater than in a multiple step scheme. *Id.* Because each step in the latter situation, when viewed in the abstract, is innocent by itself, an attorney must be wary of convincing himself that he is not "misstating the facts or seeking to mislead the Treasury." *Id.* Thus, with regard to both types of transactions, the attorney must initially decide if the end in view is a misrepresentation of the true financial picture. *Id.*

[36] *See generally* Corneel, *supra* note 30.

[37] *Id.* at 33–36.

prepares.[38] Corneel recommends that "[r]easonable doubts . . . may be resolved in favor of [the] client," but only if "a reasonable basis

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[38] *Id.* at 33. Corneel suggests that "the lawyer's signature on the return as a preparer may be taken as evidence by the Service that he has made at least some effort to insure that the return is correct and complete." *Id.* at 33–34.

[39] *Id.* Formal Opinion 314 provides that in the preparation of his client's return, the tax lawyer may freely adopt statements of positions most favorable to the client as long as a reasonable basis exists for taking them. FORMAL OPINION No. 314 (1965). As a result, the lawyer has no duty to advise that riders be attached to the return which explain the rationale of such positions. *Id.* However, while this statement of ethics relates to what the lawyer must do, "[p]rudence may recommend procedures not [specifically] required by ethical considerations." *Id.* For example, in certain situations, it may be to the advantage of the client to be free from any taint of fraud, or to have the advantage of a shorter statute of limitations which might be available due to full disclosure of the circumstances of a transaction or deduction. *Id.* Thus, the tax lawyer should feel free to advise his client to attach a rider to the return justifying a particular position that was taken in the determination of tax liability. *Id.*

[40] Corneel, *supra* note 30, at 34. The quality of tax practitioner's evaluation of his client's return becomes very important due to the possible negative impact upon the tax practitioner's standing with the Internal Revenue Service. In his practice the tax lawyer always deals with the government, usually maintaining regular contacts with the same group of agents and lawyers. Address by Thomas Tarleau, *Tax L. Rev. Banquet, supra* note 34, at 13. As a result, these government representatives are often ready to rely on his integrity as a reputable attorney in handling many routine matters. *Id.* For example, the acceptance of a statement of facts without verification, or the adoption of data submitted without an independent audit are common manifestations of this trust. *Id.* While this state of affairs may be quite convenient to the tax lawyer's practice, to maintain continued credibility he must make certain that the material he presents to the government is accurate. *Id.*

> In effect, he is regarded as having vouched for the correctness of the material he submits unless he expressly disavows responsibility for it. Obviously, while the latter course may frequently be the safest, it is also one which can arouse suspicion and thereby prove detrimental to the client's interests.

Id.

It is clear that a reputation for candor and fairness takes years to develop and is a valuable part of a tax practice. The practitioner must always be on guard against the few innocent misrepresentations that can turn his most valuable asset into a distinct liability. At times, a client may seek advice as to the legality of a guaranteed method to avoid taxation. Paul, *The Lawyer as a Tax Advisor*, 25 ROCKY MTN. L. REV. 412, 416–21 (1953). The tax lawyer must clearly advise against unsound schemes that would not stand the test of "objective analysis and litigation." *Id.* at 416. He must have the ability to say "no" to his client "[e]ven when he knows that the client may shop for a more welcome answer in other offices which are more interested in pleasing clients than they are in rendering sound opinions." *Id.*

The tax lawyer must also recognize that he is retained by his client to provide effective and aggressive representation. In this regard, "the lawyer is free to resolve factual questions in favor of his client and make statements of positions most favorable to the client, so long as there is a reasonable basis for these positions." Collie & Marinis, *Ethical Considerations on Discovery in Tax Returns*, 22 TAX LAW. 455, 462 (1968).

An attorney must be conscious of the fact that government representatives often rely on his reputation in the decision making process. Paul, *supra* at 423. In doing so, these government officials place a special burden of responsibility upon the reputable tax attorney. *Id.* He is duty bound to recognize this trust, and must guard against the client who is less than honest with him, and who hopes to use the attorney's reputation as a shield against his own tax liability. *Id.*

. . . in the law or the facts" exists.[39] Of course, the standard of reasonableness will vary with different attorneys in different geographical areas. However, if the return does not meet an honest belief as to its reasonableness, the attorney should not sign it, and should not encourage the client to file it.[40]

Corneel also proposes that the attorney should not knowingly make misstatements of fact to the Internal Revenue Service nor should he encourage any tax plan that is bound to fail if all the facts are known to the Internal Revenue Service.[41] This does not mean that there is an obligation to volunteer evidence or law that is adverse to the client's position.[42] However, if an error on a return of a prior open year is found, the attorney should urge the client to rectify the error.[43] If the client refuses to accept the advice to correct the error, the attorney should consider withdrawing from representation of the client.[44] Finally, Mr. Corneel suggests consulting another attorney in order to obtain a more impartial opinion in a case where the proper course of ethical conduct is doubtful.[45]

Thus, one commentator has noted that "[l]awyers whose word is their bond have a special obligation to be diligent in their analysis of the facts involved in tax controversies and scrupulously careful that their factual presentations to Government representatives fairly reflect the truth." *Id.*

[41] Corneel, *supra* note 30, at 34. It has been noted that "[i]t is unethical for a tax lawyer to advise his client to take admittedly unauthorized deductions or to exclude income which is incontrovertibly taxable." Address of Jerome R. Hellerstein, *Tax L. Rev. Banquet, supra* note 34, at 7 (emphasis omitted). Furthermore, "[i]t is unethical for a tax lawyer to draw legal documents or otherwise give advice, as a result of which, by deliberate misrepresentation of facts or circumstances, tax evasion will result." *Id.* at 5–6 (emphasis omitted).

