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NEWSQUARTERLY

Dealing with an Uncooperative Client

By Michael B. Lang*

In a perfect world, a client would consult a lawyer before engaging in any transaction that might have significant tax consequences and would then attempt to implement the transaction in accordance with the lawyer's advice; a client filing returns and other documents would seek advice where appropriate in advance and would file in accordance with the advice received, on a timely basis and without perjuring himself; a client advised by counsel not to enter a dubious tax shelter transaction would not do so; and a client advised of a material error in a prior communication to, or filing with, the Service or in testimony before a tribunal would agree to correct the error or at least consult with independent counsel about whether to do so. But this is not a perfect world. Clients ignore the advice of their lawyers. They engage in transactions without following their lawyers' advice or without getting advice at all. They file forms that contain inaccuracies, both unintentional and intentional. Sometimes they tell their lawyers of their intention to do so in advance of filing. Clients often refuse, or are at least reluctant, to correct misstatements in communications or filings with the Service or tribunals, even in situations where the errors are material.

This article briefly reviews the principal obligations of a tax lawyer to the client and others when a client refuses to follow the lawyer's advice. It will serve as background material for **"Dealing with an Uncooperative Client,"** the subject of this year's **Tax Link Live** member benefit teleconference, which will be presented by the ABA Tax Section on **Wednesday, June 3, at 1:00 p.m. ET**. For details on this special, 90-minute CLE ethics program, please see the program announcement on page 9.

Return Preparers

Many lawyers are "tax return preparers" within the meaning of section 7701(a)(36) when they prepare a return (or a substantial portion of a return) for a client. Under Regulations sections 301.7701-15(b)(2) & (3), a person who provides "advice on a position that is directly relevant to the determination of the existence, characterization, or amount of an entry on a return" that is a substantial portion of the return is generally a return preparer if the advice is provided with respect to events that have already occurred when the advice is given.

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TAXATION
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EDITORIAL POLICY

The ABA Section of Taxation NEWSQUARTERLY is published quarterly to provide information on developments pertaining to taxation, Section of Taxation news, and other information of professional interest to Section of Taxation members and other readers.

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Articles and reports reflect the views of the individuals or committees that prepared them and do not necessarily represent the position of the American Bar Association, the Section of Taxation, or the editors of the NEWSQUARTERLY. Although contributions are subject to selection and editing, the Section conducts no systematic review of these items. The Editors welcome new submissions as well as responses to material previously published in the NEWSQUARTERLY.

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The Tax Section is sponsoring the following CLE programs at the ABA Annual Meeting in Chicago. These programs are complimentary and will be held in the Presidential CLE Centre located at the Hyatt Regency Chicago.

For information regarding the Annual Meeting, go to **www.abanet.org/annual/2009**.

ADVANCE REGISTRATION AND HOUSING DEADLINE: Tuesday, July 7, 2009

TAX CLE HIGHLIGHTS AT THE ANNUAL MEETING

FRIDAY, JULY 31

8:30am – 10:00 am

DUE DILIGENCE: STATE AND LOCAL TAX ISSUES AFFECTING BUSINESS ACQUISITIONS

Description: This panel will discuss a wide variety of state and local tax ("SALT") due diligence issues that should be considered when buying the stock or assets of a business, including a preliminary incentives analysis and investigation for non-disclosed SALT liabilities, the potential for successor liability and risky SALT strategies/tax shelters.
Speakers: **William M. Backstrom, Jr.**, Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P., New Orleans, LA: **Janette M. Lohman**, Thompson Coburn LLP, St. Louis, MO.
Organized by: State and Local Taxes Committee

2:00pm – 3:30pm

BUY-SELL AGREEMENTS FOR CLOSELY HELD BUSINESSES AND PROFESSIONAL PRACTICES

Description: This program will educate the business lawyer on the fundamentals, including basic tax considerations, of buy-sell agreements in all entity forms and under all triggering events.
Speakers: **William P. Prescott**, Wickens, Herzer, Panza, Cook & Batista Co., Avon, OH *(moderator)*; **Saba Ashraf**, Troutman Sanders LLP, Atlanta, GA; other panelists TBA.
Organized by: Closely Held Businesses Committee
Cosponsor: Section of Business Law

SATURDAY, AUGUST 1

9:00am – 10:00am

NEW DEVELOPMENTS IN ACCOUNTING FOR EMPLOYEE BENEFIT PLAN ASSETS AND LIABILITIES

Description: Employee benefit plan assets and liabilities can have very significant impacts on companies' balance sheets. This panel will review the current GAAP rules and discuss the changes that the International Financial Reporting Standards will bring, focusing on accounting for share-based payments and pension and other post-employment payments.
Speakers: TBA
Organized by: Employee Benefits Committee

SUNDAY, AUGUST 2

3:30pm – 5:00pm

ETHICAL, PROFESSIONAL, AND TAX ASPECTS OF BACKDATING PARTNERSHIP AGREEMENTS AND PARTNER TRANSACTIONS

Description: This panel will discuss what constitutes "backdating," when it works and when it does not, and when it is ethical and when it is not, all in the context of partnership transactions.
Speakers: **Sheldon I. Banoff**, Katten Muchin Rosenman LLP, Chicago, IL *(moderator)*; panelists TBA.
Organized by: Partnerships & LLCs Committee
Cosponsor: Section of Business Law

William J. Wilkins*

The Tax Section has a tradition of annual "courtesy calls" with senior tax officials in Washington. Just before Christmas 2008, a small group of Section officers and staff held three meetings in one day to continue this tradition, meeting separately with the Treasury Department's Office of Tax Policy; the Internal Revenue Service; and the Tax Division of the Department of Justice. Attendees included the Assistant Secretary for Tax Policy, the Commissioner of the IRS, the Assistant Attorney General for the Tax Division, and many other key officials. It was gratifying to hear that our Committees' regulation comments and other policy commentary are appreciated and relied upon by senior policymakers.

One of the more interesting aspects of these meetings was the insight offered by senior officials on issues where they were balancing competing policy demands, including in some cases pressures from the Congress. This insight can help all of us better understand the perspectives of government officials, and better anticipate policy developments that could affect private tax practice and future Tax Section activity.

For example, each group mentioned international tax compliance as an area of increased activity and likely policy change. It is clear that the uncovering of thousands of undisclosed offshore accounts associated with U.S. individuals will lead to changes in audit and enforcement activity. Other changes are in the wind as well. When the Senate Permanent Subcommittee on Investigations grills the Commissioner of the IRS on what the Subcommittee Chairman and staff consider "soft spots" in cross border tax compliance, the executive branch naturally focuses its attention on whether current policies need to be updated and potentially tightened. In each of our three meetings, officials expressed an expectation of increased flows of information to U.S. tax authorities from international sources. Each speaker was probably thinking of a different kind of international information flow—the topic potentially covers a broad range of topics, including withholding and reporting requirements, qualified intermediaries, treaty renegotiations, and international requests for tax information in enforcement actions.

Each government group was also wrestling with the broad set of issues involved in disputes about IRS access to tax accrual workpapers. Justice Department officials identified ongoing litigation as a priority activity. Treasury and IRS officials face, on one side, Congressional members and staff who cannot believe that the IRS would voluntarily exercise restraint in obtaining information as valuable as workpapers are, and on the other side, bar leaders who fear that clients with audited financial statements will cease to have frank discussions with counsel on how to comply with the tax law. Based on our conversations, we can expect the IRS to explore ways to gain greater transparency into business tax issues on audit, including ways to help agents do a better job of identifying which issues deserve the most development. It appears that the IRS hopes to accomplish this without undermining the valuable public interests that are served by traditional attorney-client and work product privileges. However, the IRS also sees powerful forces that do not care very much for the privileges and the principles they represent, and there are concerns that solutions will be imposed from the outside if the IRS cannot show progress on transparency of tax issues that should be audited.

Treasury Department officials were prescient in warning us that the tax system would be under increasing pressure to serve as the enforcement tool for new restrictions on executive compensation. Economic stimulus legislation signed in February 2009 may be only the latest wave. Members of our Employee Benefits Committee are sure to have their hands full with both client and Tax Section work in this area.

Finally, we had very productive discussions with both the Treasury Department and IRS about the IRS Appeals process. We offered observations that Appeals officials were well trained on independence issues, but that sometimes IRS officials from outside of Appeals were not so well trained. We expressed particular concerns about experiences where an agent or IRS counsel would make an inappropriate request (or demand) that put an Appeals official in an uncomfortable position. We were very pleased to hear that the IRS was already responding to such issues, beginning by holding full day training sessions on the Appeals process for leaders in the Large and Medium Size Business and Small Business and Self Employed Divisions of the IRS.

It perhaps states the obvious that some of the officials we met with in December 2008 are no longer serving in government. It is probably more important to note that the great majority of the people we met with have not changed jobs despite the change of administrations. The concerns we heard in December will continue and will perhaps be further invigorated by new personnel and policies under President Barack Obama's administration. ■

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Michael K. Friel

Martin J. McMahon, Jr.

By Jasper L. Cummings, Jr. and Alan J.J. Swirski*

Mike Friel is Director of, and Marty McMahon is the Stephen C. O'Connell Professor of Law, teaching in, the Graduate Tax Program of the University of Florida Levin College of Law, Gainesville, Florida. Florida's Graduate Tax Program is 35 years old and has one of the largest groups of full-time tax faculty and of full-time tax graduate students among the more than 25 graduate tax programs in law schools in the United States.

Q How did the Florida Graduate Tax Program get started?

