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The Tax Man's Ethics: Four of the Hardest Ethical Questions for an IRS Lawyer

Michelle M. Kwon

THE TAX MAN'S ETHICS: FOUR OF THE HARDEST ETHICAL QUESTIONS FOR AN IRS LAWYER*

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* *Cf.* Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991).

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INTRODUCTION

The traditional approach to legal ethics is often characterized to mean that lawyers must zealously advocate for their clients' objectives, tempered only by the bounds of the law.[1] A lawyer operating within the traditional legal model, consistent with the lawyer's duty of loyalty to the client, is to marshal the available evidence to tell the client's story in the most favorable light to win the client's case.[2] The traditional approach has been criticized because single-minded zeal for only the client's interests may lead lawyers to showboat, putting form over substance without regard to the underlying legal merits of the client's claim or defense.[3] In addition to that criticism, the traditional approach may create tension for government lawyers if they are expected to act not only on behalf of their agency clients but also in the interests of the public. In contrast to the traditional approach, the public interest approach to legal ethics extends a government lawyer's duties of loyalty, diligence, and confidentiality from the agency client to the public at large to further the public interest.[4] Commentators, in advocating either the traditional approach or the public interest approach to govern-

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[1] *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983) (stating that a lawyer should "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor"). *See also* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 8 (Harvard Univ. Press 1998) [hereinafter SIMON, THE PRACTICE OF JUSTICE] (stating that the Model Code's "mandate of zealous advocacy within the bounds of the law states the [traditional approach] in a nutshell").

[2] Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow From Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 18 (2003) [hereinafter Berenson, *Duty Defined*] (describing the traditional approach to mean that "lawyers should make all possible efforts to advance the private ends of their individual clients unless those ends are illegal, or pursuit of those ends would require the lawyer him or herself to engage in illegality or ethically proscribed conduct").

[3] Professor Simon criticizes the traditional approach, which he calls the "dominant view," in his book *The Practice of Justice*, *supra* note 1, at 26-76.

[4] *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084-90 (1988) [hereinafter Simon, *Ethical Discretion*]. Professor Simon labels the two models as the "libertarian approach" and the "regulatory approach." The libertarian approach is the traditional approach of zealous advocacy. The regulatory approach is akin to the public interest approach where the lawyer exercises a duty of loyalty to the public by facilitating "an informed resolution of the substantive issues by the responsible officials." *Id.* at 1085-86. See Susan D. Carle, *Power as a Factor in Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 121-35 (2006) for a comprehensive description of the "fundamental divide" between what Professor Carle terms the "client-centered approach" and the "justice-centered approach" to legal ethics. *See also* Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170 (2002) [hereinafter Note, *Rethinking the Prof'l Responsibilities*] (distinguishing between the "agency loyalty approach" and the "public interest approach").

ment lawyering, disagree about whether a government lawyer owes some sort of duty to the public, and if so, the nature and scope of that duty.[5]

This Article assumes that government lawyers have some obligation to the public interest but proposes that the traditional approach and the public interest approach are not mutually exclusive. Rather, a government lawyer is able to ethically serve the agency client as well as the public at large. This Article describes an approach to legal ethics that simultaneously serves the agency client's interest and the public interest by exploring the ethical responsibilities of Internal Revenue Service (IRS) Office of Chief Counsel lawyers who litigate cases in the United States Tax Court on behalf of the Commissioner of the IRS.

The IRS Office of Chief Counsel, which is comprised of attorneys of the Department of the Treasury who are dedicated solely to supporting the IRS, plays a unique role in the enforcement of the nation's tax laws. Like private lawyers, Chief Counsel lawyers are subject to the Model Rules of Professional Conduct (Model Rules) as promulgated by the American Bar Association (ABA) and adopted by the states where the lawyers are admitted and perhaps where they engage in their duties. But the Office of Chief Counsel has assumed certain duties to the public to curb the conduct of Chief Counsel lawyers that otherwise may be permissible under the Model Rules. This Article examines the role of the IRS Office of Chief Counsel and its self-imposed duties to the public by examining four hypothetical situations, the theoretical basis for these self-imposed duties, and an assessment of the main objections to

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[5] *See, e.g.*, Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991) (advocating the traditional approach); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987) (finding a duty to the public interest to be "incoherent"); Berenson, *Duty Defined*, *supra* note 2 (advocating the public interest approach). *See also* Simon, *supra* note 1 (advocating a third approach called the discretionary approach, which is a more refined public interest approach); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000) (advocating the extension of the duty of prosecutors to "seek justice" to government lawyers in civil litigation) [hereinafter Green, *Must Government Lawyers "Seek Justice"*]; Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest*, 41 B.C. L. REV. 789, 789 (2000) [hereinafter Berenson, *Public Lawyers, Private Values*] (stating that "[i]t is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice"). Arguably, the tension between the client's interests and the public's interests creates ethical dilemmas to some extent even for non-government lawyers who, in addition to being advocates for their clients, are officers of the court who have "a special responsibility for the quality of justice." MODEL RULES OF PROF'L CONDUCT Preamble [1].

imposing duties to the public on government lawyers. This Article concludes that the IRS Chief Counsel's self-imposed duties to the public serve an important function in our self-assessment tax system and are compatible with Chief Counsel lawyers' ethical duties to their agency client, the IRS.

I. THEORETICAL BASIS FOR THE PUBLIC INTEREST APPROACH

There is not universal agreement on whether government lawyers have greater obligations to the public to seek justice than non-government lawyers.[6] Lawyers, whether they are employed by the government or are in private practice, have a "special responsibility for the quality of justice" as officers of the court.[7] But the public interest approach to government lawyering assumes that government lawyers have some sort of special obligations to the public.[8] The source of such obligations is unclear.

The Committee on Professional Ethics of the Federal Bar Association issued Opinion 73-1 to address the issue of who a government lawyer's client is.[9] Opinion 73-1 recognizes that lawyers working for a federal government agency, by definition, assume a public trust because the government agency itself is charged with carrying out the public interest.[10] Thus, the government attorney's "employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part."[11] Although Opinion 73-1 acknowledges this public duty, it nonetheless concludes that the client of a federal government lawyer is actually the agency that employs the lawyer and not the public.[12]

Similarly, Rule 1.13 of the Model Rules of Professional Conduct for Federal Lawyers identifies the client of a government lawyer as the

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6 *See supra* text accompanying note 5.

7 MODEL RULES OF PROF'L CONDUCT Preamble [1] (1983).

8 *See* Green, *Must Government Lawyers "Seek Justice," supra* note 5, at 789.

9 Prof'l Ethics Comm. of the Fed. Bar Ass'n, Op. 73-1, 32 FED. B.J. 71 (1973), *reprinted in* BERNARD WOLFMAN, DEBORAH H. SCHENK & DIANE M. RING, ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE, at 328 (Aspen Publishers 4th ed. 2008) [hereinafter ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE].

10 *Id.* at 329.

11 *Id.*

12 *Id.*

federal agency that employs the lawyer.[13] The comments to that rule recognize that "arguments have been made that the Government lawyer's ultimate obligation is to serve the public interest or the 'government as a whole,'" yet nonetheless conclude that "for practical purposes, these may be unworkable ethical guidelines."[14]

The Third Restatement of Law Governing Lawyers (Third Restatement) echoes the approach taken in Opinion 73-1 and the Federal Model Rules. The comments to section ninety-seven of the Third Restatement regarding the representation of a government client acknowledge that "the goals of a governmental client necessarily include pursuit of the public interest" and that "it has been asserted that government lawyers represent the public, or the public interest."[15] Nonetheless, the Third Restatement concludes that it is preferable to "regard the respective agencies as the clients" rather than the public generally.[16]

Traces of an amorphous duty owed to the public by government lawyers can be found in the Model Code, which was in effect before the ABA adopted the Model Rules in 1983. The Model Code is comprised of Canons, Ethical Considerations, and Disciplinary Rules.[17] The Canons are "statements of axiomatic norms" that express in general terms the expected conduct of lawyers.[18] The Ethical Considerations are the "objectives toward which every member of the profession should strive."[19] The Disciplinary Rules define the "minimum level of conduct" for lawyers.[20]

Canon 7 of the Model Code states: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."[21] Ethical Consideration 7-14, one of the Ethical Considerations illustrating Canon 7, tells government lawyers with discretionary power "relative to litigation" to "refrain from instituting or continuing litigation that is obviously un-

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13 MODEL RULES OF PROF'L CONDUCT FOR FED. LAWYERS R. 1.13. The Federal Bar Association adopted the Federal Model Rules to tailor the ABA Model Rules to federal government practice. MODEL RULES OF PROF'L CONDUCT FOR FED. LAWYERS Preface. See *infra* notes 26-28 and accompanying text for additional discussion regarding the Federal Model Rules.

14 *Id.*

15 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 97 cmts. b-c (2000).

16 *Id.* § 97 cmt. c.

17 MODEL CODE OF PROF'L RESPONSIBILITY Preamble and Preliminary Statement (1983).

18 *Id.*

19 *Id.*

20 *Id.*

21 MODEL CODE OF PROF'L RESPONSIBILITY Canon 7.

fair."[22] Ethical Consideration 7-14 professes that "[a] government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results."[23] Notwithstanding the apparent heightened duty imposed on government lawyers to "seek justice," the Ethical Considerations were merely aspirational.[24] Therefore, a government lawyer could not be disciplined for violating Ethical Consideration 7-14 in a jurisdiction that had adopted the Model Code.[25]

The Federal Bar Association adopted supplemental Ethical Considerations specifically for government lawyers in 1974, between the time that the ABA adopted the Model Code in 1969 and the Model Rules in 1983.[26] The Federal Ethical Considerations emphasized the government lawyer's obligation to the public. For example, Federal Ethical Consideration 7-2 recognized that "[t]he federal lawyer is under the professional obligation faithfully to apply his professional talents to the promotion under law and applicable regulations of the public interest entrusted to the . . . agency of his employment."[27] Likewise, Federal Ethical Consideration 6-1 stated that "[i]n performing the duties of his particular employment [the obligation to represent a client competently] is fully applicable to the federal lawyer, to be fulfilled with special regard to the public interest."[28] But like the Ethical Considerations in the Model Code, the Federal Ethical Considerations are merely aspirational.

By the time the ABA adopted the Model Rules, only the scope of the Model Rules recognized that lawyers of government agencies "may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so[,]" but the guidance in the Model Code to government lawyers to seek justice was removed, as were the specific Ethical Considerations that addressed the role of gov-

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22 MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14.

23 *Id.*

24 MODEL CODE OF PROF'L RESPONSIBILITY Preamble and Preliminary Statement.

25 *See id.* Lawyers subject to the Model Code could be disciplined only for violations of the Disciplinary Rules. *Id.*

26 ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE, *supra* note 9, at 321.

27 Federal Ethical Consideration 7-2 (adopted Nov. 17, 1973), *reprinted in* C. Normand Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A. J. 1541, 1544 (1974).

28 Federal Ethical Consideration 6-1 (adopted Nov. 17, 1973), *reprinted in* Poirier, *supra* note 27, at 1543.

ernment lawyers.[29] The only references to the role of government lawyers in the current Model Rules appear in the scope of the Model Rules themselves; Model Rule 3.8, regarding special responsibilities for prosecutors; and in comments to Model Rule 1.13, which acknowledges the uncertainty in defining the identity of the client in a government context.[30] Even though the ABA had the benefit of the Federal Ethical Considerations, it chose to avoid more extensive coverage of the ethical duties of government lawyers.[31] Thus, the Model Rules merely acknowledge that government lawyers may have authority to represent the public interest but do not themselves impose any duties specific to government lawyers. Likewise, the preamble to the Federal Bar's model rules simply states that, "the government lawyer has a specific responsibility to strive to promote the public interest."[32]

The ABA's Committee on Ethics and Professional Responsibility Formal Opinion 94-387 concluded that the Model Rules do not impose obligations on government lawyers that are different than obligations imposed on private lawyers.[33] The fact that a government lawyer represents a government agency does not mean the government lawyer has less of a duty to zealously represent the client "within the bounds of the law than does a lawyer representing a private litigant."[34]

Notwithstanding the failure of the professional codes of conduct to articulate the nature and scope of the duties that government lawyers owe to the public, courts have indicated that higher ethical duties apply to government lawyers.[35] For example, in *Freeport-McMoRan v. Federal Energy Regulatory Commission*, the court in dicta determined that gov-

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29 MODEL RULES OF PROF'L CONDUCT Scope [4] (1983).

30 MODEL RULES OF PROF'L CONDUCT Scope [18]; MODEL RULES OF PROF'L CONDUCT R. 3.8; MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 9.

31 Lanctot, *supra* note 5, at 971-72.

32 MODEL RULES OF PROF'L CONDUCT FOR FED. LAWYERS Preamble (2010).

33 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994).

34 *Id.*

35 Douglas v. Donovan, 704 F.2d 1276, 1279-80 (D.C. Cir. 1983) (counsel, and particularly government counsel, have a duty to keep the court informed, and government lawyers have a duty to the court and the public at large); Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983) (noting the same as *Douglas*). *See also* Williams v. Sullivan, 779 F. Supp. 471, 472 (W.D. Mo. 1991) (explaining that government lawyer "has a duty beyond just zealously representing her client" and that "there is a special duty imposed on government lawyers to 'seek justice and to develop a full and fair record'"); Bonanza Trucking Corp. v. United States, 642 F. Supp. 1170, 1176 n.18 (Ct. Int'l Trade 1986) (noting that EC 7-14 mandates "that a government lawyer in an administrative proceeding has the responsibility to develop a full and fair record"); Jones v. Heckler, 583 F. Supp. 1250, 1256 n.7 (N.D. Ill. 1984) (quoting EC 7-14,

ernment lawyers have an obligation to ensure that "justice shall be done."[36] Chief Judge Mikva found it "astonishing" that a lawyer of a government agency "could so unblushingly deny that . . . [he] has obligations that might sometimes trump the desire to pound an opponent into submission."[37]

II. OVERVIEW OF IRS OFFICE OF CHIEF COUNSEL

A. *Role of the IRS Office of Chief Counsel*

Before discussing the specific hypothetical situations, it is important to first describe the role of the IRS Office of Chief Counsel and the sources of ethical rules that apply to IRS lawyers. The IRS Office of Chief Counsel is the law firm for the IRS, making it the "largest tax law firm in the country."[38] Among other duties, the Office of Chief Counsel represents the Commissioner of the IRS in the United States Tax Court, where a taxpayer may challenge a proposed deficiency without first paying the tax purported to be owed.[39] With respect to tax litigation, the Chief Counsel, the IRS's chief law officer—who is appointed by the President and confirmed by the Senate—reports to the IRS Commissioner and the General Counsel for the Department of the Treasury.[40] Employees of the Office of Chief Counsel report to the Chief Counsel.[41] The Department of Justice (DOJ), not the IRS Office of Chief Counsel, initiates or defends civil tax litigation at the request of the IRS Office of Chief Counsel in courts other than the Tax Court,

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and emphasizing that "counsel for the United States has a special responsibility to the justice system").