[42] Corneel, *supra* note 30, at 20. Corneel notes that "[n]one of the canons require a disclosure of legal authority that casts doubt on the client's case." *Id.*

[43] *Id.* at 14. Corneel recommends that the attorney "call the mistake to his client's attention and . . . urge his client to correct the mistake, particularly where [the attorney] has participated in the preparation of the return." *Id.*

[44] *Id.* at 15. However, one commentator has remarked that "[t]he obligation of candor and fairness should not require the lawyer to [withdraw]." Collie & Marinis, *supra* note 40, at 463.

The attorney must also be conscious of making any adverse impression upon the Internal Revenue Service. Corneel urges that "[w]here the lawyer has signed the prior incorrect return himself, a termination of the relationship may be desirable in order to preserve the lawyer's reputation with the Service." Corneel, *supra* note 30, at 15–16. For a further discussion of the importance of a tax specialist's reputation with the I.R.S., see note 40 *supra*.

[45] Corneel, *supra* note 30, at 35. Corneel stresses that an additional reason for a lack of objectivity is the attorney's financial interest inherent in maintaining contact with the client. *Id.*

> The other improvement upon letting our conscience be the guide is to be aware that our livelihood depends in the first place upon our clients. Under these circumstances our judgment as to what is ethically permissible may well be affected. In case of doubt, therefore the lawyer should make it a point to consult another—where the matter is important to the firm as a whole, someone outside the firm. Not only will consultation with an unprejudiced outsider prevent what might otherwise be a misstep, but I have found I sleep better when advised by one not directly involved that my course of action is proper.

Id.

Another set of guidelines is contained in the American Institute of Certified Public Accountants' Statements on Responsibilities in Tax Practice[46] required to be used by certified public accountants in federal tax practice.[47] Statement One provides that a certified public accountant sign the return if he, in fact, prepared it, "whether or not the return was prepared for compensation."[48] However, if a certified public accountant has not prepared the federal tax return, he is not required to sign the preparer's declaration.[49] The standard for signing returns as required by the AICPA is more specific than that included in the Code of Professional Responsibility and the Corneel article, since the certified public accountant must make a "reasonable effort . . . to provide appropriate answers" even if an answer might prove disadvantageous to the taxpayer.[50] Thus, accountants are not expected to represent their clients with the same zealous advocacy of the attorney.[51] Furthermore, if there is an omission on the return, even on reasonable grounds, the certified public accountant has the duty to alert the Internal Revenue Service by "red-flagging" the item.[52]

Upon discovering an error, the certified public accountant must notify the client, and consider whether preparation of the current year's return should be continued, but "the CPA is neither obligated to inform the Internal Revenue Service [of the error] nor may he do so without his client's permission."[53] When representing a client in

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[46] AICPA STATEMENTS ON RESPONSIBILITIES IN TAX PRACTICE [hereinafter cited as AICPA STATEMENT No.].

[47] The AICPA Statements "[are] intended to constitute a body of opinion on what are good standards of tax practice, outlining the accountant's responsibility to his client, the public, the Government and his profession." Collie & Marinis, *supra* note 40, at 456.

[48] AICPA STATEMENT No. 1, *reprinted in* 118 J. ACCOUNTANCY 66 (Oct. 1964).

[49] AICPA STATEMENT No. 2, *reprinted in* 120 J. ACCOUNTANCY 62 (Sept. 1965).

[50] AICPA STATEMENT No. 3, *reprinted in* 122 J. ACCOUNTANCY 60 (Oct. 1966).

[51] Paul F. Icerman, a certified public accountant, has argued that "the accountant traditionally is not brought up in the sense of the adversary or advocacy climate as is the lawyer." *Panel Discussion*, *supra* note 29, at 28. Mr. Icerman feels that this lack of emphasis on advocacy "would allow [the accountant] to accept the concept of dual responsibility more readily than the attorney." *Id.*

[52] AICPA STATEMENT No. 3, *reprinted in* 122 J. ACCOUNTANCY 60 (Oct. 1966). The explanation to Statement 3 provides that "[i]t is not consistent with the professional statute of the CPA to sign the preparer's declaration on a return which is incomplete." *Id.*

[53] AICPA STATEMENT No. 6, *reprinted in* 130 J. ACCOUNTANCY 64 (Nov. 1970), outlines the responsibility of a CPA when he discovers a mistake in a tax return, or in another document relevant to his client's tax liability. *Id.* Three principal guidelines are provided. First, the CPA should promptly advise the client of the error, and recommend the appropriate action to be taken, which usually amounts to disclosure of the mistake by filing an amended return. *Id.* However, the CPA has no duty to inform the IRS of the discovery, and in fact can not do so without his client's authorization. *Id.*

The second provision is applicable when the client has refused to correct an error in a

an administrative proceeding, the certified public accountant should request the client's permission to disclose the error to the Internal Revenue Service.[54] Otherwise, the certified public accountant may be required to withdraw.[55] In preparing the return, however, the certified public accountant may ordinarily rely on the information furnished by the client, and he is not required to examine or review documents or other evidence supporting the client's information in order to sign the preparer's declaration.[56]

