The Section’s Role in Ethics and Standards of Tax Practice

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Every major development in ethics and standards of tax practice has emanated from the Tax Section. Not the Treasury, or the Service, or the ABA, or the AICPA, or any other professional organization, but the Tax Section. This perhaps startling proposition may not be evident from the chronology of formal pronouncements. But it is well known to the many vitally interested Section members who devoted hundreds, and in some cases thousands, of hours from their already demanding schedules to getting right the role of practitioners in our tax system.

Certainly there have been issues besides the “majors” that involved ethics and standards of practice, particularly important ones dealing with the pernicious effects of tax products aimed at exploiting the underfunding of the Service and its inability to cope timely with them. The Section’s Standards of Tax Practice Committee has been a constant, active and well led, serving as both the focal point for issue discussion and a source of learning for Section members. Issues dealt with by the Section have ranged from exclusively practitioner-focused, such as an opinion to allow lawyers to downsize the amount of work done to match the size of the problem, to exclusively system-focused, such as Ron Pearlman’s proposals for tax shelter legislation and Pam Olson and David Glickman’s proposal for Code simplification, both of which were enacted into law.

Vast amounts of time and energy have been devoted to helping the Service make workable its regulation of tax advice through Circular 230, from the first tax opinion rules to the development of the legend on written advice to its recent abandonment in favor of more general rules for all written tax advice, encompassing dozens of extensive and thoughtful formal comments.

But for “majors,” there have been only three. The fundamental questions they addressed were:

1. What is the relationship between tax lawyers and the government; is it purely adversarial?
2. What needs to be in an “honest” tax opinion?
3. How strong must a position be in order to be asserted in a tax return?

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It speaks eloquently of the role of the Tax Section that it provided the answers to these questions, then worked to have those answers adopted and become widely accepted and universally acknowledged.

I. Formal Opinion 314: Relationship of Lawyer to the Tax System

Although now known mostly for the “reasonable basis” tax position standard that had to be restated two decades later, Formal Opinion 314 remains the principal document addressing the relationship of tax lawyers to their government. It asks whether the lawyer’s duty is more akin to dealing with a court or more like dealing with an adversary. It concludes that the Service is not even a quasi-judicial tribunal but nonetheless provides that a lawyer may assert in a tax return only those tax positions meeting a minimum substantive standard.

The details of the Section and Committee deliberations may be lost, but the essence of the dialogue is a rich part of the Section’s oral history. There were two camps, those advocating a higher standard and those in favor of a lower one. Fred Corneel, recipient of the Section’s Distinguished Service Award for his work in the field, historically championed the view that reasonable basis meant a relatively high standard, a basis that was truly reasonable. Boris Kostelanetz, for decades dean of the criminal tax defense bar, supported the view that any colorable claim was enough to be reasonable. Agreement was reached on the words, “reasonable basis,” but not the standard. For this reason it is said that Opinion 314 was a “patch but not a fix.”

Despite the failure of the reasonable basis term to stand the test of time, Opinion 314 remains as the guideline for lawyer conduct in dealing with the Service. Its characterization of the blended duty to both clients and to the tax system leads to answers to fundamental questions. It purports to shed light on those questions and does just that. We are told forthrightly that there is a duty not to mislead the Service deliberately and affirmatively, either by mis-statements or by silence or by permitting the client to mislead. At the same time, we learn that there is no duty to reveal weaknesses in our client’s cases any more than to opposing counsel. This guidance is used in practice daily and underlies the familiar “20 Questions” commonly employed by Section leaders and local bars to familiarize practitioners with knotty issues such as what to do upon learning that the client has lied or that the agent is unaware that the statute of limitations is about to expire.

II. Formal Opinion 346: Requirements of an “Honest” Tax Opinion

Formal Opinion 346 (Revised) describes what needs to be included in an “honest” tax opinion. Literally it applies only to tax shelter opinions provided

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to non-client third parties. But as the only formal pronouncement on tax opinions, its effect is pervasive. It states what probably is obvious to the layman: An opinion must address the material tax issues, address the actual facts, relate the law to the facts, and either make a prediction of overall outcome or say why that cannot be done. Importantly, it also establishes that the lawyer has a duty of limited inquiry: although not obligated to audit the client’s affairs, a lawyer cannot accept as true facts or representations that are incomplete, inconsistent, or otherwise suspect.

The process leading to Opinion 346 took shape in the Standards of Tax Practice Committee in early 1979, with a plan to publish an article and propose an opinion. The subject was then given high visibility at the Section Meeting in August 1979, featuring a panel in which Commissioner Jerry Kurtz participated, and a skit written by Fred Corneel billed as “a tragedy in three acts – the construction, sale and collapse of a tax shelter.” In January 1980, the Section commenced a critical examination of the role of tax opinions in tax shelters through its new Tax Shelter Study Committee, an effort led by Bill Goldstein, Phil Mann, and Buck Chapoton. By March 1980 a first draft was circulated to the Section committees of what became Sax, “Lawyer Responsibility in Tax Shelter Opinions.”