36 Freeport-McMoRan v. Fed. Energy Regulatory Comm'n, 962 F.2d 45, 47 (D.C. Cir. 1992) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). The Supreme Court in *Berger* was speaking about criminal prosecutors, but the court in *Freeport-McMoRan* said "no one has suggested . . . that the same principle does not apply with equal force to the government's civil lawyers." *Freeport-McMoRan*, 962 F.2d at 47 (discussing *Berger*, 295 U.S. 78).

37 *Id.* at 48.

38 INTERNAL REVENUE SERVICE PUB. 4063, ATTORNEY CAREERS WITH THE OFFICE OF CHIEF COUNSEL INTERNAL REVENUE SERVICE 2 (Aug. 2008) [hereinafter IRS PUB. 4063] (stating that the Office of Chief Counsel has "approximately 1,500 attorneys in 49 offices nationwide"), *available at* http://www.jobs.irs.gov/downloads/IRS-CC-5.pdf.

39 I.R.C. §§ 7452, 7803(b)(2)(D) (2006); Treas. Reg. § 601.103(c)(2) (2010). Unless otherwise noted, all section references are to the Internal Revenue Code as currently in effect.

40 I.R.C. § 7803(b)(1), (3)(A)(ii) (2006).

41 *Id.* § 7803(b)(4) (2006).

including United States district courts, the Court of Federal Claims, and in bankruptcy cases.[42]

IRS lawyers are located in both the national office in Washington, D.C. and in field offices across the country.[43] Attorneys in the field work in the Large Business & International Division (LB&I), the Tax Exempt/Government Entity Division, the Criminal Tax Division, or the Small Business/Self Employed Division (SB/SE).[44] Lawyers in SB/SE, which is the largest division, spend most of their time handling cases in the Tax Court.[45] There were 30,680 cases docketed in the Tax Court in the fiscal year ending September 30, 2009, of which 23,837 cases (77.7%) were pro se cases where taxpayers represented themselves.[46]

B. *Sources of Ethical Rules for Chief Counsel Lawyers*

IRS Chief Counsel lawyers are subject to the following federal ethical rules: the Office of Government Ethics' Standards of Ethical Conduct for Employees of the Executive Branch, Supplemental Standards of Ethical Conduct for Employees of the Department of the Treasury, Department of the Treasury Employee Rules of Conduct, and Office of Personnel Management Regulations on Employee Responsibilities and Conduct.[47] These federal ethical rules provide little guidance with respect to the four hypothetical situations discussed in this Article. These rules instead address such issues as prohibited financial interests, em-

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42 *Id.* § 7803(b)(2)(E) (2006) (stating that the Chief Counsel for the IRS is responsible for making recommendations to the Department of Justice regarding the commencement of civil actions); 28 C.F.R. § 0.70(a) (2010). *See also* CHIEF COUNS. DIRECTIVES MANUAL Part 34 (Aug. 11, 2004), *available at* http://www.irs.gov/irm/part34/index.html (regarding litigation in District Court, Bankruptcy Court, Court of Federal Claims, and state court and preparation of suit letters and defense letters). The *Chief Counsel Directives Manual* refers to *Internal Revenue Manual*, Parts 30 through 39.

43 *See* IRS PUB. 4063, *supra* note 38.

44 *Id.* Effective October 1, 2010, the Large & Midsize Business Division became the Large Business & International Division. I.R.S. News Release IR-2010-88 (Aug. 4, 2010).

45 *Id.*

46 American Bar Association Tax Section, Meeting of the Court Procedure Committee (Jan. 22, 2010) (Office of Chief Counsel slide presentation on file with the author).

47 CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.3 (Aug. 11, 2004) (citing Office of Government Ethics Standards of Ethical Conduct, 5 C.F.R. Part 2635; Supplemental Standards of Ethical Conduct for Employees of the Department of the Treasury, 5 C.F.R. Part 3101; Department of the Treasury Employee Rules of Conduct, 31 C.F.R. Part 0; and the Office of Personnel Management Regulations on Employee Responsibilities and Conduct, 5 C.F.R. Part 735).

ployment restrictions, restrictions on accepting gifts, as well as rules to lessen certain conflicts of interest.[48]

Another source of ethical rules for IRS Chief Counsel lawyers is the ABA. The ABA promulgated national ethics standards as early as 1908 when it adopted the Canons of Professional Ethics.[49] The Canons of Professional Ethics were replaced by the Model Code of Professional Responsibility (Model Code) in 1970.[50] The Model Rules of Professional Conduct (Model Rules) replaced the Model Code in 1983.[51] These ABA codes are merely aspirational codes of conduct that have served as models for states to consider adopting.[52] The highest court in each state has the authority to regulate and discipline lawyers within the state's borders.[53] Once adopted by a state, the applicable code of conduct is mandatory for the lawyers in that state who may be disciplined for violating its provisions.[54] All states have in place a mandatory code of conduct, and all states except California have adopted some version of the Model Rules.[55]

IRS Chief Counsel lawyers who litigate cases on behalf of the government in the Tax Court are subject to the codes of conduct adopted by the states in which they are admitted to practice.[56] They may also be

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48 *See, e.g.*, 5 C.F.R. § 3101.106(b) (2010) (prohibiting IRS employees from engaging in outside employment involving tax matters or tax return preparation, whether for compensation or not); 5 C.F.R. §§ 2635.202-.204 (2010) (prohibition on accepting gifts from outside sources); 5 C.F.R. §§ 2635.401-.403 (2010) (prohibitions regarding certain financial interests).

49 David J. Moraine, *Loyalty Divided: Duties to Clients and Duties to Others – The Civil Liability of Tax Attorneys Made Possible By the Acceptance of a Duty to the System*, 63 TAX LAW. 169, 175-77 (2009) [hereinafter Moraine, *Loyalty Divided*].

50 *Id.*

51 RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS – THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1-1(e) (2010-2011 ed.).

52 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 1 cmt. d (2000).

53 *Id.* § 1 cmt. c (stating that the highest courts in most states view their power to regulate and discipline lawyers as "inherent in the judicial function"). *See also* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 461-63 (1996).

54 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 1 cmt. d.

55 *Id.*

56 MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. 2 (1983) (stating that government lawyers are subject to the Model Rules); CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.3(2) (Aug. 11, 2004) (stating that IRS Chief Counsel lawyers are subject to codes of conduct in jurisdictions where they are admitted to the bar); TAX CT. R. 201(a) (requiring practitioners before the Tax Court to "carry on their practice in accordance with the letter and spirit of the Model Rules"); TAX CT. R. 202(a)(3) (stating that lawyers may be disciplined for violating the "letter and spirit of the Model Rules").

subject to the codes of conduct in the states where they engage in their duties.[57] They are subject to discipline by the Tax Court for conduct that "violates the letter and spirit of the Model Rules."[58]

The Model Rules do not distinguish between government and non-government lawyers other than prosecutors.[59] The Federal Bar Association has attempted to make the Model Code and the Model Rules more relevant to government lawyers by adopting Federal Bar Association Canons of Ethics and Federal Ethical Considerations, based on the ABA Model Code, and the Model Rules of Professional Conduct for Government Lawyers, based on the ABA Model Rules.[60] In reality, the Federal Bar Association's codes of conduct offer little practical guidance, and are merely aspirational until adopted by a federal government agency.[61]

C. *IRS Office of Chief Counsel's Policy of Restraint*

As will be addressed throughout this article, the IRS Office of Chief Counsel has promulgated internal policies in the *Chief Counsel Directives Manual* (CCDM) to impose on Chief Counsel lawyers certain duties to taxpayers, who are technically their adversaries in the Tax Court. The Chief Counsel's policy that requires its lawyers to act in ways to further the public interest does not originate from any mandatory code of conduct or judicial pronouncement. Rather, it reflects the Office of Chief Counsel's self-imposed responsibility to be a

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57 *See* 28 U.S.C. § 530B (2006) (providing that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State"). The phrase "attorney for the Government" as used in 28 U.S.C. § 530B is defined in regulations promulgated by the DOJ and includes DOJ lawyers and lawyers from certain components of the DOJ such as the Federal Bureau of Investigation. *See also* MODEL RULES OF PROF'L CONDUCT R. 8.5 (stating that a lawyer may be subject to discipline by the state where the lawyer is admitted to practice and the jurisdiction where the lawyer provides legal services).

58 TAX CT. R. 202(a)(3) (notifying lawyers that they may be disciplined by the Tax Court for violating the "letter and spirit" of the ABA Model Rules); CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.2 (Aug. 11, 2004) (requiring Chief Counsel attorneys to adhere to the "letter and spirit" of the ABA Model Rules). Presumably, references in the *Chief Counsel Directives Manual* and Tax Court Rule 202(a) to the ABA Model Rules are to the ABA's most current version.

59 *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 (containing special ethical rules for prosecutors).

60 Robert C. Power, *Lawyers and the War*, 34 J. LEGAL PROF. 39, 61 (2009). Professor Power says the Federal Bar Association's efforts "served mainly to reveal the obvious and to finesse the hard questions." *Id.* at 65.

61 MODEL RULES OF PROF'L CONDUCT FOR GOV'T LAWYERS, Preface and Scope.

minister of justice, an advocate for the legal process and not merely an advocate for its client.[62] Model Rule 3.8 describes a prosecutor in a criminal case as a "minister of justice and not simply that of an advocate."[63] Prosecutors have a great deal of discretion in areas such as selecting the cases to charge and deciding whether to settle cases or take them to trial.[64] Although not prosecutors, IRS lawyers have a lot of discretion in settling Tax Court cases.[65] IRS lawyers have to determine the IRS's legal position and weigh the strength of the government's case in deciding whether to settle or concede an issue in the case or the case itself.[66] Deciding whether the relevant legal requirements are satisfied and weighing the relative hazards of litigation sometimes involves significant uncertainty. A Chief Counsel lawyer may not always settle cases on the merits notwithstanding the Chief Counsel's policy that prohibits nuisance settlements.[67] Given this amount of discretion, it seems appropriate to impose restraint on IRS lawyers, who, like prosecutors, have the potential to misuse their power. It is of little consequence that the IRS is the respondent or defendant in Tax Court cases.[68] The government in Tax Court cases is in a very different position from an ordinary civil defendant in, for example, a personal injury lawsuit or a breach of contract claim.[69] In cases that are unrelated to the mission of the gov-

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62 *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1983) (describing a prosecutor in a criminal case as a "minister of justice and not simply that of an advocate"). The role of the IRS lawyer may also be viewed as less of an advocate and more of an advisor. *See* MODEL RULES OF PROF'L CONDUCT Preamble [1]. A lawyer acting as an advocate "zealously asserts the client's position under the rules of the adversary system." *Id.* By contrast, an advisor gives a client "an informed understanding of the client's rights and obligations and explains their practical implications." *Id.*

63 MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1; *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1983) (discussing responsibilities of a public prosecutor).

64 *See generally* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (Thomson/West 2010-2011 ed.).

65 The Department of Justice Tax Division is responsible for supervising most criminal tax prosecutions. 28 C.F.R. § 0.70(a) (2011).

66 CHIEF COUNS. DIRECTIVES MANUAL 35.5.2.3(1) (Aug. 11, 2004).

67 CHIEF COUNS. DIRECTIVES MANUAL 35.5.2.4(2) (Aug. 11, 2004) ("No case is to be settled on a so-called nuisance basis, either for or against the government."); *see also* CHIEF COUNS. DIRECTIVES MANUAL 35.5.2.4(1) ("Cases and issues are to be settled on the merits."); see situation (4), *infra* Part VI, which discusses an example where the Chief Counsel lawyer concedes a case without regard to the legal merits.

68 TAX CT. R. 60(b).

69 *See* Green, *Must Government Lawyers "Seek Justice," supra* note 5, at 249-54 (discussing Lybbert v. Grant County, 1 P.3d 1124 (Wash. 2000)). The plaintiffs in *Lybbert* sued Grant County after they were injured in an automobile accident. The plaintiffs served the wrong official but the government did not disclose this fact until after the statute of limitations expired.

ernment agency, perhaps it makes sense for the government lawyer to be a zealous advocate for the government client alone.[70] But the purpose of Tax Court litigation is to enforce the tax laws, which is the very heart of what the IRS does.

Commentators debate about whether government lawyers owe special duties to the public. Advocates of the public interest approach presume that such duties exist, while advocates of the traditional approach argue that government lawyers owe no greater duty to the public than private counsel.[71] This Article proposes that the traditional approach and the public interest approach are not mutually exclusive. Rather, a government lawyer is able to ethically serve the agency client as well as the public at large by acting in a manner that will further legitimate objectives of the agency client. Under this approach, neither the agency's interest nor the public's interest is paramount. Rather, the government lawyer plays a central role in formulating the agency's legal position in matters to further the agency's legitimate objectives, and in that way, the public interest is served.[72]

This refinement of the public interest approach resembles in some respects the contextual view of lawyering developed by Professor William Simon.[73] A lawyer following Professor Simon's contextual view would evaluate the relative merits of a particular case based on the lawyer's analysis of the legal rules and take only those actions that result in the most legally just resolution of the case.[74] In Professor Simon's words, "lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice,"

The Supreme Court of Washington held that the county was not equitably estopped from raising the insufficiency of service of process. *Lybbert*, 1 P.3d at 1129. The court refused to impose on the government lawyers a duty of disclosure that does not exist with respect to private lawyers in cases where the government is not acting in a regulatory capacity. *Id.* The fact that the IRS is the respondent in the Tax Court is more a function of the presumption of correctness given to the government in its determination of the taxpayer's deficiency. TAX CT. R. 142(a). The presumption of correctness makes sense in civil tax cases where it is the taxpayer who has access to the records needed to substantiate the taxpayer's correct tax liability. Durovic v. Comm'r, 54 T.C. 1364, 1393 (1970).

