

# GUIDELINES TO TAX PRACTICE THIRD

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## I. INTRODUCTION

A well-known tax lawyer, when asked for the source of the ethics governing his conduct, answered, "I don't know; I suppose it is my parents." Surely what this lawyer learned from his parents was not sterile rules but how they lived their lives, how they responded in action to the challenges and opportunities that came their way. Similarly, each of us who has been in practice for any length of time carries within himself or herself both consciously and unconsciously the example of other lawyers whom we have admired. Their specific problems, like the problems of my friend's parents, were different from ours. The guidance they provide is in values and in attitude, in our self-respect and in the sense of our obligation to other individuals, to the government and to the various communities of which we are a part. It is these that we bring to bear on our problems, where usually the question is not what a rule provides or how it applies, but what we should do when different principles pull us in very different directions.

With the increase in the size of law firms, the growth in specialization, the frequency of movement of lawyers from one firm to the other and the ever growing importance of the bottom line, it has become more difficult to ensure that young lawyers receive the kind of guidance all of us need in preparation for the unpredictable challenges of the future. Certainly every senior dealing with or acting in the presence of a junior must remember that he or she is setting an example.<sup>1</sup> But more than that, firms should consider stating in writing what they are about and the standards they expect from those who are working in the firm. To keep that writing a living document, it must be referred to in practice and supplemented or changed in the light of experience and changing standards in the profession. An approach along these lines should help maintain the observance of professional standards in the firm. Also, if there is a failure in an individual case, such an approach may help make clear that it is in fact an

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\*Authors' Note: The late Frederic G. Corneel, Partner, Sullivan & Worcester, Boston, Massachusetts, was the recipient of the Tax Section's 2001 Distinguished Service Award. His *Guidelines to Tax Practice* appears at 31 TAX LAW. 551 (1978) and *Guidelines to Tax Practice Second* at 43 TAX LAW. 297 (1990). He had nearly completed this article at the time of his death. As with prior *Guidelines*, this *Guidelines Third* was presented and discussed at meetings of the Section's Committee on Standards of Tax Practice. Nonetheless the views expressed are those of the author, as minimally edited and updated for subsequent events by us. Gersham Goldstein, Stoel Rives, LLP, Portland, Oregon and Paul J. Sax, Orrick, Herrington & Sutcliffe LLP, San Francisco, California.

<sup>1</sup>A friend who teaches tax ethics reports that students returning from summer clerkships frequently express astonishment at the lack of adherence to professional standards in firms where they clerked. Often the seniors simply have not had the education in professionalism that in recent years has become a required part of the law school curriculum. It does not follow that senior guidance has become unimportant. Rather, it is a wake-up call to all seniors concerned about the future of their profession.

individual failure and not a matter of firm-wide disregard of professional standards.

Based upon the foregoing, this paper has two parts. The first part consists of a set of suggested general guidelines. The second part addresses specific problems arising in several areas of tax practice.

The guidelines for each firm will be helpful only if they reflect the particular practice of the firm. The first one, set out below, was drafted for my own firm, where most of the practice is in tax planning for business or personal transactions. However, at least to acknowledge other fields of practice, there follow considerations bearing on guidelines for tax lawyers engaged in criminal tax practice, tax lawyers who are working as corporation counsel and tax lawyers who have been unable to resist the lure (or perhaps lucre) of the Final Four and have become tax lawyers working in accounting firms.

Of course, the basic rules applicable to the conduct of a tax lawyer do not vary, regardless of the lawyer's specialty or place of employment. But rules of conduct to be useful must reflect the context in which they are to be applied. Thus, both an SEC registration statement and a tax return require the lawyer preparing the document to be honest. But the degree of disclosure and the required certainty as to the correctness of what is stated may be different. Therefore, to be helpful, the guidelines of any firm should seek to address the specific aspects of its practice where problems are likely to arise.

The need for specificity in deciding upon the appropriate application of potentially conflicting rules requires caution in the use of these and any other guidelines. What they provide may be generally true, but in a particular situation quite a different course of conduct may be indicated. Nevertheless, the general guidelines supplemented by the second part of this paper hopefully will help the lawyer using them to have a basic understanding, which is fine as long as the lawyer is clear that in any particular case they do not tell the whole story.

