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### A Study of Tax Lawyers Discussing Duties

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## **A Study of Tax Lawyers Discussing Duties**

**Michelle M. Kwon**

**&**

**Michael Hatfield**

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*A Study of Tax Lawyers Discussing Duties*

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# A Study of Tax Lawyers Discussing Duties

MICHAEL HATFIELD\*

MICHELLE KWON\*\*

*Zoom back from the placement of a comma that you're relying on, or a particular word in a statute. What does the rhythm of the code say?*<sup>1</sup>

*Taxes, money, and loss of property, as a result of unfair governmental taking. We've got, I think, the best area of practice.*<sup>2</sup>

*The same thing I enjoy about my practice is the same thing I hate about my practice. It's the clients.*<sup>3</sup>

## Abstract

This Article reports the first qualitative empirical study of U.S. tax lawyers. We interviewed women lawyers who were tax planning specialists. Though this is the first such study of U.S. tax lawyers, this methodology has been used often to study the professional ethics of other tax practitioners around the world. We had three research questions that we sought to answer through dynamic conversations on topics such as the distinctions between good and bad tax plans and good and bad tax lawyers and also the joys and stresses of tax practice. Our first research question was as to the make-up of the U.S. tax bar. The bar was described largely as very smart, team-playing puzzlers. We did not hear concern about widespread failures of professional responsibility. Our second research question was about how U.S. tax lawyers experience ethical tensions. We heard about the tension involved in

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\*\*Michelle Kwon, Professor of Law, University of Tennessee College of Law. For their extraordinary generosity and frankness, the authors thank the interviewees without whom this research obviously would not have been possible. For their research assistance, we thank Crystal Alberthal, Maya Swaynes, and Mary Whisner of the University of Washington Gallagher Law Library and our student research assistant, Sydney Johnson. For her editing, we thank Cindy Fester of the Gallagher Law Library. We thank Jennifer Fan, Zahr Said, and the faculty and student participants in the University of Washington Faculty Colloquium, and for their initial and essential suggestions, we thank Elaine Doyle and Penelope Tuck.

<sup>1</sup> Interview Transcript #7 (July 9, 2021) (on file with authors).

<sup>2</sup> Interview Transcript #3 (June 15, 2021) (on file with authors).

<sup>3</sup> Interview Transcript #1 (May 31, 2021) (on file with authors).

determining and communicating the right advice, managing clients, and billing. Our third question: how do U.S. tax lawyers discuss their professional duties? We heard about competence, diligence, and other duties from the ABA Model Rules. We did not hear tax-specific language like “substantial authority” or “realistic possibility of success.” We also did not hear about a special duty to the tax system. We conclude the Article with pragmatic suggestions for state bar tax sections, tax law professors, and academic researchers.

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## I. Introduction

This Article reports the first qualitative empirical study of U.S. tax lawyers. We interviewed women who are board-certified tax lawyers. In these interviews, we discussed professional ethics issues. Though this is the first such study of U.S. tax lawyers, this methodology has often been used to study the professional ethics of other tax practitioners. Empirical research has established, for example, the effect on ethical reasoning of tax practitioners' training and socialization, as well as the effect on ethical reasoning of communicating professional standards to practitioners.<sup>4</sup> There have been over 500 empirical studies of ethical decision-making in business contexts, including more than 100 qualitative empirical studies.<sup>5</sup>

Although the qualitative empirical methodology has not been used to investigate professional ethics and U.S. tax lawyers, a great deal has been written on the topic.<sup>6</sup> U.S. tax lawyers have long debated their professional duties. The literature is more than 70 years old.<sup>7</sup> The first casebook on professional ethics for any legal specialization was written for tax lawyers, and 50 years ago enough articles had been written on the topic that an anthology of articles was published.<sup>8</sup> The tax lawyer being between the client's money and the government's need for revenue focused tax lawyers on the ethical

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<sup>4</sup> See *infra* Part III.

<sup>5</sup> See *infra* Part III.

<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* Part I.

<sup>8</sup> See *infra* Part II.

issues that seemed to them unlike those found by lawyers in other fields.<sup>9</sup> The discussion about whether tax lawyers have a special duty to the tax system has been ongoing for 60 years.<sup>10</sup> During those years, Congress has enacted laws, the Treasury Department has issued regulations, and bar committees have provided formal guidance on the line between appropriate and inappropriate tax positions.<sup>11</sup>

Given how much has been written about professional ethics and tax lawyers by academics, lawyers, bar committees, Congressional committees, and the Treasury Department, we set out to explore how these volumes have shaped tax lawyers' experiences and explanations of their duties and conflicts.<sup>12</sup> We wondered, for example, whether tax lawyers use the terms of the statutes or formal bar guidance or whether they use more informal terms when discussing their duties.<sup>13</sup> With our interview-based methodology, we also anticipated that our conversations would give us a better, if still incomplete, sense of who tax lawyers are.<sup>14</sup>

We interviewed only board-certified tax lawyers.<sup>15</sup> This ensured our interviewees would all have verified tax expertise and experience.<sup>16</sup> Given the low percentage of women among board-certified tax lawyers, we focused first on offering interview opportunities to them.<sup>17</sup> These lawyers' interest in the study was so great that our time for interviewing was soon filled. Thus, this first qualitative empirical study of U.S. tax lawyers is one of women tax lawyers. Although we did not design the study to test gender differences, nor to support statistical generalizations, we believe it makes the study more interesting as well as preparatory for research into gender and professional duties.

Our goal was not to work as a pollster with a questionnaire, but rather to engage in dynamic conversation, a back-and-forth between the interviewer and the interviewee on topics such as the distinctions between good and bad tax plans and good and bad tax lawyers.<sup>18</sup> We heard about the never-ending intellectual demands of tax practice, and how much the lawyers enjoyed solving the tax puzzles.<sup>19</sup> We heard about specific frustrations with clients and the clients' other tax advisors.<sup>20</sup> We heard about the importance of teamwork

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<sup>9</sup> See *infra* Part 4.

<sup>10</sup> See *infra* Part 4.

<sup>11</sup> See *infra* Part A.

<sup>12</sup> See *infra* Part A.

<sup>13</sup> See *infra* Part A.

<sup>14</sup> See *infra* Part A.

<sup>15</sup> See *infra* Part B.

<sup>16</sup> See *infra* Part B.

<sup>17</sup> See *infra* Part B.

<sup>18</sup> See *infra* Part B.

<sup>19</sup> See *infra* Part 3; Part 1.

<sup>20</sup> See *infra* Part 2; Part 4; Part 5; Part 6.

in serving clients and the importance of professional self-defense.<sup>21</sup> We heard a positive assessment of the tax bar, which is interesting in that it is at odds with much of the academic commentary on the ethics of tax lawyers.<sup>22</sup> We were very interested in what we did not hear, which was any citation to a special duty to the tax system, even though that duty has been discussed for 60 years.<sup>23</sup>

In the next Part of this Article, we provide the context for the discussions about professional ethics with the interviewees. We begin it with an overview of the formal professional standards of lawyers, the regulations of tax practitioners by the Treasury Department, and the tax position accuracy-related penalty statutes. We conclude it with a sampling of informal advice to tax lawyers. In the third Part of the Article, we introduce the qualitative empirical method of study and then set out the purpose and methodology of this particular study. In Part IV, we establish the credibility of the interviewees by describing not only their objective qualifications but also more personal details such as their paths into the tax field, what they enjoy about it, and how they describe the tax bar and the tax system. We then analyze the substance of the interviews. In conclusion, we answer the research questions that guided our interviews and sketch some pragmatic reflections.

## II. Tax Lawyers and Professional Responsibility

The professional responsibilities of U.S. tax lawyers have been analyzed, debated, formalized, and revised extensively.<sup>24</sup> As an organized specialization, tax lawyering began in the 1920s.<sup>25</sup> The debate about the professional responsibilities of tax lawyers began in the early 1950s.<sup>26</sup> In the early 1960s, the organized tax bar appointed a committee to study what were considered the peculiar ethical issues of tax lawyering.<sup>27</sup> One of its first questions was whether the responsibilities of tax lawyers were so dissimilar from those of

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<sup>21</sup> See *infra* Part 5; Part 9.

<sup>22</sup> See *infra* Part 4; Part A

<sup>23</sup> See *infra* Part 4; Part 4; Part A

<sup>24</sup> Most of this history is documented and discussed in Michael Hatfield, *Legal ETHICS AND FEDERAL TAXES, 1945–1965: PATRIOTISM, DUTIES, AND ADVICE*, 12 FLA. TAX REV. 1 (2012) [hereinafter, Hatfield, *1945–1965*]; Michael Hatfield, *Committee Opinions and Treasury Regulation: Tax Lawyer Ethics, 1965–1985*, 15 FLA. TAX REV. 675 (2014) [hereinafter, Hatfield, *1965–1985*]; and Michael Hatfield, *The Rise of Law and the Fall of Circular 230: Tax Lawyer Professional Standards, 1985–2015*, 24 FLA. TAX REV. 828 (2021) [hereinafter, Hatfield, *1985–2015*].

<sup>25</sup> On the emergence of the tax bar, see Mindy Herzfeld, *The Role of Professional Organizations in Practice and Policy: How Lawyers Overtook Accountants and Economists in the Early 20th Century Tax Field*, 75 TAX LAW. 79 (2022) [hereinafter Herzfeld, *The Role*].

<sup>26</sup> See, e.g., Randolph E. Paul, *The Responsibilities of the Tax Adviser*, 63 HARV. L. REV. 377 (1950) [hereinafter Paul, *The Responsibilities*]; *What Makes a Successful Tax Lawyer? A Tax Law Review Symposium*, 7 TAX L. REV. 1 (1951) [hereinafter *What Makes a Successful Tax Lawyer*].