A (Mike Friel) The program started in 1974, preceded by several years of preparation. The co-founders of the tax program were Dick Stephens and Jack Freeland, who were well known and highly regarded tax professors and scholars who worked together for a few years laying the ground work. The two of them and Steve Lind, Larry Lokken, and Doug Miller were part of the faculty that initial year, and Dennis Calfee came on board right after that. Collectively, they designed the program, wrote the materials, and taught the courses. We are indebted to them. They put together a terrific program that we have been building on ever since 1974 and that has long been recognized for its quality. We have had truly excellent faculty members over the years and today. They have written leading textbooks and treatises that are used nationwide and have always been dedicated to their teaching. That has helped the program attract outstanding students with distinguished records from across the country and around the world.

Q Who are your full-time faculty today?

A (Mike Friel) Today they include Paul McDaniel, David Hudson, Pat Dilley, Steve Willis, Yariv Brauner, and Charlene Luke, in addition to Larry Lokken, Doug Miller, Dennis Calfee, Marty McMahon, and me. We also continue to have superb adjunct professors who have always added a special dimension to our program. And every year we are joined by an outstanding graduate of our program who is interested in teaching, and for whom the opportunity to be a visiting professor here frequently serves as a springboard to a career in tax teaching.

Q Unlike many graduate tax programs, yours has a high percentage of full-time students. How do you find that impacts the educational experience?

A (Mike Friel) The full-time nature of the program is an important part of the educational experience here. Students get to know each other and to work together regularly. The professors get to know the students, because we are here full-time and the interactions that take place with the students are much more extensive. So, all of the learning that goes on outside the classroom becomes easier to accomplish.

(Marty McMahon) I think that the real benefit from having almost exclusively

(Mike Friel) The full-time nature of the program is an important part of the educational experience here.

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full-time students and almost exclusively full-time faculty is that the entire educational process becomes more collaborative. Our students typically join together in groups of three or four students to study for all of their classes. Almost all of our classes here are taught by the problem method and the students have the problems well in advance. They work the problems out among themselves, going back and forth on their proposed solutions because they know they are going to be called on in class to present them. We expect them to be prepared and they respond very professionally with excellent preparation. That collaborative experience extends outside the classroom because our faculty is here in the building all the time, and all of us frequently have groups of students in our offices to go over the problems that we studied in class. Oftentimes the students want to go a step farther than we went in class and pursue alternatives that we did not have time to pursue in class. This is something that can readily happen with full-time students and full-time faculty.

Q How has the curriculum in your program changed over the years?

A (Mike Friel) The curriculum winds up reflecting the greater complexity that we have seen take place in federal taxation over the years.

(Marty McMahon) We have increasingly moved to three-credit courses. For example, I teach corporate tax in two three-credit blocks, rather than in either two two-credit blocks or three two-credit blocks. I have found that by using three-hour blocks, particularly with two segments back to back—and almost all of our students go into the second corporate tax course as well—you can really pursue great depth because you understand what the students have learned in the earlier courses and what background they have. It gives us the opportunity to pursue a lesser number of subjects but in greater depth than using only two-credit courses.

(Mike Friel) Curricular changes occur in numerous other ways as well. Some examples: A collaborative writing experience for students in international tax planning; an expanded course in taxation of financial instruments; the founding and development of an innovative Center for Estate and Elder Law Planning; the ongoing revision and expansion of courses in employee benefits, executive compensation, and deferred compensation; an advanced seminar in estate and gift and generation-skipping transfer tax; the revision and development of our state and local tax coverage; the incorporation of important technological advances into materials and courses on timing and tax exempt organizations; the creation of an opportunity for in-depth study of taxation and fiscal policy; the development of courses and materials on intangibles and on taxation and economic development; and new teaching approaches in business tax courses. The curricular changes emerge from faculty research and from writing of their textbooks and treatises; from their active involvement in major state, national, and international professional organizations; from their experiences and services as staffers and consultants at the national level relating to federal taxation; from experience in practice; and from lecturing on taxation at institutes, seminars, and workshops in the U.S. and abroad.

In addition, a few years ago, we added an LL.M. in International Taxation degree to our program. Our curriculum has changed in a significant way to provide greater exposure to international taxation, which reflects the ever increasing importance of that topic in the tax world outside. We have introduced courses in international tax planning, international tax policy, tax treaties, and other areas that reflect the globalization of tax practice.

(Marty McMahon) Our International Tax degree, in addition to attracting some U.S. students who opt into that particular degree, which is labeled separately from our LL.M. in Taxation degree, also attracts a large number of students from other countries. This year we have 22 students from other countries, and these are all people who have practice or government experience beyond their law school degree. Almost all of them take the full six-hour corporate tax sequence because they view understanding U.S. corporate tax as part of being an international tax lawyer in their home country. And they are phenomenally good students.

Another addition in the last decade is a very extensive enrichment speaker series that is co-curricular in one sense, but that all the students attend. Every year we have a number of speakers drawn from a variety of backgrounds. In the last few years, for example, we have had Tax Court Judges Juan Vasquez, Joe Gale, Bob Wherry, and John Colvin. We have had from the government side Eric Solomon and Pam Olson when they were the Assistant Secretaries for Tax Policy. We have had John Buckley and Mark Prater from the Hill, George Yin and Lindy Paull, Chiefs of Staff of the Joint Committee, and eminent practitioners like Emily Parker, Larry Gibbs, and Jerry Cohen. [After finishing this interview] I am going to go to the airport in a few hours to pick up Chris Rizek. And for the last five years running now, we have had Chief Counsel Don Korb, and we will have Acting Chief Counsel Clarissa Potter coming in a couple of weeks.

(Mike Friel) We present, in addition, an annual International Tax Symposium with leading tax scholars from within and outside our own faculty. And we also work closely with the Tax Section of The Florida Bar to provide an annual Ethics in Taxation Workshop and other presentations that have in the past year included prominent practitioners such as Richard Comiter, Lauren Detzel, Cristin Keane, Mike Lampert, Brian Phillips, David Pratt, and Sam Ullman. So while all these activities are taking place outside the normal classroom setting, they are very much an important part of our curriculum.

Q What are the most in-demand or "hot" specialties for new tax lawyers, in your opinion? You may have already answered that in terms of the international emphasis, but do you have any further thoughts on that question?

A (Mike Friel) While international tax is a good example of an enhanced emphasis, I can also stress what does not change: Being in this program involves the rigorous study of the Code and regulations, the rigorous application of the Code and regulations and other administrative guidance to problems and hypotheticals. This infuses our entire curriculum and does not change even if the particular aspect of tax law that we are talking about on a given day has changed. The methodology, the approach, does not change.

(Marty McMahon) I would add that the way I explain our philosophy to our students—and indeed to lawyers when I talk to them about why they should hire our students—is that all of us here focus on teaching methodology, not on what the current rules are. The students learn a lot about what the current rules are as a by-product of our focus on methodology. But we are teaching how to read the Code, how to read the Regs, how to do problem solving. I tell my students all the time that my role is to help them learn an operating system that will serve them well for 30 years, not to fill up a data disc with what the state of the law is today, because a few years from now not only will they be asked to solve problems and answer questions that they have never before seen in their lives, but the rules that they are going to apply will be different rules. My goal, and the goal of all of us here, is to prepare the students to answer questions that they have never before seen in their life to which rules apply that they have never before seen in their life.

(Mike Friel) All of us express something of the same notion by telling our students that what we are trying to do is to provide the foundation on which they can build the tax practice they are going to be involved in for the next 30 or 40 years. Most of the employers we talk with are looking to hire the graduate who has the foundation, the operating system, that is going to allow that person to be a productive high quality tax lawyer for the next 30 or 40 years, regardless of what may take up more of the billable hours in one year as opposed to another year.

Q Do you think the need for an LL.M. in Taxation has increased or decreased for law students going into tax practice over the last 30 years; and how do potential employers view the degree?

A (Mike Friel) We regularly encounter potential employers who say in so many words that the people they want to hire as tax associates in their tax department are students who hold an LL.M. in Taxation. The degree has validated itself over the years, and we are increasingly seeing that it is an expected part of the preparation for a tax career.

(Marty McMahon) I am often out talking at CLE programs all over the country. Many of the lawyers that I talk to tell me that except in some of the biggest cities they are not going to hire someone to do tax work unless they have an LL.M. In fact, recently a hiring partner from one of the tax boutiques told me that he had recently had somebody who had clerked for him summers and told this person when she graduated with her J.D. that she was terrific, he would love to hire her, but she had to come and get an LL.M. from Florida before he would actually put her to work.

Q How has the relationship of LL.M. tax programs to their law schools generally evolved over the last 30 years?

A (Mike Friel) LL.M. programs in taxation have become an accepted part of the landscape at 25 or 30 law schools. Those programs are viewed as providing important parts of the curriculum and as providing an advanced degree that the law schools value as a way of distinguishing themselves from others of their peer schools. Here at Florida, we have been part of this law school and its faculty for more than 30 years, and we are committed to its excellence.

(Marty McMahon) Different tax programs have different relationships with their law schools. I understand that at some schools the graduate tax program is viewed as a money maker for the law school to help subsidize the overall budget. This law school provides the LL.M. program in taxation as a public service.

Q I know you have a writing requirement for your students. Please tell us about that.

A (Mike Friel) We have a requirement that each student must complete a substantial research paper in order to receive our graduate tax degree. As part of that experience we provide training in tax research techniques and an understanding of the tools of tax research. We then ask that each student, under the supervision of a member of the tax faculty, undertake research and writing that leads to a high quality paper. So that is now, and has been since its inception, an important and prominent feature of our program.

(Marty McMahon) Year in, year out, more than one of those papers ends up published in places like *Tax Notes*, *Tax Notes International*, the ABA Tax Section *Tax Lawyer*, the *Florida Tax Review*, and the *Virginia Tax Review*, and in the last couple of years we have had a winner of the Tannenwald competition and the ACTEC competition, and an honorable mention in the Tannenwald competition. So, we really get some very, very good writing products from our students.