70 *See* Green, *Must Government Lawyers "Seek Justice," supra* note 5, at 249-54.

71 *See supra* note 5 and accompanying text.

72 Note, *Rethinking the Prof'l Responsibilities*, *supra* note 4, at 1188; *see also* Carle, *supra* note 4, at 123.

73 SIMON, THE PRACTICE OF JUSTICE, *supra* note 1. In his earlier work, Professor Simon coined his approach the discretionary approach. *See* Simon, *Ethical Discretion*, *supra* note 4. Professor Simon's approach is not limited to government lawyers.

74 SIMON, THE PRACTICE OF JUSTICE, *supra* note 1, at 138.

where justice is synonymous with "legal merit."[75] Professor Simon suggests that lawyers analyze the legal rules in much the same way that a judge would.[76] Under Professor Simon's contextual view, getting the correct legal answer is paramount, although a lawyer applying the contextual view can still be a zealous advocate for the client if the client's position is consistent with the underlying legal merits of the case.[77] The contextual view is distinguishable from the public interest approach in that the contextual view relies on legal sources to derive the just resolution of the case, whereas the public interest model relies on the lawyer's own moral judgments.[78]

This Article demonstrates an approach to legal ethics that simultaneously serves the agency client interest and the public interest by exploring the ethical responsibilities of a lawyer who litigates cases in the U.S. Tax Court on behalf of the Commissioner of the IRS in the context of four hypothetical situations.

III. SITUATION (1): REMAINING SILENT

A. *Description of the Dilemma*

The IRS issues to the taxpayer a notice of deficiency, claiming that the taxpayer failed to properly determine her tax liability on a tax return timely filed more than three years earlier.[79] The taxpayer timely files a proper petition with the Tax Court to contest the IRS's determination.[80] The IRS Chief Counsel lawyer and the taxpayer will confer about the case and may attempt to settle it before trial.[81] If no settlement is reached, the case is tried. The taxpayer has the burden of proving by a preponderance of the evidence that the IRS's proposed determination as

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75 *Id.*

76 *Id.* at 139.

77 *Id.* at 11.

78 *Id.* at 138 (clarifying that under the contextual view, decisions are not "assertions of personal preferences, nor are they applications of ordinary morality").

79 I.R.C. § 6212 (2006) (discussing procedure for the IRS to notify taxpayers of deficiency determinations).

80 I.R.C. § 6213(a) (2006). Rather than filing a petition in the Tax Court, a taxpayer could pay the proposed deficiency, file a refund claim with the IRS, and then file for a refund in federal district court or the Court of Federal Claims. 28 U.S.C. § 1346(a)(1) (2006); Flora v. United States, 362 U.S. 145 (1960). This Article is limited to litigation in the Tax Court.

81 CHIEF COUNS. DIRECTIVES MANUAL 35.4.3.2 (Aug. 11, 2004) (directing Chief Counsel lawyers to schedule *Branerton* conferences, named after *Branerton v. Comm'r*, 61 T.C. 691 (1974), to confer with the taxpayer or taxpayer's counsel regarding the facts of the case); CHIEF COUNS. DIRECTIVES MANUAL Part 35 (relating to settlement procedures).

set forth in the notice of deficiency is incorrect.[82] The Chief Counsel lawyer who is assigned to the case determines that the government's substantive position in the deficiency notice is legally correct and uncontroverted. However, the government lawyer realizes that the three-year statute of limitations on assessment has expired.[83] The taxpayer does not raise the expired assessment statute of limitations as a defense in the Tax Court petition. Section 6501 gives the IRS three years from the date a tax return is filed to assess the amount of tax not shown on the return.[84] The three-year assessment period is suspended while a taxpayer is challenging the notice of deficiency in the Tax Court and until sixty days after the Tax Court enters its decision.[85] Only after the Tax Court's decision has become final may the IRS assess the tax due and begin actions to collect the tax owed.[86] The notice of deficiency in situation (1) is untimely because it was issued after the assessment period expired.[87] Does the Chief Counsel lawyer have an ethical duty to raise the late notice of deficiency or may the government lawyer simply remain silent?

B. *Resolving the Ethical Dilemma in Situation (1)*

The ethical dilemma that the IRS Chief Counsel lawyer faces in situation (1) is whether to raise the untimely notice of deficiency or to simply remain silent. The Model Rules provide the starting point to resolve this dilemma.[88] Model Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client."[89] The

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82 Welch v. Helvering, 290 U.S. 111, 115 (1933); TAX CT. R. 142(a); *cf.* I.R.C. § 7454(a) (2006) (imposing burden of proof on IRS to prove by clear and convincing evidence taxpayer's civil fraud); I.R.C. § 7491 (2006) (shifting the burden of proof to the IRS in certain situations); I.R.C. §7491(c) (imposing burden of production on IRS with respect to penalties).

83 I.R.C. § 6501(a) (2006) (giving the IRS three years from the date a return is filed to assess the tax).

84 *Id.* The date of "assessment" is the date that the taxpayer's liability is officially recorded in the IRS's records. *Id.* § 6203. In certain situations not raised by the facts of situation (1), the IRS may assess tax without regard to the three-year statute of limitations. *Id.* § 6501(c).

85 *Id.* § 6503(a)(1) (2006).

86 *Id.* § 6215(a) (2006) (stating that "the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary"). The Tax Court's decision becomes final after the ninety-day period to file an appeal expires if no appeal is filed. *Id.* § 7481(a)(1) (2006).

87 *See* Fears v. Comm'r, 97 T.C.M. (CCH) 1317 (2009).

88 See *supra* notes 57-59 and accompanying text for a discussion of the applicability of the Model Rules to IRS lawyers.

89 MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983).

comments to the duty of diligence in Model Rule 1.3 state that a lawyer should:

> [P]ursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate the client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.[90]

Model Rule 1.3 instructs lawyers to be zealous advocates for their clients based on the notion that a just result will occur in our adversary system if each litigant's lawyer zealously and single-mindedly pursues the client's objectives.[91] Model Rule 1.3 can fairly be interpreted to permit the Chief Counsel lawyer to remain silent about the untimely notice of deficiency in the interests of "tak[ing] whatever lawful and ethical measures are required"[92] to defend the IRS's position in the notice of deficiency.

Nothing in the Model Rules requires the Chief Counsel lawyer to perform legal analysis for the taxpayer or her lawyer, or to disclose flaws in the IRS's case to the taxpayer.[93] In fact, if the Chief Counsel lawyer voluntarily discloses the fact that the assessment statute of limitations has expired, the lawyer may be violating Model Rule 1.6, which requires

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90 *Id.* cmt. 1. The comments accompanying the Model Rules are illustrative but not authoritative. MODEL RULES OF PROF'L CONDUCT Scope [21].

91 MODEL RULES OF PROF'L CONDUCT Preamble [8]. *See also* Lanctot, *supra* note 5, at 959. Of course, this paradigm holds true only if both litigants are well represented. MODEL RULES OF PROF'L CONDUCT Preamble [8]. Many lawyers operate under the false impression that their primary responsibility is to be a zealous advocate. But the Model Rules identify three responsibilities for lawyers: a representative of clients, an officer of the court, and a public citizen. *Id.* at Preamble [1]. While fulfilling his or her duties to a client, a lawyer needs to harmonize his or her other responsibilities as an officer of the court and a public citizen. *Id.* at Preamble [8]. Thus, for example, a lawyer can be a zealous advocate and assume that justice is being done if the opposing party is well represented. If the opposing party is not represented or is not adequately represented, query whether a lawyer who acts as a zealous advocate fulfills the lawyer's responsibilities as an officer of the court or as a public citizen.

92 MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1.

93 *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1 ("A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."). *See also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (stating that the Model Rules "do not require a lawyer to disclose weaknesses in her client's case to an opposing party, in the context of settlement negotiations or otherwise").

lawyers to keep confidential all information relating to the representation unless the client consents to disclosure.[94] Similarly, disclosure without informed consent of the client may violate Model Rule 1.8(b), which prohibits a lawyer from using "information relating to representation of a client to the disadvantage of the client unless the client gives informed consent."[95]

Admittedly, Model Rules 3.4 and 4.1 prohibit the Chief Counsel lawyer from making false statements and from obstructing the taxpayer's access to evidence.[96] But in situation (1), all necessary evidence and all relevant facts are known to the taxpayer, so no false statements need be made and no destruction or concealment of evidence need be contemplated.[97] The only relevant facts needed to determine that the notice of deficiency is untimely is the date the return was filed and the date the notice of deficiency was issued, both of which are known by the taxpayer. Model Rules 3.4 and 4.1 create a level playing field for both sides to present their cases by requiring litigants to deal with each other fairly, but neither Model Rule 3.4 nor 4.1 imposes a duty to cooperate with the opposing party.[98] The taxpayer has available all necessary information to defeat the IRS's proposed determination. It is of no consequence to the IRS lawyer under the Model Rules that the taxpayer fails to raise the issue, whether through ignorance, incompetence, or otherwise. In fact, some would assert that this is the sort of windfall an advocate dreams of in our adversarial system of justice.[99]

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94 MODEL RULES OF PROF'L CONDUCT R. 1.6(a). This result occurs by focusing solely on the Model Rules. As discussed below, the IRS and the Office of the Chief Counsel have imposed a higher duty on IRS lawyers that changes this result.

95 MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (1983).

96 MODEL RULES OF PROF'L CONDUCT R. 3.4, 4.1.

97 *But see* CHIEF COUNS. DIRECTIVES MANUAL 35.6.2.9 (Aug. 11, 2004) (Chief Counsel lawyer "should offer all available evidence of material facts" to "help the court to make a proper ruling").

98 MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. 1 ("The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.").

99 ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (stating that "'the whole point of the adversarial system is that parties are entitled to harvest whatever windfalls they can from the miscues or odd judgments of their opponent'") (quoting HAZARD & HODES, THE LAW OF LAWYERING § 3.1:204-2) (1992 Supp.)).

What about the fact that Model Rule 3.1 prohibits lawyers from bringing or defending frivolous claims?[100] Could an argument be made that the IRS is abusing the legal process by defending a claim for which there is no basis in fact or law if the IRS cannot legally collect the tax that may ultimately be determined to be owed? The law and the facts in situation (1) are clear and have been fully substantiated, and there is no disagreement as to the relevant facts. The Internal Revenue Code (IRC) requires the IRS to assess a deficiency before it collects it, and an assessment must be made within three years of the filing of the return.[101] The IRS cannot assess the tax in situation (1) because the three-year assessment statute of limitations had lapsed before the IRS had issued the notice of deficiency. How can the Chief Counsel lawyer make a good faith argument in support of the IRS's position that the taxpayer has a tax liability?

The substantive position that the IRS took in the deficiency notice with respect to the underlying tax liability in situation (1) is legally proper and not frivolous, and it is the position in the deficiency notice that the Chief Counsel lawyer is defending. The expiration of the assessment statute is a defense that must be asserted by the taxpayer in the petition.[102] If the taxpayer does not raise the issue, it is waived and is not properly before the court.[103] The availability of an affirmative de-

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100 MODEL RULES OF PROF'L CONDUCT R. 3.1 (1983) (stating that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."). *See also* TAX CT. R. 33(b).

> The signature of counsel or a party constitutes a certificate by the signer that the signer has read the pleading; that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Id.

101 *See supra* text accompanying notes 84-86.

102 TAX CT. R. 39 (stating that "[a] party shall set forth in the party's pleading any matter constituting an avoidance or an affirmative defense, including . . . statute of limitations"); TAX CT. R. 142(a) (stating that the burden of proof is on the taxpayer with respect to issues raised in the petition); Brailsford v. Comm'r, 62 T.C.M. (CCH) 1602 (1991) (stating that the assessment statute of limitations is an affirmative defense that must be pleaded by the taxpayer or it is waived); Goldberg v. Comm'r, 49 T.C.M. (CCH) 168 (1984); Pesch v. Comm'r, 78 T.C. 100, 136 (1982).

103 TAX CT. R. 34(b)(4) (stating that "[a]ny issue not raised in the [petition] shall be deemed to be conceded."). Query whether the result would be different if the statute of limitations defect were jurisdictional. *See* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op.

fense does not make the IRS's determination frivolous.[104] The fact that the assessment period had run does not bar the Tax Court's jurisdiction.[105] The Tax Court's jurisdiction to redetermine a deficiency is properly invoked after a taxpayer has received a notice of deficiency from the IRS and the taxpayer files a timely petition with the court.[106] The taxpayer in situation (1) properly invoked the jurisdiction of the Tax Court by filing a timely petition after receiving a notice of deficiency. The notice of deficiency is valid assuming it was properly addressed and mailed by certified or registered mail to the taxpayer's last known address.[107] Thus, the Tax Court would have jurisdiction to render a decision in the case as to the taxpayer's tax liability notwithstanding the fact that the notice of deficiency was mailed after the three-year assessment statute had expired. Moreover, the IRS would be entitled to keep any payments made before the assessment statute expired, even if the subsequent assessment is untimely.[108]

Would the Chief Counsel lawyer's silence run afoul of Model Rule 3.3, which, among other things, prohibits a lawyer from failing "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel"?[109] The expiration of the assessment statute of limitations is not directly adverse to the IRS's legally correct position supporting the asserted deficiency.[110] Admittedly, the IRS's proposed deficiency is defeated if the taxpayer raises the expired

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94-387 (1974) (acknowledging that a court lacking jurisdiction does not have the power to adjudicate the case and could dismiss it on its own motion).

104 ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 94-387 (1974) (stating that a lawyer does not have an ethical duty to inform an opposing party that the statute of limitations has run).

105 Fisher v. Comm'r, 96 T.C.M. (CCH) 339 (2008) (stating that the Tax Court's jurisdiction does not depend on the IRS's ability to assess a deficiency).

106 I.R.C. § 6213(a) (2006); TAX CT. R. 13.

107 I.R.C. § 6212 (2006); I.R.C. § 7459(e) (2006) ("If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Tax Court to that effect shall be considered as its decision that there is no deficiency in respect of such tax."). Section 7459(e) reiterates that a time-barred deficiency does not affect the Tax Court's jurisdiction because the Tax Court would be unable to render a decision that there is no deficiency as a result of a late-issued deficiency notice unless it had jurisdiction. *See also* Worden v. Comm'r, 67 T.C.M. (CCH) 2835 (1994) (stating that a late-issued notice of deficiency does not render notice invalid and thus, does not affect the Tax Court's jurisdiction).