Do notice that these guidelines focus on what *should* be done and not how far we may deviate from accepted standards without exposing ourselves to penalties, disbarment or malpractice liability. Of course, in practice we will from time to time feel forced to go to the limits of what is permissible. But our teaching should relate to the center of the highway. If what we teach is driving on the edge, the young lawyer will soon wind up in the ditch and perhaps we and our firm with him.

## II. GUIDELINES FOR GENERAL TAX PRACTICE

Tax lawyers must comply with the rules governing the professional conduct of all lawyers relating to competence, confidentiality, avoidance of conflict of interest, diligent representation of our clients, reasonable fees and adherence to standards of decency and professionalism. However, in addition to these generally applicable rules, each field of practice has a somewhat different set of problems. The purpose of this memorandum is to provide guidance to this firm's approach to frequently arising questions in our tax practice.

Unfortunately, the publicity relating to tax shelters and gossip about report-

edly effective tax evasion tactics leads some to believe that tax lawyers care nothing about the law. We must make clear to clients that this is not our view. We assume that clients want to minimize their tax burden, as they have a perfect right to do. And we will try our hardest to help them achieve that objective. But we will do so only within the limits of what is legal and in conformity with professional standards.

In chronological order, once our engagement has been agreed upon, our practice might be divided into i) tax planning, including ruling requests, ii) return preparation, iii) audit representation and administrative appeals, and iv) litigation. The rules of professional conduct relating to tax litigation do not differ substantially from those relating to other litigation and, therefore, will not be covered in this memorandum. However, as this firm does not usually handle criminal tax litigation, whenever it appears that there is a threat of imposition of criminal penalties, the lawyer handling the matter should immediately consult an attorney experienced in such practice and where appropriate turn over all or part of the responsibility for the matter.

#### A. *Tax Planning*

While tax planning may come first in chronological order, it requires consideration of the later stages referred to: How will the transaction be reported? What will be the impact of the form of reporting on the likelihood and nature of the audit? How will we answer questions that may arise on audit? What are our chances of success if the transaction is challenged by the tax authorities and must be litigated? In our work we have great respect for the law and make every effort to assist our clients to achieve their personal and business goals in full compliance with the law. Given the enormous body of law, regulations, rulings and court decisions, it is surprising but nevertheless true that there are many transactions with uncertain tax consequences. In such situations we seek to assist the client in weighing the benefits and costs of alternate approaches. Where relevant, we will advise the client whether, and under what conditions of disclosure, we would ultimately be prepared to sign a return reflecting the transaction in the manner desired by the client. If we believe that any return position contemplated by the client would be frivolous or fraudulent, we caution the client and, if the client persists, we withdraw from further participation.

Generally we will not advise a client with respect to a tax-planning approach devised by another firm which requires us to sign a confidentiality agreement which may impede our service to other clients.

#### B. *Tax Opinions*

Tax planning necessarily involves giving our view on the tax consequences of a transaction. Formal tax opinions must comply with the rules applicable to our firm's opinions generally. Even if a formal opinion is not required, we should make sure before expressing any view that we have a clear understanding of all relevant facts. To the extent possible, our opinion should be based on facts rather than on assumptions and, if assumptions must be made, they should seem

reasonable, be clearly described, and discussed with the client.

Tax aspects of a transaction that are irrelevant to one party may be of vital interest to another. Accordingly, a tax opinion must specify to whom it is addressed and that others should not rely on it without our specific consent. If the transaction involves a tax shelter, our opinion must comply with the Internal Revenue Code provisions, ABA opinions, Circular 230 and other authority applicable to such opinions. Where tax consequences turn on the valuation of property, we should advise our clients that while we are familiar with court decisions bearing on value, we are not appraisers and we should point out to them the benefits and, where applicable, the legal necessity, of an appraisal by a qualified appraiser.