<sup>27</sup> Randolph W. Throver, *Chairman's Page*, BULL. SEC. TAX'N, Apr. 1962, at 3.

other lawyers that there should be a distinct professional code.<sup>28</sup> By the late 1960s, the tax bar had laid aside curiosity about a distinct code, but there was such a sufficient volume of writings about the distinct ethical issues, especially as related to planning and compliance, that Professor Boris Bittker published an anthology of the literature.<sup>29</sup> About a decade later, the continuing prominence of the distinctive ethical issues of tax lawyering prompted a special casebook on professional responsibility for tax lawyers—the very first for a specialized legal field.<sup>30</sup> By about that time, the American Bar Association (ABA) Committee for Professional Responsibility (PR Committee) had twice opined formally on the return positions lawyers could responsibly advise, Congress had enacted accuracy-related penalty statutes to constrain tax advice, and the Treasury Department was set on regulating opinions written by tax lawyers.<sup>31</sup> To this day, concerns over return position standards and tax shelters continue to prompt articles, reports, proposals, studies, and statutory and regulatory changes.<sup>32</sup>

To summarize the literature, guidance, laws, and regulations of tax lawyer professional responsibility in detail is beyond the scope of this project. But familiarity with its dominant themes is necessary to provide the context for what the interviewees said about their professional lives and duties. To facilitate that familiarity, we have divided the material into two categories: the first is devoted to the official rules and standards, and the second to informal duties and advice. The official nature of the first category comes from the rules and standards originating in or being enforceable by the bars, the courts, Congress, or the Treasury Department. The informal literature is concerned with professional and practical questions apart from threat of sanction.

### A. *Official Rules and Standards*

Tax lawyers may be disciplined by their state bar, Treasury, or the courts. The relevant rules and standards are sometimes quite similar but found in dissimilar authorities: formal professional codes and bar opinions, statutes,

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<sup>28</sup> Merle H. Miller & John H. Grosvenor, Jr., *Report of the Special Committee on Standards of Tax Practice*, BULL. SEC. TAX'N, July 1963, at 270. Merle H. Miller, *Report of the Special Committee on Standards of Tax Practice Presented at the Chicago Meeting*, BULL. SEC. TAX'N, Jan. 1964, at 37; Merle H. Miller & John H. Grosvenor, Jr., *Report of Special Committee on Standards of Tax Practice*, BULL. SEC. TAX'N, July 1964, at 272.

<sup>29</sup> On the committee declining to pursue a special code, see Marvin K. Collie & Thomas P. Marinis, Jr., *Ethical Considerations on Discovery of Error in Tax Returns*, 22 TAX LAW. 455, 460 n.16 (1969). The first anthology was PROFESSIONAL RESPONSIBILITY IN FEDERAL TAX PRACTICE (Boris I. Bittker ed., 1970) [hereinafter BITTKER, PROFESSIONAL RESPONSIBILITY].

<sup>30</sup> Deborah H. Schenk, *Tax Ethics*, 95 HARV. L. REV. 1995, 1995 (1982) (reviewing BERNARD WOLFMAN & JAMES P. HOLDEN, ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE (1981)).

<sup>31</sup> Hatfield, 1965–1985, *supra* note 24, at 683, 689–98, 703–05, 715; Hatfield, 1985–2015, *supra* note 24, 832–35, 841–51, 860–63, 866–70, 872–88, 892, 894–95, 901, 918, 921.

<sup>32</sup> Hatfield, 1985–2015, *supra* note 24, at 901–09.

and regulations. Tax lawyers may also be disciplined through malpractice suits premised on tort or contract law. Much of the discussion of the professional responsibilities of tax lawyers has been a discussion about formal rules and standards and the negative consequences for violating or falling short.

### 1. *Bar*

For lawyers, it is the state bars, not the ABA, that have the authority to discipline members.<sup>33</sup> Most state bars have adopted a professional code based on the ABA Model Rules of Professional Conduct (Model Rules).<sup>34</sup> The Model Rules require that lawyers know who the client is; avoid or address conflicts of interest; be competent and diligent in serving the client; be candid as an advisor and, as an advocate, refrain from making frivolous assertions; avoid participating in lies and frauds; communicate with a client promptly and in a way that enables an informed decision; bill reasonably; and, subject to specific exceptions, keep confidential the information learned during the representation.<sup>35</sup> Conceptually related to the duty of confidentiality is the attorney–client privilege of the law of evidence.<sup>36</sup>

Within the ABA, the PR Committee issues guidance on how the Model Rules apply in specific situations.<sup>37</sup> For tax lawyers, there have been two PR Committee opinions on advising tax return positions. The first was the 1965 Formal Opinion 314.<sup>38</sup> It opined that a lawyer may “freely urge” any return

<sup>33</sup> MODEL RULES OF PRO. CONDUCT r. 8.4 (Misconduct), 8.5 (Disciplinary Authority) (AM. BAR ASS'N 2020). Despite the prominence of the return position and tax shelter standards in the literature, there is no evidence that a state bar has ever disciplined a tax lawyer for the substance of tax advice.

<sup>34</sup> Am. Bar Ass'n, *Alphabetical List of Jurisdictions Adopting Model Rules* (Mar. 28, 2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/) [<https://perma.cc/G2AU-LE8R>].

<sup>35</sup> MODEL RULES OF PRO. CONDUCT r. 1.1 (Competence), 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.3 (Diligence), 1.4 (Communications), 1.5 (Fees), 1.6 (Confidentiality of Information), 1.7 (Conflicts of Interest: Current Clients), 1.8 (Conflicts of Interest: Current Clients: Special Rules), 1.13 (Organization as Client), 2.1 (Advisor), 3.1 (Meritorious Claims and Contents), 4.1 (Truthfulness in Statements) (AM. BAR. ASS'N 2020).

<sup>36</sup> Congress also has enacted a federal tax practitioner privilege modeled on the attorney–client privilege. See Louis F. Lobenhofer, *The New Tax Practitioner Privilege: Limited Privilege and Significant Disruption*, 26 OHIO N.U. L. REV. 243 (2000); Jared T. Meier, *Understanding the Statutory Tax Practitioner Privilege: What is Tax Shelter Promotion*, 78 U. CHI. L. REV. 671 (2011); John O. Sawyko, *The Tax Practitioner–Client Privilege: Valero's Shortcomings and a Better Approach*, 64 TAX LAW. 519 (2011).

<sup>37</sup> Previously this committee was known as the Committee on Ethics and Professional Responsibility.

<sup>38</sup> ABA Comm. on Ethics & Pro. Resp., Formal Op. 314 (1965), *reprinted in* 51 A.B.A. J. 671 (1965) [hereinafter Formal Op. 314]. This was an application of the ABA Code of Professional Responsibility, which was replaced in 1983 by the Model Rules of Professional Conduct. See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 1-1(e) (2021–2022 ed.).

position favorable to the client so long as the position has a “reasonable basis.”<sup>39</sup> If there is a reasonable basis, the committee concluded there is no duty to make any special disclosure to the Service.<sup>40</sup> A great deal of literature has been written about the meaning of the reasonable basis standard.<sup>41</sup> Much of that literature criticized that standard for enabling the audit lottery: filing a return position with neither more than a reasonable basis nor a disclosure of relevant facts in order to exploit the low chance that neither the legal nor factual grounds will be reviewed.<sup>42</sup>

Propelled by criticisms, in 1985, the PR Committee replaced Formal Opinion 314 with Formal Opinion 85-352.<sup>43</sup> It provided that a lawyer may advise an undisclosed return position that “probably will not prevail” so long as the lawyer believes in good faith that the position is warranted in existing law or by a good faith argument about the law.<sup>44</sup> The PR Committee said this belief requires “there is some realistic possibility of success if the matter

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<sup>39</sup> Formal Op. 314, *supra* note 38, at 672.

<sup>40</sup> Formal Op. 314, *supra* note 38, at 672. It allowed that “prudence” and “tactical” considerations might be relevant to the decision of whether to make a special disclosure, but a disclosure is not ethically required if the position has a reasonable basis.

<sup>41</sup> See, e.g., Frederic G. Corneel, *Ethical Guidelines for Tax Practice*, 28 TAX L. REV. 1 (1972) [hereinafter Corneel, *Ethical Guidelines*]; Henry Sellin, *Professional Responsibility of the Tax Practitioner*, 52 TAXES 584 (1974) [hereinafter Sellin, *Professional Responsibility*]; James R. Rowen, *When May a Lawyer Advise a Client That He May Take a Position on His Tax Return?*, 29 TAX LAW. 237 (1976); ABA Sec. of Tax'n, Comments Concerning Proposed Amendments to Accuracy Related Penalty, IRC Section 6662 (1994), in *ABA Members Suggest Definition of 'Reasonable Basis' for Accuracy-Related Penalty Regs*, 94 TAX NOTES TODAY 141-48 (July 14, 1994); Letter from C.J. Muller to Margaret Milner Richardson, I.R.S. Comm'r (June 17, 1994), in *Penalty Standard for Taxpayers Should Be on a Par with Standard for Return Preparers, Attorney Asserts*, 94 TAX NOTES TODAY 131-29 (June 17, 1994); Juliann Avakian Martin, *Definition of 'Reasonable Basis' Considered at Penalty Reg Hearing*, 94 TAX NOTES TODAY 135-1 (July 13, 1994).

<sup>42</sup> See John S. Nolan, *Audit Coverage and Private Tax Planning*, 27 NAT'L TAX J. 425, 428 (1974) [hereinafter Nolan, *Audit Coverage*]; David W. Santi, Comment, *Legal Liability of the Professional Tax Practitioner*, 26 EMORY L.J. 403, 427-28 (1977) [hereinafter Santi, Comment, *Legal Liability*]; *Discussion on "Questionable Positions,"* 32 TAX LAW. 13, 17-21, 23-27 (1978); Frederic G. Corneel, *Report of the Committee on Standards of Tax Practice*, 32 TAX LAW. 933, 933-34 (1979); Paul J. Sax, *Lawyer Responsibility in Tax Shelter Opinions*, 34 TAX LAW. 5, 37-38 (1980) [hereinafter Sax, *Lawyer Responsibility*]; Special Comm. On Lawyer's Role in Tax Practice, Ass'n of the Bar of the City of New York, *The Lawyer's Role in Tax Practice*, 36 TAX LAW. 865, 883-884 (1983); Marvin J. Garbis, *The Tax Professional and the New Tax Compliance Environment*, 29 WM. & MARY TAX CONF. 9, 10-11 (1983) [hereinafter Garbis, *The Tax Professional*]; Dean Marsan, *Tax Shelter Opinions: Ethical Responsibilities of the Tax Attorney*, 9 OHIO N.U. L. REV. 237, 241 (1982) [hereinafter Marsan, *Tax Shelter Opinions*]; Lee A. Sheppard, *Ethics Opinion 314 and Tax Shelters Addressed at ABA Meeting*, 22 TAX NOTES FED. 757, 757 (Feb. 27, 1984). *But see* Jacques T. Schlenger & John B. Watkins V, *Exploring the Myths of Circular 230*, 62 TAXES 283, 283 n.2 (1984).

