



FROM THE CHAIR

Ethical and Other Practice Dilemmas in a Shrinking World

By Michael Hirschfeld*

Looking back over the last year, the Tax Section has achieved a permanent relationship with the ABA that gives the Section greater autonomy, aided the ABA in submitting comments on tax reform proposals affecting use of the accrual method of accounting, submitted tax reform proposals affecting international tax and financial products as well as numerous other regulatory submissions, written to Congress seeking better funding for the Service and the Joint Committee on Taxation, kept its membership and programs vital in a world where finances are increasingly encroaching on our members' participation, and has continued to grow after the loss of Christine Brunswick in a way that would serve her proud. At the same time, our practice faces complex new substantive laws, and perhaps of greater concern, ethical and practical issues, which are making the practice of law far more difficult than it was when I first started practicing many years ago.

The Foreign Account Tax Compliance Act (FATCA), which took effect July 1, 2014, but whose full impact is being delayed by several helpful actions by the Service, was enacted in response to U.S. taxpayers seeking to hide their money in offshore accounts and not pay tax on that income. While the Service and the Justice Department have pursued taxpayers to insure full collection of tax, interest, and penalties, including for failure to comply with FBAR filing requirements, their efforts have also led to actions against these taxpayers' advisors, including their counsel. While the vast majority of tax lawyers are not affected, ethical issues in a global economy are increasingly becoming a concern for every practitioner.

Lawyers based in New York, Miami, or Los Angeles may be advising on global matters that could get them caught up in the ethical and legal requirements of other countries. As to confidentiality, U.S. counsel knows there is an attorney-client privilege that is built into Code section

7525 and a work product privilege that is built into section 26(b)(3) of the Federal Rules of Civil Procedure. However, when advising on matters outside the U.S., foreign law, and not U.S. standards, needs to be reviewed to see if either privilege applies and if so, what its scope is.

Even in the U.S., the protection afforded by these principles is under siege. In *U.S. v. Textron*, 577 F.3d 21 (1st Cir. 2009), the First Circuit took a narrow view of the work product doctrine and held that it was of no use where the tax work papers were prepared to support a taxpayer's calculation of tax reserves for its audited financial statements. Where corporate tax reserves exist or where no such reserves were set up due to the expectation that the company will litigate any challenge, the corporation may have to file Schedule UTP, the Uncertain Tax Position (UTP) Statement, with its return. The UTP statement must include information that reasonably can be expected to apprise the Service of the identity of the tax position and the nature of the issues. A similar requirement is built into Form 8275, the Disclosure Statement used to try to avert penalties.

Lawyers based in the U.S. who are contacted by a U.S. affiliate of a multinational group need to determine who their client is. The *ABA Code of Professional Responsibility* addresses this possible quandary in Ethical Canon 5-18, which states that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." For a multinational group, clarification that the advice is for the group and not an entity may be crucial not just for ethical reasons but to make sure the group gets the right collective result.

Lawyers are subject to a duty of competence (MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983)), but how is that applied in the international tax arena? A lawyer can attain that expertise by the requisite amount of study or by associating with a lawyer having the

requisite knowledge. Advice given in the international arena raises the likelihood of a higher level of professional responsibility, since it is harder for a lawyer to assert knowledge of foreign law as compared to the law of another state or a complex provision of the Internal Revenue Code. If the lawyer advises the client to seek foreign counsel and the client says, "Great, you engage them," then the lawyer owes the duty to supervise the foreign counsel. MODEL RULES OF PROF'L CONDUCT R. 5.1 (1983). This obligation may require the lawyer to insure that the foreign lawyer is competent as well as to become knowledgeable about the local substantive law to insure proper advice is being given. Local ethical laws can get subsumed in that effort.

A lawyer must serve his client "zealously within the bounds of the law." MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980). There are boundaries to this duty of zeal as the lawyer may "never encourage or aid the client in criminal acts." MODEL CODE OF PROF'L RESPONSIBILITY EC 7-5 (1980). If the client intends to follow U.S. laws, but not those of a foreign country, then the lawyer is drawn into a dilemma as to what action to take. If the lawyer feels the client is not being totally candid about the relevant facts, what can the lawyer do? Lawyers are well-advised to lay out all the pertinent facts in writing and seek client corroboration. To avoid a possible problem, this approach may be best to adopt for all clients, so that an issue may not be missed.

Tax lawyers today need all the help they can get to keep pace with an ever-evolving and increasingly complex set of tax laws. The Tax Section serves as a valuable resource in our meetings, our publications, and our collaborative efforts to achieve that goal and also to ensure compliance with ethical requirements we face in a global economy. As my term as Chair comes to a close, I look forward to seeing the Section continue to lead in this effort, which will help make the practice of tax law better for all of us. ■

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