In addition to the required writing project, many of the faculty members have individually decided to use writing projects as all or part of the evaluation process in their classes. Larry Lokken, for example, in the Taxation of Property

Transactions course, uses a number of interim writing assignments during the course of the semester in addition to an examination at the end. Paul McDaniel, in the Tax Treaties, International Tax Planning, and International Tax Policy courses, assigns only papers, and he goes over first drafts and second drafts of those papers with the students. And in the Taxation and Fiscal Policy course that I teach, I assign a number of short papers during the semester. I review the papers with the students, and they rewrite them and turn them in again until I am satisfied with the paper; and the course culminates in a larger paper. These are not papers that satisfy the writing requirement; these are over and above that writing requirement. So many of our students have written multiple papers before they graduate.

(Mike Friel) Other writing opportunities include independent study papers and research under the supervision of a member of the tax faculty. All of the members of the tax faculty have provided supervision of numerous research papers, seminar papers, independent study projects, or other writing projects out of a shared conviction of the importance of such work.

Q What changes do you foresee for graduate tax programs in the coming years?

A (Marty McMahon) We are interested in international collaboration with both faculty and practitioners and law schools in other countries. We, for example, regularly have a law professor from another country in residence here for part of the semester teaching a course or working as a visiting research scholar. That is part of that international collaboration program. Many of our faculty travel abroad to lecture at other law schools or in international programs. For example, many of us have taught in the LL.M. Program at Leiden. In addition, to some extent through the contacts initiated by our international students who have graduated and are well established

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in their home countries, we are starting to work on programs in other countries. For example, just last summer, the UF Graduate Tax Program and IFA Peru co-sponsored a multi-day conference for practicing lawyers in Lima, Peru, focusing on international tax law. We had over 200 Latin American lawyers in attendance.

(Mike Friel) We are also looking into opportunities in other Latin American countries where we have been approached about possible collaboration, including recent visits to Chile, Argentina, and Colombia, but our interest extends to other parts of the world as well. We have had faculty members regularly teaching in Taiwan and in Europe. Others were recently in Korea and China in response to some inquiries there. It is striking to me the extent to which our faculty participates in workshops, in conferences, in giving lectures both in this country and throughout the world. What we are seeing is a moving beyond simply one professor talking to another; it is becoming institutional. And we are developing closer ties to tax programs in other countries and to organizations of tax professionals in other countries as well.

Q Thinking back to the 1950s and '60s, graduate tax programs were one of the first options available to lawyers to go back to school and retrain for a specialty. Now there are many more such opportunities. Do you see that early role as having continuing importance for graduate tax programs, and if so what does Florida do to foster that role?

A (Marty McMahon) I think that even though other areas of the law are increasing in complexity, tax laws are probably increasing in complexity even more so. As a result of this increasing complexity, I think that an LL.M. program in tax becomes more important relative to other specialized programs than it ever was before. And, we have had a great deal of success with lawyers who have been practicing in other areas of law and then have decided to become tax lawyers.

I think one of the reasons they want to become tax lawyers is that tax lawyers have business when the economy is going up and when the economy is going down. When it is going up, you are putting deals together, and when it is going down, you are restructuring financing to try to bail people out. And, over the years, year in, year out, we have had a significant number of students who have been out of school anywhere from three, four, even in some instances 10 or 15 years. Oftentimes those experienced lawyers, who might have had one tax course when they were in law school many years ago, will come back and turn out to be among the very best students because of their professional habits. Some of our graduates who came back here after a number of years doing other things, like bankruptcy or litigation, have gone on to have quite successful tax careers after graduating.

(Mike Friel) And then on top of that, they bring a wonderful dimension to our classroom discussions and to the learning experience outside the classroom for all our students. They enrich the program for everyone. ■

POINT TO REMEMBER

Identity Theft

By Robb A. Longman*

Identity theft is a growing problem nationwide. Individuals' identities are being stolen and used by others. The results to the victims are devastating. Identity thieves use a stolen personal identity to open credit card accounts, utility accounts, and other accounts and can easily ruin their victims' credit history. Identity thieves do not stop there. They may also use their victims' tax-related information, causing them problems with their tax return filings.

Taxpayers need to be aware of three types of identity theft. First, an identity thief may steal the taxpayer's identity and use the victim's social security number on a false tax return. That return will claim a refund. Second, an illegal worker may use the taxpayer's social security number. That results in additional income being reported to the Service. Third, a business may use an individual's social security number and report paying wages to that person even though the person did not work there. The business does this to reduce its taxable income and tax liability. Not only do these three actions cause havoc for both taxpayers and the Service, they cost the government significant lost revenue.

Discovering and Reacting to the Theft

When a taxpayer's identity is stolen and used to file a fraudulent tax return, the taxpayer usually does not find out immediately. It is usually difficult for the taxpayer to even find out at all. When a fraudulent tax return is filed, the thief uses an address other than that of the taxpayer. The Service then updates the taxpayer's account with the new address. All notices sent by the Service then go to the new address, which is usually a false address, and the victim does not receive any of them. The taxpayer typically finds out about this type of fraud after she files her tax return and it is rejected or an expected refund never arrives. Once that occurs, the taxpayer will have to provide documentation to demonstrate to the Service that she is in fact the owner of the social security number stolen. The items that constitute documentation are a copy of a driver's license or passport, a copy of the social security card, and a police report or FTC Affidavit of Identity Theft. By providing that information to the Service, the taxpayer has officially proven that she is who she says she is. The taxpayer's account should then be coded, and this should (hopefully) protect her account in the future.

It is unfortunately frequent that the taxpayer does not receive any notice of the fraud because the Service does not recognize that the abuse has occurred. In some circumstances, a taxpayer may not learn of the fraud until it is too late and collection activity has occurred on the account. When this occurs, it is imperative to respond immediately to the Service in order to protect the funds in jeopardy of being seized.

In some circumstances the Service will notice first that a taxpayer's social security number has been compromised. In those circumstances, it will request the same documentation listed above. If the taxpayer does not provide the information in a timely manner, his social security number will be frozen and he will be issued a taxpayer identification number until the matter is resolved.

When a taxpayer's social security number has been stolen and used for work purposes, the taxpayer will eventually receive a notice that he needs to file a tax return or that his tax return has been changed. The taxpayer must respond accordingly. In these situations, he must prove that he did not have income when it has been reported that income does exist. Usually he can demonstrate this by obtaining information from the employer reporting the wages or by showing that he did not live in or near the location from which the incorrect income was reported.

It is imperative that the taxpayer comply with the Service's requests in this situation to ensure that an assessment is not entered against him and that

With identity theft problems growing, the Service finally established a unit to specifically handle these issues. The new unit is the IRS Protection Specialized Unit and is reached at the Identity Theft Hotline at 1-800-908-4490.

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collection activity does not occur. If collection activity has occurred, the taxpayer should follow regular avenues for disputing the tax assessed. The taxpayer can use the Offer in Compromise Program, ask for Audit Reconsideration, or go through the necessary channels to have the case heard in the United States Tax Court. In this situation, the burden of proving the taxpayer actually received the income will shift to the Service.

Service Assistance

With identity theft problems growing, the Service finally established a unit to specifically handle these issues. The new unit is the IRS Protection Specialized Unit and is reached at the Identity Theft Hotline at 1-800-908-4490. If you are unable to work with the unit, or the unit is not properly handling your client's matter, the next place to turn is the Taxpayer Advocate Service, which can be contacted at 1-877-777-4778. The taxpayer should turn to the advocate's office for assistance if the Service has not properly resolved the matter. The advocate's office will assign the case to a specific individual and will make contact for this matter easier.

Before the Service has knowledge of the identity theft activity, there is nothing that it will do to an individual's account to indicate that it could be targeted. Action will occur only after the account actually is targeted. That does not mean that taxpayers should do nothing on their own. A taxpayer can and should be proactive. She can monitor use of her social security number by ordering a free credit report each year and checking for unauthorized activity. While a taxpayer cannot always prevent her identity from being stolen or used in an unauthorized manner, she can work with the Service to resolve the resulting tax problem. ■

OPINION POINT

Too Many Carrots and Not Enough Sticks? The Role of the Carbon Tax in Energy Tax Policy

By Roberta Mann*

After years of inaction, the U.S. government appears poised to do something about climate change. The government can control environmentally damaging activity either by regulation or by market mechanisms—that is, by imposing costs that alter the economics of the activity. As almost all modern human activity involves greenhouse gas (GHG) emissions, regulation would be burdensome, inefficient, and unpopular. It is almost certain that the government will choose to use a market mechanism to reduce GHG emissions.

Options

The most popular proposal to date has been some form of a cap-and-trade system. In a cap-and-trade system, the government decides the maximum permissible quantity of GHG emissions and allocates or sells permits to GHG emitters. Once the initial allocation of permits has been made, the emitters can buy and sell permits. The other market mechanism is a tax on GHG emissions, also known as a carbon tax. Economists, including Peter Orzag and Lawrence Summers, prefer a carbon tax, finding it superior to cap-and-trade from an economic efficiency standpoint. Like a cap-and-trade system, a carbon tax adds to the cost of GHG emitting activity, but unlike a cap-and-trade system, the cost is limited to the tax. In a cap-and-trade system, the quantity of GHG emissions is limited, but the cost of reducing the emissions is theoretically unlimited. In practice, cap-and-trade systems have experienced significant price volatility.