<sup>43</sup> Hatfield, 1965-85, *supra* note 24, at 693-98; ABA Comm. on Ethics & Pro. Resp., Formal Op. 85-352, *reprinted in* 39 TAX LAW. 631 (1986) [hereinafter, Formal Op. 85-352].

<sup>44</sup> Formal Op. 85-352, *supra* note 43, at 633.

is litigated.<sup>45</sup> A great deal has been written about what this means, such as whether it is different than the reasonable basis standard, and whether it should be understood as quantifiable, specifically requiring at least a 1-in-3 chance of success.<sup>46</sup> Commentators have also expressed concerns that the PR Committee failed to emphasize the non-adversarial nature of tax returns, despite suggestions from the tax bar that they do so in the new opinion.<sup>47</sup>

In 1982, the ABA issued Formal Opinion 346 (Revised), which provided guidance on writing tax shelter opinions.<sup>48</sup> Although subsequent changes to the tax code rendered the guidance in that opinion mostly irrelevant for practical purposes, it belongs to a significant literature on the lawyer's professional duties in writing tax shelter opinions.<sup>49</sup> Of course, not all opinions given by tax lawyers are related to tax shelters, and the professional standards for issuing tax opinions for other purposes, especially for securities purposes, have generated considerable analysis.<sup>50</sup>

On the one hand, as mentioned above, the tax bar has questioned its similarity to other lawyers, emphasizing its special role as a tax profession. On

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<sup>45</sup> Formal Op. 85-352, *supra* note 43, at 633.

<sup>46</sup> See, e.g., Paul J. Sax et al., *Report of the Special Task Force on Opinion 85-352*, 39 TAX LAW. 635, 637-39 (1986) [hereinafter Sax et al., *Report of the Special Task Force*]; Theodore C. Falk, *Tax Ethics, Legal Ethics, and Real Ethics: A Critique of ABA Formal Opinion 85-352*, 39 TAX LAW. 643, 654-56 (1986); Letter from Bernard Wolfman, Professor, Harvard L. Sch., to Leslie S. Shapiro, I.R.S. Dir. of Prac. (Feb. 9, 1987), in *Wolfman Recalls History of Circular 230, Suggests What Should Constitute Substantial Authority*, 87 TAX NOTES TODAY 30-24 (Feb. 9, 1987) [hereinafter 1987 Wolfman Letter]; J. Timothy Philipps, *What Part of RPOS Don't You Understand?: An Update and Survey of Standards for Tax Return Positions*, 51 WASH. & LEE L. REV. 1163 (1994); Paul J. Sax, *The Section's Role in Ethics and Standards of Tax Practice*, 68 Tax Law. 59, 63 (2014).

<sup>47</sup> See, e.g., Sax et al., *Report of the Special Task Force*, *supra* note 46, at 640.

<sup>48</sup> ABA Comm. on Ethics & Pro. Resp., Formal Op. 346 (Revised) (Jan. 29, 1982), *reprinted in* 68 ABA J. 471, 471 (1982).

<sup>49</sup> The 1986 enactment of the section 469 passive activity loss limits greatly undermined the appeal of individual tax shelters that were the subject of Formal Opinion 346. George K. Yin, *Getting Serious About Corporate Tax Shelters: Taking a Lesson from History*, 54 SMU L. REV. 209, 214, 218-219 (2001); BERNARD WOLFMAN ET AL., STANDARDS OF TAX PRACTICE 138 (6th ed. 2004). On the subject of tax shelter opinions, see, e.g., Sax, *Lawyer Responsibility*, *supra* note 42, at 37-38; Jacques T. Schlenger, *Comments on the Proposed Regulations on Tax Shelter Opinions*, 59 TAXES 173, 174, 180-81 (1981) [hereinafter Schlenger, *Comments on the Proposed Regulations*]; Marsan, *Tax Shelter Opinions*, *supra* note 42, at 245; L. Ray Patterson, *Tax Shelters for the Client—Ethics Shelters for the Lawyer*, 61 Tex. L. Rev. 1163, 1165 (1983) (book review) [hereinafter Patterson, *Tax Shelters for the Client*]; James P. Holden, 1999 Erwin Griswold Lecture Before the American College of Tax Counsel: *Dealing with the Aggressive Corporate Tax Shelter Problem*, in 52 TAX LAW. 369, 371-73 (1999).

<sup>50</sup> See, e.g., Nolan, *Audit Coverage*, *supra* note 42, at 429; Gordon M. Weber et al., *The Responsibilities and Liabilities of Tax Advisors*, 29 MAJOR TAX PLAN. 605, 613 (1977); Sharon Burrell, *Legal Malpractice of the Tax Attorney*, 34 TAX EXECUTIVE 259, 270-71 (1982) [hereinafter Burrell, *Legal Malpractice*]; Mark J. Gimenez, *Tax Shelter Opinions—Securities and Tax Liabilities after TEFRA*, 35 BAYLOR L. REV. 25, 25-28, 42-43, 46 (1983) [hereinafter Gimenez, *Tax Shelter Opinions*]; Robert P. Rothman, *Tax Opinion Practice*, 64 TAX LAW. 301, 327-31 (2011).

the other hand, the tax bar has sought to distinguish itself from non-lawyer tax professionals. Certified public accountants (CPAs) and return preparers have always worked in the tax field.<sup>51</sup> The division of roles in the field has often been an issue, especially between lawyers and CPAs. The rivalry between the two professions is almost as old as the income tax itself.<sup>52</sup> In 1944, the ABA and the American Institute of Certified Public Accountants (AICPA) established a joint conference to promote good relations, and, from time-to-time, it has issued statements describing the respective roles of each profession within the practice of tax.<sup>53</sup> By the end of the 1950s though, the tension between the two professions, mostly over litigation related to the unauthorized practice of law by CPAs, led the Dean of Harvard Law School to write of the “two great professions of law and accountancy [being] squared away for a battle royal.”<sup>54</sup> About that time, the PR Committee prohibited a lawyer-accountant from even holding himself out as practicing both law and accountancy.<sup>55</sup> While unauthorized practice suits against CPAs have almost ceased, the Model Rule’s prohibition on the unauthorized practice of law and the prohibition of a lawyer sharing fees with a CPA mean that a lawyer working for an accounting (or other non-law firm) may not practice law and that, though a law firm may employ a CPA, the CPA must not have an ownership interest in the law firm.<sup>56</sup> Thus, the U.S. bar maintains its wall against the other primary professionals in the tax field.

A final point on the literature of the bar’s professional codes: a violation may be closely tied to a malpractice suit against the lawyer. It may evidence a

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<sup>51</sup> As discussed below, commercial return preparers were only briefly regulated along with tax lawyers and CPAs under Circular 230. There are some relatively minor categories of other tax practitioners that practice before the Service, such as enrolled agents (often former Service employees), actuaries, and retirement plan specialists. 31 C.F.R. § 10.3 (2021).

<sup>52</sup> See Herzfeld, *The Role*, *supra* note 25.

<sup>53</sup> This occurred in 1951, 1975, and 1981. Am. Inst. Of Certified Public Accountants & Am. Bar Ass’n, *Lawyers and Certified Public Accountants: A Study of Interprofessional Relations*, 36 TAX LAW. 25, 26–27 (1982).

<sup>54</sup> Erwin N. Griswold, *Role of Lawyer in Tax Practice*, 10 MAJOR TAX PLAN. 1, 1 (1958).

<sup>55</sup> ABA Comm. on Pro. Ethics and Pro. Resp., Formal Op. 297 (1961). Ten years later, the PR Committee reversed itself in Formal Opinion 328. ABA Comm. on Pro. Ethics and Pro. Responsibility, Formal Op. 328 (1972). For an analysis of Formal Opinion 297 and similar opinions in the greater context of the development of the ABA’s professional standards, see Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY’S L. J. 343, 436 (2008).

<sup>56</sup> State bars rarely bring unauthorized practice of law cases against CPAs, though a client unwilling to pay may do so, as a court will not enforce payment for legal services provided by a non-lawyer. LINDA GALLER & MICHAEL B. LANG, REGULATION OF TAX PRACTICE 242–43 (2015). Lawyers working for non-law firms are prohibited to practice law under the Model Rules, MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS’N 2020) (Unauthorized Practice of Law), on the basis that their employment is not permitted. Under Model Rule 5.4, non-lawyers must not be owners in a law firm on the basis that lawyers may not share fees with non-lawyers, lest their professional judgment be influenced. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY, A STUDENT’S GUIDE, § 5.4-1 and § 5.5-3 (2010–2011).

violation of a contractual or tort law duty.<sup>57</sup> The concern over malpractice claims against tax lawyers is mentioned early in the literature.<sup>58</sup> One of those early writers warned that in tax law, “the day of reckoning is often on earth and not in heaven,” and the “tax adviser’s failure will be measurable in dollars and cents, the client’s dollars and cents—and the tax adviser’s, as well.”<sup>59</sup> Not surprisingly, academics and others continue to analyze the malpractice risks for tax lawyers.<sup>60</sup>

## 2. *Penalty Statutes*

Through penalty statutes, Congress has established certain accuracy-related standards for return positions.<sup>61</sup> Even when a lawyer is not preparing a return but advising the client long before, the lawyer knows the advice may eventually be reflected on the client’s return and thus subject the client’s position to these standards. One of these standards is the strict liability penalty related to transactions that lack economic substance.<sup>62</sup> This requires, in effect, that all transactions meaningfully affect the taxpayer’s economic position (without regard to tax effects) and that the taxpayer has a substantial purpose for entering into the transaction.<sup>63</sup>

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<sup>57</sup> GALLER & LANG, REGULATION, *supra* note 56, at 293.

<sup>58</sup> See, e.g., Paul, *The Responsibilities*, *supra* note 26, at 379, 383–84; Santi, Comment, *Legal Liability*, *supra* note 42, at 403; Burrell, *Legal Malpractice*, *supra* note 50; Garbis, *The Tax Professional*, *supra* note 42, at 17.

<sup>59</sup> Paul, *The Responsibilities*, *supra* note 26, at 379.