108 *See, e.g.*, Bachner v. Comm'r, 109 T.C. 125, 131 (1997) (relying on Lewis v. Reynolds, 284 U.S. 281 (1932)).

109 MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (1983).

110 *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1974).

assessment statute.[111] But the IRS would lose on a technicality and not on the substantive merits. If the taxpayer fails to raise the expired assessment statute, the Tax Court would decide the case on its merits and the IRS would prevail because its substantive position is correct. This conclusion is consistent with the notion that the IRS is not ethically required to do the job of the taxpayer or the taxpayer's lawyer.[112]

The Model Rules do not distinguish between private lawyers and government lawyers other than prosecutors.[113] Consequently, the same analysis under the Model Rules would apply if the lawyer in situation (1) was not an IRS lawyer but was instead a private lawyer representing a client in a civil action. A private plaintiff's lawyer arguably may ethically negotiate a time-barred claim or file a civil action without informing the defendant or the court that the statute of limitations has expired.[114] And the defendant ethically may raise the lapsed statute of limitations as an affirmative defense without regard to the merit of the claimant's case.[115] The same rules apply to Chief Counsel lawyers, but unlike in traditional litigation where the plaintiff who brings the suit has the burden of proof and the defendant or respondent may raise an affirmative defense to defeat the claim, the government is the respondent in the Tax Court and the taxpayer is the petitioner who has the burden of proving the IRS's proposed determination incorrect by raising the expired assessment statute or otherwise.

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111 *See, e.g.*, Clayton v. Comm'r, 97 T.C.M. (CCH) 1583 (2009); Amesbury Apartments, Ltd. v. Comm'r, 95 T.C. 227, 240 (1990) (addressing three-year assessment statute applicable to partnerships under § 6229(a)); Robinson v. Comm'r, 57 T.C. 735, 737 (1972).

112 MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 4 (stating that "[a] lawyer is not required to make a disinterested exposition of the law"). *See also* I.R.S. Field Serv. Advisory 199941015 (Oct. 15, 1999), *available at* 1999 WL 821670 (Chief Counsel has no ethical obligation to inform partners in a TEFRA proceeding of assessments being invalid because IRS did not issue notices of deficiencies to the affected partners and doing so may violate lawyer's duty of confidentiality).

113 MODEL RULES OF PROF'L CONDUCT R. 3.8 (discussing the special responsibilities of a prosecutor).

114 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1974). *See also* David H. Taylor, *Filing With Your Fingers Crossed: Should a Party Be Sanctioned for Filing a Claim to Which There is a Dispositive, Yet Waivable, Affirmative Defense?*, 47 SYRACUSE L. REV. 1037 (1997) (discussing approaches courts have taken to decide whether to sanction plaintiffs for filing claims when there is a dispositive affirmative defense). *But see* ROTUNDA & DZIENKOWSKI, *supra* note 51, § 3.4-1 (stating that not disclosing an expired statute of limitations during litigation violates Model Rules of Professional Conduct Rule 3.3, Duty of Candor to the Tribunal).

115 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1974).

Even if the Model Rules would permit the Chief Counsel lawyer to remain silent and not raise the statute of limitations issue in situation (1), the Office of Chief Counsel's policy is to notify the taxpayer that the assessment statute of limitations has expired and to concede the case.[116] The obvious next question, then, is whether the Chief Counsel's policy improperly infringes on the client-lawyer relationship by causing the Chief Counsel lawyer to violate Model Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer) or Model Rule 1.7 (Conflict of Interest: Current Client). To answer this question, we must first identify the client of the IRS lawyer.

Defining a government lawyer's client sometimes proves difficult.[117] Depending on the type of lawyer and the type of representation, the government lawyer's client may be a particular government official, a member of the military, a branch of government, a particular agency, or even the government as a whole.[118] And there certainly is some theoretical appeal for treating the public itself as the client of a government lawyer because government agencies and their employees, including their lawyers, exist to fulfill public purposes.[119] The IRS exists to administer and enforce the nation's tax laws. IRS employees and Chief Counsel lawyers are engaged to further this public purpose. While it is true that the IRS exists to fulfill a public purpose, it does not follow that IRS lawyers consequently owe to taxpayers professional and ethical duties typically owed only to clients.[120] Rather, IRS lawyers fulfill their duty to the public as public servants by providing legal representation to

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116 CHIEF COUNS. DIRECTIVES MANUAL 35.2.1.1.1(8) (Aug. 11, 2004).

> It is the longstanding policy of the Office of Chief Counsel to notify the taxpayer or representative of the existence of an expired statute of limitations even if it has not been assigned as error in the petition (and thus deemed conceded under the court's rules), notwithstanding the lack of any duty under the ABA Model Rules of Professional Conduct to make such a disclosure.

Id. See also I.R.S. Chief Couns. Advice 200536019 (May 27, 2005), *available at* 2005 WL 2176764 (requiring the docket attorney who has jurisdiction over a case to notify the taxpayer if the period of limitations on assessment has expired).

117 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 9 (1983) (recognizing that "[d]efining precisely the identity of the client and prescribing the resulting obligations of . . . lawyers may be more difficult in the government context.").

118 *Id.*

119 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 97 cmt. b (2000) (recognizing that the goals of a governmental agency "necessarily include pursuit of the public interest").

120 Prof'l Ethics Comm. of the Fed. Bar Ass'n, Op. 73-1, *reprinted in* ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE, *supra* note 9, at 329.

the IRS to promote the IRS's public purpose.[121] Notwithstanding the theoretical appeal of treating the public as the client of the IRS lawyer, neither the taxpayer in situation (1) nor the public at large is the IRS lawyer's client.[122] Rather, the IRS is the client of the Office of Chief Counsel.[123] Thus, the Model Rules define and govern the client-lawyer relationship between the IRS and the IRS lawyer.[124]

Model Rule 1.2 ethically obligates a lawyer to carry out the objectives of the representation as the client has defined those objectives.[125] While the client ultimately decides the purposes and scope of the representation, it is the lawyer, in consultation with the client, who generally decides the means of achieving the client's objectives.[126] The lawyer should pursue the client's objectives with zeal, taking "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[127] Model Rule 1.7 prohibits a lawyer from representing a client if there is a "significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to . . . a third person."[128] Could the Chief Counsel's concession of the case in situation (1) cause the Office of Chief Counsel to breach these ethical duties?

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121 *See* Note, *Rethinking the Prof'l Responsibilities*, *supra* note 4; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 97 cmt. f ("A lawyer for the government is required to act . . . in a manner reasonably calculated to advance the governmental client's lawful objectives and with reasonable competence and diligence.").

122 I.R.C. § 7803(b)(2) (2006) (the Chief Counsel is the "chief law officer for the Internal Revenue Service"). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 9 (discussing the identity of the client in the context of a government agency); Prof'l Ethics Comm. of the Fed. Bar Ass'n, Op. 73-1, *reprinted in* ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE, *supra* note 9, at 329 (concluding that the client of a government lawyer in the Federal Executive Branch is the agency where the lawyer is employed); *Report by the District of Columbia Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct*, WASH. LAW., Sept./Oct. 1988, *reprinted in* ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE, *supra* note 9, at 332, 334; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 97 cmt. c (stating that "for many purposes, the preferable approach . . . is to regard the respective agencies as the clients").

123 I.R.C. § 7803(b)(2) (2006). *See also* I.R.S. Field Serv. Advice, *supra* note 112 (stating that the IRS is the client of the Office of Chief Counsel).

124 *See* MODEL RULES OF PROF'L CONDUCT R. 1.0–1.18 (1983), which govern the client-lawyer relationship.

125 MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

126 MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 1 (lawyer may take whatever action is "impliedly authorized to carry out the representation"); MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1; MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (stating that the lawyer must consult with the client about the means to achieve the client's objectives).

127 MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1.

128 MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983).

Requiring the IRS lawyer to concede the case in situation (1) is entirely consistent with the IRS's objectives in administering the tax laws. The IRS defines its duty to interpret the tax laws impartially, with "neither a government nor a taxpayer point of view."[129] The IRS directs its employees to "find the true meaning" of the tax laws rather than "adopt a strained construction in the belief that [they are] 'protecting the revenue.'"[130] The IRS's mission is to "provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all."[131] To meet its mission, the IRS has established the following two principal goals: (1) "improve service to make voluntary compliance easier," and (2) "enforce the law to ensure everyone meets their obligation to pay taxes."[132] The IRS wants to ensure that taxpayers who voluntarily file their returns and pay their taxes on time continue to do so by facilitating voluntary compliance.[133] It also wants to make non-compliant taxpayers compliant to reduce the tax gap, the difference between the amount of taxes owed and what is actually collected.[134]

Applying the tax laws impartially reflects the role that the IRS plays in promoting voluntary compliance in our self-assessment tax system—where taxpayers compute and self-report their tax liability to the government—and government resources to verify taxpayers' compliance are scarce.[135] The Treasury Department estimates that 83.7% of taxpayers correctly calculate and timely file and pay the taxes they owe voluntarily

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129 Rev. Proc. 64-22, 1964-1 C.B. 689 (1964).

130 *Id.*

131 INTERNAL REVENUE MANUAL 1.2.10.1.1(1) (Dec. 18, 1993).

132 IRS STRATEGIC PLAN 2009-2013, at 19 (Apr. 2009), *available at* http://www.irs.gov/pub/irs-pdf/p3744.pdf (stating that "we owe it to all the citizens who meet their civic responsibility to pay taxes to be vigorous in pursuing individuals who are not paying what they owe") [hereinafter IRS STRATEGIC PLAN]. *See also* Richard Lavoie, *Analyzing the Schizoid Agency: Achieving the Proper Balance in Enforcing the Internal Revenue Code*, 23 AKRON TAX J. 1, 12 (2008) (describing the "inherent duality" in the IRS's roles of tax administration and tax enforcement) [hereinafter Lavoie, *Schizoid Agency*].

133 IRS STRATEGIC PLAN, *supra* note 132, at 13.

134 U.S. DEP'T OF THE TREASURY, UPDATE ON REDUCING THE FEDERAL TAX GAP AND IMPROVING VOLUNTARY COMPLIANCE 2 (July 8, 2009), *available at* http://www.irs.gov/pub/newsroom/tax_gap_report_-final_version.pdf [hereinafter 2009 TREASURY REPORT]. The net tax gap—the amount owed after subtracting revenue collected through enforcement actions and late payments—is estimated to be $290 billion. *Id.*

135 Lavoie, *Schizoid Agency*, *supra* note 132, at 12; INTERNAL REVENUE MANUAL 1.2.10.1.25(2) (Aug. 11, 1972) (stating that public attitudes towards the voluntary compliance tax system depend "to a substantial extent" upon the contacts that the public has with the IRS).

without intervention by the IRS.[136] To help maintain a high voluntary compliance rate, taxpayers must be confident that the tax laws are being fairly administered.[137] Otherwise, compliant taxpayers may revolt and become non-compliant if they perceive that other citizens are not paying their fair share of taxes, whether through biased administration and enforcement of the tax laws or because they perceive IRS enforcement efforts to be inadequate.[138]

The IRS's twin goals of service and enforcement are entirely consistent with the public's interest. Taxpayers who voluntarily file their returns and pay their taxes benefit from IRS efforts to make the process easier and more effective. Likewise, the entire tax system benefits when the IRS enforces the tax laws against those who do not voluntarily comply. The self-assessment system depends on taxpayers' voluntary compliance, which in turn is based to at least some extent on whether citizens think the system is fair.[139] Enforcement efforts to bring noncompliant taxpayers into compliance help maintain a hearty voluntary compliance rate, which ultimately benefits the entire tax system.

The Chief Counsel lawyer's concession of the case in situation (1) acknowledges that the Office of Chief Counsel owes a duty to taxpayers that the Model Rules themselves do not impose.[140] The taxpayer in situation (1) knows or should know the date the tax return was mailed and the date of the notice of deficiency, but the taxpayer may not understand the significance of those facts, particularly if the taxpayer is not

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136 2009 TREASURY REPORT, *supra* note 134, at 4. The 16.3% of noncompliant taxpayers are so labeled because they do not file required returns, they underreport their income, or they fail to timely pay the taxes they owe. *Id.*

137 Lavoie, *Schizoid Agency*, *supra* note 132, at 12.

138 *Id. See also* IRS STRATEGIC PLAN, *supra* note 132, at 19 ("We owe it to all the citizens who meet their civic responsibility to pay taxes to be vigorous in pursuing individuals who are not paying what they owe.").

139 2009 TREASURY REPORT, *supra* note 134, at 4. *See also* INTERNAL REVENUE MANUAL 4.22.1.1(2) (Oct. 1, 2008).

140 *See* IRS Chief Couns. Notice CC-2003-008 (Feb. 3, 2003) (stating that "Chief Counsel attorneys are expected to adhere to the highest standards of conduct, not simply conform to minimum professional obligations"). *See also* CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.1(1) (Aug. 11, 2004) (stating that "[m]embers of the Office of Chief Counsel play a special role in the administration of the internal revenue laws. The mission of the Internal Revenue Service is to apply the tax law with integrity and fairness. As the independent legal counsel to the Service, the responsibility of the Office of Chief Counsel is to ensure that the Service is able to fulfill this mission. The Office of Chief Counsel does this by providing the correct legal interpretation of the internal revenue laws, representing the Service in litigation, and providing all other legal support needed by the Service in its administration of the tax law.").

represented by counsel. By conceding the case in situation (1), the Chief Counsel lawyer is doing more than what is required by Model Rule 3.4. Model Rule 3.4 encourages fairness to opposing parties by prohibiting lawyers from destroying or concealing evidence.[141] However, Model Rule 3.4 does not require lawyers to highlight facts highly favorable to the opponent. This behavior essentially recognizes that the Office of Chief Counsel owes a duty to the public, albeit unenforceable by taxpayers, to impartially and correctly interpret the tax laws.[142] The Office of Chief Counsel acknowledges that it is responsible for ensuring that the IRS fulfills its mission of applying "the tax law with integrity and fairness" by "providing the correct legal interpretation of the internal revenue laws."[143] Moreover, the Office of Chief Counsel tells its lawyers that they "must carry out these responsibilities by interpreting the law with complete impartiality" because "the duty of service requires [them] to think and act to ensure that the American public receives the fair and correct interpretation of our tax law."[144] Conceding the case in situation (1) does not cause the Chief Counsel lawyer to violate Model Rule 1.2 because by conceding the case, the lawyer is able to carry out the client's objectives of the representation to impartially apply the correct interpretation of the tax law. Section 6501(a) requires assessment within three years of the date the return is filed. Notwithstanding the fact that the taxpayer should raise the issue of the expired assessment statute of limitations, fairness demands concession of the case.