Recently, Exxon Mobil's CEO, Rex Tillerson, called a carbon tax "a more direct, a more transparent and a more effective approach" to reducing GHG emissions than a cap-and-trade system. Russell Gold & Ian Talley, *Exxon CEO Advocates Emissions Tax*, WALL ST. J., Jan. 9, 2009, at B3. Most other oil companies have supported a cap-and-trade approach. For businesses, the carbon tax presents two advantages over a cap-and-trade system: reduction in uncertainty and trade advantages. *See* Martin A. Sullivan, *Will Business Learn to Love the Carbon Tax?*, TAX NOTES TODAY, 2008 TNT 102-11, May 27, 2008. Nonetheless, carbon taxes face significant political challenges. Supporting a new tax requires political courage, and imposing higher costs on business and consumers requires a lot of courage in harsh economic times.

Tax Incentives

Adding new incentives to the Code, on the other hand, requires very little courage. Tax incentives are popular with the beneficiaries, and they rarely cause dissent except among academics. The energy sector has long benefited from tax incentives, from the venerable expensing of intangible drilling costs (1916) to the production credit for electricity produced from marine renewables (2008). The energy tax provisions in the Emergency Economic Stabilization Act amount to $17 billion. That amount doesn't sound like much when numbers like $700 billion, $825 billion, or $1 trillion in economic bail-out provisions hit the front pages every day. However, the energy sector receives more money from the tax system than from direct governmental expenditures. In 2007, the energy sector received $10.4 billion in tax expenditures, and $6.2 billion in direct expenditures, research and development, and federal electricity support. *See* Energy Information Administration, *Federal Financial Interventions and Subsidies in Energy Markets 2007*, at xi (Apr. 2008), at http://www.eia.doe.gov/.

Tax incentives for renewable energy are designed to encourage production and use of renewable energy sources. Using renewable energy for power generation and transportation, instead of fossil fuels, will reduce GHG emissions. Tax incentives reduce the cost of producing renewable energy, making it more competitive with such traditional energy sources as oil, gas, and coal. Both traditional energy fuels and renewable energy get subsidies through the tax system. In 1997, the fossil fuel industry received more than half of the tax expenditures for energy. In 2007, renewable fuels received more than half of the tax expenditures for energy. According to economist Gilbert Metcalf, nuclear, wind, and solar power enjoy tax subsidies ranging from nearly 100 percent for nuclear, to more than 200 percent for solar. Gilbert E. Metcalf, *Taxing Energy in the United States: Which Fuels Does the Tax Code Favor?*, ENERGY POL'Y & ENV'T REP., Jan. 2009, at 5, http://www.manhattan-institute.org/html/eper_04.htm. Subsidies for biofuels constitute the single largest expenditure.

* University of Oregon School of Law, Eugene, OR.

Grants

Congress recently added another carrot. The American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, section 1603, provides grants for placing certain energy property in service. Depending on the type of property, the grant equals either 10% or 30% of the property's basis. These grants are in lieu of production and investment tax credits for renewable energy otherwise available under sections 45 and 48. I.R.C. § 48(d)(1). The grants are not included in gross income, and the effect on basis is determined using the rules in sections 48(a) and 50(c). I.R.C. § 48(d)(3).

The ARRA authorizes grants only for property placed in service during 2009 and 2010 and for property on which construction began during either year and which was placed in service by the credit termination date. That date varies depending on the type of property. ARRA § 1603(a) & (e).

Economic Challenges

Despite the seemingly large subsidies it has received, renewable energy has gained no more than a toehold in the U.S. energy sector. Renewable energy makes up 6.8% of U.S. primary energy consumption, while gas, oil, and coal make up 86.2%. Falling oil prices, rising corn prices, and a depressed economy have hit the ethanol industry hard. Kate Galbraith, *Economy Shifts, and the Ethanol Industry Reels*, N.Y. Times, Nov. 5, 2008, at B1. T. Boone Pickens has abandoned his plans for a 4,000 megawatt wind farm, citing falling natural gas prices and difficulty in obtaining financing. Ryan Randazzo, *Oil Billionaire Revises Plan to Reduce Foreign Oil Imports*, Ariz. Rep., Nov. 12, 2008, http://www.azcentral.com/arizonarepublic/business/articles/2008/11/12/20081112biz-pickens1112.html.

Bank failures and mergers of failed banks will dry up financing for renewable energy projects. The renewable credit crunch comes via the convergence of several tax policies. First, many renewable energy projects are funded by "selling" tax credits. The primary purchasers of those tax credits have been banks. In the wake of the economic crisis, many banks have little income to shelter. The banks that still have income have mostly taken over failed banks, frequently in tax-free reorganizations. Section 382 usually applies to limit the use of net operating losses and built-in losses by acquirers of loss corporations. If a loss corporation, defined as a corporation with net operating losses or built-in losses, has a 50% shift in ownership, the future use of those pre-existing losses is limited to the value of the "old" loss corporation multiplied by the long-term tax exempt interest rate. This rule prevents the use of acquired losses against the profitable purchaser's income. In light of the financial crisis, the Service issued Notice 2008-83, indicating that it would not treat bad debt deductions as built-in losses. *See* Amit R. Paley, *A Quiet Windfall for U.S. Banks*, Wash. Post. Nov. 10, 2008, at A1 (describing the Notice as a $140 billion windfall for U. S. banks). Even if Notice 2008-83 was a technically correct interpretation, it would have exacerbated the financing issues for renewable energy projects. Howard Gleckman of the Urban Institute noted on his TaxVox blog that a recession is the wrong time for tax credits. For example, Wells Fargo has financed more than $300 million in solar and wind projects since 2006. But after acquiring Wachovia, WellsFargo has enough losses to shelter income for years to come. Fortunately, Congress gave Notice 2008-83 a relatively short life and repealed it, although not retroactively, in the ARRA, section 1261.

Trying Carrots and Sticks

Renewable energy tax incentives and grants are "carrots," encouraging environmentally good behavior. A carbon tax is more of a "stick," discouraging environmentally bad behavior. Economic research shows that cooperation is most successfully enforced when both rewards and punishment may apply. James Andreoni, William Harbaugh & Lise Vesterlund, *The Carrot or the Stick: Rewards, Punishments, and Cooperation*, 93 Am. Econ. Rev. 893 (2003). Particularly in an economic environment where "carrots" lose their appeal, a carbon tax can continue to influence behavior. Moreover, when economic activity is lower than predicted, a cap-and-trade system also loses effectiveness. The Regional Greenhouse Gas Initiative (RGGI) caps emissions for 233 power generating plants in Maine, Vermont, Connecticut, Rhode Island, and Maryland. (New York, New Jersey, Delaware, and New Hampshire also belong to RGGI, but did not participate in the first carbon allowance auction.) In 2004, energy experts set the first RGGI cap at 188 million tons of carbon emission, anticipating that by 2008, emissions would exceed that amount. However, a slowing economy and milder weather caused carbon emissions to decrease from 184.5 million tons in 2005 to an estimated 172.4 million tons in 2007. Felicity Barringer & Kate Galbraith, *States Aim to Cut Gases by Making Polluters Pay*, N.Y. Times, Sept. 16, 2008, at A17.

When the cap is set too low, emissions will not decrease. However, a carbon tax would still apply even in a decreasing emission situation, although revenues may be lower. A revenue neutral carbon tax, with revenues recycled to reduce payroll taxes, would be a self-correcting mechanism. The carbon tax would have a regressive impact, as lower income bracket taxpayers spend a greater percentage of their income on energy. As emissions decreased, the revenue from the tax would decrease, but so would the regressive effect and thus the need for lowering other taxes. A carbon tax could also operate to smooth the volatility in fossil fuel prices and thus preserve the effect of renewable energy incentives in the face of falling fossil fuel prices. It could be just the stick to get the economy moving again. ■

OPINION POINT

The Complexity of the Tax Code

- Section 7803 requires the National Taxpayer Advocate to prepare an Annual Report to Congress that includes, among other things, legislative recommendations to resolve problems encountered by taxpayers. In the second of an annual series, *NewsQuarterly* publishes a part of the Annual Report. In her 2008 Annual Report to Congress, the National Taxpayer Advocate, Nina E. Olson, recommended that Congress address the growing complexity of the Internal Revenue Code. As indicated in a recent white paper, *Statement of Policy Favoring Tax Simplicity, Stability and Transparency,* published in the Fall 2008 *NewsQuarterly*, the Tax Section is also concerned about complexity.

Selected portions of "The Complexity of the Tax Code" are reproduced below. The *NewsQuarterly* encourages readers to submit responses or comments, which may be published in a subsequent issue.—*Christopher M. Pietruszkiewicz, Vice Chancellor for Business and Financial Affairs and J.Y. Sanders Professor of Law, LSU Law Center, Baton Rouge, LA*

The largest source of compliance burdens for taxpayers—and the IRS—is the overwhelming complexity of the tax code. The only meaningful way to reduce these burdens is to simplify the tax code enormously.

Consider the following:

- According to a TAS [Taxpayer Advocate Service] analysis of IRS data, U.S. taxpayers and businesses spend about 7.6 billion hours a year complying with the filing requirements of the Internal Revenue Code. And that figure does not even include the millions of additional hours that taxpayers must spend when they are required to respond to an IRS notice or an audit.
- If tax compliance were an industry, it would be one of the largest in the United States. To consume 7.6 billion hours, the "tax industry" requires the equivalent of 3.8 million full-time workers.
- Compliance costs are huge both in absolute terms and relative to the amount of tax revenue collected. Based on Bureau of Labor Statistics (BLS) data on the hourly cost of an employee, TAS estimates that the costs of complying with the individual and corporate income tax requirements in 2006 amounted to $193 billion—or a staggering 14 percent of aggregate income tax receipts.
- Since the beginning of 2001, there have been more than 3,250 changes to the tax code, an average of more than one a day, including more than 500 changes in 2008 alone.
- The Code has grown so long that it has become challenging even to figure out how long it is. A search of the Code conducted in the course of preparing this report turned up 3.7 million words. A 2001 study published by the Joint Committee on Taxation put the number of words in the Code at that time at 1,395,000. A 2005 report by a tax research organization put the number of words at 2.1 million, and notably, found that the number of words in the Code has *more than tripled* since 1975.
- Tax regulations, which are issued by the Treasury Department to provide guidance on the meaning of the Internal Revenue Code, now stand about a foot tall. The CCH Standard Federal Tax Reporter, a leading publication for tax professionals that summarizes administrative guidance and judicial decisions issued under each section of the Code, now comprises 25 volumes and takes up nine feet of shelf space. Two companies publish newsletters *daily* that report on new developments in the field of taxation; the print editions often run 50-100 pages and the electronic databases contain substantially more detailed information.
- Individual taxpayers find the return preparation process so overwhelming that more than 80 percent pay transaction fees to help them file their returns. About 60 percent pay preparers to do the job, and another 22 percent purchase tax software to help them perform the calculations themselves.