At times clients request opinions with the thought of showing them to an auditing agent as a protection against penalties applicable to taxpayers who acted unreasonably or not in good faith. Such an opinion should not overstate our confidence in the soundness of the taxpayer's position, because that would not only violate our basic commitment to honesty in all communications, but also might furnish the basis for a malpractice suit by a client allegedly misled by our opinion. In this regard it is useful to remember that the client whose representative today urges that we stretch to give a favorable opinion may tomorrow be replaced by a merger successor or bankruptcy trustee. When an opinion does not relate to a tax shelter, generally there is no requirement to describe in detail weaknesses in the client's position, and doing so will depend on the degree of confidence we intend to convey. Ordinarily a "will" opinion would not address any contrary view whereas a "more likely than not" opinion would discuss contrary views in detail.

Clients and other lawyers will often request oral advice with respect to a particular tax issue. The simpler the question, the greater the temptation to give an unqualified answer. But it is important to remember that the answer to any tax question may require modification if other factors are taken into account. Therefore, we should not be embarrassed to indicate where we have doubt or to insist on time for additional investigation and reflection.

### *C. Ruling Requests*

An opinion is rarely an insurance policy and clients are entitled to a consideration of the alternative of a private letter ruling. Of course, frequently a ruling is not available; at other times it seems certain to require more time than the transaction will permit. But where a ruling request is the approach chosen, we must remember that the applicable disclosure rules are more stringent than those which apply to other dealings with the Service.

### *D. Return Preparation*

Return preparation, as it is done in this office, is a demanding task: We carefully review the facts provided by the client, ask for additional information when needed to assure the correctness of the required reporting, research every material issue of law, and consider the preferable method of reporting various

transactions. Diligence will frequently require us not to accept at face value the conclusory opinions of others—such as on a Form K-1—but to make such further investigation as will provide a proper basis for the return position. Although, in order to limit costs, paralegals are employed in the preparation process, all returns are reviewed by an attorney. Further, we will consider any tax planning opportunities that come to our attention in the return preparation process. All of this makes return preparation by this firm more expensive than return preparation by commercial preparer firms. We should advise clients of the estimated costs and benefits so that if they would prefer to pursue other arrangements they are free to do so; but the lawyer's duty of competence requires that we not skimp on the quality of our work to achieve economies.

It is not unusual that a transaction may be reported in a variety of ways, often involving a balancing between the client's desire to reduce the tax burden and at the same time to avoid interest and penalties for failing to meet the statutory requirements. Our obligation is to advise the client in this process, but to do so in a way that is consistent with statutory rules applicable to return preparers and our other legal and ethical obligations.

In situations where it comes to our attention that there is an error on a return, whether due to our fault or that of the client or another preparer, we must call the error to the attention of the client, and discuss with the client the benefits and costs of disclosure, whether by filing an amended return or on audit. Where this firm prepared a return now known to be erroneous, the potential conflict of interest between us and the client must be addressed.

#### *E. Audit Representation*

In contrast to tax planning and return preparation, audit representation is an adversary process, as are administrative appeals. We do not misstate facts to the tax authorities, or seek to delay them just for the purpose of delay, or deal with them in other than an entirely professional manner. On the other hand, we do not disclose client confidences unless such disclosure is legally required, or appears to be in the best interest of the client and is expressly or impliedly authorized by the client.

We usually should not represent a client on audit when we have signed the return and it subsequently has come to our attention that the return is incorrect, if the client has refused to authorize us to make disclosure to the authorities.

#### *F. Time and Billing*

Attorneys new to tax practice are often astonished at the length of time it takes to educate themselves on issues arising in tax practice and feel that it would not be fair to the client to charge for their education. On the other hand, they are concerned with the problems that might arise from insufficient thought and research or, alternatively, from reflections on their productivity if they do not record their time. How much time to devote to it is a matter of judgment in every case; and promptness in our response is an important factor in our clients' evaluation of our work. But our main concern is to do good work and the

general rule is to take the time that is required and to record it. It is up to the partner to decide to what extent, as a matter of fairness to the client, some of the time should not be billed because it was spent bringing the associate up to the standard the client has a right to expect.