July saw circulation of the first draft of the Standards of Tax Practice Committee proposed opinion, while at the same time Treasury floated a draft of counterpart Circular 230 amendments. In September the Treasury issued its proposed Circular 230 changes, and in October the Committee-proposed opinion was sent to Section Officers and Council. On December 30, 1980, the Section forwarded the proposed opinion to the Standing Committee on Ethics and Professional Responsibility, the ABA body that issues Formal Opinions, with the request for issuance of a Formal Opinion. Dialogue followed, and Formal Opinion 346 was issued by the Standing Committee on June 1, 1981.

Unsurprisingly, issuance of a Formal Opinion was met with objection from other ABA Sections, outcry from tax professionals with skin in the tax shelter game, and requests for “clarification” from professionals who wanted their skin out of the game. Hundreds of written comments, many extensive, were submitted and considered. Under the steady hand of Section Chair Jack Nolan, the many forces at play were successfully brokered, and the opinion was reissued on January 29, 1982, with clarifying but not substantive changes. Most of the changes dealt with refining the universe of transactions to which the opinion applied and enumerating those that were exempt. There was virtually no controversy over the “honest opinion” requirements except the obligation to predict outcome, which was addressed by adding an option to explain why no such opinion could be expressed. Treasury’s proposed amendments to Circular 230 thereafter were reissued in December 1982 to reflect Opinion 346.

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It is noteworthy that the honest opinion requirements were never the focus of the Circular 230 controversy spanning the next decades, involving creation and abandonment of the “legend” on written advice. The difficult questions involved when advice is an opinion and when it is not, and what is a potentially abusive transaction and what is not. At no point was there controversy over the fundamentals of an honest opinion: Address the material tax issues, examine the actual facts, relate the law to the facts, and give an overall prediction of outcome or say why not. Indeed, in the June 2014 revision to Circular 230 applicable to written tax advice, these familiar requirements remain as first articulated, save and except only the requirement to express an overall evaluation, necessarily dropped in light of the revision’s application far beyond opinions to written tax advice generally.


Formal Opinion 85-352 answers the question “when can a position be asserted in a tax return” by answering “when it has a realistic possibility of success if litigated.”

The process began with a call from Bernie Aidinoff after being elected Chair, observing that the “reasonable basis” formulation of Opinion 314 had become degraded and required a change. A draft formulation was prepared, circulated, vetted, and redrafted by the Standards of Tax Practice Committee, from May to July 1983. From inception, the touchstone of the restated standard was a “realistic possibility” that the position would be sustained if litigated. Varying other terms were employed throughout the process before settling on what has come to be known as RPOS; “substantial basis” enjoyed favor for awhile before it was scrapped, and “meritorious” was employed but defined by reference to “realistic possibility.”

The proposed opinion was approved by the Council of the Section, then submitted for discussion and a vote of the Section membership. It was approved by a large majority at the May 1984 Section Meeting plenary session and forwarded to the ABA Standing Committee on Professional Responsibility on June 26, 1984.

When the proposed opinion was sent to the ABA Standing Committee, which after all had issued Opinion 314 and its reasonable basis standard, the initial response was “what’s wrong with reasonable basis?” Dialogue followed, with the Section submitting a paper citing testimony and presentations demonstrating that the term had come to mean “any colorable claim” or “any position you could advance without blushing.” The opponents of an upgraded standard responded vigorously by formal statement to the Standing Committee arguing that the reasonable basis language was not inherently defective. The Standing Committee was persuaded to restate the standard, then issued the restatement very much along the lines of the Section’s proposal.

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Reasonable basis was abandoned; the penalty standard of “substantial authority” was rejected as too reliant on precedent, and “some realistic possibility of success if the matter is litigated” became the restated tax reporting standard.

Still there were problems. The Standing Committee had declined to state forthrightly that a tax return is not a submission in an adversary proceeding. And the Opinion made clear its view that there is nothing wrong with the term they had previously used if “properly interpreted and applied,” such that the new language was not intended to change what the Standing Committee intended “reasonable basis” to mean. The result was an Opinion every much as vulnerable to being degraded over time as Opinion 314.

Under the leadership of Chair Hugh Calkins, the Section determined to supplement the Opinion with publication and dissemination alongside the Opinion of its Report of the Special Task Force on Formal Opinion 85-352.5 What could and could not be said in the Report was the subject of discussions with the Standing Committee, and as recited in the Report, it was approved by the Council of the Section and the Standards of Tax Practice Committee. Of fundamental importance was to attach a percentage likelihood of success, “closely approaching one third,” to the RPOS words, reasoning that the absence of such a benchmark was what caused “reasonable basis” to be degraded by the inevitable push of forces pursuing aggressive tax positions.

The quantification seems to have worked, despite initial fierce objections within the Section. It took only 20 years to degrade “reasonable basis.” After nearly 30 years, RPOS has not been degraded; it is widely understood to imply an “approximately one-third” likelihood of success, and indeed efforts may be gaining traction to upgrade the vestiges of “reasonable basis.”

The next chapter is yet to be writ. Doubtless there is today need for guidance and revision. History suggests that it will be up to the Tax Section to provide leadership and direction, as it always has.

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