The Office of the Taxpayer Advocate sees dozens of examples of the impact of tax law complexity each year.

- ***Excessive Number of Education and Retirement Savings Incentives***. The Code currently contains at least 11 incentives to encourage taxpayers to save for and spend on education; the eligibility requirements, definitions of common terms, income level thresholds, phase-out ranges, and inflation adjustments vary from provision to provision. The Code also contains at least 16 incentives to encourage taxpayers to save for retirement; these incentives are subject to different sets of rules governing eligibility, contribution limits, taxation of contributions and distributions, withdrawals, availability of loans, and portability. Taxpayers wishing to choose the optimal vehicle to save for college must know the difference between a Section 529 plan, a Coverdell Education Savings Account, and the Hope and Lifetime Learning Credits, among other alternatives. Taxpayers wishing to choose the optimal plan in which to save for retirement must know the difference between a traditional IRA, a Roth IRA, a Section 401(k) plan, a Section 403(b) plan, and a SARSEP, among others.

- ***The Alternative Minimum Tax (AMT)***. The AMT concept, originally enacted in response to a report that 155 high-income taxpayers had paid no tax for the 1966 tax year, now effectively requires taxpayers to compute their taxes twice—once under the regular rules and again under the AMT regime—and then to pay the higher of the two amounts. The AMT was originally conceived to prevent wealthy taxpayers from escaping tax liability through the use of tax-avoidance transactions. However, most of the significant tax loopholes that enabled taxpayers to escape tax at the time the AMT was written have long since been closed, and it is now estimated that about 77 percent of the additional income subject to tax under the AMT is attributable simply to family size or residing in a high-tax state. Few people think of having children or living in a high-tax state as a tax avoidance maneuver, but under the unique logic of the AMT, that is how those actions are treated. Yet government has become so dependent on AMT revenue that Congress to date has been unwilling to make permanent changes in law to curtail the AMT, and it is not likely that such changes will be made outside the context of major tax reform.

- ***Tax Consequences of Mortgage Foreclosures and Canceled Debts***. Most financially distressed individuals who lose their homes to foreclosure or cannot pay off their car loans, credit card balances, student loans, or medical bills probably do not realize that their delinquency may increase their tax liabilities, but it often does. If a creditor writes off a debt, the tax code generally treats the amount of the canceled debt as taxable income to the debtor. Congress has carved out a number of exclusions, including a recently enacted exclusion to help homeowners whose mortgage debts are canceled when their houses are foreclosed upon and sold. However, taxpayers do not receive the benefit of these exclusions automatically. A taxpayer must file Form 982, *Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment)*, to claim an exclusion. Form 982 is extremely complex, and very few taxpayers or preparers are familiar with it. The IRS estimates that it takes business taxpayers ten hours and 43 minutes to complete the form, and the form is not included in many tax software packages available to taxpayers.

  IRS data shows that approximately two million Forms 1099-C, *Cancellation of Debt*, are issued to taxpayers each year reporting canceled debts. The National Taxpayer Advocate estimates that tens of thousands and possibly hundreds of thousands of taxpayers who qualify to exclude canceled debts from gross income do not file Form 982 to claim allowable exclusions. Instead, some of these taxpayers unnecessarily include the amount of the canceled debt in gross income, and other taxpayers who fail to include it unnecessarily face IRS examinations and tax assessments.

- ***Earned Income Tax Credit (EITC) Complexity***. About 22 million low income taxpayers claim the EITC each year. The eligibility requirements and computations are complex, yet EITC recipients are relatively less able to understand complex rules and less likely to speak English as their primary language, creating a recipe for confusion.

  EITC complexity leads to improper claims by taxpayers—some intentional but many inadvertent—and to improper denials by the IRS. A 2004 TAS study surveyed cases in which the IRS denied an EITC claim on audit but the taxpayer asked the IRS to reconsider its findings. Despite the initial IRS denials, the study found that taxpayers ultimately obtained some or all of the EITC amount they had claimed on their returns in 43 percent of the cases (and they received, on average, 94 percent of the amount they had originally claimed).

  Another window into EITC complexity: One might expect that low income taxpayers would be less likely to need return preparers because their sources of income are often limited to wages and perhaps interest income, yet 72.5 percent of taxpayers who claim the EITC use tax preparers.

- ***Proliferating Tax Sunsets***. The tax code contains more than 100 provisions that are temporary and set to expire soon, up from about 21 in 1992. Tax benefits have increasingly been enacted for a limited number of years in order to reduce their cost for budget-scoring purposes. . . . If taxpayers do not know whether a tax benefit will remain in the Code, the incentive is less likely to influence their decision-making, thereby undermining its purpose. The uncertainty associated with an expiring tax benefit also makes it difficult for taxpayers to estimate their tax liabilities and pay the correct amount of estimated tax, potentially subjecting them to penalties and causing disillusionment with the tax system.

- ***Phase-out Complexity***. More than half of all individual income tax returns filed each year are affected by the phase-out of certain tax benefits. . . . [T]here are about 100 phase-outs [and] [l]ike tax sunsets, phase-outs are largely used to reduce the cost of tax provisions for budget-scoring purposes. However, phase-outs add substantial complexity and create marginal "rate bubbles"—income ranges within which an additional dollar of income earned by a relatively low income taxpayer is taxed at a higher rate than an additional dollar of income earned by a relatively high income taxpayer. This inequity is largely hidden by the complexity of the phase-out calculations.

- ***Unclaimed Telephone Excise Tax Refunds***. In 2006, taxpayers were permitted to claim a one-time tax credit for telephone excise taxes that the government concluded it had improperly collected in the past. The amount of the credit ranged from $30 to $60, depending on the number of personal exemptions the taxpayer was entitled to claim on the return. No substantiation was required unless a taxpayer claimed a larger amount, so this credit was essentially free money. Yet IRS data show that 28 percent of eligible taxpayers (37 million out of 133.2 million) did not claim the credit. The only plausible explanation is that taxpayers missed the credit because of the complexity of the law and the tax forms.

- ***Burgeoning Penalties***. The number of civil penalties in the Code has grown from about 14 in 1954 to approximately 130 today. Penalties should be designed to enhance voluntary tax compliance, but they also should be reasonable and can only influence future taxpayer behavior if taxpayers are aware that the penalties exist. As a consequence of "penalty creep," some penalties are obscure or unduly harsh. . . .

- ***Small Business Burdens***. Small business taxpayers face a particularly bewildering array of laws, including a patchwork set of rules that governs the depreciation of equipment, numerous and overlapping filing requirements for employment taxes, and a vague set of factors that govern the classification of workers as either employees or independent contractors and that can keep businesses and the IRS battling each other for years with no obvious "correct" answer.

To assist the Congress in pursuing tax simplification, [the Report includes] a number of proposals in the Legislative Recommendations section. In doing so, [the National Taxpayer Advocate] recommends that emphasis be given to six core principles:

1. The tax system should not "entrap" taxpayers.
2. The tax laws should be simple enough so that most taxpayers can prepare their own returns without professional help, simple enough so that taxpayers can compute their tax liabilities on a single form, and simple enough so that IRS telephone assistors can fully and accurately answer taxpayers' questions.
3. The tax laws should anticipate the largest areas of noncompliance and minimize the opportunities for such noncompliance.
4. The tax laws should provide some choices, but not too many choices.
5. Where the tax laws provide for refundable credits, they should be designed in a way that is administrable; and
6. The tax system should incorporate a periodic review of the tax code—in short, a sanity check. ■

LISTEN TO NINA OLSON DISCUSS HER REPORT

Nina Olson, *IRS National Taxpayer Advocate*, discussed the major findings and recommendations from her 2008 Annual Report to Congress in a 90-minute Tax Section CLE teleconference on February 10, 2009. As with all Tax Section teleconferences, the audio recording of this presentation can be purchased in MP3 or CD-ROM formats from the ABA webstore. Go to www.ababooks.org, and search "Taxpayer Advocate" in the CLE Products category for more information.

2009 Janet Spragens Pro Bono Award Recipient: Elizabeth Copeland

The Section of Taxation presented its annual Janet Spragens Pro Bono Award to San Antonio lawyer Elizabeth Copeland during a luncheon on January 10 at the Section's 2009 Midyear Meeting. Each year the Tax Section recognizes one or more individuals or law firms that have provided meritorious pro bono service in the representation of low-income taxpayers. The award is intended to encourage pro bono activities by all members through public recognition of the pro bono services of the annual award winners.

With this year's Award, the Tax Section is honoring Elizabeth for her work establishing the first state-wide U.S. Tax Court Pro Bono Program. The program encourages lawyer members of the State Bar of Texas to offer pro bono consultation services to unrepresented taxpayers—who make up a majority of the petitioners who appear before the U.S. Tax Court—at calendar calls, settlement negotiations, and final trial preparation, an often unfamiliar process for taxpayers.