Although there is some variation in the principles set forth in the AICPA standards, the Code of Professional Responsibility and Mr. Corneel's article, they all maintain the common element proscribing the tax practitioner from lying to the Internal Revenue Service and, in some circumstances, requiring the tax practitioner to withdraw based upon a client's inappropriate action. While these guidelines are of some use in helping the bar consider the ethical issues involved in

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previous return that would reduce current tax liability. *Id.* At this point, the CPA should question his continued involvement in the preparation of the current year's return and, if he decides to proceed, the CPA should "take reasonable steps to assure himself that the error is not repeated." *Id.* In addition, he should not allow carryovers and other similar items associated with the error to result in a material understatement of the client's tax liability. *Id.*

The third guideline comes into play when the CPA represents the client in an administrative proceeding regarding a return "in which there is an error known to the CPA that has resulted or may result in a material understatement of tax liability." AICPA STATEMENT No. 7, *reprinted in* 130 J. ACCOUNTANCY 66 (Nov. 1970). Under these circumstances, the CPA should request the client's permission to disclose the error to the Service. If that request is denied, the CPA may be required to withdraw from the proceeding, *id.*, except where this withdrawal would clearly violate the confidential relationship with the client. *Id.* at 67.

These guidelines do not apply in the absence of a material understatement of tax liability, or "in cases where there is reasonable support for the position taken by the client or there was reasonable support at the time the return was filed." *Id.* at 66. In addition, Statement 7 applies whether or not the CPA had prepared the erroneous return, *id.*, but does not govern the conduct of a CPA who is engaged to provide assistance to legal counsel in a matter relating to counsel's client. *Id.* at 67.

[54] *Id.* at 66.

[55] *Id.* A CPA in the panel discussion at the N.Y.U. 21st Annual Institute on Federal Taxation stated that if a client refused to correct his statement to the Internal Revenue Service, the CPA would be required to withdraw both on ethical grounds and because the situation would destroy the mutual confidence and trust necessary to a successful accountant-client relationship. *Panel Discussion, supra* note 29, at 51.

[56] *Id.* at 43. Although not required to check a client's documentation, certified public accountants have varying views on the amount of substantiation required. One certified public accountant has stated that he would require documentation for any deduction or expense over $10,000. *Id.* at 42. Another CPA, however, has adopted a more flexible policy in not requiring the client to present documentation, unless "there seem[ed] to be a doubt as to the substantiation." *Id.* at 43. Both accountants agreed that large amounts claimed as travel, entertainment and charitable donations would have to be documented. *Id.* at 43–46. They also agreed that expenditures of large amounts in these areas would be supportable by "cancelled checks and letters of gratitude and acknowledgment." *Id.* at 45.

tax practice, they do not resolve the fundamental conflict between client advocacy and upholding the law. Formal Opinion 314 attempts to deal with the dichotomy between representing the client and upholding the law by redefining the role of the Internal Revenue Service. The question is propounded whether "the service, however fair and impartial it may try to be," is due "the same duty of disclosure . . . owed to the courts," considering that it "is the representative of one of the parties" to the litigation.[57] The ABA answers this question by stating that "the lawyer has no duty to advise that riders be attached to the client's tax return explaining the circumstances surrounding the transaction or the expenditures."[58] Furthermore, "the absolute duty not to make false assertions of fact" does not "require the disclosure of weaknesses in the client's case," nor is there any requirement which mandates the breach of attorney-client confidences, "unless the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed."[59] The opinion carefully notes that "[a] wrong, or indeed . . . unjust, tax result in the settlement of a controversy is not a crime."[60] Formal Opinion 314, after stating that it is the lawyer's duty not to "deliberately and affirmatively" mislead the Internal Revenue Service or permit a client to do so, questions the appropriate role of the attorney when his client misleads the Internal Revenue Service.[61] When this occurs, the lawyer must advise the client to correct the statement and, "if the client refuses, the lawyer's [further] obligation depends on all . . . the

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[57] FORMAL OPINION No. 314 (1965). Formal Opinion 314 states that the government has the clear advantage when practicing before the Internal Revenue Service. *Id.* The Service is simply not structured in a way that will assure a taxpayer a genuine adversarial proceeding complete with full judicial safeguards. *Id.* Although the Service "provide[s] for 'fresh looks' through departmental reviews and informal and formal conference procedures," it is not designed to operate as a true impartial tribunal. *Id.*

[58] *Id.*

[59] *Id.* Formal Opinion 314, however, suggests that even where the attorney has no duty to disclose, "he may, as a tactical matter, advise his client to disclose the transaction in reasonable detail by way of a rider to the return." *Id.* The rationale for such a disclosure is to avoid "either a *claim* of fraud (albeit unfounded) or to have the protection of a shorter statute of limitations (which might be available by the full disclosure of such a transaction in detail . . .)." *Id.* (emphasis in original).

It has been noted that "[i]n following the traditional legal approach one must never forget that there is often a thin line between mere nondisclosure of evidentiary facts and misrepresentation." Collie & Marinis, *supra* note 40, at 464.

[60] FORMAL OPINION No. 314 (1965).