This self-imposed duty to the public could cause the Office of Chief Counsel to breach its ethical duty to its client, the IRS, under Model Rule 1.7, if the public duty materially limits the Chief Counsel's representation of the IRS.[145] Effective representation is possible only if the lawyer exercises independent professional judgment in the best interests of the client.[146] A lawyer cannot effectively represent a client if the lawyer's responsibilities to another client, a third party, or even the law-

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141 MODEL RULES OF PROF'L CONDUCT R. 3.4 (1983).

142 Barnes v. Comm'r, 130 T.C. 248, 255 (2008) (stating that the *Internal Revenue Manual* "does not have the force of law, is not binding on the Commissioner, and does not confer any rights on the taxpayer"); Rev. Proc. 64-22, 1964-1 C.B. 689, *supra* note 129 (IRS has a duty to impartially and correctly interpret the tax laws).

143 CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.1(1) (Aug. 11, 2004).

144 CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.1(2) (Aug. 11, 2004).

145 *See* MODEL RULES OF PROF'L CONDUCT R. 1.7.

146 MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (discussing duty of loyalty); MODEL RULES OF PROF'L CONDUCT R. 2.1 (discussing duty to exercise independent professional judgment).

yer's own personal interests conflict with the client's interests.[147] The Chief Counsel's self-imposed duty to the public does not materially limit the lawyer's representation of the IRS because the IRS's interests coincide with the public interest. The lawyer can simultaneously satisfy her duty to the public to "seek justice," by conceding the case in situation (1), and her duty to the IRS to achieve the IRS's objectives, while representing the agency in the Tax Court. The lawyer's duty to the public is entirely consistent with the lawyer's duty to the IRS. Both are rooted in notions of fairness, and each reinforces the other. The IRS expects the Chief Counsel's Office to treat taxpayers fairly and to interpret the laws impartially, which is what taxpayers should reasonably expect.

A more tempered version of zealous representation as reflected in the Chief Counsel's approach to situation (1) is consistent with its own mission to "serve America's taxpayers fairly and with integrity by providing correct and impartial interpretation of the internal revenue laws and the highest quality legal advice and representation for the Internal Revenue Service."[148] Chief Counsel lawyers should not seek to maximize revenue for the public fisc by winning cases.[149] Rather, their role is to find the "true meaning" of the tax laws and to ensure that those laws are being fairly and uniformly applied.[150] The CCDM, which is a compilation of the Office of Chief Counsel's policies and procedures, cautions Chief Counsel lawyers to discharge their duties impartially, "with neither a 'Government' nor a 'taxpayer' point of view."[151] Chief Coun-

147 MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983).

148 CHIEF COUNS. DIRECTIVES MANUAL 30.1.1.1(1) (Aug. 11, 2004).

149 CHIEF COUNS. DIRECTIVES MANUAL 35.6.2.9 (Aug. 11, 2004) ("Respondent counsel's obligation as a public servant is to assist the court to reach the correct result, even if it is adverse to respondent's original determination" and should offer "all available evidence of material facts . . . to help the court make a proper ruling"). *See also* CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.1(2) (Aug. 11, 2004) (Chief Counsel lawyers are "to provide the answer that most accurately reflects the meaning of the tax code" rather than "an answer that is most beneficial to the government"). *Cf.* Thor Power Tool Co. v. Comm'r, 439 U.S. 522, 542 (1979) (stating that "the major responsibility of the Internal Revenue Service is to protect the public fisc").

150 CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.1(2) (Aug. 11, 2004). *See also* CHIEF COUNS. DIRECTIVES MANUAL 33.1.1.1(2) (Aug. 11, 2004) ("each Chief Counsel attorney should ensure that legal advice rendered reflects a uniform application of the tax laws").

151 CHIEF COUNS. DIRECTIVES MANUAL 31.1.1.1(3) (Aug. 11, 2004). *See also* CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.1(2) (Aug. 11, 2004) (the Office of the Chief Counsel must carry out its responsibilities "by interpreting the law with complete impartiality").

sel lawyers are required "to think and act to ensure that the American public receives the fair and correct interpretation of our tax law."[152]

IV. SITUATION (2): DEFEATING A TAXPAYER'S MERITORIOUS CLAIM ON A TECHNICALITY

A. *Description of the Dilemma*

The IRS determines deficiencies in income tax liability reported on a taxpayer's tax return and issues a timely notice of deficiency.[153] The taxpayer fails to file a petition in the Tax Court to challenge the IRS's determination even though the taxpayer received the notice of deficiency in time to do so.[154] The IRS assesses the tax liability shown in the notice of deficiency, notifies the taxpayer that the government intends to levy on the taxpayer's property to collect the taxes owed, and informs the taxpayer that she can receive a collection due process hearing with the IRS Appeals Office before the levy is carried out.[155] The taxpayer timely requests a collection due process hearing to challenge the IRS's proposed levy.[156] At the hearing, the taxpayer presents evidence that shows that the amount of tax that the IRS assessed as shown in the notice of deficiency was clearly in error. The IRS officer who presided over the hearing declines to grant the taxpayer any relief because IRC § 6330(c)(2)(B) permits a taxpayer to challenge the "existence or amount of the underlying liability" at the hearing only if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute [the] tax

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152 CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.1(2) (Aug. 11, 2004).

153 I.R.C. § 6212 (2006).

154 *Id.* § 6213 (2006) (permitting taxpayers to challenge the IRS's determination by filing a petition in the Tax Court).

155 *Id.* § 6331(a) (2006) (stating that the IRS is permitted to collect the tax by levying upon the taxpayer's property if a person liable for an assessed tax neglects or refuses to pay within ten days after notice and demand for payment); *id.* § 6330(a) (2006) (stating that no levy may be made until thirty days after the IRS gives written notice to the taxpayer of its intent to levy); *id.* §§ 6330, 6331(d) (stating that during the thirty-day period, the taxpayer may request an administrative appeal called a collection due process hearing to challenge the IRS's intent to levy on the taxpayer's property to collect assessed but unpaid tax).

156 *Id.* § 6330(b)(1) (2006). During the collection due process hearing, the taxpayer may raise any relevant issue relating to the proposed levy, including "challenges to the appropriateness of [the proposed levy]" and "offers of collection alternatives," such as an installment agreement or offer in compromise. I.R.C. § 6330(c)(2)(A) (2006); Treas. Reg. § 301.6330-1(e)(3), Q&A E6 (2006).

liability."[157] The Appeals Officer issues a notice of determination to the taxpayer concluding that all applicable laws and procedures had been followed and sustaining the proposed levy.[158] The taxpayer files a timely petition in the Tax Court seeking judicial review of the IRS's proposed levy.[159] The Chief Counsel lawyer reviews the administrative file and determines that the taxpayer's challenge to the amount of liability has merit. May the Chief Counsel lawyer ethically raise IRC § 6330(c)(2)(B) to bar the taxpayer from challenging the existence or amount of the underlying liability in a collection due process hearing notwithstanding the fact that the taxpayer meritoriously claims that the IRS's determination in the notice of deficiency is incorrect?[160] The IRS lawyer could raise the IRC § 6330(c)(2)(B) issue by filing a motion for summary judgment, asking the court to find as a matter of law that the IRS did not abuse its discretion in sustaining the proposed levy.[161] An abuse of discretion standard of review would be appropriate because the

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157 I.R.C. § 6330(c)(2)(B) (2006); Behling v. Comm'r, 118 T.C. 572 (2002); Pierson v. Comm'r, 115 T.C. 576 (2000); Sego v. Comm'r, 114 T.C. 604 (2000); Goza v. Comm'r, 114 T.C. 176 (2000).

158 I.R.C. § 6330(c)(3) (2006) (stating that the IRS Appeals Officer will issue a notice of determination after verifying that all legal and procedural requirements have been satisfied, evaluating any proposed collection actions, and considering whether the proposed levy balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary).

159 *Id.* § 6330(d)(1) (2006) (giving the Tax Court jurisdiction to hear appeals of collection due process determinations for taxpayers who file petitions within thirty days of the notice of determination). The Tax Court's jurisdiction in a collection due process case depends on the IRS's issuance of a valid notice of determination and the taxpayer's timely filing of a proper petition. Prevor v. Comm'r, 123 T.C. 326, 328 (2004). The Tax Court's review is limited to issues properly raised in the collection due process hearing. Giamelli v. Comm'r, 129 T.C. 107, 112-16 (2007); Treas. Reg. §§ 301.6320-1(f), Q-F3 and 301.6330-1(f), Q-F3 (2006). If the taxpayer's underlying liability is properly at issue, the Tax Court reviews the IRS's determination using a de novo standard of review. Sego v. Comm'r, 114 T.C. 604, 610 (2000); Goza v. Comm'r, 114 T.C. 176, 181-82 (2000). Otherwise, the Tax Court reviews the government's determination under an abuse of discretion standard of review. Craig v. Comm'r, 119 T.C. 252, 260 (2002). Standard of review refers to how the court will examine the evidence. Ewing v. Comm'r, 122 T.C. 32, 56 (2004) (Halpern & Holmes, JJ., dissenting), *rev'd on other grounds*, 439 F.3d 1099 (9th Cir. 2006). Under an abuse of discretion standard of review, the Tax Court will overturn the IRS's determination only if the taxpayer is able to show that the IRS's determination is "arbitrary, capricious, clearly unlawful, or without sound basis in fact or law." *Ewing*, 122 T.C. at 39 (majority opinion). By contrast, a reviewing court applying a de novo standard of review gives little deference to the original decision maker's determinations. Nihiser v. Comm'r, 95 T.C.M. (CCH) 1531 (2008).

160 I.R.C. § 6330(c)(2)(B) (2006).

161 Med. Practice Solutions, LLC v. Comm'r, 99 T.C.M. (CCH) 1392 (2010) (granting government's motion for summary judgment to sustain proposed levy).

issue of underlying liability is not properly before the Tax Court.[162] Summary judgment would be appropriate because there is no dispute as to the relevant facts: the taxpayer received a notice of deficiency and failed to challenge the deficiency in the Tax Court.[163] The only error raised in the petition is a challenge to the underlying liability and the taxpayer is precluded from raising that issue because she admits that she received a notice of deficiency for the year at issue.[164] The taxpayer in situation (2) did not raise any other challenges to the IRS's proposed levy, nor did she propose any collection alternatives. Any issues not raised in the petition would be deemed conceded.[165] Situation (2) is a more conspicuous example as compared to situation (1). In situation (1), the question is whether it is ethical for the Chief Counsel lawyer to simply remain silent and leave it up to the taxpayer to raise the expired assessment statute of limitations. In situation (2), the Chief Counsel lawyer has the option of affirmatively raising a defense to dismiss the taxpayer's case without a consideration of the underlying merits of the case.

B. *Resolving the Ethical Issue in Situation (2)*

Filing a motion for summary judgment in situation (2) is entirely consistent with the plain language of § 6330(c)(2)(B) of the IRC. On the surface, it may seem unfair to dispose of the claim without reaching the merits because the taxpayer will be responsible for a tax liability that she does not actually owe.[166] But the taxpayer had the opportunity to challenge the liability in the Tax Court when she received the notice of deficiency. She waived her right to challenge the IRS's liability determination by failing to file a petition in the Tax Court.[167] The fact that the

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162 See *supra* note 159 for a discussion of the applicable standard of review.

163 Sundstrand Corp. v. Comm'r, 98 T.C. 518, 520 (1992) (stating that summary judgment may be granted "where there is no genuine issue as to any material fact and a decision can be rendered as a matter of law").

164 Pursuant to I.R.C. § 6330(c)(2)(B), the Appeals Officer had no obligation to consider the taxpayer's challenge to underlying tax liability but nonetheless has the discretion to do so even though the taxpayer received the notice of deficiency. Treas. Reg. § 301.6330-1(e)(3), Q&A E11 (2006). But the Appeals Officer's determination regarding the liability issues are not part of the notice of determination and will not be subject to judicial review. *Id.*

165 TAX CT. R. 33(b)(4); Lunsford v. Comm'r, 117 T.C. 183 (2001).

166 *See* Lanctot, *supra* note 5, at 983-84 (discussing apparent unfairness in denying a citizen a right to challenge an administrative denial of social security benefits because she failed to timely bring the claim).

167 I.R.C. § 6213(a) (2006).

IRS bungled the deficiency was all the more reason for the taxpayer to seek judicial review when she received the notice of deficiency. Arguably, it seems equally unfair to require the government to hear taxpayers' challenges to liability indefinitely.

A lawyer filing a motion for summary judgment in situation (2) also seems to comport with Model Rule 1.3, which provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[168] The comments to Model Rule 1.3 provide that a lawyer must act "with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf" and should take "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[169] Model Rule 1.2 requires a lawyer to follow the client's objectives of the representation and the client's decisions regarding settlement.[170] Concluding the case in situation (2) by filing a motion for summary judgment is beneficial to the IRS. The agency would be able to proceed with its levy and the Chief Counsel lawyer is not burdened by having to prepare for a trial on the merits.[171] Procedural maneuvering using a summary judgment motion is consistent with Model Rule 3.1 regarding meritorious claims and contentions, assuming there is no genuine dispute of a material fact.[172] A lawyer's job is to use "legal procedure for the fullest benefit of the client's cause."[173] Section 6330(c)(2)(B) of the IRC is similar to the doctrine of res judicata (claim

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168 MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983).

169 MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1.

170 MODEL RULES OF PROF'L CONDUCT R. 1.2(a). *See also* MODEL CODE OF PROF'L RESPONSIBILITY EC-7 (1983) (stating that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer"). EC-7 expressly stated that it is "for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense." *Id.* Model Code EC-8 emphasized that "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." MODEL CODE OF PROF'L RESPONSIBILITY EC-8.

171 *See* MODEL RULES OF PROF'L CONDUCT R. 3.2 (stating that "a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client").

172 MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1 (stating that "the law, both procedural and substantive, establishes the limits within which an advocate may proceed"); Fla. Peach Corp. v. Comm'r, 90 T.C. 678, 681 (1988) (holding that summary judgment is intended to expedite litigation and avoid unnecessary trial); TAX CT. R. 121.