<sup>60</sup> See, e.g., Jay A. Soled, *Tax Shelter Malpractice Cases and Their Implications for Tax Compliance*, 58 AM. U. L. REV. 267 (2008); 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 (2009); Michael B. Lang, *Thinking About Tax Malpractice: Outline and Hypotheticals*, PRAC. TAX LAW., Winter 2013, at 21; Jacob L. Todres, *Bad Tax Shelters—Accountability or the Lack Thereof: Ten Years of Tax Malpractice*, 66 BAYLOR L. REV. 602 (2014).

<sup>61</sup> Until 1982, there was no accuracy-related penalty, only a negligence penalty. See Michael C. Durst, *The Tax Lawyer’s Professional Responsibility*, 39 FLA. L. REV. 1027, 1068 (1987) [hereinafter Durst, *The Tax Lawyer’s Professional Responsibility*]; Donald Arthur Winslow, *Tax Penalties—“They Shoot Dogs, Don’t They?”*, 43 FLA. L. REV. 811, 825, 828–30 (1991); Lawrence Zelenak, *Reforming Penalty Reform: Congress Should Eliminate the Profusion of Accuracy Standards*, 52 TAX NOTES Fed. 471, 475–76 (July 22, 1991); Hatfield, *1985–2015*, *supra* note 24, at 834–35.

<sup>62</sup> I.R.C. § 6662(b)(6), (i). The reasonable-cause exception is not available for this penalty. I.R.C. § 6664(c)(2).

<sup>63</sup> Economic substance is defined in I.R.C. § 7701(o). The penalty may also be applied for failing to meet the requirements of any similar rule of law. I.R.C. § 6662(b)(6). For a critique of the codification of this doctrine, see ABA Sec. of Tax’n, Request for Guidance on Implementation of Economic Substance Legislation, in *ABA Members Seek More Guidance on Codification of Economic Substance Doctrine*, 2011 TAX NOTES TODAY 12–13 (Jan. 18, 2011).

None of the other accuracy-related penalties are no-fault penalties.<sup>64</sup> Indeed, there is a general protection from the penalties so long as the taxpayer acted in good faith and had reasonable cause for the understatement.<sup>65</sup> All relevant facts and circumstances are considered, including reliance on the advice of a tax professional.<sup>66</sup> But reliance on advice does not necessarily establish reasonable cause and good faith.<sup>67</sup> To be reliable, the advice must not be premised on unreasonable assumptions but on all the pertinent facts, specifically the purposes for which the taxpayer entered the transaction.<sup>68</sup>

Even if the taxpayer fails to sustain a return position with the Service or, ultimately, with the courts, the accuracy-related penalties on return positions can be avoided in three ways. The first is that the taxpayer establishes he or she acted in good faith and there was reasonable cause for the understatement.<sup>69</sup> The second is that there is substantial authority for the return position, even though there was no special disclosure of the facts related to the position.<sup>70</sup> The third is that there was a reasonable basis for the position and the taxpayer specifically disclosed the relevant facts.<sup>71</sup>

The reasonable basis and substantial authority standards each have a complicated history.<sup>72</sup> Under the current statute, the Treasury Regulations describe the reasonable basis standard as “a relatively high standard, that is, significantly higher than not frivolous or not patently improper.”<sup>73</sup> A return position that reasonably relies on one or more legal authorities will generally satisfy the reasonable basis standard.<sup>74</sup> Critics of this standard, when it was used in Formal Opinion 314, claimed that it enabled taxpayers to play the audit lottery, avoiding disclosure of facts relevant to a position that merely

<sup>64</sup> Some commentators describe the accuracy-related penalties as no-fault penalties. However, these penalties are not “no-fault” insofar as section 6664(c) provides an exception to the penalties so long as the taxpayer had reasonable cause for the underpayment and acted in good faith. GALLER & LANG, REGULATION, *supra* note 56, at 53.

<sup>65</sup> I.R.C. § 6664(c)(1).

<sup>66</sup> Reg. § 1.6664-4(b)(1).

<sup>67</sup> Reg. § 1.6664-4(c)(1).

<sup>68</sup> Reg. § 1.6664-4(c)(1)(i), (ii).

<sup>69</sup> This avoids the penalty on negligence or disregard of rules or regulations. I.R.C. § 6662(b)(1), (c). Technically, the exception for reasonable cause and good faith might apply even if otherwise there has been negligence or disregard of rules or regulations. Conceptually, this is contradictory, at least in the most usually-imagined situations. GALLER & LANG, REGULATION, *supra* note 56, at 54.

<sup>70</sup> I.R.C. § 6662(b)(2), (d)(2)(B)(i).

<sup>71</sup> I.R.C. § 6662(b)(2), (d)(2)(B)(ii).

<sup>72</sup> See Hatfield, 1965–1985, *supra* note 24, at 683–89, 696–98; Hatfield, 1985–2015, *supra* note 24, at 834–40, 872–84.

<sup>73</sup> Reg. § 1.6662-3(b)(3).

<sup>74</sup> Reg. § 1.6662-3(b)(3). Even if a position does not have a reasonable basis, the taxpayer may be able to establish good faith and reasonable cause for the position and thus be protected from penalty under section 6664.

had a reasonable basis.<sup>75</sup> However, to avoid a penalty under the statute, there must be a disclosure if the position merely has a reasonable basis.<sup>76</sup> The substantial authority standard was designed by Congress to require the same type of reasoning about the tax law that judges use.<sup>77</sup> It involves a weighing of specific categories of legally-relevant authorities (*e.g.*, excluding treatises) and exists if the weight of the authorities supporting the position is substantial in relation to those contrary to it.<sup>78</sup> The standard is described as “more stringent than the reasonable basis standard” but “less stringent than the more likely than not standard.”<sup>79</sup> The more likely than not standard requires a greater than 50% likelihood that the position would be upheld were it to be challenged by the Service.<sup>80</sup> Though quantifying these standards is considered questionable by many, the Joint Committee on Taxation did quantify the standards at one point: reasonable basis at a 20% likelihood of being upheld, and substantial authority at 40%.<sup>81</sup>

A different set of rules applies to tax shelters transactions: for transactions with a significant purpose of federal income tax avoidance or evasion, neither the substantial authority standard nor the combination of disclosure and the reasonable basis standard will protect the taxpayer.<sup>82</sup> Under the Treasury Regulations, a non-corporate taxpayer may be protected if the tax shelter return position is supported by substantial authority and the taxpayer reasonably believed it was more likely than not to be upheld.<sup>83</sup> The reasonable belief requirement may be met by a good faith and reasonable reliance on a “more likely than not” opinion of a tax professional so long as the opinion is based on all the pertinent facts, including the purposes for which the taxpayer entered into the transaction.<sup>84</sup> Though there are some technical differences for corporate taxpayers, there is a fairly parallel structure for protection from

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<sup>75</sup> See Hatfield, 1965–1985, *supra* note 24, at 683–89.

<sup>76</sup> See I.R.C. § 6662(d)(2)(B)(ii).

<sup>77</sup> It was first used in 1982. Hatfield, 1985–2015, *supra* note 24, at 838–39.

<sup>78</sup> Reg. § 1.6662-4(d)(3)(i).

<sup>79</sup> Reg. § 1.6662-4(d)(2).

<sup>80</sup> *Id.*

<sup>81</sup> STAFF OF THE JOINT COMM. ON TAX'N, COMPARISON OF JOINT COMM. STAFF AND TREASURY RECOMMENDATIONS RELATING TO PENALTY AND INTEREST PROVISIONS OF THE INTERNAL REVENUE CODE 13 (1999). The authors of a prominent casebook on professional responsibility for tax lawyers characterized the assumption that these standards can be quantified as “dubious.” GALLER & LANG, REGULATION, *supra* note 56, at 53. For a helpful explanation, see Sarah B. Lawsky, *Probably—Understanding Tax Law's Uncertainty*, 157 U. PA. L. REV. 1017 (2009).

<sup>82</sup> I.R.C. § 6662(d)(2)(C).

<sup>83</sup> Reg. § 1.6662-4(g)(1). Although it has not been withdrawn, this regulation does not reflect the current statute but an earlier one. GALLER & LANG, REGULATION, *supra* note 56, at 53.

<sup>84</sup> Reg. § 1.6662-4(g)(4).

penalties related to corporate tax shelter return positions, including the usefulness of a good quality opinion of a tax professional.<sup>85</sup>

Lawyers who prepare tax returns and, in some situations, those who advise on how completed events should be reported on the return, are also subject to accuracy-related standards.<sup>86</sup> These standards are now mostly equivalent to the standards for taxpayers (although the two did not coincide for many years).<sup>87</sup> The lawyers are generally protected by acting in good faith and having a reasonable cause for the understatement position.<sup>88</sup> And, as with non-tax-shelter transactions that are not disclosed, penalties are avoided if there is substantial authority.<sup>89</sup> The reasonable basis standard applies if the lawyer advises the taxpayer to disclose the transaction.<sup>90</sup> As for tax shelter transactions, the lawyer needs to have reasonably considered all the pertinent facts and authorities and have reasonably concluded the position is more likely than not to be sustained.<sup>91</sup>

In addition to these civil penalties, there are many criminal penalties in the tax code that apply to taxpayers and their advisors who cross that line.<sup>92</sup> Indeed, despite the higher accuracy-related standards for tax shelter positions, as well as various special statutes that apply to tax shelters, it has been the chilling effect of criminal prosecution of tax shelter advisors that has proven

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<sup>85</sup> The corporate taxpayer is addressed under the section 6664 Regulations. Reg. § 1.6664-4(f)(2). The position having substantial authority and the taxpayer reasonably believing that such position would more likely than not prevail are necessary—but by themselves insufficient—to avoid the penalty. The corporate taxpayer must also establish that it acted in good faith and with a reasonable cause for the position. I.R.C. § 6664(c)(1). GALLER & LANG, REGULATION, *supra* note 56, at 54, n.14. There is also a section 6664 rule for reportable transactions and a separate accuracy-related penalty for understatements related to reportable transactions. I.R.C. §§ 6662A, 6664(d).

<sup>86</sup> I.R.C. § 6694(a). “Tax return preparer” is defined in section 7701(a)(36). The definition is then divided between “signing” and “non-signing” preparers. Reg. § 301.7701-15(b).

<sup>87</sup> For a discussion of how the standards became aligned, see Hatfield, 1985–2015, *supra* note 24, at 880–85

<sup>88</sup> See I.R.C. § 6694(a)(3).