[61] *Id.* Professor Maguire has remarked that "the lawyer's commitment to battle for his client through thick and thin, by every effective means, should definitely be held within bounds by the requirement of straightforward probity." Maguire, *Conscience and Propriety in Lawyer's Tax Practice*, 13 TAX L. REV. 27, 36 (1958).

circumstances."[62] The lawyer is only required to withdraw when the misstatement will be associated with him.[63] Even then, however, the attorney cannot disclose the confidences of his client.[64]

The position taken by Formal Opinion 314 seems to have a sound basis since, as an adversary, the Internal Revenue Service and the government can certainly guard their own interests, whereas the public needs the legal profession for protection from the comparatively unlimited resources of the government.

False Statements and the Falsification of Records Submitted to the Internal Revenue Service

The knowing submission of a false statement to the Internal Revenue Service by an attorney is a violation of the code of conduct to which attorneys are expected to adhere. Both the ABA in Formal Opinion 314, and the AICPA in its Statements on Responsibilities in Tax Practice denounce the making of false statements or knowing misrepresentations by tax practitioners.[65] The Supreme Court of New Jersey has also spoken on this issue.

The disciplinary case of *In re Weiner* involved an attorney who made a false statement to the Internal Revenue Service, under oath, which resulted in the hindering of a criminal investigation.[66] Although he later corrected his false statement, the attorney was suspended from practice for one year.[67] Another case involving a false statement to a governmental agency was *In re Turco*.[68] The attorney knowingly submitted false statements to the Internal Revenue Service

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[62] FORMAL OPINION No. 314 (1965).

[63] *Id.* AICPA Statement 7 provides that a CPA is "under a duty to withdraw" if the CPA has discovered an error which "may result in a material understatement of tax liability" and the client does not agree "to disclose the error to the Internal Revenue Service." AICPA STATEMENT No. 7, *reprinted in* 130 J. ACCOUNTANCY 66 (Nov. 1970).

[64] FORMAL OPINION No. 314 (1965).

[65] *See* notes 46–64 *supra* and accompanying text. Furthermore, DR 1-102(A)(4) prohibits a lawyer from "engag[ing] in conduct involving dishonesty, deceit, or misrepresentations." *Id.*

[66] In re Weiner, 56 N.J. 165, 166, 265 A.2d 545, 545 (1970). In *Weiner*, the attorney made false statements while under oath to both the Internal Revenue Service and the Federal Bureau of Investigation. *Id.* at 166–67, 265 A.2d at 545–46. Later in the same year, he gave conflicting testimony before the Committee on Rules and Administration of the United States Senate. *Id.* This testimony was taken as part of an investigation into the activities of Bobby Baker. *Id.* at 166, 265 A.2d at 545. The testimony included the payment of a retainer for legal services. *Id.* Although the attorney originally testified that the fee was paid to the firm of Tucker and [Robert] Baker, "in truth it was Baker who was retained and to whom the money was paid." *Id.*

[67] *Id.*

[68] 66 N.J. 50, 327 A.2d 668 (1974).

and was convicted in a criminal action on that charge.[69] Based upon this conviction, he was disbarred by the supreme court.[70]

Both of these cases, although dealing with an attorney's statements before a governmental body, are not necessarily precedential because they do not concern an attorney in his role as attorney, but rather in his role as a party.[71] However, it is reasonable to expect that some disciplinary proceeding would be appropriate if an attorney knowingly contradicts the truth with no room for reasonable doubt, while acting on behalf of a client. Conversely, it would seem extremely unfair to punish an attorney who merely relays information, which is a carefully contrived client fabrication presenting no reason for further investigations. The legal profession cannot be guarantors of the veracity of every client's statement, even if the attorney provides the means by which the client's statements are conveyed. However, in *In re Blatt*,[72] the Supreme Court of New Jersey stated that "[a] lawyer may not follow the directions of a client without first satisfying himself that the latter is seeking a legitimate and proper goal and intends to employ legal means to attain it."[73] The court further noted that the attorney must first consider "[t]he propriety of any proposed course of action," and may pursue such course of action "only if . . . completely satisfied that it involves no ethical compromise."[74] This decision, the court concluded, "is for the lawyer, [and] not the client."[75] Thus, there is a higher standard of care to which the attorney may be held in matters of legal judgment as compared to the mere relaying of client-provided information.

With regard to the falsification of documents, the *Blatt* court

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[69] *Id.* at 51–52, 327 A.2d at 668. The attorney in *Turco* defrauded his clients of funds "received in settlement of their claims," and failed to include these monies in his income tax return. *Id.* at 51, 327 A.2d at 668.

[70] *Id.* at 52, 327 A.2d at 669.

[71] *See* notes 66–70 *supra* and accompanying text.

[72] 65 N.J. 539, 324 A.2d 15 (1974).

[73] *Id.* at 545, 324 A.2d at 18. In *Blatt*, the client was involved in a kickback scheme. *Id.* at 541, 324 A.2d at 16. The attorney removed an invoice from the client's file and added the word "surveying." *Id.* at 542, 324 A.2d at 17. The altered invoice read "[t]o Bill your account for Surveying work performed—$9,000." *Id.* The attorney then advised witnesses, who were not his clients, to be as uncooperative as possible with the pending federal investigation. *Id.* The attorney also prepared two contracts for the sale of a particular piece of property, with different prices, so that real estate brokers could interpose a strawman. *Id.* at 544, 324 A.2d at 18. This transaction resulted in a $25,000 profit. *Id.* The attorney argued that he was just following the directions of his client, but the Supreme Court of New Jersey held that "[r]espondent's duty, upon being requested to draft the aforementioned agreements, was to learn all the details of the proposed transaction." *Id.* at 545, 324 A.2d at 19.