### *G. Resolving Problems of Professionalism*

Whenever a question of professionalism arises, the lawyer concerned should begin by doing the necessary research. General issues of professionalism are dealt with in state rules and decisions, the ABA Model Rules and comments and The Restatement of the Law Governing Lawyers. With respect to tax practice issues, the Code has various penalty provisions which bear on issues of professionalism. They relate to underpayment of tax, failure to file returns, negligent or intentionally incorrect returns, tax shelters and returns that result in substantial understatement of income or valuation errors. Some of the penalties apply to the taxpayer, others to the return preparer and still others to those who aided or abetted the taxpayer, particularly with respect to tax shelter offerings. The tax practitioner's conduct is also regulated by Treasury Department Circular 230. The AICPA, the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Tax Section Committee on Standards of Tax Practice have published statements and opinions relating to questions arising in tax practice. By far the best available guide to this material is Wolfman, Holden and Harris, *STANDARDS OF TAX PRACTICE*, 5th Edition (1999). If research does not resolve the question, the lawyer should discuss it with an appropriate partner in the Tax Department.

If we are concerned that our financial interest may affect our judgment, it is important to discuss the matter with one or more uninvolved partners and, if necessary, to obtain the advice of outside counsel. Where conduct on our part may have given rise to malpractice liability, we must promptly notify our Managing Partner and, in certain cases, we may have to notify the client.

Every lawyer in the Tax Department should feel comfortable that appropriate professional standards are maintained in every aspect of our practice, so that we can continue to take pride in our practice and enjoy it, free of the doubts and fears that plague corner cutters. Suggestions for improvement are welcome. A lawyer having a question with respect to the propriety of any particular action should discuss it first with any other lawyer in the firm who is involved in the matter, then with a member of our Ethics Committee or other partner in whose judgment the lawyer has confidence, and finally the firm's Executive Committee. In the end, of course, we each have ultimate responsibility for our own conduct.

### III. SPECIAL CONSIDERATIONS FOR CORPORATION COUNSEL

An attorney working in a law firm can assume that all others working in the firm are governed by the same standards of professional conduct. That is not true of corporation counsel. The employer, whether making steel or selling life insurance, will have its own applicable rules of law and standards of practice

and the corporation counsel must comply with those rules. But in addition, like an ambassador from another country, in doing legal work corporation counsel must also comply with the rules of conduct applicable to lawyers, including particularly competence, confidentiality, and client loyalty, as well as an obligation to the system of law which makes the lawyer's work possible. In certain businesses, corporation counsel must also be concerned with the rules against unauthorized practice and assisting others in unauthorized practice.

Frequently corporation counsel has the responsibilities of a corporate executive, albeit one that is well-informed as to the applicable law. But that is different from acting as a lawyer. Basically, a tax lawyer *advises* clients or carries out the client's decisions in matters normally handled by lawyers, but does not make or *execute* business decisions unless specifically authorized to do so. Of course, lawyers in private practice also must be knowledgeable of their client's business and frequently are consulted because of their business acumen. But the lawyer in private practice, unlike corporation counsel, is not part of the business, and that brings about a difference at least in degree if not in kind.

The particular hat the corporation counsel is wearing makes an enormous difference: Corporate executives frequently have what would be a prohibited conflict for a lawyer, as they try to balance the demands of different interest groups to which they have responsibility. As corporate executives, they must use all of the information available to them, without being restricted by any considerations of confidentiality. Therefore, whatever may be the particular task, corporation counsel should ask themselves "Am I the executive here, or the lawyer, or alas, the client who acts as his own lawyer?"

Another aspect where the work of in-house tax counsel differs from the usual private practice, is that normally clients will consult with outside tax attorneys concerning a specific problem that the client has identified. Corporation counsel must be more active in educating all concerned with respect to tax issues potentially relevant to their work. This requires corporation counsel to become sufficiently familiar with all aspects of the business, and even the tax situation of the suppliers and customers of the business, so as to avoid missteps and be able to generate potentially useful planning ideas.

Much of the work of the tax department of a business is likely to relate to compliance at the local, state, federal and international levels. Here, more than is generally true in private practice, corporation counsel must apply a standard of materiality to make sure that items of importance are given the attention they deserve but time is not wasted unnecessarily on minor matters.

Particularly for businesses that are almost under constant review by the tax authorities, it is important to establish and maintain a sense of confidence on the part of these authorities in the tax reporting of the business. Once confidence is lost, it may become expensive for the business to respond to voluminous inquiries into every aspect of items of income, credit and deduction. Therefore, it has become common practice at the beginning of every audit to bring to the attention of the revenue agent clear errors that have come to the attention of the tax department since the filing of the return. Altogether, while lawyers in private

practice may at times take a short range view—"How can I best help my client in the particular fix in which it finds itself?"—corporation counsel must take a long range view—"What approach is likely to be best for my business in the light of the numerous problems it faces now and in the future? What will best promote the attitude we want to bring to our tax obligations and dealings with state, federal and foreign tax personnel?"