<sup>89</sup> I.R.C. § 6694(a)(2)(A).

<sup>90</sup> The taxpayer may or may not follow the advice, of course, and the preparer should not be penalized for the taxpayer’s choice. A signing and non-signing preparer have different options for avoiding the penalties. Reg. § 1.6694-2(d)(3).

<sup>91</sup> I.R.C. § 6694(a)(2)(C); Reg. § 1.6694-2(b).

<sup>92</sup> For example, the attempt to evade a tax is a felony under section 7201, as is advising or assisting in the preparation of fraudulent returns and other documents under section 7206 or obstructing the Service under § 7212. The underlying activities may violate laws outside the tax code, such as conspiracy to defraud the government (18 U.S.C. § 371) and mail fraud (18 U.S.C. § 134). See, e.g., *United States v. Daugerdas*, 837 F.3d 212 (2d Cir. 2016), *cert. denied*, 138 S. Ct. 62 (2017). See, generally, MICHAEL SALTZMAN & LESLIE BOOK, IRS PRAC. & PROC. ¶ 12.01 (2022) [hereinafter SALTZMAN & BOOK, IRS PRAC. & PROC.].

most effective in curbing tax shelters.<sup>93</sup> It was prosecution of tax shelter advisors—not merely the investors—that has proven effective in the tax shelter war that began at the end of the twentieth century.<sup>94</sup> These prosecutions have included very high profile advisors, and the media coverage of these prosecutions ensured that they had a ripple effect across the tax professions.<sup>95</sup>

### 3. *Circular 230*

The Treasury Department has long regulated tax representatives in certain of their roles.<sup>96</sup> Regulations from the Treasury Department known as “Circular 230” precede the modern income tax.<sup>97</sup> Circular 230 applies to those who “practice before” the Service.<sup>98</sup> Many of its requirements are similar to those of the Model Rules: competence; diligence; promptness; identifying and resolving conflicts of interest; protecting privileged information; and not charging unconscionable fees.<sup>99</sup> There is also a statement of best practices for tax advisors; standards for advising return positions that mostly track the accuracy-related penalty standards; requirements that written advice set forth the relevant facts and apply the law; and guidance on handling the discovery of a client’s error on a return.<sup>100</sup>

Historically, a tax lawyer became subject to Circular 230 by filing a power of attorney with the Service in order to represent a client.<sup>101</sup> Representing a client in a proceeding was “practice before” the Service, but neither tax

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<sup>93</sup> See Michelle M. Kwon, *The Criminality of “Tax Planning,”* 18 FLA. TAX REV. 153, 158–59 (2015) [hereinafter Kwon, *The Criminality*].

<sup>94</sup> Scott A. Schumacher, *Magnifying Deterrence by Prosecuting Professionals*, 89 IND. L.J. 511, 512, 516–17, 520 (2014) [hereinafter Schumacher, *Magnifying Deterrence*]; Kwon, *The Criminality*, *supra* note 93, at 158–59; Hatfield, *1985–2015*, *supra* note 24, at 909–16.

<sup>95</sup> Scott A. Schumacher, *Magnifying Deterrence*, *supra* note 94, at 546.

<sup>96</sup> Since 1884, the Treasury Department has had the power to regulate the practice of representing persons in Department proceedings. Act of July 7, 1884, ch. 334, 23 Stat. 236, 258–59; *see also* Pub. L. No. 97-258, 96 Stat. 877, 884 (1982) (codifying 31 U.S.C. § 330).

<sup>97</sup> They are so named as they were in the 230th circular issued by Treasury since they were first published in 1921. *See* ARTHUR H. BOELTER & HERTSEL SHADIAN, TAX PREPARER PENALTIES AND CIRCULAR 230 ENFORCEMENT § 1:2 (2022) (discussing practice regulations); Durst, *The Tax Lawyer’s Professional Responsibility*, *supra* note 61, at 1049–50 nn.80–81.

<sup>98</sup> *See* 31 C.F.R. § 10.0(a) (2021). “Practice before the Internal Revenue Service” is defined in 31 C.F.R. § 10.2(a)(4). However, that definition is limited by 31 U.S.C. § 330, which authorizes the Treasury to regulate certain representatives.

<sup>99</sup> 31 C.F.R. §§ 10.20 (furnishing non-privileged information), 10.22 (diligence), 10.23 (promptness), 10.29 (conflicts of interest), 10.35 (competence) (2021).

<sup>100</sup> 31 C.F.R. §§ 10.21 (knowledge of client’s errors), 10.33 (best practices for tax advisors), 10.34 (standards for tax returns), § 10.37 (requirements for written advice) (2021).

<sup>101</sup> *See* 31 C.F.R. § 10.3(a)–(b), 31 Fed. Reg. 10,773, 10,774 (Aug. 13, 1966).

advising nor return preparation were.<sup>102</sup> However, if a lawyer was otherwise practicing before the Service, Circular 230 imposed duties with respect to preparing returns.<sup>103</sup> Beginning in 1984, Treasury began expanding its regulation of those who were already subject to Circular 230. First, it asserted that it had the authority to regulate the substance of tax shelter opinions issued by persons subject to Circular 230.<sup>104</sup> Two years later, Treasury proposed to extend that authority to a substantive standard for the advice such persons gave regarding tax return positions.<sup>105</sup> That these requirements applied only to those lawyers otherwise subject to Circular 230 was an obvious gap in coverage, but it was considered to mark the extent of Treasury's authority in this area.<sup>106</sup>

Over the next three decades, Treasury expanded its regulation of tax professionals, and though there were robust debates with the tax bar as to the technicalities of the regulation, most of the tax bar supported Treasury's expansion, and only a few complained of a conflict of interest or raised other issues.<sup>107</sup> This history is exceptionally complicated.<sup>108</sup> At the height of Treasury's claimed authority, it redefined "practice before" the Service (and thus subsection to Circular 230) in 2007 to include written tax advice and,

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<sup>102</sup> Before 1984, the exclusion of return preparation was explicit in § 10.2, see 31 C.F.R. § 10.2, 31 Fed. Reg. at 10,775, and then, after 1984, it was found in § 10.7. See 31 C.F.R. § 10.7(c), 49 Fed. Reg. 6719, 6722 (Feb. 23, 1984).

<sup>103</sup> 31 C.F.R. § 10.2(a), 31 Fed. Reg. at 10,733–34 (amended by 42 Fed. Reg. 38,350, 38,352 (July 28, 1977)); 37 Fed. Reg. 1016, 1017 (Jan. 21, 1972)); 31 C.F.R. § 10.22.

<sup>104</sup> The new § 10.33 required a factual inquiry and additionally required that there be an opinion expressed on each material issue, relating the law to the facts, and that the position taken would not be unreasonable based on the practitioner's knowledge and experience. 31 C.F.R. § 10.33, 49 Fed. Reg. at 6722–23.

<sup>105</sup> Prop. Reg. §§ 10.22, 10.34, 51 Fed. Reg. 29,113 (Aug. 14, 1986) (proposed regulations to be promulgated at 31 C.F.R. pt. 10). One did not need to be admitted to practice before the IRS in order to prepare returns.

<sup>106</sup> See, e.g., Schlenger, *Comments on the Proposed Regulations*, *supra* note 49, at 180; ABA Sec. of Tax'n, *Statement on Proposed Rule Amending Circular 230 with Respect to Tax Shelter Opinions*, 34 TAX LAW. 745, 747–48 (1981).

<sup>107</sup> On the debate over the technical details, see, e.g., 1987 Wolfman Letter, *supra* note 46; *IRS Urged to Rewrite Proposal Tying Ethics Standard for Tax Return Preparers to Taxpayer Understatement Penalty*, DAILY REP. FOR EXECs. (BNA), Feb. 24, 1987, at K-1; Doug Briggs, *Tax Attorneys Debate Merits of Amendment to Circular 230*, 35 TAX NOTES 635 (May 18, 1987); Lin M. Trucksess, Note, *Painting the Gray Zone Grayer: Why Substantial Authority Fails As A Replacement for the Reasonable Basis Standard in Assessing Practitioner Conduct Under Circular 230*, 8 VA. TAX REV. 743, 745–748 (1989). For evidence of support and resistance to Treasury's expanding role, see, e.g., N.Y. St. Bar Ass'n Tax Section, *Circular 230 and the Standards Applicable to Tax Shelter Opinions*, 12 TAX NOTES 251, 261 (Feb. 9, 1981); *Incoming Treasury Letters: Proposed Regulations on Tax Shelter Opinions Said to Threaten Adversary System*, 11 TAX NOTES 1009 (Nov. 24, 1980); Gimenez, *Tax Shelter Opinions*, *supra* note 50, at 46; Marsan, *Tax Shelter Opinions*, *supra* note 42, at 254–55.

<sup>108</sup> See Hatfield, *1965–1985*, *supra* note 24, at 699–714; Hatfield, *1985–2015*, *supra* note 24, at 846–90, 896–909.

in 2011, to include return preparation.<sup>109</sup> These changes effectively united tax lawyers, CPAs, and return preparers into something like a single tax profession covered by the same professional standards enforced by the same authority. Yet, this was not to last. In two cases, courts ruled that Treasury's redefinition of "practice before" the Service to include return preparation exceeded the statutory authority to regulate "representatives."<sup>110</sup> The logic of the opinions in those cases brought into question whether merely providing written tax advice amounted to "practice before" the Service. A third case made it seem the most likely answer was "no."<sup>111</sup> Reflecting on the undermining of Treasury's authority, one prominent tax lawyer said that Circular 230 had gone from being "sacrosanct" to being "completely called into question."<sup>112</sup> Indeed, the former Director of the Office of Professional Responsibility, the person charged with enforcing Circular 230, said that Treasury's authority in this regard had been eviscerated.<sup>113</sup> Much of a 30-year expansion of Treasury's regulation of tax practitioners, built on countless hours of work not only by Treasury workers, but also by bar committee members, now hangs on Congressional authorization, which has yet to be given.<sup>114</sup>

### B. *Informal Duties and Advice*

Before the development of formal opinions and standards, there were informal analyses of how tax lawyers should do their job. These continued to develop after formal opinions and standards were adopted, for example,

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<sup>109</sup> T.D. 9359, 72 Fed. Reg. 54,540, 54,545 (Sept. 26, 2007)); T.D. 9527, 76 Fed. Reg. 32,286 (June 3, 2011); Richard M. Lipton, *New Circular 230 Guidance Is Broad—And May Prove to Be Controversial*, 115 J. TAX'N 61, 61 (2011); Patrick E. Toland, Jr., *It's About Time: Registration and Regulation Will Boost Competence and Accountability of Paid Tax Preparers*, 31 VA. TAX REV. 471, 473–75 (2012).