[74] *Id.* at 545, 324 A.2d at 18.

[75] *Id.*

noted that "[t]he falsification of records, especially when there is a strong likelihood that they may later be examined in the course of an investigation or judicial proceeding, is on its face improper conduct."[76] Since there is a reasonable expectation of an investigation or a judicial proceeding as the result of documents submitted to the Internal Revenue Service, the alteration, even of just one word, is violative of the applicable ethical standards.[77]

Attorney-Client Privilege

The attorney-client privilege, aside from being a rule of evidence,[78] is an additional element in the conflict between the rights of the client and the power of the state. The attorney-client privilege belongs to the client,[79] although the attorney can claim the privilege on behalf of the client.[80] In tax situations, the problem arises as to the extent of the privilege when the client intends to circumvent the tax law.

In re Callan[81] reaffirms the rule of evidence that the attorney-client privilege is not available when, in the course of his legal services, a client communication to an attorney is sought in order to commit or further a crime or fraud.[82] If the discussion concerns the structuring of a transaction in such a manner as to make its form differ from its substance to avoid tax, it would appear that, to the extent the activity of the attorney is legal and proper, the privilege should remain intact.

Unlike attorneys, certified public accountants and enrolled agents do not enjoy the right of privileged communications with their

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[76] *Id.* at 543, 324 A.2d at 18.

[77] In *In re Blatt*, the attorney was disciplined for adding the word "surveying" to an invoice statement. *See* note 73 *supra*.

[78] The attorney-client privilege is detailed in Rule 26 of the New Jersey Rules of Evidence. N.J.R. EVID. 26.

[79] *In re* Callan, 122 N.J. Super. 479, 497, 300 A.2d 868, 878 (Ch. Div. 1973).

[80] N.J.R. EVID. 26(1).

[81] 122 N.J. Super. 479, 300 A.2d 868 (Ch. Div. 1973).

[82] *Id.* at 495–96, 300 A.2d at 877. *In re Callan* involved a contempt proceeding brought against three attorneys who failed to inform the court of their disbursement of escrowed rent strike funds in violation of a court order. *Id.* at 482–84, 300 A.2d at 869–70. In convicting the attorneys of contempt, the court held that "[c]onfederating with clients to allow court and counsel to labor under a misapprehension as to the true state of affairs; countenancing by silence the violation of a court order and aiding and abetting the continued contempt of another" was an exception to the lawyer-client privilege under New Jersey Rule of Evidence 26(2)(a). *Id.* at 496, 300 A.2d at 877. Rule 26(2)(a) provides that the "[lawyer-client] privilege . . . does not extend to a communication in the course of legal service sought or obtained in aid of the commission of . . . a fraud." *Id.* at 495–96, 300 A.2d at 877.

clients.[83] Therefore, in order to be protected by the attorney-client privilege, the attorney should be the employer of the certified public accountant or enrolled agent.[84] A derivative attorney-client privilege would then be available.[85]

PRACTICE BEFORE THE INTERNAL REVENUE SERVICE

Practice before the Internal Revenue Service is governed by the rules contained in Treasury Department Circular 230.[86] The Internal Revenue Service has its own ethics enforcement system which is managed by the Director of Practice.[87] Attorneys, certified public accountants, and enrolled agents are permitted to practice before the Internal Revenue Service.[88] Such practice "comprehends all matters connected with presentation to the Internal Revenue Service or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service."[89] Essentially, practice before the Internal Revenue Service is the practice of law. Under the principle established in *Sperry v. State Bar of Florida*,[90] however, governmental agencies are authorized to allow non-lawyers to represent clients before that particular agency.[91]

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[83] Address by Bruno Schachner, *Tax L. Rev. Banquet*, *supra* note 34, at 17. The lack of this privilege may require the CPA to disclose client communications under oath since "the client's confidences are not protected if they are entrusted to an accountant." *Id.* The accountant "should guard himself against receiving [such confidences], lest he have to disgorge them under oath." *Id.*

[84] *Id.* Schachner states "that accountants are . . . frequently and properly employed to aid lawyers in the investigation of facts and in the preparation of accounting data which help them to present the case." *Id.*

[85] *See id.* With regard to direct communication between the accountant and the client, however "it is by no means sure that [the client's] admissions are protected even if the accountant is the lawyer's employee pro tem." *Id.*

[86] TREAS. DEP'T CIRCULAR No. 230, 31 C.F.R. § 10 (1977).

[87] *Id.* § 10.1(a)(b). The Director of Practice "act[s] upon appeals from decisions of the Commissioner of Internal Revenue denying applications for enrollment to practice before the Internal Revenue Service." *Id.* § 10.1(b). The Director also "institute[s] and provide[s] for the conduct of disciplinary proceedings relating to attorneys, certified public accountants, and enrolled agents." *Id.*

[88] *Id.* § 10.3(a),(b),(c). For a definition of enrolled agent, see note 15 *supra*.

[89] Practice before the Internal Revenue Service "include[s] the preparation and filing of necessary documents, correspondence with and communications to the Internal Revenue Service, and the representation of a client at conferences, hearings, and meetings." *Id.* However, practice before the Internal Revenue Service does not include the preparation of a tax return. *Id.*

[90] 373 U.S. 379 (1963).