Altogether, it is important for corporation counsel to remember that they are still lawyers. This may give rise to real challenges. Lawyers in private practice may decline to work with clients on projects they find distasteful. This is not easy where the client is important to the firm. But it may be even more difficult for corporation counsel where the corresponding alternative may be to give up the job altogether. Therefore, it is particularly important for corporation counsel both to demonstrate sympathy with their client's perfectly appropriate desire to reduce the tax burden as much as possible and; on the other hand, persuade the client to do so within appropriate limits.

The business setting also is likely to generate conflicts of interest to which corporation counsel must be alert. They must remember that their obligation is to the organization and not to the individual executive who consults them. Where there is any potential conflict, the executive should be advised that what is best for him or her may not necessarily be best for the organization and that, accordingly, the executive should consult counsel who does not have this conflict.

Finally, in smaller corporation counsel offices, corporation counsel may not have ready access to experienced attorneys with whom to consult on questions of practice. In such a setting corporation counsel must be particularly alert to questions of professional responsibility and should establish a connection with outside counsel with whom corporation counsel can comfortably consult.

#### IV. SPECIAL CONSIDERATIONS FOR CRIMINAL TAX PRACTICE

##### A. *Difference between criminal tax practice and general tax practice*

Although it has been said before, it is worth repeating: The basic rules for tax lawyers are the same regardless of their place of employment or specialization. That is to say, what is prohibited for one is prohibited for the other. But what is *appropriate* is bound to vary with the context. For example, in general tax practice we are inclined to be forthcoming with information in order to save time and expense, induce the auditing agent to be cooperative in turn, and avoid potential penalties. In criminal practice we are aware that it is not the facts, but the facts known to the government that may land our client in jail. Therefore we tend to be protective of our clients' non-disclosure rights and very cautious in giving any information to the Service. In case of doubt we may insist on summons and enforcement procedures. Generally speaking, our clients are not likely to be interested in an early resolution of the controversy. "A continuance is as good as an acquittal—it just does not last as long".

*Note:* Because of the difference in approach, it is important in the early stages of any case that may possibly lead to criminal charges to agree with the client

whether to handle it as a criminal case or whether the risk is sufficiently small that it is worthwhile to be cooperative in the hope that the Service will treat the matter as a civil case.

### B. *Conflict of Interest*

In general tax practice it is not unusual for a firm to represent husband and wife, the family partnership and several of its partners, a corporation and some of its shareholders, directors, officers or employees. While even in civil matters we must always be alert to a potential conflict, when there appears to be even the possibility of a criminal charge, our general rule is that we will have one client only and advise all others to arrange for separate representation. Where an exception appears appropriate, we must be certain that all of the clients understand not only the benefits but also the risks of joint representation. We must also believe not only that none of the clients would be prejudiced by joint representation, but that an entirely independent attorney would arrive at the same conclusion.

### C. *Tax Planning*

Unlike general tax practice, criminal tax practice rarely involves assisting clients in tax planning. We cannot aid and abet with planning any transactions designed to conceal tax crimes that have been committed or to improperly conceal or disburse funds required for the payment of assessed taxes. When clients come in with plans that appear of doubtful legality we must warn them of the risk and seek to assist them in finding ways that will achieve their objectives but do so in a way that we believe has at least a reasonable basis of being sustained if challenged and will be consistent with the professional standards of tax practitioners.

### D. *Reporting*

Two types of issues arise in criminal tax practice in connection with income tax reporting. The first has to do with reporting of income from criminal activities. No one is required to incriminate himself or herself. But no one is excused from reporting income merely because it represents ill-gotten gain. Some have tried to meet both requirements by reporting "Fifth Amendment Income"—certainly a red flag. It is preferable to seek to describe the income accurately but in a non-incriminatory way and leave the Fifth Amendment defense to the time of audit. In any event we must neither be accessories after the fact by seeking to help the client hide his criminal activity, nor waive any privilege that the client may have.