173 MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1 (1983).

preclusion) and "should be affirmatively pleaded, if appropriate, . . . when answering an appeal of a notice of determination."[174]

Even though IRC § 6330(c)(2)(B) precludes the taxpayer in situation (2) from challenging the underlying liability, the goal of the IRS is "to ensure that the correct amount of tax liability is being fairly collected."[175] Consequently, in cases where the taxpayer raises a "legitimate liability issue," the IRS Office of Chief Counsel instructs its lawyers not to seek summary judgment in collection due process cases without first ensuring that the IRS will address the liability issue.[176] Chief Counsel lawyers are to "make every attempt" to resolve cases like the one presented in situation (2).[177] If the Chief Counsel lawyer does not raise IRC § 6330(c)(2)(B), the parties presumably would be allowed to deal with the issue on the merits.[178] Or the Chief Counsel lawyer could ask the Tax Court to remand the case to the Office of Appeals to correct the assessment.[179]

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174 I.R.S. Chief Couns. Notice CC-2009-010 (Feb. 13, 2009), *available at* 2009 WL 497736. *See also* Kovacevich v. Comm'r, 98 T.C.M. (CCH) 1 (2009). The court in *Kovacevich* questioned but did not decide whether "preclusion under section 6330(c)(4) is a 'matter' that must be pleaded as an affirmative defense." Section 6330(c)(4) precludes a taxpayer from raising at a collection due process hearing any issue that was addressed at a previous collection due process hearing or another administrative hearing or judicial proceeding. I.R.C. § 6330(c)(4) (2006).

175 I.R.S. Chief Couns. Notice CC-2009-010, *supra* note 174.

176 *Id.*

177 *Id.* (stating the "Counsel should not be seeking summary judgment . . . if the taxpayer files a return which shows a clear error in the amount assessed from the statutory notice of deficiency"). On the other hand, IRS lawyers "should vigorously rely on section 6330(c)(2)(B) where the taxpayer is raising only frivolous issues or was uncooperative at the Appeals hearing." *Id.*

178 *See* Severo v. Comm'r, 129 T.C. 160, 163 (2007). In *Severo*, the taxpayer tried to defeat the IRS's enforced collection action by arguing that the ten-year collection statute had expired. *Id.* at 168. The Tax Court had held in *Boyd v. Comm'r*, 117 T.C. 127 (2001) that a challenge to the statute of limitations is a challenge to underlying liability. Nonetheless, the IRS lawyer in *Severo* did not try to defeat the taxpayer's claim by arguing that it was precluded by § 6330(c)(2)(B). *Id.* at 168. Instead, the government asked the court to decide the issue on its merits and the court did so. *Id.* at 168-73. *See also* I.R.S. Chief Couns. Notice CC-2009-010, *supra* note 174 (stating that if the IRS lawyer cannot prove receipt of a notice of deficiency by a taxpayer who is challenging the underlying liability by making only frivolous arguments, it may be more efficient to address the merits of the underlying liability rather than proving receipt of the deficiency notice).

179 The Tax Court has discretion to remand a case to permit the Appeals Office to consider matters that were inadequately considered at the collection due process hearing. Lunsford v. Comm'r, 117 T.C. 183, 189 (2001).

Just as was the case in situation (1), the Chief Counsel's policy with respect to challenges to the underlying liability notwithstanding IRC § 6330(c)(2)(B) squares with the IRS's objective to interpret the tax laws impartially with "neither a government nor a taxpayer point of view."[180] Accordingly, the Chief Counsel is able to fulfill its self-imposed duty to the taxpayer as set forth in the Chief Counsel's policy without breaching its ethical duty to its client, the IRS, under the Model Rules. The taxpayer wants the opportunity to challenge the underlying liability, and the Chief Counsel and the IRS want to ensure that the taxpayer is assessed only what she owes.[181]

V. SITUATION (3): LITIGATING A LOSING CASE

A. *Description of the Dilemma*

The sole managing member of a limited liability company files a petition in the Tax Court to challenge the IRS's disallowance of a passive activity loss claimed on the taxpayer's return.[182] Pursuant to IRC § 469, losses from passive activities are deductible only against income from passive activities.[183] The term "passive activity" is an activity that involves a trade or business in which the taxpayer does not materially participate.[184] Except as provided in regulations, no limited partnership interest is treated as "an interest with respect to which a taxpayer materially participates."[185] The IRS treated the taxpayer as a limited partner in a limited partnership for purposes of the passive activity loss limitation rules because the temporary Treasury Regulations define a limited partnership interest to include one where the holder has limited liability for the obligations of the partnership.[186] As a member of a limited liability company, the taxpayer has limited liability for the entity's obligations.[187] The temporary regulations specify seven safe harbors, and the satisfac-

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180 Rev. Proc. 64-22, 1964-1 C.B. 689, *supra* note 129.

181 *See* Kenney Hegland, *Quibbles*, 67 TEX. L. REV. 1491 (1989) (recommending that lawyers in civil cases refrain from asserting technical defenses like the statute of limitations if doing so results in injustice).

182 I.R.C. § 6213(a) (2006).

183 *Id.* § 469(a)(1), (b), (d) (2006).

184 *Id.* § 469(c)(1) (2006). A taxpayer materially participates in an activity only if the taxpayer is involved in the activity on a regular, continuous, and substantial basis. *Id.* § 469(h)(1) (2006).

185 *Id.* § 469(h)(2) (2006); Temp. Treas. Reg. § 1.469-5T(e)(1) (2005).

186 Temp. Treas. Reg. § 1.469-5T(e)(3)(i)(B) (2010).

187 CARTER S. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW ¶ 6.01 (Warren, Gorham & Lamont 1994).

tion of any of them is deemed to constitute material participation.[188] A taxpayer who is not a limited partner is deemed to materially participate in the activities of the trade or business by satisfying any one of the safe harbors, whereas only three of the seven safe harbors are applicable to limited partners.[189] The taxpayer in situation (3) satisfies none of the three safe harbors applicable to limited partners, but does meet one of the safe harbors that apply to taxpayers who are not limited partners. Consequently, the taxpayer could deduct flow-through losses from the limited liability company only to the extent of the taxpayer's share of limited liability company income.[190] By the time the taxpayer's case is docketed in the Tax Court, the government has lost on this issue in two refund suits, one in federal district court and the other in the Court of Federal Claims.[191] May the government lawyer ethically continue to litigate the case at issue given the government's losing track record?

B. *Resolving the Ethical Dilemma in Situation (3)*

Nothing in the Model Rules seems to prohibit the IRS lawyer from continuing to assert the government's position, however futile it may be, so long as it is not frivolous. Model Rule 3.1 prohibits lawyers from bringing or defending frivolous claims.[192] A taxpayer's position is frivolous "if it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law."[193] An action is not frivolous even if the lawyer believes that the client's position ultimately will be

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188 Temp. Treas. Reg. § 1.469-5T(a) (2005).

189 Temp. Treas. Reg. § 1.469-5T(a), (e)(2) (2005).

190 I.R.C. § 469(a)(1), (b), (d) (2006).

191 Situation (3) is based on the facts of the following two cases, which the government lost: *Thompson v. United States*, 87 Fed. Cl. 728 (Fed. Cl. 2009) and *Gregg v. United States*, 186 F. Supp. 2d 123 (D. Or. 2000). On April 5, 2010, the IRS acquiesced in the result in *Thompson*. Thompson v. United States, 87 Fed. Cl. 728 (Fed. Cl. 2009), *action on dec.*, 2010-14, (Apr. 5, 2010) (acquiescence in result only). Acquiescing in the result means that the Chief Counsel will follow the result in *Thompson* in cases with the same controlling facts. INTERNAL REVENUE MANUAL 4.10.7.2.9.8.1(4) (Jan. 1, 2006). Situation (3) ignores the cases the government lost in the Tax Court on this issue, including *Newell v. Comm'r*, 99 T.C.M. (CCH) 1107 (2010) and *Garnett v. Comm'r*, 132 T.C. 368 (2009), because the analysis in situation (3) may be different if the government continues to litigate an issue that it had already lost in the Tax Court.

192 MODEL RULES OF PROF'L CONDUCT R. 3.1 (1983) (providing that "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law"). *See also* TAX CT. R. 33(b).

193 Williams v. Comm'r, 114 T.C. 136, 144 (2000) (quoting Coleman v. Comm'r, 791 F.2d 68, 71 (7th Cir. 1986)). *See also* I.R.C. § 6673 (2006) (imposing penalties on taxpayers for maintaining frivolous positions).

unsuccessful.[194] But a lawyer has to be able to make a good faith argument on the merits or a good faith argument for an extension, modification, or reversal of existing law.[195]

The government's position in situation (3) is not frivolous provided it is not contrary to established law. The government's position is based on the temporary regulations, which are binding on the government and taxpayers and have the same weight as final regulations.[196] Another provision in the temporary regulations says that a partnership interest will not be considered a limited partnership interest if the individual is a general partner in the partnership at all times during the partnership's taxable year.[197] Arguably, the government's position is inconsistent because it relies on the temporary regulations to treat a member of a limited liability company as a limited partner, but fails to recognize that the taxpayer, as the sole manager of the limited liability company, is more akin to a general partner pursuant to another provision in the temporary regulations.[198] But the fact that there are two temporary regulations that potentially could apply—and that, if applied, lead to opposite results—does not make a position frivolous. Reasonable minds can differ about whether a member of a limited liability company should be treated like a limited partner or a general partner for purposes of the passive loss limitation rules. On the one hand, a limited liability company member resembles a limited partner because both have limited liability for entity-level obligations. On the other hand, a limited liability company member who is also the sole manager of the limited liability company resembles a general partner in the sense that both participate in the entity, actively and materially.

The fact that the government's position was unsuccessful in other courts does not make its position in situation (3) frivolous. Model Rule 3.1 does not oblige lawyers to have winning positions before pursing or defending a claim. To the contrary, the government should have the right to continue litigating the same issue if it believes in good faith that its position is legally correct.[199] Moreover, if the government's position

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194 MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2.

195 *Id.*

196 Peterson Marital Trust v. Comm'r, 102 T.C. 790, 797 (1994).

197 Temp. Treas. Reg. § 1.469-5T(e)(3)(ii) (2005).

198 Temp. Treas. Reg. § 1.469-5T(e)(3)(i)(B), -5T(e)(3)(ii) (2005).

199 *Badaracco v. Commissioner* is a good illustration of the government's pursuit to create a conflict among the circuits. The government had lost in the Second and Tenth Circuit Courts of Appeal regarding whether the three-year assessment statute of limitations in § 6501(a) begins

is a reasonable one, then continuing to litigate the claim would not violate Model Rule 3.2, which provides that "[a] lawyer shall make reasonable efforts to expedite litigation" and not take actions that harass the opposing party or inappropriately delay the proceedings.[200]

Maintaining the litigation would not violate Model Rule 3.3, which imposes on lawyers a duty of candor to the tribunal, provided the IRS lawyer is not required to make any false statement of fact or law, or offer false evidence.[201] The lawyer need only disclose controlling authority that is directly adverse to the government's position to comply with its duty under Model Rule 3.3.[202]

Beyond the ethical obligations, the IRS docket lawyer in the field has a legal obligation to follow the government's position as expressed in the temporary Treasury regulations.[203] The Tax Court, in *Rauenhorst v. Commissioner*, in granting the taxpayer's motion for partial summary judgment, chastised the government for failing to follow a twenty-five-year-old revenue ruling that was directly on point and that had not been

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once a taxpayer who had previously filed a false or fraudulent return later files a nonfradulent amended return. Britton v. United States, 697 F.2d 288 (2d Cir. 1982), *aff'g* 532 F. Supp. 275 (D. Vt. 1981); Dowell v. Comm'r, 614 F.2d 1263 (10th Cir. 1980). Yet the government kept pursing the issue and then won in the Third and Fifth Circuit Courts of Appeal. Badaracco v. Comm'r, 693 F.2d 298 (3d Cir. 1983); Nesmith v. Comm'r, 699 F.2d 712 (5th Cir. 1983). The Supreme Court resolved the conflict in favor of the government in an appeal of the Third Circuit's decision in *Badaracco v. Comm'r*, 464 U.S. 386 (1984). *See also* Estate of Perry v. Comm'r, 931 F.2d 1044, 1046 (5th Cir. 1991) (stating that "[a] policy decision to continue to whip a dead horse in circuit after circuit in the hope, however vain, of establishing a conflict is clearly an option within the discretion of the Commissioner"). The court in *Perry* ultimately decided to require the IRS to pay the taxpayer's attorney fees under I.R.C. § 7430 because, while the government has the prerogative of continuing to litigate an issue after losing the issue in other litigation, "[t]hat does not, however, substantially justify his causing an innocent taxpayer in each other circuit to expend attorneys' fees for the dubious honor of being Commissioner's guinea pig." *Id.* at 1046. *See also* I.R.S. Chief Couns. Notice CC-2003-014 (May 8, 2003) (explaining that the IRS may continue to litigate a case despite adverse precedent to create a conflict among the circuits to seek Supreme Court review of the issue).

200 MODEL RULES OF PROF'L CONDUCT R. 3.2 (1983).

201 MODEL RULES OF PROF'L CONDUCT R. 3.3.

202 MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2).

203 *See also* I.R.S. Chief Couns. Notice CC-2003-014, *supra* note 199 (subject to litigating hazards, requiring Chief Counsel lawyers to follow legal positions in published guidance including final and temporary regulations, revenue rulings, revenue procedures, IRB notices, and announcements); I.R.C. § 7430(c)(4)(B) (2006) (government may be liable for taxpayer's attorneys fees and court costs for failing to follow published guidance). *See also* Walker v. Comm'r, 101 T.C. 537, 549 (1993) (refusing to accept argument that was "diametrically opposed" to published revenue ruling).

revoked or modified.[204] The view of the Office of Chief Counsel is that its national office in Washington, D.C., creates tax policy through the promulgation of regulations and rulings, not through litigation.[205] Litigating positions are derived from the IRC and published guidance.[206] The IRS lawyer must obtain national office approval before filing any paper in the Tax Court that is different from a position in published guidance.[207] The national office will decide whether to revoke or modify the published guidance or whether the published guidance can be distinguished in the case at issue.[208] IRS lawyers need to continue to follow published guidance unless the national office says otherwise to help ensure uniform treatment of taxpayers across the country.