<sup>110</sup> *Loving v. Internal Revenue Service*, 917 F. Supp. 2d 67, 69 (D.D.C. 2013), *aff'd*, 742 F.3d 1013, 1022 (D.C. Cir. 2014); *Ridgely v. Lew*, 55 F. Supp. 3d 89, 90 (D.D.C. 2014); William Garofalo, *The Many Problems of Circular 230*, 126 J. TAX'N 207, 208–09 (2017); Jamie P. Hopkins, *Loving v. IRS: The IRS's Achilles' Heel for Regulated Tax Advice?*, 34 VA. TAX REV. 191, 191–92 (2014); Steve R. Johnson, *Loving and Legitimacy: IRS Regulation of Tax Return Preparation*, 59 VILL. L. REV. 515, 520 (2014).

<sup>111</sup> *Sexton v. Hawkins*, 2017-1 U.S.T.C. ¶ 50,181, at 83,424–25, 119 A.F.T.R.2d 1187, 1191–92 (D. Nev. 2017); SALTZMAN & BOOK, IRS PRAC. & PROC. ¶ 1.09, *supra* note 92.

<sup>112</sup> Amy S. Elliot, *Hawkins Asserts Her Authority to Regulate Lawyers, CPAs*, 147 TAX NOTES FED. 516, 517 (May 4, 2015) (remarks of Richard M. Lipton, Baker McKenzie).

<sup>113</sup> Karen L. Hawkins, *2017 Erwin N. Griswold Lecture Before the American College of Tax Counsel: A (Not So) Modest Proposal*, 70 TAX LAW. 647, 652 (2017).

<sup>114</sup> Congress could overturn the results in these cases, or more generally authorize the regulation of tax professionals by Treasury, through a broadening of the provisions of 31 U.S.C. § 330.

yielding written guidelines to teach newer tax lawyers practice norms.<sup>115</sup> The hallmark of these informal guidelines was the focus on preparation, skills, and norms, rather than the risk of penalties or other sanctions.

### 1. *The Successful Tax Lawyer*

The seminal moment for these informal attempts to provide advice in this regard was the 1951 Tax Law Review banquet exploring what makes a successful tax lawyer. The foundation was a good law school education, as tax lawyers are faced with an exceptional variety of non-tax legal issues.<sup>116</sup> There must be a commitment to reading the “steady-flowing river of texts, services, and articles” about taxation that “any tax expert, who is unfortunately required to earn his living while trying to maintain his expertness” must read to keep up to date.<sup>117</sup> The successful tax lawyer must know the Internal Revenue Code “at least as well as a minister knows his Bible,” and also regulations, rulings, and cases, and the “suggestion and criticism and dogma” of the magazines, law reviews, and other periodicals.<sup>118</sup> The successful tax lawyer must accept the need to do “more research on specific problems than is required of his brethren in general practice,” and that the “economic justification is that he will spend less additional time for his client on those phases of his work than the general practitioner will spend in finding the tax law.”<sup>119</sup> The successful tax lawyer must work well with partners, assistants, and experts in the fields of accounting, engineering, and economics, and also develop the ability to communicate well, avoiding “verbosity and pomposity.”<sup>120</sup>

### 2. *Client Expectations*

Prominent tax lawyers explained that clients come with such confidence in the lawyer’s mastery of technicalities that they tend not to disclose relevant facts.<sup>121</sup> The lawyer, having no technical “bag of tricks,” must then work to dig up the client’s facts, like “a miner who digs up mounts of earth to reach

<sup>115</sup> See Corneel, *Ethical Guidance*, *supra* note 41; Comm. On Standards of Tax Prac., ABA Tax Sec., *Guidelines to Tax Practice*, 31 Tax Law. 551, 554–55 (1978). For a similar guide for non-lawyers in the tax law office, see Frederic G. Corneel, *The Code and the Law Firm*, 63 A.B.A. J. 570 (1977). Circular 230 § 10.33 describes best practices for tax advisors and should also be seen as one example of these types of guidelines. 31 C.F.R. § 10.33 (2021).

<sup>116</sup> *What Makes A Successful Tax Lawyer*, *supra* note 26, at 4.

<sup>117</sup> *What Makes A Successful Tax Lawyer*, *supra* note 26, at 2–3.

<sup>118</sup> *What Makes A Successful Tax Lawyer*, *supra* note 26, at 2; Paul, *The Responsibilities*, *supra* note 26, at 378.

<sup>119</sup> *What Makes A Successful Tax Lawyer*, *supra* note 26, at 4.

<sup>120</sup> *What Makes A Successful Tax Lawyer*, *supra* note 26, at 7, 10.

<sup>121</sup> Norris Darrell, *Some Responsibilities of the Tax Adviser in Regard to Tax Minimization Devices*, 8 N.Y.U. ANN. INST. ON FED. TAX’N 983, 983–985 (1950) [hereinafter Darrell, *Some Responsibilities*]; Merle H. Miller, *Morality in Tax Planning*, 10 N.Y.U. ANN. INST. ON FED. TAX’N. 1067, 1074–75 (1952) [hereinafter Miller, *Morality in Tax*].

the ore.”<sup>122</sup> The facts must be determined in order to “to identify a transaction by its right name.”<sup>123</sup> The most important facts to determine are the client’s non-tax goals, as clients are often overly influenced by the idea of saving taxes and too willing to go off on “screwy tantrums, diverting their energies into non-productive tax avoidance activities.”<sup>124</sup> The successful tax lawyer will put the tax and non-tax aspects “before his client in their proper light so that the client may be guided toward a wise decision.”<sup>125</sup>

### 3. *Advising*

Commentators emphasized that guiding the tax client is often difficult because the lawyer is often in relatively unexplored legal territory.<sup>126</sup> It is the problems that do not permit categorical solution that are most likely to be submitted to the tax lawyer, yet the lawyer must be decisive and never “equivocal or wishy-washy.”<sup>127</sup> Even where the “suggested answer is no more than an informed guess, the practitioner is not excused from stating his position—with an appropriate caveat, of course.”<sup>128</sup> In advising clients, the successful tax lawyer considers legal history and Congressional purpose and searches for the “underlying substance and basic realities.”<sup>129</sup> Others emphasized the importance of “developing a sense of moral fairness” alongside technical knowledge of the Code, to keep the client out of trouble as that moral sense and ultimate legal effectiveness often shade into one another.<sup>130</sup> One talked about the need for a tax lawyer to think “with his profound intestines” when giving tax advice.<sup>131</sup> Several mentioned the need for a plan to pass a “smell test.”<sup>132</sup> One commentator divided legitimate tax advice from “a smart aleck’s gimmicks.”<sup>133</sup>

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<sup>122</sup> Darrell, *Some Responsibilities*, *supra* note 121, at 985; Miller, *Morality in Tax*, *supra* note 121, at 1074–75.

<sup>123</sup> Darrell, *Some Responsibilities*, *supra* note 121, at 985.

<sup>124</sup> *What Makes A Successful Tax Lawyer*, *supra* note 26, at 14; Miller, *Morality in Tax*, *supra* note 121, at 1076; Darrell, *Some Responsibilities*, *supra* note 121, at 983–85, 988.

<sup>125</sup> Darrell, *Some Responsibilities*, *supra* note 121, at 988.

<sup>126</sup> *What Makes A Successful Tax Lawyer*, *supra* note 26, at 9.

<sup>127</sup> *What Makes A Successful Tax Lawyer*, *supra* note 26, at 7.

<sup>128</sup> *What Makes A Successful Tax Lawyer*, *supra* note 26, at 7.

<sup>129</sup> Paul, *The Responsibilities*, *supra* note 26, at 378–79, 381, 385; Darrell, *Some Responsibilities*, *supra* note 121, at 988.

<sup>130</sup> Miller, *Morality in Tax*, *supra* note 121, at 1077; Bittker, *Professional Responsibility*, *supra* note 29, at 101.

<sup>131</sup> Paul, *The Responsibilities*, *supra* note 26, at 379.

<sup>132</sup> See *What is Good Tax Practice: A Panel Discussion*, 21 N.Y.U. ANN. INST. ON FED. TAX’N. 23, 38, 43 (1963) [hereinafter *What is Good (Panel Discussion)*].

<sup>133</sup> George Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 COLUM. L. REV. 1553, 1586 (1980).

One prominent lawyer emphasized that the good tax lawyer must “only too often turn down the fashionable device of the moment.”<sup>134</sup> Another explained:

The escaped tax, a favorite topic of conversation at the best clubs and the most sumptuous pleasure resorts, expands with repetition into fantastic legends. But clients want opinions with happy endings, and he smiles best who smiles last. It is wiser to state misgivings at the beginning than to have to acknowledge them ungracefully at the end. The tax adviser has, therefore, to spend a large part of his time advising against schemes of this character. I sometimes think the most important word in his vocabulary is “No;” certainly he must frequently use this word most emphatically when it will be an unwelcome answer to a valuable client, and even when he knows that the client may shop for a more welcome answer in other offices which are more interested in pleasing clients than they are in rendering sound opinions.<sup>135</sup>

Another said a good tax lawyer spends nine tenths of the time killing off someone else’s bad tax scheme.<sup>136</sup> Eventually, so much time doing this has its impact.

As we grow old in the practice, this mortality rate bothers us less and less, and we come to suspect that the scheme is bad even before we have heard it. Once a man has become reconciled to the proposition that there is little new under the sun, this job of decimating someone else’s brain child becomes rather perfunctory, and even loses some of its zest.<sup>137</sup>

The same lawyer, however, added that, “Infanticide is as abhorrent in the intellectual, as in the physical realm,” and so while “[i]t is easy to kill off someone else’s scheme,” it is “most difficult to maintain that critical attitude with respect to one’s own creations.”<sup>138</sup>

But not all creative tax plans are to be dismissed. One commentator explained that, while the good tax lawyer “must only too often disappoint clients and only too often turn down the fashionable tax device of the moment,” he need not always “take a line so conservative that his clients drop off to more daring advisers.”<sup>139</sup> It is “inexcusable to frustrate appropriate and desirable action because of a lurking fear, born of confusion; only the

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<sup>134</sup> Darrell, *Some Responsibilities*, *supra* note 121, at 988.