The other type of potentially criminal activity relates simply to the client's obligations as a taxpayer, such as a failure to report income or even file returns; or an overstatement of credits and deductions. Here especially judgment is required as to how best to handle the matter in a way that will discharge the client's tax obligation but to do so in such a way least likely to generate a criminal investigation.

When a criminal charge is based on a failure to report properly, clients will not infrequently seek to put the blame on their tax adviser, with potential harm to the professional reputation of the adviser as well as financial and penalty exposure. Accordingly, it is essential when advising on reporting matters having uncertain but potentially criminal tax consequences, to make a complete record, agreed to by the client, of all of the information provided to us.

The foregoing advice is directed to those who find themselves engaged as return preparers in potentially troublesome situations. But where we are consulted in what is likely to be a criminal matter, our rule should be to have the client hire another firm as return preparer. The reason is that information given to us to prepare a return is not privileged. By avoiding return preparation, we prevent difficult questions of privilege turning on the capacity in which we received the information.

#### *E. Audit*

When our first involvement with a matter is after the client has been informed that a criminal investigation is under way, we should find out from the client what facts are likely already to be in the possession of the investigators and what facts they are likely to learn without any cooperation on our part. We cannot advise the destruction of evidence and we should avoid advising potential witnesses other than our client as to the information they should give in response to IRS inquiries – they should be urged to consult their own counsel. If a search warrant is not pending, we may request the client to let us have all relevant documentation in order to permit us to investigate the possibility of claiming the attorney client privilege or work-product protection, remembering that our possession cannot be used to conceal from the Service non-privileged documents.

In our dealings with the Service in criminal matters we should always be polite but clearly committed to our client's interest and the protection of all privileged information. We should never assert or deny anything except what we know to be true. To avoid problems arising from the presentation of misleading information, we should generally insist that our client not meet with Service personnel.

If we are first consulted when an audit is scheduled, we should consider whether it would not better serve our client's interest if the audit representation were handled by someone else: Someone not known by the Service to specialize in criminal matters, perhaps an accountant not burdened by information not relevant to computation of the tax but bearing on potential criminal liability.

#### *F. Legal Fees*

Because clients who lose criminal cases generally find their financial ability impaired, we should see that our fees are covered by a retainer. Because of the reporting requirements relating to cash fees over \$10,000 and the risk that cash payments in any substantial amount may be seized as illegal proceeds, we should generally decline major payments in cash. Altogether, we should carefully explore the financial resources of the client and of the client's relatives and friends

to see that our work will be compensated in line with our expectations. We certainly can handle some matters on a pro bono or a partial pro bono basis, but we and the client should know ahead of time what the arrangement is, so that we will not be deterred by financial considerations from doing the very best we can for our client.

#### V. SPECIAL CONSIDERATIONS FOR TAX LAWYERS IN AN ACCOUNTING FIRM

Until such time as multi-disciplinary practice is authorized, accounting firms cannot practice law. Since employees, principals and partners of accounting firms are acting on behalf of their firm, it follows that even though they may be lawyers, they cannot practice law in their present employment. There may be little change indeed in the work of a tax lawyer who moves from a law firm to an accounting firm. The line may be drawn in connection with the drafting of instruments having legal consequences and representation in controversies between private parties, and also with the government where the client may be subject to criminal sanctions. Certainly the lawyer will continue to analyze the impact of the tax law on those who were involved in or are thinking of getting involved in a particular transaction, and will continue to give opinions as to the likely tax consequences and suggest steps to reduce future tax burdens.

A common sense analysis indicates that the work of the tax lawyer in the accounting firm may fall into one of three different categories.

First, it may be the unauthorized practice of law. Because engaging in the unauthorized practice is illegal for the firm and constitutes improper conduct for any lawyer assisting the firm in such conduct, every lawyer working in an accounting firm must make sure that the unauthorized practice of law is avoided. What constitutes unauthorized practice varies from state to state, although with respect to federal practice, in contrast to practice before state bodies, federal law may preempt state law. Our firm will seek to provide helpful guidance in that connection, but it is also the personal responsibility of the individual lawyer to avoid conduct which could result in unauthorized practice charges against the firm.