VI. SITUATION (4): CONCEDING A WINNING CASE

A. *Description of the Dilemma*

Now consider a situation where a win by the government is a foregone conclusion.[209] In situation (4), a married couple files a joint tax return, claiming an earned income credit for their three-year-old son.[210] The IRS disallows the earned income credit because the wife is in the United States illegally, cannot work legally in the United States, and thus does not have a social security number.[211] The taxpayers properly

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204 Rauenhorst v. Comm'r, 119 T.C. 157, 169-71, 173 (2002).

205 I.R.S. Chief Couns. Notice CC-2003-014, *supra* note 199; CHIEF COUNS. DIRECTIVES MANUAL 31.1.1.1.3(1) (Aug. 11, 2004).

206 I.R.S. Chief Couns. Notice CC-2003-014, *supra* note 199; *see also* CHIEF COUNS. DIRECTIVES MANUAL 31.1.1.1.3(1) (Aug. 11, 2004) (stating that "litigation should be used as an enforcement tool to advance and defend established positions, not as a vehicle for making policy").

207 I.R.S. Chief Couns. Notice CC-2003-014, *supra* note 199.

208 *Id.*

209 Situation (4) intentionally presents a case where the facts are not in dispute and the applicable law is clear and uncontroverted. Determining a Chief Counsel lawyer's duty to continue to litigate cases that are closer calls is outside the scope of this article. Chief Counsel lawyers must continue to have the discretion to settle cases based on the hazards of litigation.

210 The earned income credit provides refundable tax credits to lift the living wage of low-income families who work and earn some, but not a lot of, income. *See* H.R. REP. NO. 101-881 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2017, 2281 ("The earned income tax credit is intended to provide tax relief to low-income working individuals with children and to provide incentives for work."); BORIS I. BITTKER, MARTIN J. MCMAHON, JR. & LAWRENCE A. ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 27.02 [1] (Warren Gorman & Lamont 3d ed. 2002). The amount of the credit depends on the amount of the taxpayer's earned income and the number of the taxpayer's "qualifying children." I.R.C. § 32(a)(1) (2006).

211 *See* BITTKER, MCMAHON & ZELENAK, *supra* note 210, ¶ 27.02 [1] (stating that the earned income credit is effectively denied to illegal aliens); 42 U.S.C. 405(c)(2)(B)(i) (2006)

and timely petition the Tax Court to challenge the IRS's disallowance of the earned income credit.[212] The government would be entitled to a judgment as a matter of law in situation (4) because there is no dispute regarding the facts and the applicable law is well settled. May the Chief Counsel lawyer nonetheless ethically concede the case by filing a stipulated settlement with the Tax Court?

B. *Resolving the Ethical Dilemma in Situation (4)*

The Model Rules do not say much about the ethics of conceding a winning case, presumably because such a notion is antithetical to the role of an advocate in our adversary system. The comments to Model Rule 3.1, which preclude frivolous claims or defenses, remind lawyers that they have "a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure."[213] While Model Rule 3.1 prohibits lawyers from bringing or defending frivolous claims, nothing in that rule requires a lawyer to maintain a serious, non-frivolous claim. But maintaining rather than conceding a serious claim that presents no litigation risk would seem to be in the best interests of the client.[214] The goal of litigation in a traditional adversarial system of justice is to win. In an adversary system, the litigants marshal the available evidence to establish their claim or defense.[215] The notion is that justice will be done if the litigants are well represented by lawyers who act single-mindedly as zealous advocates for their clients.[216] Each side's

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(social security numbers may be assigned to aliens who are admitted lawfully to the United States or are otherwise permitted to work in the United States). To properly claim the earned income credit, married taxpayers must file a joint income tax return and both the taxpayers and their qualifying children must have social security numbers. I.R.C. § 32(c)(1)(E) and (m) (2006) (requiring taxpayers and qualifying children to have valid social security numbers); *id.* § 32(d) (requiring married taxpayers to file joint returns).

212 I.R.C. § 6213(a) (2006).

213 MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1 (1983).

214 *See* MODEL RULES OF PROF'L CONDUCT Scope [2] (stating that as an advocate, "a lawyer zealously asserts the client's position under the rules of the adversary system").

215 MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. 1.

216 MODEL RULES OF PROF'L CONDUCT Preamble [8]. *See also* Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625 (1979) (*cited in* Lanctot, *supra* note 5, at 981). Professor Lawry says that the Model Code is based on the assumption that "the world is composed of two groups, clients and non-clients: that clients are to be embraced and non-clients are to be kept at arm's length." *Id.* at 628-29; Moraine, *Loyalty Divided*, *supra* note 49, at 171-73.

goal is to convince the fact-finder of the litigant's position by presenting the evidence and argument.[217]

Model Rules 1.2 and 1.3 require a lawyer to diligently pursue a client's cause or endeavor to accomplish the objectives of representation as defined by the client.[218] Settling the case requires the client's informed consent.[219] A lawyer certainly helps shape the client's objectives and should manage the client's expectations regarding the prospects of success, but it is the client who has the "ultimate authority to determine the purposes to be served by legal representation."[220] In a typical private client-lawyer relationship where winning the case is often viewed as paramount, a lawyer would not concede a winning case, at least not without the client's informed consent. Conceding the case without obtaining the client's consent could result in a violation of Model Rules 1.2 and 1.3.

Admittedly, the relationship between the IRS and the Office of Chief Counsel is different than a typical private client-lawyer relationship.[221] The Office of Chief Counsel makes decisions in the course of litigation without consulting with or securing the IRS's consent.[222] And as discussed throughout this article, the IRS's goal is not to simply win cases. Notwithstanding the autonomy of the Office of Chief Counsel, however, it seems reasonable to expect that Chief Counsel lawyers will make decisions consistent with the client's overarching goal of impar-

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217 MODEL RULES OF PROF'L CONDUCT R. 3.5 cmt. 4.

218 MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.3.

219 MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (stating that "a lawyer shall abide by a client's decision whether to settle a matter"); MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (stating that "a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent").

220 MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 1. *See also* MODEL RULES OF PROF'L CONDUCT R. 1.3 (requiring a lawyer to act with "reasonable diligence and promptness in representing a client"); MODEL RULES OF PROF'L CONDUCT R. 2(a) (requiring a lawyer "to abide by a client's decisions concerning the objectives of representation"); MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 5 (lawyers have a duty to educate the client so that the client can "participate intelligently in decisions concerning the objectives of the representation" and "should explain the general strategy and prospects for success" in litigation).

221 *See* MODEL RULES OF PROF'L CONDUCT Scope [18] (recognizing that government lawyers may have authority to make decisions and take actions in situations that ordinarily would be the client's prerogative in a private client-lawyer relationship).

222 CHIEF COUNS. DIRECTIVES MANUAL 31.1.2.2(1) (Aug. 11, 2004) (stating that the field attorneys are responsible for developing and executing trial strategy and deciding whether to settle cases); *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 2 (requiring lawyers to obtain their clients' consent before taking action in connection with the representation).

tially applying the correct interpretation of the tax law.[223] Conceding the case in situation (4) violates the IRS's objective because the taxpayers in situation (4) will receive a tax benefit that the tax laws do not confer.

Suppose that another IRS lawyer litigating a case with identical facts as those in situation (4) refuses to concede the case, relying instead on a plain reading of the IRC, which prohibits illegal aliens from receiving an earned income credit.[224] Could the different outcomes be justified if the lawyer in situation (4) had just recently passed the bar exam and has little legal experience? Model Rule 1.1, which requires a lawyer to possess the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," may be implicated if the Chief Counsel lawyer concedes the case in situation (4) because the lawyer is unaware of the law.[225] Being able to spot the legal issue and determine who is entitled to claim an earned income credit in situation (4) seems to be a fundamental skill for Chief Counsel lawyers litigating cases in the Tax Court. The IRS lawyer who has direct supervisory authority over the lawyer and lawyers with managerial authority over the professional work of the Office of Chief Counsel could be subject to discipline under Model Rule 5.1, particularly if the manager knows of or ratifies the IRS lawyer's conduct.[226]

Would the two different outcomes be justified if the Chief Counsel lawyer in situation (4) concedes the case because the lawyer has too many cases to contend with on the upcoming trial docket? Would the

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223 *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (client defines the scope of the representation); MODEL RULES OF PROF'L CONDUCT R. 1.3 (lawyer is to pursue client's objectives by taking "whatever lawful and ethical measures are required"); MODEL RULES OF PROF'L CONDUCT R. 1 cmt. 5 (stating that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of the representation."). *See also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 97 cmt. b (2000) ("the goals of a governmental client necessarily include pursuit of the public interest, as identified . . . by decisions of government officials in the course of their duties").

224 *See supra* note 211 and accompanying text.

225 MODEL RULES OF PROF'L CONDUCT R. 1.1.

226 MODEL RULES OF PROF'L CONDUCT R. 5.1. Model Rule 5.1 obligates lawyers with managerial authority and lawyers with supervisory authority to "make reasonable efforts" to ensure that other lawyers conform to the Model Rules. MODEL RULES OF PROF'L CONDUCT R. 5.1(a)-(b). The comments to Model Rule 5.1 apply the rule to lawyers in government agencies. MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 1. When an IRS lawyer proposes to settle a case, the lawyer is supposed to prepare a counsel settlement memorandum to justify the proposed settlement or concession. CHIEF COUNS. DIRECTIVES MANUAL 35.5.2.14(1)-(2) (Aug. 11, 2004).

different outcomes be justified if the Chief Counsel lawyer finds the taxpayers in situation (4) to be particularly sympathetic? Perhaps the Chief Counsel lawyer finds the taxpayers in situation (4) to be polite, hard working, and decent people that are deserving of a larger tax refund than they would otherwise legally receive. Or perhaps the Chief Counsel lawyer decides that it is unfair to deny the earned income credit to illegal aliens notwithstanding Congress's express prohibition in the IRC.

Conceding a case due to a heavy workload could be a violation of the lawyer's duty of loyalty and diligence in Model Rule 1.3.[227] What if the managing lawyer instead orders the Chief Counsel docket lawyer to concede the winning case because the office has too many cases on the trial docket? Under those circumstances, both the managing lawyer and the docket lawyer could be subject to discipline.[228] Conceding a case because the Chief Counsel lawyer sympathizes with the taxpayer, who is the opposing party in a slam dunk case for the government, arguably creates a conflict of interest prohibited by Model Rule 1.7.[229] The Chief Counsel lawyer should not be conflicted about whether to impartially enforce the plain meaning of the IRC or to concede the case to give the taxpayers a break that the Chief Counsel lawyer believes is appropriate but that is contrary to the law.

By conceding the winning case in situation (4), the Chief Counsel lawyer fails to follow the plain language of the IRC, thus acting contrary to the Office of Chief Counsel's policy to follow published guidance.[230] Conceding the case also undermines the voluntary compliance system because similarly situated taxpayers are effectively treated inconsistently.

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227 MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 2 (stating that "a lawyer's work load must be controlled so that each matter can be handled competently"). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (stating that a diligent lawyer pursues a client's cause with zeal and "despite opposition, obstruction, or personal inconvenience to the lawyer").

228 MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(1) (stating that "a lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if the lawyer orders . . . the specific conduct . . . involved"); MODEL RULES OF PROF'L CONDUCT R. 5.2(a)-(b) (stating that "a lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person" unless the "subordinate lawyer . . . acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty").

229 MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (prohibiting a lawyer from representing a client if there is "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer").

230 A harder question is raised when the case at issue involves unclear interpretations of the law or disputed facts. It is obviously easier to predict success on questions of pure law.

A concession could cause even the specific taxpayers in situation (4) to be treated inconsistently. Using a stipulated decision to concede the case in situation (4) to permit the taxpayers to receive the earned income credit is not binding on the IRS because the case will be settled rather than actually litigated before the court.[231] Suppose the IRS raises the issue in a subsequent tax year and a different Chief Counsel lawyer is assigned that case. The second Chief Counsel lawyer litigates the issue and the taxpayers lose. The only way to explain a completely different outcome with respect to the very taxpayers who had received the earned income credit in the earlier year is the different Chief Counsel lawyers assigned to the two cases. The answer to a black letter tax question should not differ depending on the identity of the Chief Counsel lawyer defending the IRS. This sort of selective enforcement undermines the voluntary compliance system.

VII. ASSESSMENT OF IRS OFFICE OF CHIEF COUNSEL'S APPROACH TO GOVERNMENT LAWYERING

The IRS Office of Chief Counsel, through internal policies in the CCDM, imposes on its lawyers certain duties to taxpayers who technically are their adversaries in the Tax Court. Imposing dual obligations on government lawyers to act as the agency's advocate while being fair to the public is potentially problematic to the extent an impermissible conflict of interest arises between the duties owed to the public and the government agency client.[232] The dual duties that an IRS Chief Counsel lawyer has to the IRS and to the taxpayers are not, however, necessarily inconsistent because the IRS's objective is not just to win every case to protect the public fisc.[233] Rather, the IRS's objective of finding the true meaning of the tax laws and impartially applying the correct inter-

231 Acme Steel Co. v. Comm'r, 85 T.C.M. (CCH) 1208 (2003) (collateral estoppel applies only if, among other things, the issue was actually litigated).

232 *See* BERNARD WOLFMAN, JAMES P. HOLDEN & KENNETH L. HARRIS, STANDARDS OF TAX PRACTICE § 702, at 374-75 (Little, Brown & Co. 1997 ed. 1996).