<sup>135</sup> Randolph E. Paul, *The Lawyer as Tax Advisor*, 25 ROCKY MNTN. L. REV. 412, 416 (1953) [hereinafter Paul, *The Lawyer*].

<sup>136</sup> Miller, *Morality in Tax*, *supra* note 121, at 1075.

<sup>137</sup> Miller, *Morality in Tax*, *supra* note 121, at 1075.

<sup>138</sup> Miller, *Morality in Tax*, *supra* note 121, at 1076.

<sup>139</sup> BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 29, at 100; Darrell, *Some Responsibilities*, *supra* note 121, at 988.

incompetent will do that.”<sup>140</sup> Competent tax plans were infused not only with “care and caution,” but also “constructive imagination and ingenuity.”<sup>141</sup>

#### 4. *Duty to the Tax System*

There is today (and has long been) concern about the widespread failure of the ethics of tax lawyers and their clients.<sup>142</sup> Early on, this led several commentators to emphasize the relevance of the civic duties of taxpaying for both lawyers and their clients.<sup>143</sup> In that intense Cold War period, one described taxes as the rightful payment for “privilege of American citizenship” and thought that tax lawyers “contribut[e] greatly to the well-being of the country” by killing off “bad tax scheme[s].”<sup>144</sup> He did not think any lawyer should want to be known for drafting minutes giving “reasons for not paying out dividends” or writing “long instruments setting up tricky trusts.”<sup>145</sup> Another called taxation a “benefit, not a curse,” in that “we should never have had the money in the first place if it were not for the taxes.”<sup>146</sup> There were calls for revenue agents to be respected for their work in securing these benefits of government.<sup>147</sup> Of course, understanding that the revenue agents were themselves doing their patriotic duty did not mean they were to be given *carte blanche*, and, indeed, to do so would undermine the democratic system of government.<sup>148</sup> Rather, it was that the revenue agents and the tax lawyers

<sup>140</sup> Darrell, *Some Responsibilities*, *supra* note 121, at 988.

<sup>141</sup> Darrell, *Some Responsibilities*, *supra* note 121, at 988.

<sup>142</sup> See *What Makes A Successful Tax Lawyer*, *supra* note 26, at 17–18; *Ethical Problems of Tax Practitioners: Transcript of the Tax Law Review’s 1952 Banquet*, 8 TAX L. REV. 1–2, 10, 14, 32 (1952) [hereinafter *Ethical Problems*]. This concern has been repeated throughout the decades. See, e.g., John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Advisor Professionalism in American Society*, 84 FORDHAM L. REV. 2721 (2016) [hereinafter Dzienkowski & Peroni, *The Decline*].

<sup>143</sup> See Mortimer M. Caplin, *What is Good Tax Practice: A Statement of the Problem and the Issues Involved*, 21 N.Y.U. ANN. INST. ON FED. TAX’N. 9, 9 (1963) [hereinafter Caplin, *What is Good*]; *Ethical Problems*, *supra* note 142, at 9; Norris Darrell, *Conscience and Propriety in Tax Practice*, 17 N.Y.U. ANN. INST. ON FED. TAX’N. 1, 23 (1959) [hereinafter Darrell, *Conscience and Propriety*]; Robert N. Miller, *Human Elements in the Federal Tax System*, 10 N.Y.U. ANN. INST. ON FED. TAX’N 1049, 1050 (1952) [hereinafter Miller, *Human Elements*]; Peter James Wikel, *Grandfather Paid Taxes Too*, 37 TAXES 329 (1959).

<sup>144</sup> Merle H. Miller, *A Taxpayer’s Duty to his Fellow Taxpayers*, 19 N.Y.U. ANN. INST. ON FED. TAX’N. 1, 9 (1961); Miller, *Morality in Tax*, *supra* note 121, at 1076.

<sup>145</sup> Miller, *Morality in Tax*, *supra* note 121, at 1075.

<sup>146</sup> Erwin N. Griswold, *The Blessings of Taxation: Recent Trends in the Law of Federal Taxation*, 36 A.B.A. J. 999, 1002 (1950).

<sup>147</sup> *What Makes A Successful Tax Lawyer*, *supra* note 26, at 9; Miller, *A Taxpayer’s Duty*, *supra* note 144, at 9; Miller, *Human Elements*, *supra* note 143, at 1050; Sellin, *Professional Responsibility*, *supra* note 41, at 608; *What is Good (Panel Discussion)*, *supra* note 132, at 23, 25.

<sup>148</sup> BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 29, at 268; Caplin, *What is Good*, *supra* note 143, at 13; Darrell, *Conscience and Propriety*, *supra* note 143, at 23; Sellin, *Professional Responsibility*, *supra* note 41, at 608.

had the same task: discerning the correct result “under the circumstances, and facts, and the applicable law.”<sup>149</sup>

In these early discussions, the question arose as to the similarity of tax lawyers to other lawyers. Do tax lawyers have a special duty to the tax system? There was general agreement that the tax system needed improvement and that tax lawyers had a duty to use their expertise in working for that improvement and not merely for their clients.<sup>150</sup> But what were their duties when working for clients? Once controversy began, and especially at the point of litigation, the professional standards for all lawyers were sufficient.<sup>151</sup> The hard questions were at the points of planning and compliance. In these situations, did the tax lawyer have special duties or responsibilities to the tax system, the government, the public?<sup>152</sup> Some very prominent legal academics and tax lawyers answered “no,” insisting that the standards for all lawyers are always sufficient.<sup>153</sup> Others argued that the self-assessment nature of the tax system, and specifically the need to avoid exploiting the audit lottery, raised issues not encountered by other lawyers, and thus claimed tax lawyers had special duties if the self-assessment tax system were to work.<sup>154</sup> Some believed

<sup>149</sup> Johnnie M. Walters, *Ethical and Professional Responsibilities of Tax Practitioners*, 17 GONZ. L. REV. 23, 26 (1981) [hereinafter Walters, *Ethical and Professional*].

<sup>150</sup> See *What Makes A Successful Tax Lawyer*, *supra* note 26, at 17; Miller, *A Taxpayer's Duty*, *supra* note 144, at 7; Sidney I. Roberts et al., *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 325, 327–331, 367–73 (1972) [hereinafter Roberts et al., *A Report on Complexity*]; Paul, *The Lawyer*, *supra* note 135, at 434; Mark H. Johnson, *Does the Tax Practitioner Owe a Dual Responsibility to his Client and to the Government?—The Theory*, 15 MAJOR TAX PLAN. 25, 36 (1963) [hereinafter Johnson, *Does the Tax Practitioner Owe*].

<sup>151</sup> The ABA PR Committee addresses return positions and tax shelter opinions, never controversy or litigation. As the debate over the duty to the system emerged, the debate was centered on planning and compliance. See Hatfield, *1945–1965*, *supra* note 24, at 15–28.

<sup>152</sup> See, e.g., Cahn et al., *Ethical Problems*, *supra* note 142, at 9–10; Miller, *Morality in Tax*, *supra* note 121, at 1081–83; Miller, *A Taxpayer's Duty*, *supra* note 144, at 5; *What is Good (Panel Discussion)*, *supra* note 132, at 25, 27–29; BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 29, at 95, 241; Johnson, *Does the Tax Practitioner Owe*, *supra* note 150; Milton Young, *Does the Tax Practitioner Owe a Dual Responsibility to His Client and to the Government?—The Practice*, 15 MAJOR TAX PLAN. 39 (1963); John Potts Barnes, *The Lawyer and the Voluntary Assessment System*, 40 TAXES 1034, 1036 (1962) [hereinafter Barnes, *The Lawyer*]; John M. Maguire, *Conscience and Propriety in Lawyer's Tax Practice*, 13 TAX L. REV. 27, 44 (1957) [hereinafter Maguire, *Conscience and Propriety*]; Darrell, *Conscience and Propriety*, *supra* note 143, at 2; Mortimer M. Caplin, *Responsibilities of the Tax Adviser—A Perspective*, 40 TAXES 1030, 1032 (1962); Sellin, *Professional Responsibility*, *supra* note 41, at 585; Sax, *Lawyer Responsibility*, *supra* note 42, at 30; Walters, *Ethical and Professional*, *supra* note 149, at 25–26; Garbis, *The Tax Professional*, *supra* note 42, at 23–24.

<sup>153</sup> BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 29, at 267–69; Johnson, *Does the Tax Practitioner Owe*, *supra* note 150, at 28; Barnes, *The Lawyer*, *supra* note 152, at 1039; Paul, *The Lawyer*, *supra* note 135, at 425; Maguire, *Conscience and Propriety*, *supra* note 152, at 48.

<sup>154</sup> See, e.g., Maguire, *Conscience and Propriety*, *supra* note 152, at 30, 44–48; Miller, *Morality in Tax*, *supra* note 121, at 1083; Miller, *A Taxpayer's Duty*, *supra* note 144, at 7; Darrell, *Conscience*

that being enrolled to practice before the Service under Circular 230 entailed special responsibilities.<sup>155</sup> Several prominent commentators dismissed the debate on pragmatic grounds, confident that practicing on the borderline where ethical questions arose was neither good practice nor good business.<sup>156</sup> Conservative tax advice protected the clients and the tax system.<sup>157</sup>

Several of the issues motivating this original debate were eventually at least somewhat resolved by formal rules and standards, such as the accuracy-related penalty standards, or Treasury and the courts refining who is subject to Circular 230 and what that requires. Yet, the debate over a more encompassing duty to the system has endured.<sup>158</sup> Contemporary casebooks on tax lawyer ethics mention the special duty on page one.<sup>159</sup>

### III. Qualitative Empirical Method of Study

There have been more than 500 empirical studies of ethical decision-making in business contexts.<sup>160</sup> That research includes studies of tax practitioners. Empirical research on tax practitioners showed that communicating professional ethical standards had a positive effect on their decision-making.<sup>161</sup> Empirical research established that the majority of CPAs

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*and Propriety*, *supra* note 143, at 2; Roberts et al., *A Report on Complexity*, *supra* note 150, at 330; Nolan, *Audit Coverage*, *supra* note 42, at 426–27; Sellin, *Professional Responsibility*, *supra* note 41, at 597–98; Sax, *Lawyer Responsibility*, *supra* note 42, at 36–38; Walters, *Ethical and Professional*, *supra* note 149, at 28–29, 34–37; Patterson, *Tax Shelters for the Client*, *supra* note 49, at 1171.