Second, there are aspects of what is generally considered the practice of law in which non-lawyers are also permitted to engage. The trial of a Tax Court case is a clear example. Whatever may be the rules applicable to the authorized practice of law by non-lawyers, when a lawyer engages in such activity, the lawyer is bound by the rules of conduct applicable to lawyers. Another view of this type of practice, which leads to the same conclusion, is that certain activities when engaged in by non-lawyers are not the practice of law and when engaged in by a lawyer are the practice of law.

Finally, it may be that at least technically the lawyer in the accounting firm is not engaged in the practice of law; and if that is in fact so, the rules of conduct specifically developed for lawyers may not apply to that activity. While that may be so in an individual case, it is more likely that usually the activity will fall into the second category just discussed, so that lawyer rules of professionalism

continue to apply.

In addition, merely because what the lawyer is engaged in is not the unauthorized practice of law, it does not follow that there are no ethical standards governing that practice. To the contrary, even then the rules are much the same. The Circular 230 standards continue to apply. Further, the American Institute of Certified Public Accountants has established its own standards of ethics and tax practice which apply to all working in the firm. Finally, where the firm also provides auditing services to the client, audit and SEC responsibilities must be taken into account. Thus, just because there is "a realistic possibility of success" for taking a particular position on the tax return, it does not follow that the financial statements opined upon in performance of the firm's audit function can adopt that same standard: Where an asset, such as a refund claim, has less than an even chance of success, it probably cannot be reflected on the balance sheet any more than a contingent tax liability can be omitted merely because some arguments can be advanced in support of the proposition that the taxes are not owing. Given the firm's responsibility, the tax lawyer owes the audit partner an obligation of full disclosure.

Further, the fact that rules of conduct developed for professionals other than lawyers (or in the case of Circular 230, lawyers and other tax practitioners) will govern the conduct of lawyers working in accounting firms does not mean that lawyers' rules of professional conduct have suddenly become irrelevant, particularly because these rules frequently mirror decisions relating to malpractice liability. Large accounting firms, like large law firms, are large businesses. The focus of large businesses tends to be on profitability, and the desire for individual and firm profitability, particularly short-term profitability, may run counter to what is best for the client and for the tax system as a whole. The client wants competent advice. The firm wants to make money on giving the advice, which may mean pressure to have the service performed by younger less experienced persons or to have them performed quickly in order to reduce the costs to the firm. Our self-respect and even the long-run welfare of our firm requires us to give competent advice, which may require more senior and therefore more expensive staff working on a particular matter or require more time than is good for profitability. We cannot always fully satisfy what are clearly conflicting demands, but we must be aware where the conflict lies and do our best to satisfy the needs of our clients consistent with the needs of our firm.

Also related to the desire to build profitability is the marketing of products developed by the firm, particularly where our services are to be performed on a "value billing" basis. There is nothing wrong, as part of our tax planning services, to promote *appropriate* tax strategies in a manner not so different from investment bankers. As a thoughtful friend writes "In multi-office, multi-national, multi-disciplinary organizations, it is necessary to capture the intellectual capital of the firm in training materials and internal databases to enhance consistency, risk management and quality assurance as well as to extend quality services to the very large and diverse client base." But the emphasis must be on the word *appropriate*. Is the approach consistent with respect for the tax system or

does it rely on a strained interpretation of the tax law or doubtful valuations? Further, is the particular approach suitable to the client and *its* needs? The promotion of "products" we have developed clearly makes more urgent the need to strike a proper balance between what is best for the client and what is best for our firm. Referring clients to an advisor that does not share our motivation may at times be the best way of protecting both the client and the future business of our firm which in the long run depends upon matching the service that we provide for our client with the client's needs.

There are other instances where the client's interest may make desirable a reference to another firm. For instance, where we believe the client would be best served by litigating his case in a U.S. District Court or the Court of Federal Claims, we should so advise the client even though as a result the matter will have to be handled by another law firm where we ourselves could have represented the client in the Tax Court.

In sum, the bottom line surely matters, but it is not all that matters, and even with respect to profitability the long view is likely to be the better view: Our long-run profitability depends upon client satisfaction and a reputation for fair dealing, and our very existence may depend upon our remembering to drive in the center of the highway.