[91] Sperry v. State Bar of Fla., 373 U.S. 379, 404 (1963), involved Sperry, a non-lawyer patent agent, who held himself out as and performed the functions of a patent attorney. *Id.* at

There are three fundamental standards of practice imposed by Treasury Department Circular 230. First, no attorney may "neglect or refuse" to promptly submit records or information in any matter before the Internal Revenue Service "unless he believes in good faith and on reasonable grounds that such record or information is privileged or that the request for, or effort to obtain, such record or information is of doubtful legality."[92] Second, upon discovery of an omission or error by the client, the attorney "shall advise the client promptly of the fact of such noncompliance, error, or omission."[93] Finally, the attorney must "exercise due diligence" in providing information to the Internal Revenue Service.[94]

Although outlining some standards of conduct, Treasury Department Circular 230 is, due to its lack of specificity, of rather limited utility in assisting the practitioner in determining the duty owed to the Internal Revenue Service. Although both ABA Formal Opinion 314 and the AICPA Tax Statements state that a duty is owed to the Internal Revenue Service, the specifics of that duty are not articulated.[95] Even the Chief Counsel's Advisory Committee Report, which proposes revisions to Treasury Department Circular 230, fails

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381. Sperry was registered to practice only before the United States Patent Office. *Id.* Acting on a motion by the state bar, the Florida supreme court enjoined Sperry's practice on the ground that it constituted an unauthorized practice of law. *Id.* at 382. The United States Supreme Court reversed, noting that 35 U.S.C. § 31 specifically authorizes "the Commissioner of Patents '[to] prescribe regulations governing the *recognition* and conduct *of agents*, attorneys, *or other persons* representing applicants or other parties before the Patent Office.' " *Id.* at 384 (emphasis in original). The Court held that Congress, in delegating such power to the Commissioner, did not violate the reserved powers clause of the tenth amendment even though the legislation concerned "a matter otherwise within the control of the state." *Id.* at 403.

With regard to non-lawyer practice before other administrative agencies, the *Sperry* Court discussed section 6(a) of the Administrative Procedure Act which recognizes the right of a non-lawyer to practice before administrative agencies subject to the regulations of the particular agency. *Id.* at 396–97. Thus, the Treasury Department is permitted to allow non-lawyer practice before the Internal Revenue Service. The right of non-lawyers to practice before the Internal Revenue Service may be granted on a showing of "special competence in tax matters by written examination administered by the Internal Revenue Service" provided the agent has not participated in any activity which would "justify the suspension or disbarment of any attorney, certified public accountant, or enrolled agent under the provisions of [Treasury Department Circular No. 230]." TREAS. DEP'T CIRCULAR No. 230, 31 C.F.R. § 10.4(a) (1977).

92 *Id.* § 10.20(a).

93 *Id.* § 10.21.

94 *Id.* § 10.22(a). The attorney, certified public accountant, or enrolled agent must be diligent with respect to the "filing of returns, documents, affidavits, and other papers relating to Internal Revenue Service matters." *Id.* In addition, care must be exercised "[i]n determining the correctness of oral or written representations made . . . to the Internal Revenue Service," *id.* § 10.22(b), and "made . . . to clients with reference to any matter administered by the Internal Revenue Service." *Id.* § 10.22(c).

95 *See* notes 46–64 *supra* and accompanying text.

to address the issue of the fundamental duty owed to the Internal Revenue Service by attorneys in the representation of taxpayers.[96]

CONFLICT OF INTERESTS

Conflict of interests is a frequent problem area for many otherwise ethically conscious attorneys and is the frequent subject of disciplinary proceedings. In the area of taxation, the possibilities of conflict range from the prior government employment of an associate of the firm, to dealings with witnesses and the problems of fees paid by third parties. Frequently, a determination that an activity is unethical is incorrect, since the conduct is not obviously improper. Such determinations are often rationalized as a means of preventing the "appearance of professional impropriety."[97]

Actions by Former Employees of the Government

Treasury Department Circular 230 prohibits former employees of the Internal Revenue Service from representing clients in a matter in which the United States is a party, and in which the attorney personally and substantially participated as an employee of the government.[98] If the attorney had a general responsibility for a matter, even absent substantial involvement, there is a one-year prohibition against representing a client in an action where the United States is an opposing party.[99]

In *In re Biederman*,[100] a former deputy attorney general was reprimanded for representing a private construction contractor.[101] The attorney sought the reversal of a prior ruling obtained against the contractor during the attorney's period of employment as a deputy attorney general.[102] The Supreme Court of New Jersey affirmed the

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[96] CHIEF COUNSEL'S ADVISORY COMM. ON RULES OF PROFESSIONAL CONDUCT, 41 Fed. Reg. 41, 119 (1976).

[97] Canon 9 of the ABA Code of Professional Responsibility provides that "[a] lawyer should avoid even the appearance of professional impropriety." CANON No. 9. Furthermore, DR 9-101 enumerates specific activities which must be avoided due to the appearance of impropriety. DR 9-109.

[98] TREAS. DEP'T CIRCULAR No. 230, 31 C.F.R. § 10.26(b) (1977). Treasury Department Circular 230 provides that "[n]o former . . . employee of . . . the U.S. Government . . . shall represent anyone in any matter administered by the Internal Revenue Service, involving a specific party . . . , in which [the employee] participated personally and substantially as an officer or employee." *Id.*

[99] *Id.* § 10.26(c).