Elizabeth worked closely with the U.S. Tax Court to set up a program in each of the cities in Texas where the court sits. As the point person for that state's program, Elizabeth coordinates lawyers to appear at calendar call for S case dockets or hybrid dockets in order to provide assistance to pro se petitioners. The lawyers, supervised by Elizabeth at each calendar call location, serve as mediators between the IRS and the petitioners. In addition to these efforts, Elizabeth has generously assisted other state and local bar associations in setting up programs under new Tax Court pro bono assistance criteria.

Elizabeth Copeland is a shareholder in the Texas firm, Oppenheimer, Blend, Harrison & Tate, Inc. Since 1999, she has been an active member of the American Bar Association's Section of Taxation, and has chaired several subcommittees, including the Low Income Taxpayer Committee's Tax Court Subcommittee. She currently serves as chair of the Texas State Bar Association Tax Section's Pro Bono Committee. She was recognized in *The Best Lawyers in America* (2009), and named a "Texas Super Lawyer" in the area of tax law by *Texas Monthly* and *Law & Politics* magazines. She also received mention as one of San Antonio's Best Tax Law Attorneys in *Scene in SA* magazine.

Elizabeth received her J.D. from The University of Texas School of Law, and her B.B.A. with honors from The University of Texas at Austin. ■

2009-2010 Leadership Changes

The Chair-Elect of the Section, Karen L. Hawkins, of Oakland, CA, submitted her resignation, effective April 12, 2009, to become director of the IRS Office of Professional Responsibility. The Nominating Committee met and elected Stuart M. Lewis, of Washington, DC, to become Chair-Elect, effective April 12, 2009, for the remainder of the 2008-2009 term. This election was then approved by Council. A new slate of nominees, including the two changes noted below, was submitted by the Nominating Committee and approved by Council. This slate will be voted on at the ABA Annual Meeting in August. The full report of the Nominating Committee can be found on the Section's homepage at www.abanet.org/tax.

Chair-Elect: **Charles H. Egerton**, Orlando, FL

Vice Chair: **Samuel L. Braunstein**, Fairfield, CT *(Professional Services)*

Section Meeting Calendar

www.abanet.org/tax/calendar

DATE	MEETING	LOCATION
May 7-9, 2009	**MAY MEETING**	Grand Hyatt – Washington, DC
September 24-26, 2009	**JOINT FALL CLE MEETING**	Hyatt Regency – Chicago, IL
January 21-23, 2010	**MIDYEAR MEETING**	Grand Hyatt – San Antonio, TX
May 6-8, 2010	**MAY MEETING**	Grand Hyatt – Washington, DC
September 23-25, 2010	**JOINT FALL CLE MEETING**	Sheraton – Toronto, ON
January 20-22, 2011	**MIDYEAR MEETING**	Boca Raton Resort & Club – Boca Raton, FL
May 5-7, 2011	**MAY MEETING**	Grand Hyatt – Washington, DC
October 20-22, 2011	**JOINT FALL CLE MEETING**	Hyatt Regency Denver at Colorado Convention Center – Denver, CO

SECTION MEETING MATERIALS

As a benefit of membership, Tax Section members can view and search hundreds of papers and materials presented at the Section's Fall, Midyear, and May Meetings dating back to 1999 at: **http://www.abanet.org/tax/taxiq**. This service is made possible through Thomson Reuters Tax & Accounting and West, a Thomson Reuters business—a primary sponsor of the Section of Taxation.

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In the context of return filing, both taxpayers and tax return preparers, including lawyers, can avoid a penalty with respect to a return position for which there is a reasonable basis if the return position is adequately disclosed on the return. *See* I.R.C. §§ 6662(d)(2)(B)(ii) and 6694(a)(2)(B). Otherwise, the return position must be supported by substantial authority to avoid imposition of a penalty, except in the case of a position that is with respect to a tax shelter or a reportable transaction. In such a case, the return preparer can avoid a penalty only if it is reasonable to believe that the position is more likely than not to be sustained on its merits. I.R.C. § 6694(a)(2)(C).

A signing return preparer can satisfy the disclosure requirement for a reasonable basis position by providing the taxpayer with a prepared tax return that includes the required disclosure. Treas. Reg. § 1.6694-2(d)(3)(i)(B). A nonsigning preparer can satisfy the disclosure requirement by advising the taxpayer of any opportunity to avoid possible penalties under section 6662 and of any applicable disclosure standards, provided the preparer contemporaneously documents the advice in his files. Treas. Reg. § 1.6694-2(d)(3)(ii)(A). A parallel rule applies when a nonsigning preparer is advising another return preparer. Treas. Reg. § 1.6694-2(d)(3)(ii)(B). In none of these cases is there any requirement that the taxpayer actually file the return with an adequate disclosure of the position.

Suppose the taxpayer refuses to disclose the position on the return. Note that the preparer may not even know whether the return, as filed, includes the disclosure, in which case the issues discussed below will not arise until the taxpayer calls the preparer for assistance during an audit. Suppose, however, the taxpayer tells the preparer that the return is being filed without the disclosure. Must the preparer, assumed to be a lawyer, withdraw from representing the taxpayer? Presumably the preparer could not represent the taxpayer if the return is audited, but what about representing the taxpayer in planning a real estate purchase or putting together and implementing an estate plan? These questions, and others involving uncooperative clients, require exploration of the ethical standards that apply to a lawyer seeking to withdraw from representing a client.

Mandatory Withdrawal

Model Rule of Professional Conduct ("MRPC") 1.16(a)(1) requires a lawyer to withdraw from representing a client if "the representation will result in violation of the rules of professional conduct or other law." *Accord*, Restatement Third, The Law Governing Lawyers ["Restatement"] § 32(2)(a). Some jurisdictions have somewhat different rules. *See, e.g.*, Cal. Rule of Professional Conduct 3-700(B) (no mention of "other law," but mandating withdrawal if lawyer knows or should know the client is bringing the action "without probable cause and for the purpose of harassing or maliciously injuring any person"). Thus, withdrawal would be required if continued representation would involve a non-consentable conflict of interest, such as when a lawyer is asked to represent a client being audited with respect to a tax return as to which the client refused to make an appropriate disclosure of a reasonable basis position as advised to do by the lawyer. In addition, if the revenue agent handling the audit becomes aware that the lawyer provided the client advice in connection with the return preparation or with regard to any transaction with significant tax consequences reflected on the return, there is a good chance the agent will ask to see a conflict waiver, thus triggering potential application of Circular 230, section 10.20. If the conflict is non-consentable, as it would appear to be, the lawyer would be well-advised not to agree to handle the audit rather than face responding to such a request.

MRPC 1.2(d) prohibits a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent. Such conduct might in some circumstances include assisting a client in implementing a tax shelter investment. MRPC 4.1 prohibits a lawyer in the course of representing a client from knowingly making a false statement of material fact or law to a third person (which would include the Service) or failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited under MRPC 1.6. MRPC 3.3, dealing with candor toward a tribunal, prohibits a lawyer from knowingly making a "false statement of fact or law to a tribunal" or failing "to correct a false statement of material fact or law previously made" by the lawyer. MRPC 3.3(a)(1). It also prohibits the lawyer from offering evidence "the lawyer knows to be false." MRPC 3.3(a)(3), also requiring reasonable remedial measures if the lawyer comes to know that previously offered material evidence is false. This may include, if necessary, disclosure to the tribunal, even if such disclosure includes information otherwise protected by MRPC 1.6. *See* MRPC 3.3(b). Other aspects of MRPC 3.3 provide additional standards of candor toward a tribunal, standards that vary considerably from one state to another. If a client seeks to have the lawyer perform any of the acts prohibited by the applicable version of MRPC 1.2(d), 3.3, or 4.1, the lawyer should first seek to dissuade the client from the client's desired course of action. If the attempt at persuasion fails, the lawyer is required to withdraw from the representation.

Circular 230 includes provisions covering ground that overlaps with that covered by the Model Rules discussed above. Thus, Circular 230, section 10.51(a)(7) prohibits any practitioner from willfully assisting, counseling, encouraging a client in violating, or suggesting that the client violate, any

When terminating representation, MRPC 1.16(c) requires the lawyer to comply with any applicable law requiring notice or permission of a tribunal and indicates that, if ordered to do so by a tribunal, the lawyer must continue the representation.

Federal tax law, or knowingly counseling or suggesting to a client an illegal plan to evade Federal taxes. It also covers the same activities with respect to prospective clients. Practitioners are also prohibited from knowingly giving false or misleading information, or participating in giving false or misleading information to the Treasury Department (including the Service), its employees or officers or any tribunal dealing with Federal tax matters. Circular 230, § 10.51(a)(4), which defines "information" to include "facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral." Thus, if the client seeks to use the lawyer's assistance in any of these prohibited acts, the lawyer is again generally required to withdraw from the representation.

Permissive Withdrawal

Of course, not every situation in which a client refuses to follow his lawyer's advice requires the lawyer to "fire" the client. Sometimes the client is not seeking to use the lawyer's assistance to do anything that might be considered fraudulent or criminal, or whatever the client chooses to do, however wrong, may not ultimately involve or have involved using the lawyer's assistance at all. In fact, the lawyer may not know what the client has done, only that the client rejected the lawyer's advice. When withdrawal is not required by MRPC 1.16(a), it is permitted if: (1) it can be done without material adverse effect on the client's interests, (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, (3) the client has used the lawyer's services to perpetrate a crime or fraud, (4) the client insists on taking action the lawyer either considers repugnant or with which the lawyer fundamentally disagrees, (5) the client, after a reasonable warning, fails substantially to fulfill an obligation to the lawyer (such as paying fees or court costs or honoring limitations on the objectives of the representation), (6) the representation will result in an unreasonable financial burden to the lawyer or has been rendered unreasonably difficult by the client, or (7) for other good cause. MRPC 1.16(b) and Comments [7] & [8]. If the problem is a disagreement between the client and the lawyer, Comment [2] to MRPC 1.2 suggests that the lawyer should "consult with the client and seek a mutually acceptable resolution of the disagreement" before considering withdrawal.