233 Rev. Proc. 64-22, 1964-1 C.B. 689, *supra* note 129 (directing IRS employees to "find the true meaning" of the tax laws rather than "adopt a strained construction in the belief that [they are] 'protecting the revenue'"); CHIEF COUNS. DIRECTIVES MANUAL 35.6.2.9 (Aug. 11, 2004) ("Respondent counsel's obligation as a public servant is to assist the court to reach the correct result, even if it is adverse to respondent's original determination" and should offer "all available evidence of material facts . . . to help the court make a proper ruling"); CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.1(2) (Aug. 11, 2004) (Chief Counsel lawyers are "to provide the answer that most accurately reflects the meaning of the tax code" rather than "an answer that is most beneficial to the government").

pretation of the law is in the public's best interest. This self-imposed duty to the public requires Chief Counsel lawyers to exercise restraint in situation (1) to disclose to the taxpayer the expired assessment statute of limitations and concede the case. In cases like situation (2), Chief Counsel lawyers must exercise restraint to ensure that the assessment is correct. Exercising restraint in situations (1) and (2) furthers the IRS's objective by ensuring that taxpayers are liable only for what they actually owe. Toning down the intensity of advocacy is particularly important in Tax Court litigation because the majority of taxpayers are not represented by counsel.[234] A more measured view of advocacy implicitly recognizes that the paradigmatic adversarial system, where the litigants are well represented and the truth eventually comes out of vigorous and zealous advocacy by lawyers on both sides, does not necessarily exist in the Tax Court to the extent that taxpayers represent themselves.[235]

Situation (4) illustrates another principal criticism of imposing on government lawyers a duty to the public, which is that individual lawyers will define the "public interest" by substituting their personal ethics and value judgments for the law.[236] One potentially troubling aspect of the Chief Counsel's duty to the public is the potential for 1500 different views of what the public interest is.[237] Inconsistent interpretation and application of the tax laws would result to the extent that Chief Counsel

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234 *See supra* note 46 and accompanying text.

235 Special accommodations are made in the Tax Court for pro se taxpayers. *See, e.g.*, TAX CT. R. 174(b) (stating that trials of so-called small tax cases (S cases) are to be conducted as informally as possible with relaxed evidentiary standards). S cases are those where the amount in dispute is $50,000 or less and the taxpayer elects S case treatment. I.R.C. § 7463 (2006); TAX CT. R. 170-175. *See also* CHIEF COUNS. DIRECTIVES MANUAL 35.6.2.12 (Aug. 11, 2004) (recognizing that Chief Counsel lawyers should not make "technical evidentiary or procedural objections" in cases where pro se taxpayer "is doing his best to present his case to the court" and that the Chief Counsel lawyer's job is to help unrepresented taxpayers "bring out all the facts").

236 *See, e.g.*, Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 299 (1991) ("The underlying problem in the public interest approach derives from the government lawyer's discretion to fashion a personal and subjective notion of the public good."). Such partiality undermines the rule of law; it would be "objectionable [to have] a government of people, not of law." *See id.* at 301. *See also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1; Berenson, *Public Lawyers, Private Values*, *supra* note 5, at 802-05 (summarizing several commentators who have found the concept of the public interest too vague and undefined and subject to the imposition of individual views of the government lawyers).

237 IRS PUB. 4063, *supra* note 38. Coordination between the field attorneys and the National Office and review in the field by first-line managers theoretically at least should mitigate inconsistencies. *See* CHIEF COUNS. DIRECTIVES MANUAL 31.1.1.2(3) (role of National Office) and 33.1.1.2(3) (role of field counsel).

lawyers decide what the public interest is or should be according to their own ethics and morals. Conceding the winning case in situation (4) because the Chief Counsel lawyer believes the taxpayers to be hardworking and decent people who deserve a break is inconsistent with the Chief Counsel lawyer's duty to the public as defined in the CCDM. Similarly, conceding the losing case in situation (3) is inappropriate to the extent it is inconsistent with what other Chief Counsel lawyers are doing in similarly situated cases.

The Chief Counsel lawyer in situation (3) should continue to litigate the weak case and the lawyer in situation (4) should continue to litigate the winning case to help ensure standardization and uniformity consistent with the client's objectives. Otherwise, taxpayers may perceive that the outcome of litigation depends not on the law but on the Chief Counsel lawyer assigned to the case.[238] The public interest should not be defined in the field offices through litigation by 1500 lawyers spread all across the country. This is why Chief Counsel lawyers are directed to follow published guidance, including final regulations, temporary regulations, revenue rulings, and revenue procedures, and to settle cases on the merits rather than on a nuisance basis.[239] Even cases that are not worth very much are to be considered on the merits.[240]

One shortcoming of the IRS Office of Chief Counsel's approach is that the public cannot enforce the self-imposed duties contained in the CCDM against Chief Counsel lawyers because the CCDM is not authoritative guidance.[241] Nor are Chief Counsel lawyers subject to the same market forces that generally serve to police the conduct of the

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238 *See* Berenson, *Public Lawyers, Private Values*, *supra* note 5, at 820-21 (recognizing the importance of establishing a set of rules to guide government attorneys so that they do not themselves define the public interest according to their own personal preferences).

239 Rauenhorst v. Comm'r, 119 T.C. 157 (2002); I.R.S. Chief Couns. Notice CC-2003-014, *supra* note 199. CHIEF COUNS. DIRECTIVES MANUAL 35.5.2.4 (Aug. 11, 2004); CHIEF COUNS. DIRECTIVES MANUAL 31.1.1.1.3.1 (Aug. 11, 2004). A nuisance settlement is "any concession made solely to eliminate the inconvenience or cost of further negotiations or litigation and is unrelated to the merits of the issues." INTERNAL REVENUE MANUAL 8.6.4.1.3 (Oct. 26, 2007). *See also* Hartman v. Comm'r, 95 T.C.M. (CCH) 1448 (2008) (characterizing seven percent reduction in deficiency in settlement with taxpayers engaged in tax shelter as a nuisance settlement).

240 CHIEF COUNS. DIRECTIVES MANUAL 31.1.1.1.3.1(1) (Aug. 11, 2004) (stating that "it is the policy of the Office of Chief Counsel that cases . . . being tried in the Tax Court will be settled on the merits" and that "[e]ven where the amount in controversy is small, the Office will defend the Commissioner's determination and conduct cases in a manner that supports the Service's tax administration priorities.").

241 See, e.g., Fargo v. Comm'r, 447 F.3d 706 (9th Cir. 2006) and cases cited therein.

private bar.[242] No client fee pressure, more autonomy from the client, and a seemingly bottomless inventory of cases from a captive client who is unlikely to sue its lawyers for professional malpractice may provide less of a deterrent for Chief Counsel lawyers to act in ways that further the IRS's objective of impartially applying the correct interpretation of the tax laws.

Nonetheless, the Office of Chief Counsel may discipline its lawyers for failing to comply with the policies set forth in the CCDM.[243] Chief Counsel lawyers may also be disciplined for violating any of the following federal ethical rules: the Office of Government Ethics' Standards of Ethical Conduct for Employees of the Executive Branch, Supplemental Standards of Ethical Conduct for Employees of the Department of the Treasury, Department of the Treasury Employee Rules of Conduct, or the Office of Personnel Management Regulations on Employee Responsibilities and Conduct.[244] Prevailing taxpayers may recover reasonable

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242 *See* Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO WASH. L. REV. 1105, 1106 (1995).

243 CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.2.2 (Aug. 11, 2004).

244 CHIEF COUNS. DIRECTIVES MANUAL 39.1.1.3 (June 3, 2009) (citing OGE Standards of Ethical Conduct, 5 C.F.R. Part 2635; Supplemental Standards of Ethical Conduct for Employees of the Department of the Treasury, 5 C.F.R. Part 3101; Department of the Treasury Employee Rules of Conduct, 31 C.F.R. Part 0; and the Office of Personnel Management Regulations on Employee Responsibilities and Conduct, 5 C.F.R. Part 735). These provisions contain rules regarding prohibited financial interests, employment restrictions, and restrictions on accepting gifts. *See, e.g.*, 5 C.F.R. § 3101.106(b) (prohibiting IRS employees from engaging in outside employment that involves tax matters and are prohibited from preparing tax returns, whether for compensation or not); 5 C.F.R. §§ 2635.202-.204 (2010) (prohibition on accepting gifts from outside sources); 5 C.F.R. §§ 2635.401-.403 (2010) (prohibitions regarding certain financial interests). IRS employees are expressly prohibited from recommending attorneys or accountants in connection with any official business that involves or may involve the IRS. 5 C.F.R. § 3101.106(a) (2010). IRS employees are expressly prohibited from outside employment performing legal services involving tax matters; appearing on behalf of a taxpayer as a representative of the government; engaging in bookkeeping, accounting, or the analysis or interpretation of financial records when the activity involves tax matters; and preparing tax returns whether for compensation or not. 5 C.F.R. § 3101.106(b) (2010). Certain of these provisions are quite broad. For example, an employee may be subject to discipline for engaging in "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government." 5 C.F.R. § 735.203 (2010). *See also* Department of the Treasury Employee Rules of Conduct, 31 C.F.R. § 0.213 (2010) (same except no prohibition regarding immoral conduct). Employees of the Executive Branch are required to "act impartially and not give preferential treatment to any private organization or individual." 5 C.F.R. § 2635.101(b)(8) (2010). In addition, an IRS employee must be terminated if found to have violated one of the so-called ten Deadly Sins, which include among other things, falsifying or destroying records, lying under oath, or harassing or violating the civil rights of a taxpayer.

administrative costs and litigation costs from the government.[245] Sanctions may also be imposed against Chief Counsel lawyers who have "multiplied the proceedings in any case unreasonably and vexatiously."[246] The Tax Court is authorized to discipline lawyers appearing before it for, among other things, violating the "letter and spirit" of the Model Rules.[247]

Another potential shortcoming of the Chief Counsel's approach is that the *Chief Counsel Directives Manual* cannot possibly address comprehensive standards of conduct for all conceivable situations.[248] Inevitably, Chief Counsel lawyers will have to use their professional judgment and discretion to resolve cases. Having government lawyers exercise discretionary judgment to make particularized decisions can be touchy because it seems contrary to the idealistic notion that the government should treat members of the public evenhandedly.[249] Ultimately, though, compliance with any code of conduct involves discretion because it depends primarily on voluntary compliance.[250] Consulting pro-

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Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1203, 112 Stat 685, 720 (1998); I.R.S. Notice 99-27, 1999-1 C.B. 1097 (May 5, 1999).

245 I.R.C. § 7430(a) (2006).

246 *Id.* § 6673(a)(2) (2006).

247 TAX CT. R. 202(a)(3).

248 CHIEF COUNS. DIRECTIVES MANUAL 30.1.1.2(2) (Aug. 11, 2004) (stating that the *Chief Counsel Directives Manual* "is neither designed nor intended to be a comprehensive checklist or "how to" guide for every action or process"). *See* Berenson, *Public Lawyers, Private Values*, *supra* note 5, at 833-34 (recognizing the importance of operational guidelines to direct the conduct of government lawyers).

249 5 C.F.R. § 2635.101(b)(8) (2010) (requiring employees of the Executive Branch to act impartially and not give preferential treatment to any organization or individual). *Cf.* PHILIP HOWARD, DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (Warner Books 1996) (discussing the negative impact of excessive government regulation). The Tax Court has recognized a limited duty of administrative consistency that must be balanced against the government's discretion to settle cases. Jaffe v. Comm'r, 87 T.C.M. (CCH) 1349 (2004) (stating that the duty of consistency "must be balanced against the settlement discretion given to the IRS, which is "at its heart a discretion to treat similarly situated taxpayers differently") (quoting Bunce v. United States, 28 Fed. Cl. 500, 509 (Fed. Cl. 1993)), *aff'd without published opinion*, 26 F.3d 138 (Fed. Cir. 1994); Wooten v. Comm'r, 65 T.C.M. (CCH) 2825 (1993) (stating that the IRS's administrative treatment generally is irrelevant unless the IRS has engaged in unconstitutional conduct); Penn-Field Indus., Inc. v. Comm'r, 74 T.C. 720, 723 (1983); Estate of Emerson v. Comm'r, 67 T.C. 612, 617 (1977) (stating that "estoppel and the duty of consistency are to be applied against the Commissioner with the utmost caution and restraint, if at all, and only in compelling situations where the result otherwise would be unwarrantable or unconscionable").

250 MODEL RULES OF PROF'L CONDUCT Scope [16]; Green, *Must Government Lawyers "Seek Justice,"* *supra* note 5, at 259-60 (recognizing that ethical rules establish professional standards even if they are not enforceable). *See also* Deborah L. Rhode, *Why the ABA Bothers: A Functional*

cedure manuals or rules of conduct do not teach lawyers to act ethically any more than "a heart surgeon could usefully derive [direction] from examination of a valentine."[251] In circumstances where guidance is lacking, IRS lawyers should seek justice by being advocates for a fair tax administration and enforcement process, and should conform their conduct to that which furthers the IRS's objectives of impartially applying a correct interpretation of the tax law to promote public confidence in the tax system.[252]

CONCLUSION

The Office of Chief Counsel's self-imposed duty of restraint to help fulfill the IRS's goal to impartially apply the correct interpretation of the tax laws serves an important function in our self-assessment system. As former IRS Commissioner Margaret Richardson said, "the confidence of the American people in our tax system . . . ultimately . . . rests on the integrity and professional conduct of those who are charged with administering the system . . . ."[253] This duty is compatible with Chief Counsel lawyers' ethical duties to the IRS. Even though the public itself is unable to enforce these duties against Chief Counsel lawyers, and the internal policies establishing these self-imposed duties cannot address every possible situation, the tax system is best served by Chief Counsel lawyers who are able to use their professional judgment and discretion to conform their conduct to that which furthers the IRS's objective of impartially applying the correct interpretation of the nation's tax laws.

Perspective on Professional Codes, 59 TEX. L. REV. 689, 708-10 (1981) (describing how ethical codes can be effective even absent formal enforcement) (*cited in* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 236 n.40 (1993)).

251 Frederic G. Croneel, *The Service and The Private Practitioner: Face to Face and Hand in Hand – A Private Practitioner's View*, 11 AM. J. TAX POL'Y 343, 363 (1994) (quoting Joseph J. Portuondo, *Abusive Tax Shelters, Legal Malpractice, and Revised Formal Ethics Opinion 346: Does Revised 346 Enable Third Party Investors to Recover From Tax Attorneys Who Violate Its Standards?*, 61 NOTRE DAME L. REV. 220, 225 (1986)).

252 Michael Mulroney, *Report on the Invitational Conference on Professionalism in Tax Practice, Washington, D.C. October 1993*, 11 AM. J. TAX POL'Y 369, 395 (1994) (stating that "professionalism provides the standard for acceptable conduct in areas where no formal standards can or do exist"); Green, *Must Government Lawyers "Seek Justice," supra* note 5, at 279 (stating that imposing a duty on government lawyers engaged in civil litigation may require a different attitude about how government lawyers "approach decisions concerning the objectives of the litigation or the means by which to accomplish them").

253 Margaret Milner Richardson, Commissioner of IRS, Remarks at the Invitational Conference on Professionalism in Tax Practice (Oct. 1993), *quoted in* Moraine, *Loyalty Divided*, *supra* note 49, at 190.