[100] 63 N.J. 396, 307 A.2d 595 (1973).

[101] *Id.* at 400, 307 A.2d at 597.

[102] *Id.* at 398, 307 A.2d at 596.

ethics committee's determination that the attorney had violated Disciplinary Rule 9-101(B), which provides that "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."[103]

In *State v. Lucarello*,[104] the appellate division further interpreted Disciplinary Rule 9-101(B).[105] *Lucarello* involved an attorney who had been a county prosecutor during an investigation which had commenced before, and continued after, his period of public employment.[106] The attorney had substantial responsibility for the case.[107] Upon his resignation from the county prosecutor's office, he represented one of the individuals who had been investigated.[108] The court held that the attorney had violated Disciplinary Rule 9-101(B) and, therefore, he was prohibited from representing the client.[109] The Supreme Court of New Jersey, in *State v. Jacquindo*,[110] imposed the same prohibition on another former prosecutor who had been on the prosecutor's staff during the same investigation as in *Lucarello*.[111] Although the attorney in *Jacquindo* had not participated in the actual investigation, the court adopted the rationale that, even absent actual knowledge, the attorney had the opportunity to know the facts and was therefore disqualified.[112] Furthermore, in *State v. Rizzo*,[113] the court prohibited the attorney in *Jacquindo*, who was the partner of the attorney in *Lucarello*, from representing the defendants because he was the partner of the disqualified attor-

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[103] *Id.* at 397–99, 307 A.2d at 595–96 (quoting DR 9-101(B)).

[104] 135 N.J. Super. 347, 343 A.2d 465 (App. Div. 1975).

[105] *Id.* at 350–52, 343 A.2d 466–68.

[106] *Id.* at 349–50, 343 A.2d at 466.

[107] *Id.* at 350–51, 343 A.2d at 467.

[108] *Id.* at 349, 343 A.2d at 466.

[109] *Id.* at 351, 343 A.2d at 467.

[110] 138 N.J. Super. 62, 350 A.2d 252 (App. Div. 1975).

[111] *Id.* at 63, 350 A.2d at 253.

[112] *Id.* at 67, 350 A.2d at 255. Advisory Opinion 207 addressed the question whether a former prosecutor could defend a person indicted as a result of an investigation which was commenced during the prosecutor's period of government employment. ADVISORY OPINION No. 207, 94 N.J.L.J. 451 (1971). The former prosecutor had not been involved in the investigation, and had resigned two months before the investigation uncovered irregularities. *Id.* The advisory committee noted that Canon 36 prevented the former prosecutor from representing the client since "[o]ne of the primary purposes of the rules of professional ethics is to preserve and protect the reputation of lawyers." *Id.* The committee noted that "[t]he . . . public might . . . know of the investigation and indictment without knowing the exact date that the inquirer resigned as . . . prosecutor or without knowing whether or not the inquirer had been involved in the particular investigation." *Id.*

[113] 69 N.J. 28, 350 A.2d 225 (1975).

ney.[114] The supreme court applied Disciplinary Rule 5-105(D),[115] which states that "if a lawyer is required . . . to withdraw from employment . . . , no partner or associate of his or his firm may accept or continue such employment."[116] In opposing the state in a matter in which he, or his partner, was involved as an employee of the state, the court held that the defendant also violated the principle that a lawyer must avoid even the appearance of impropriety established in Disciplinary Rule 9-101.[117]

Applying these prohibitions to former employees of the Internal Revenue Service would seem a natural extension of the New Jersey case law. There is a problem, however, in determining to what extent the limitations will be imposed. The substantial participation standard is certainly not inclusive enough to prevent all appearances of impropriety, or to protect the government as a client. The cases suggest a prohibition on representing the taxpayer for those years or transactions over which the attorney had authority or potential authority while in governmental employ. This standard would prevent a misperception by the public, as well as the possibility of an attorney modifying his course of conduct, to the detriment of the government for the principal purpose of securing outside employment.[118]

Once the attorney is disqualified, Disciplinary Rule 5-105(D) mandates that the entire firm be disqualified.[119] As a means of moderating the effects of the disqualification of an entire firm, the screening process proposed in ABA Formal Opinion 342 might be utilized.[120] The ABA Formal Opinion holds that "whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety," the disqualification of the firm

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[114] *Id.* at 30, 350 A.2d at 226.

[115] *Id.*

[116] DR 5-105(D).

[117] 69 N.J. at 30, 350 A.2d at 226.

[118] Formal Opinion 342 states that "[t]he appearance of evil is only one of the underlying considerations . . . for the creation and existence of . . . rule [9-101(B)]." FORMAL OPINION No. 342 (1975). The opinion lists four other "policy considerations underlying [DR] 9-101(B)." *Id.* These factors are "the treachery of switching sides," "the safeguarding of confidential government information," "the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service," and "the professional benefit derived from avoiding the appearance of evil." *Id.*

[119] DR 5-105(D).

[120] FORMAL OPINION No. 342 (1975). Formal Opinion 342 states that the entire firm should not be disqualified "[s]o long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the matters." *Id.*

imposed by Disciplinary Rule 5-105(D) may be waived by the government.[121] This practice might be a viable procedure enabling some larger firms to avoid conflicts, but the screening process could rarely be effective in a small firm.