How to Withdraw

When terminating representation, MRPC 1.16(c) requires the lawyer to comply with any applicable law requiring notice or permission of a tribunal and indicates that, if ordered to do so by a tribunal, the lawyer must continue the representation. Furthermore, upon termination of a representation, the lawyer must take steps "to the extent reasonably" practicable to mitigate the consequences to the client, such as providing reasonable notice to the client, allowing the client time to employ other counsel, returning papers and property to which the client is entitled, and refunding unearned fees paid in advance. MRPC 1.16(d) and Comment [9], indicating that retention of papers as security for a fee may be permitted under state law. *See also* Restatement § 33. Massachusetts Rule 1.16(e) provides a detailed list of documents, papers, and other items that must be made available to a former client within a reasonable time following the client's request. Other jurisdictions are likely to require the lawyer to respond as this rule requires in Massachusetts, so the list is worth consulting when a lawyer decides to withdraw from representing a client.

When withdrawal is not required, it seems likely that the lawyer will face a heavier burden of assuring that the withdrawal does not harm or inconvenience the client than when withdrawal is required. Comment [3] to MRPC 1.16 cautions that in pending litigation if a court asks for an explanation for the withdrawal, client confidentiality concerns may require the lawyer to make a vague statement, such as "professional considerations require the termination of the representation." However, Comment [15] to the 2001 version of MRPC 1.6 provided that the lawyer could give notice of the fact of withdrawal and withdraw or disaffirm any opinion, document, affirmation, or the like (sometimes referred to as a "noisy withdrawal"). This Comment now appears in the Arkansas Rules as Rule 1.6(c). *See also* ABA Formal Op. 92-366. The current version of the Model Rules does not include the Comment, although the broader permissive disclosure authority under current MRPC 1.6 discussed below probably obviates the need for a comment specifically authorizing a noisy withdrawal in many circumstances.

Client Confidential Information

Withdrawal is one thing. However, the lawyer is also permitted under the current version of the Model Rules (although not required) to reveal otherwise confidential information "to the extent the lawyer reasonably believes necessary

… to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another [such as the Service] and in furtherance of which the client has used or is using the lawyer's services" or "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." MRPC 1.6(b)(2) & (3). This provision was not in the 2001 version of the Model Rules.

These exceptions to the rule protecting client confidential information are among the most controversial of all legal ethics rules and vary considerably from state to state, with disclosure actually required in some instances. New Jersey Rule 1.6(b)(1), for example, *requires* disclosure of information to the "proper authorities" to prevent the client from committing a "criminal, illegal or fraudulent" act that the lawyer reasonably believes likely to result in substantial injury to the financial interest or property of another. At the other extreme, California Rule 3-100 has no permissive disclosure in the circumstances mentioned in the text although it is believed that the more protective confidentiality rules of jurisdictions like California are limited under the Supremacy Clause by disclosure provisions of federal law, such as the permissive disclosure provisions of the regulations promulgated by the Securities and Exchange Commission under the Sarbanes-Oxley Act. *See* 17 C.F.R. § 205.3(d)(2). Some jurisdictions also require the lawyer to attempt, depending on the context, either to dissuade the client from committing the crime or fraud or to take corrective action. *See* Okla. Rule 1.6(b)(3); Tex. Rule 1.02(d) & (e).

Withdrawal with Respect to a Particular Matter

Withdrawal from a representation does not necessarily mean withdrawing from representing the client altogether. The Model Rules seem to view a representation as being with respect to a particular matter. *See* MRPC 1.16, Comment [1] ("representation in a matter"); 1.1, Comments [1] & [5] ("a particular matter"); 1.2 & Comments, Scope of Representation and Allocation of Authority Between Client and Lawyer. For example, if a lawyer finds a material error in the client's Year One federal income tax return that will directly affect the current (Year Three) return, the client's unwillingness to file an amended return for Year One would make it necessary for the lawyer to withdraw from preparing the current year return. But does that mean the lawyer cannot plan and implement a section 1031 like-kind exchange for the client and provide advice about how the 1031 exchange should be reflected on the current year's federal income tax return? Perhaps not, as this planning and advice seems totally unrelated to the earlier return issue. But, if the lawyer views the client's attitude about amending the Year One return as sufficiently morally repugnant, he may want to terminate the representation anyway. In addition, if the lawyer was the preparer of the Year One return, the lawyer's interest in correcting the error creates a conflict with the client's interest in not correcting it. In this circumstance, withdrawing from representing the client with respect to any matters may seem like the more pragmatic course, whether mandated or not.

Duties to Former Clients

Even after withdrawing from representing a client, the lawyer's duty to protect the former client's confidential information continues, subject to the exceptions discussed above. MRPC 1.9(c)(2). Furthermore, the lawyer may not use information relating to the former representation to the disadvantage of the former client except as permitted for a client or when the information has become generally known. MRPC 1.9(c)(1). These rules also apply if the lawyer's present or former firm, as opposed to the lawyer himself, formerly represented the client.

MRPC 1.9(a) prohibits a lawyer who has represented a client in a matter from later representing another person "in the same matter or a substantially related matter in which that person's interests are materially adverse" to the former client's interests without the informed consent of the former client, confirmed in writing. The new client's informed consent, confirmed in writing, will generally also be required. *See* MRPC 1.7; Circular 230, § 10.29; *see also* Va. Rule 1.9(a), expressly requiring consent of both present and former clients. This protection extends to cases where the former representation was by the firm with which the lawyer was formerly associated, rather than by the lawyer, if the lawyer had acquired protected information about the former client that is material to the matter. MRPC 1.9(b). ■

Tax BITES The IRS Tip Line

To the tune of *I Heard It Through the Grapevine*

By William J. Wilkins*

Oo, oo, I bet you wonder how we knew
How you didn't report that million-two
It was a disgruntled employee
And we paid him a finder's fee
And anyway your neighbors around the block
Are calling up the Tip Line around the clock

Call us up on the IRS Tip Line
If you are witness to a tax crime
If you want it, anonymous is just fine
We're just trying to keep the cheaters in line
We'll pay you money, yeah

(Call us on the Tip Line if you're witness to a tax crime, baby,
doo doot doo doo doo)

People think they can hide from the government
But we know how your money's spent
You know it's really not that hard
To subpoena your Visa and Mastercard
Now you said you made only twenty grand?
So how'd you buy your girlfriend that minivan?

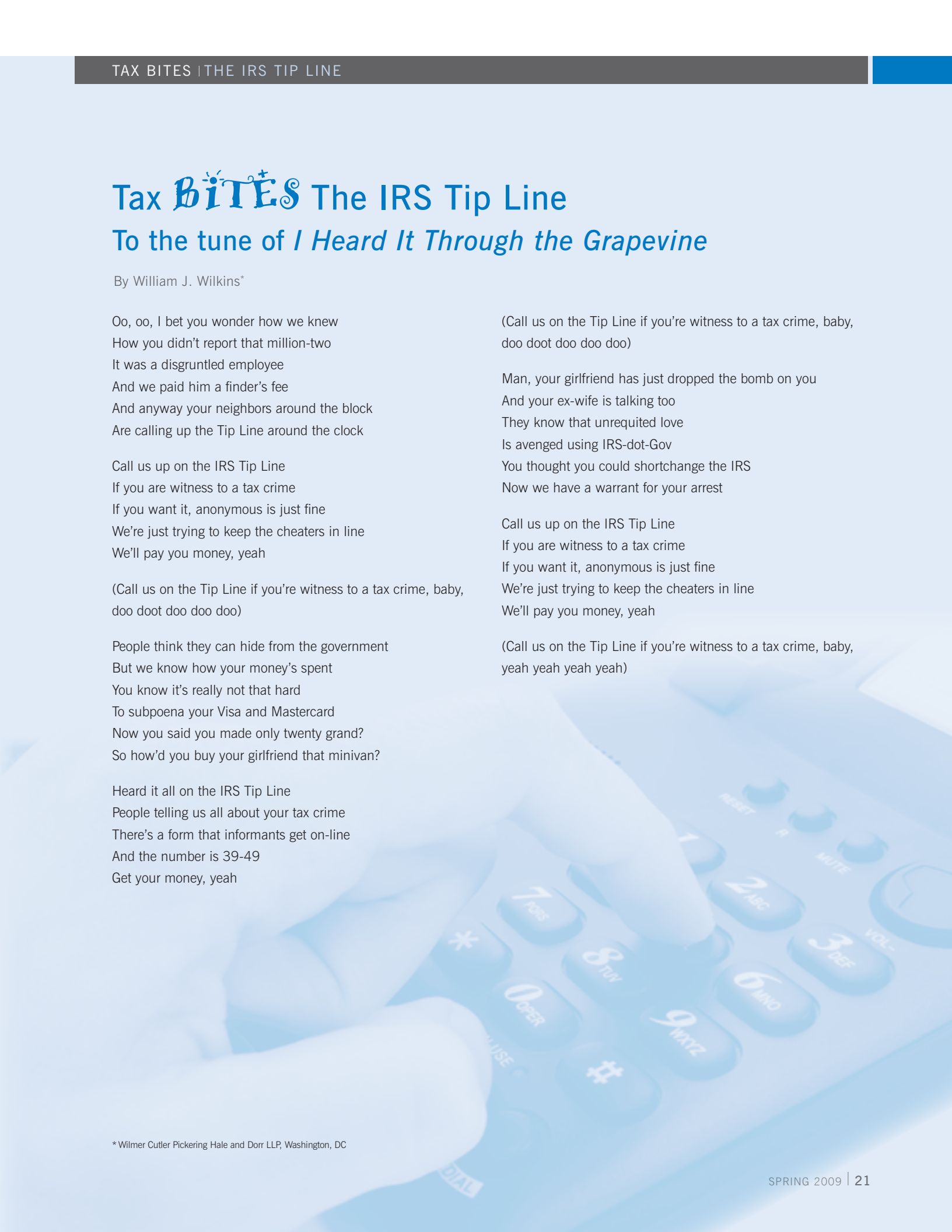
Heard it all on the IRS Tip Line
People telling us all about your tax crime
There's a form that informants get on-line
And the number is 39-49
Get your money, yeah