The Attorney Acting as a Witness, and an Advisor of a Witness

The Code of Professional Responsibility prohibits an attorney from "accept[ing] employment in contemplated . . . litigation if he . . . believes that he or a lawyer in his firm ought to be called as a witness."[122] There are exceptions if the testimony is "relate[d] solely to an uncontested matter," "a matter of formality," or "to the nature and value of [his] legal services."[123] There is a further exception "[a]s to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."[124] If, after accepting employment, it becomes clear that the lawyer "ought to be called as a witness on behalf of his client" in pending litigation, the lawyer must withdraw from representation with the same exceptions as those that are applicable in accepting employment.[125] In the event that an attorney is called as a witness other than on behalf of his client, the attorney or his firm may continue representation as long as his testimony will not be prejudicial to his client.[126] If an attorney, or a member of his firm, knows, or has reason to believe, that he will be called to give testimony of a "material nature," the attorney and firm must withdraw from representation.[127] If the testimony relates to purely formal matters, however, it would be proper to continue representation.[128] If the matter is slightly more than a minor formality, the attorney himself should appear only as a witness, but the firm would not be required to withdraw.[129] In tax matters, it would be appro-

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[121] *Id.*

[122] DR 5-101(B).

[123] DR 5-101(B)(1),(2),(3).

[124] DR 5-101(B)(4).

[125] DR 5-102(A).

[126] DR 5-102(B).

[127] ADVISORY OPINION No. 233, 95 N.J.L.J. 206 (1972). Advisory Opinion 233 addressed the situation in which a law firm was retained to seek a declaratory judgment action concerning the rights and duties created by a settlement which had been negotiated by a member of the firm. *Id.* Since it was probable that the attorney would be called as a witness at the trial, the advisory committee determined that it would be improper under DR 5-102 for the firm to continue representation. *Id.*

[128] DR 5-101(B)(2).

[129] ADVISORY OPINION No. 95, 89 N.J.L.J. 401 (1966). In Advisory Opinion 95, an associate of a law firm inquired whether he could serve both as a witness and as the attorney for the

priate if the attorney were permitted to testify concerning the manner of the return preparation, and the reasons for excluding an item from gross income, without causing a substantial conflict problem.

Another area of possible concern in tax matters is advising third party witnesses. In *In re Blatt*, the attorney for a party advised witnesses, who were not his clients, to be as uncooperative as possible if questioned by federal authorities.[130] The court held that, although an attorney has "the duty . . . to represent his client with zeal and vigor," advising non-clients to be uncooperative with federal authorities extended beyond the permissible boundaries, and was violative of Disciplinary Rule 1-102(A)(5),[131] which prohibits "conduct that is prejudicial to the administration of justice."[132]

In *In re Russell*,[133] the attorney told witnesses, who were represented by different counsel, to invoke the fifth amendment privilege of silence, rather than testify fully and truthfully as their counsel had recommended.[134] This was found to be in violation of Disciplinary Rule 7-104,[135] which mandates that a lawyer cannot directly communicate with a witness he knows is represented by another attorney, nor can he "give advice to a person who is not represented by a lawyer, other than advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with interests of his client."[136]

The representation of both the parties and witnesses can lead to an unacceptable conflict, but is not generally prohibited. Disciplinary Rule 5-105(C) permits multiple representation if it is obvious that the attorney can adequately represent the interests of each party, assuming each party has consented after complete disclosure of the possible negative effects of such multiple representation.[137] It is, however, insufficient for an attorney merely to state that he foresees no conflict, and then request permission from both clients.[138] The attorney

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executor in admitting a will to probate. *Id.* The committee held that the associate could serve as a witness, but could not act as the attorney for the executor. *Id.* However, the committee did allow legal representation by another member of the firm. *Id.*

[130] 65 N.J. at 543, 324 A.2d at 18.

[131] *Id.*

[132] DR 1-102(A)(5).

[133] 59 N.J. 315, 282 A.2d 42 (1971).

[134] *Id.* at 316, 282 A.2d at 43.

[135] *Id.* at 317 n.1, 282 A.2d at 43–44.

[136] DR 7-104(A)(2).

[137] DR 5-105(C).

[138] *In re* Lanza, 65 N.J. 347, 351, 322 A.2d 445, 447–48 (1974). In *Lanza*, an attorney represented both the vendor and the purchaser of a personal residence. *Id.* at 349, 322 A.2d at

must give examples of the possible problems to be encountered with some degree of specificity to prevent his admonition from being meaningless.[139]

CONCLUSION

This article has attempted to address those areas of tax practice in which ethical difficulties are most frequently encountered. For example, although a tax specialist may advertise among attorneys, the extent of permissible advertising to the public is presently uncertain. Furthermore, with regard to fees, it is unethical to demand consideration for a referral to a tax specialist in the absence of substantial participation by the referring attorney. In addition, although it is improper to represent a client who attempts to provide the Internal Revenue Service with false statements, the attorney need not withdraw if a reasonable basis supports the client's position. It should be noted, however, that the guidelines set forth in this article constitute minimum standards and "[e]ach lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above [these] minimum standards."[140]

446–47. The Supreme Court of New Jersey held that the attorney should have completely informed both clients of the various possibilities of conflict. *Id.* at 351, 322 A.2d at 447–48.

[139] *Id.*

[140] ABA CODE OF PROFESSIONAL RESPONSIBILITY, PREAMBLE.