(Call us on the Tip Line if you're witness to a tax crime, baby,
doo doot doo doo doo)

Man, your girlfriend has just dropped the bomb on you
And your ex-wife is talking too
They know that unrequited love
Is avenged using IRS-dot-Gov
You thought you could shortchange the IRS
Now we have a warrant for your arrest

Call us up on the IRS Tip Line
If you are witness to a tax crime
If you want it, anonymous is just fine
We're just trying to keep the cheaters in line
We'll pay you money, yeah

(Call us on the Tip Line if you're witness to a tax crime, baby,
yeah yeah yeah yeah)



* Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC

News Briefs

Government Submissions Update

Since January, the Tax Section has submitted the following technical comments to the IRS, which can be viewed and downloaded free of charge from the Section's website at www.abanet.org/tax/pubpolicy:

- Comments Concerning Notice 2008-19 and Segregated Arrangements That Do Not Involve Insurance, coordinated by the Partnerships & LLCs Committee.
- Comments Regarding Transfer Pricing as Related to Enhancing Canada's International Tax Advantage, coordinated by the Transfer Pricing Committee.

2009 Midyear Meeting Pictures

Check the Tax Section website for photos from the Midyear Meeting in New Orleans. See if you can find your friends and colleagues in slideshows of the CLE programs or social events posted on the website at www.abanet.org/tax. To see pictures of judges and students in action at this year's Law Student Tax Challenge, visit the LSTC website at www.abanet.org/tax/lstc.

Purchase Section Meeting and Teleconference Recordings

Audio CDs and MP3s of programs presented at Tax Section Meetings are available from Digital Conference Providers; members can also purchase the "Ultimate CD-ROM" complete conference package, which includes audio files and program materials from the entire Section Meeting. For more information on obtaining Section Meeting recordings, visit https://www.dcporder.com/abatx or call 630/963-8311. To purchase audio CDs and MP3s of Tax Section teleconferences, go to the CLE products page in the ABA webstore at www.ababooks.org.

Section Launches Pro Bono Opportunities Page

As part of the Section's commitment to improve access to legal assistance for taxpayers and to foster support for free legal services, the Section is providing information about ongoing pro bono opportunities available to members. The new site is located at www.abanet.org/tax/probono.

The Section also has created an LITC Match Program on this site to connect qualified attorneys with Low Income Tax Clinics in need of extra assistance. If you are from a clinic interested in posting pro bono opportunities, please take a moment to fill out a form by going to www.abanet.org/tax/probono/litcs.html.

Members interested in participating in the Section's pro bono activities are invited to become active in the Low Income Taxpayer and Pro Bono Committees. For more information, please contact the Section's Pro Bono Counsel, Catherine Engell, at engellc@staff.abanet.org or 202/442-3425.

Public Service Fellowship Program

The Tax Section is pleased to announce that the application period for its Public Service Fellowship program for 2010-2012 is now open. Applications must be received by August 1, 2009, to be considered. Applicants selected for interviews will be invited to attend the Section's Joint Fall CLE Meeting in Chicago on September 24-26, 2009, and asked to participate in interviews on September 26, 2009.

The Public Service Fellowship program, which began in 2008, reflects the Section's desire to advance public service efforts in tax law, and to foster a more fair and equitable tax system. Pro Bono service has been an integral part of the Section's activities for many years. The Section actively encourages member participation in various Pro Bono efforts, holds numerous training sessions to that end, and devotes many of its resources to providing legal services to those in need. The Section recognizes the need for funding and fostering recent law school graduates or judicial clerks who wish to dedicate some portion of their professional careers to public service in tax. For a complete fellowship description and instructions on how to apply, visit our website at www.abanet.org/tax/awards/home.html.

IRS Nationwide Tax Forums

As a component of its communication and outreach efforts, the IRS is conducting a series of tax forums across the nation this summer. Designed for tax professionals, the forums present the latest news and information from the IRS over three days of seminars taught by representatives of the IRS, the ABA Section of Taxation, and other national organizations. The 2009 dates and locations are:

Location	Date
Las Vegas, NV	July 7-9
San Diego, CA	July 14-16
Orlando, FL	August 4-6
New York, NY	August 25-27
Dallas, TX	September 8-10
Atlanta, GA	September 22-24

For more information, visit www.taxforuminfo.com. ABA members qualify for a discount. Please note that CLE accreditation is not requested in advance for these programs, and attorneys interested in attending and obtaining CLE credit are encouraged to check with their state regulatory boards.

CLE Calendar | www.abanet.org/tax/calendar

DATE	PROGRAM	CONTACT INFO
May 13, 2009	5TH ANNUAL SALT SYMPOSIUM: MULTIJURISDICTIONAL ENTERPRISES Georgetown University Law Center – Washington, DC	Tax Section **www.abanet.org/tax** I 202.662.8670
May 15, 2009	2ND ANNUAL INSTITUTE ON THE ETHICS OF TAX LAW PRACTICE The John Marshall Law School – Chicago, IL *Cosponsored by ABA Tax CLE on the Road*	John Marshall Law School **www.jmls.edu/events** I 312.427.2737
May 18-19, 2009	SOUTHEAST BUSINESS TAX FORUM: TAXATION OF BUSINESS TRANSACTIONS InterContinental Buckhead – Atlanta, GA *Cosponsored by ABA Tax CLE on the Road*	Tax Section **www.abanet.org/tax** I 202.662.8670
May 21, 2009	JCEB TELECONFERENCE: ETHICS ISSUES FOR BENEFITS LAWYERS RESPONDING TO PLAN AUDITORS	JCEB **www.abanet.org/jceb** I 202.662.8676
May 22-24, 2009	8TH ANNUAL NORTH CAROLINA/SOUTH CAROLINA TAX SECTION WORKSHOPS Kiawah Island Golf Resort – Kiawah Island, SC *Cosponsored by ABA Tax CLE on the Road*	North Carolina Bar **www.ncbar.org/cle** I 800.228.3402
May 28-29, 2009	ALI-ABA COURSE OF STUDY: HOW TO HANDLE A TAX CONTROVERSY AT THE IRS AND IN COURT: FROM ADMINISTRATIVE AUDIT THROUGH LITIGATION Omni La Mansion del Rio – San Antonio, TX	ALI-ABA **www.ali-aba.org** I 800-CLE-NEWS
June 3, 2009	"TAX LINK LIVE" MEMBER BENEFIT CLE TELECONFERENCE: DEALING WITH AN UNCOOPERATIVE CLIENT	Tax Section **www.abanet.org/tax** I 202.662.8670
June 9, 2009	TAX CLE ON THE ROAD: BUSINESS PLANNING AND TAX ISSUES FOR TAX AND NON-TAX LAWYERS: CHOICE OF ENTITY, TAX PROVISIONS IN PARTNERSHIP AGREEMENTS, AND TAX ASPECTS OF DEBT WORKOUTS Alaska Bar Association – Anchorage, AK	Tax Section **www.abanet.org/tax** I 202.662.8670
June 10-12, 2009	23RD ANNUAL NATIONAL INSTITUTE ON ERISA BASICS Millennium Knickerbocker Hotel – Chicago, IL	JCEB **www.abanet.org/jceb** I 202.662.8676
June 17-19, 2009	2ND ANNUAL U.S. – LATIN AMERICAN TAX PLANNING STRATEGIES CONFERENCE Mandarin Oriental – Miami, FL	Tax Section **www.abanet.org/tax** I 202.662.8670
July 9-10, 2009	ALI-ABA COURSE OF STUDY: CHARITABLE GIVING TECHNIQUES Hotel Monaco – Seattle, WA	ALI-ABA **www.ali-aba.org** I 800-CLE-NEWS
July 22-24, 2009	ALI-ABA COURSE OF STUDY: ESTATE PLANNING FOR THE FAMILY BUSINESS OWNER Eldorado Hotel – Santa Fe, NM	ALI-ABA **www.ali-aba.org** I 800-CLE-NEWS
October 1-2, 2009	ALI-ABA COURSE OF STUDY: CONSOLIDATED TAX RETURN REGULATIONS Hilton Washington Embassy Row – Washington, DC	ALI-ABA **www.ali-aba.org** I 800-CLE-NEWS

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NEW BOOK!

CAREERS IN TAX LAW

Perspectives on the Tax Profession and What It Holds for You

The Tax Section is pleased to announce the release of ***Careers in Tax Law: Perspectives on the Tax Profession and What It Holds for You***. Designed for those considering or beginning a career in tax, this informative guide presents a series of offerings—autobiographies in miniature—by a broad cross section of working tax professionals. Each contribution stands as a unique story of paths taken, choices made, and lessons learned. Each adds to a composite portrait of the profession and its possibilities for the next generation of tax lawyers.

In essays divided thematically into the following chapters, over 75 tax professionals share their unique perspectives, knowledge, and experiences.

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Nowhere else will you find such an honest and entertaining portrayal of the tax profession and what it holds for you. For more information and to place an order, go to the ABA webstore at: **www.abanet.org/abastore/productpage/5470719**.

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