<sup>155</sup> *Ethical Problems*, *supra* note 142, at 10; Maguire, *Conscience and Propriety*, *supra* note 152, at 45, 48.

<sup>156</sup> *What is Good (Panel Discussion)*, *supra* note 132, at 27–29; Johnson, *Does the Tax Practitioner Owe*, *supra* note 150, at 37.

<sup>157</sup> *What is Good (Panel Discussion)*, *supra* note 132, at 27–29; Johnson, *Does the Tax Practitioner Owe*, *supra* note 150, at 25–29, 38, 39–40 [NOTE TO AUTHORS: IS THIS THE RIGHT PIN CITE? THE ARTICLE ENDS AT P.37]; Roberts et al., *A Report on Complexity*, *supra* note 150, at 331, 369.

<sup>158</sup> See, e.g., Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 U. KAN. L. REV. 847, 851, 871, 909 (1999); Camilla E. Watson, *Legislating Morality: The Duty to the Tax System Reconsidered*, 51 U. KAN. L. REV. 1197 (2003); David M. Schizer, *Enlisting the Tax Bar*, 59 TAX L. REV. 331, 338 (2006); Richard Lavoie, *Am I My Brother's Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession*, 44 LOY. U. CHI. L.J. 813, 864 (2013); Dzienkowski & Peroni, *The Decline*, *supra* note 142, at 2753; Richard A. Shaw, *2020 Erwin N. Griswold Lecture before the American College of Tax Counsel: Tomorrow Is Another Day—How Did We Get Here Ethically*, 73 TAX LAW. 753, 757 (2020).

<sup>159</sup> Bernard Wolfman, Deborah H. Schenk, & Diane Ring, *Ethical Problems in Federal Tax Practice* 1 (2008); Galler & Lang, *Regulation*, *supra* note 56, at 1.

<sup>160</sup> Kevin Lehnert et al., *The Human Experience of Ethics: A Review of a Decade of Qualitative Ethical Decision-Making Research*, BUS. ETHICS: A EUROPEAN REV., Oct. 2016, at 498 [hereinafter Lehnert, *The Human Experience of Ethics*].

<sup>161</sup> Darius Fatemi et al., *The Influence of Ethical Codes of Conduct on Professionalism in Tax Practice*, 164 J. BUS. ETHICS 133, 144 (2020).

followed professional ethical standards in return preparation.<sup>162</sup> Empirical researchers developed an instrument to measure ethical reasoning in tax contexts.<sup>163</sup> Using that instrument, they found that tax professionals' training and socialization affected their moral reasoning and that, generally, their moral reasoning was at lower levels in professional scenarios than in social scenarios.<sup>164</sup> The same researchers found no evidence of a significant difference between the moral reasoning of accountants in Big Four tax practices and those working in smaller firms.<sup>165</sup> In research on moral reasoning orientation, tax practitioners showed a more marked deontological orientation in tax scenarios than in social scenarios.<sup>166</sup> In a comparison of UK and Turkish tax practitioners, both groups were shown to value obeying the law and being able to publicly defend tax planning.<sup>167</sup> Another empirical study found that partners in CPA firms rated their firms' ethical environments stronger than did the non-partner tax practitioners in the firms.<sup>168</sup> And another study showed that increased job satisfaction makes tax practitioners more likely to recognize ethical issues in work situations.<sup>169</sup>

Interesting as these studies of tax practitioners are, none cover U.S. tax lawyers. Indeed, despite several decades of academic, professional, and government discussion of professional standards for tax lawyers, there have been almost no empirical studies on tax lawyers engaged in tax planning or return preparation.<sup>170</sup> In 1969, a survey of Connecticut lawyers was the basis

<sup>162</sup> Evelyn C. Hume et al., *On Compliance with Ethical Standards in Tax Return Preparation*, 18 J. BUS. ETHICS 229, 235 (1999).

<sup>163</sup> Elaine Doyle et al., *Research Methods in Taxation Ethics: Developing the Defining Issues Test (DIT) for a Tax-Specific Scenario*, 88 J. BUS. ETHICS 35, 35 (2009).

<sup>164</sup> Elaine Doyle et al., *An Empirical Analysis of the Ethical Reasoning of Tax Practitioners*, 114 J. BUS. ETHICS 325, 325 (2013).

<sup>165</sup> Elaine Doyle et al., *Ethics in Tax Practice: A Study of the Effect of Practitioner Firm Size*, 122 J. BUS. ETHICS 623, 638 (2014) [hereinafter Doyle, *Ethics in Tax Practice*].

<sup>166</sup> Jane Frecknall-Hughes et al., *An Examination of Ethical Influences on the Work of Tax Practitioners*, 146 J. BUS. ETHICS 729, 741 (2017).

<sup>167</sup> Mehmet Demirbag et al., *Ethics and Taxation: A Cross-National Comparison of UK and Turkish Firms*, 22 INT'L BUS. REV. 100, 109 (2013).

<sup>168</sup> Donna D. Bobek et al., *The Ethical Environment of Tax Professionals: Partner and Non-Partner Perceptions and Experiences*, 92 J. BUS. ETHICS 637, 637 (2010).

<sup>169</sup> Scott A. Yetmar & Kenneth K. Eastman, *Tax Practitioners' Ethical Sensitivity: A Model and Empirical Examination*, 26 J. BUS. ETHICS, 271, 283 (2000).

<sup>170</sup> There have been some very influential empirical studies of commercial return preparers in the U.S., but the preparers were not lawyers. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-563T, PAID TAX RETURN PREPARERS: IN A LIMITED STUDY, CHAIN PREPARERS MADE SERIOUS ERRORS (2006); TREAS. INSP. GEN. FOR TAX ADMIN., Ref. No. 2008-40-171, MOST TAX RETURNS PREPARED BY A LIMITED SAMPLE OF UNENROLLED PREPARERS CONTAINED SIGNIFICANT ERRORS, (Sept. 3, 2008). It appears that the only contemporary empirical study of U.S. tax lawyers in the academic legal literature is Leandra Lederman & Warran B. Hrungr, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235 (2006).

for an article on teaching professional responsibility to tax law students.<sup>171</sup> In 1972, a researcher surveyed Boston tax practitioners to develop guidelines for young attorneys entering tax practice.<sup>172</sup> In light of the more than 500 empirical studies in the time since these two surveys were completed, the reason for the paucity of empirical studies of U.S. tax lawyers is itself perhaps worthy of study.

Of those empirical studies of ethical decision-making in business contexts, well over 100 have been qualitative rather than quantitative studies.<sup>173</sup> The quantitative method is used to investigate how often something happens, while the qualitative method investigates how it happens.<sup>174</sup> Qualitative studies are aimed at providing detailed perspectives on complex social realities that would be difficult to capture quantitatively.<sup>175</sup> Qualitative research usually involves interviews or focus groups.<sup>176</sup> This makes it an interactive exploration between the researcher and participants.<sup>177</sup> It is particularly well-suited for studying ethical values, attitudes, and understandings, as it uncovers meanings and intentions and interrelated processes that guide decisions.<sup>178</sup> A leader in qualitative research put the purpose in more basic terms: “the point of qualitative research is to have people say interesting things and analyze those interesting things that they say.”<sup>179</sup>

### A. Study Purpose

With qualitative research especially fit for the subject, we set out to nudge interesting tax lawyers into saying interesting things about their professional duties and conflicts, and then to analyze what they said. This is a significant departure from how scholarship on the professional ethics of U.S. tax lawyers is usually produced.<sup>180</sup> The usual approach is to develop an argument about

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<sup>171</sup> Leslie B. Snyder, *Teaching Professional Responsibility in Tax Courses*, 41 U. COLO. L. REV. 336, 338 (1969).

<sup>172</sup> Corneel, *Ethical Guidelines*, *supra* note 41, at 5.

<sup>173</sup> Lehnert, *The Human Experience of Ethics*, *supra* note 160, at 498.

<sup>174</sup> SVEND BRINKMAN & STEINER KVALE, INTERVIEWS: LEARNING THE CRAFT OF QUALITATIVE RESEARCH PUBLISHING 140 (2015) [hereinafter BRINKMAN & KVALE, INTERVIEWS].

<sup>175</sup> Lehnert, *The Human Experience of Ethics*, *supra* note 160, at 528; BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 288.

<sup>176</sup> Lehnert, *The Human Experience of Ethics*, *supra* note 160, at 502.

<sup>177</sup> Lehnert, *The Human Experience of Ethics*, *supra* note 160, at 499.

<sup>178</sup> Lehnert, *The Human Experience of Ethics*, *supra* note 160, at 499–501, 501, 504, 526–28.

<sup>179</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 141. Svend Brinkman is a Director of the Center for Qualitative Studies at Aalborg University, Denmark. Center for Kvalitative Studier, <https://vbn.aau.dk/en/organisations/center-for-kvalitative-studier> [<https://perma.cc/S9TB-NJL8>].

<sup>180</sup> The lack of empirical studies of tax lawyer ethics, generally, has been mentioned above. The use of interviews in the tax field is not unknown. For example, interviews have been used in studying the legislative process. Shu-Yi Oei & Leigh Osofsky, *Constituencies and Control in*

relevant professional standards or propose solutions to problems. But we set out to prepare the ground for improving our understanding of who tax lawyers are, how they experience ethical conflicts in their practice, and how they discuss their ethical duties.

We had three research questions. Our first question was: who are U.S. tax lawyers? We were motivated by the scarcity of information on the number of tax lawyers, their demographics, credentials, and locations, or the variety of their practices. Our selection of participants, and our study of their situations and our discussions about their backgrounds were expected to be preparatory to further study of the tax bar.

Our second question: how do U.S. tax lawyers experience ethical tensions? For these purposes, we were interested in their experiences of conflict between principles or expectations or with persons to whom the lawyer owes duties. What did they experience in failing to meet client expectations? When advising without much certainty? When writing a formal opinion? When billing clients? Were there intra-firm tensions?

With our third question we asked: how is it that lawyers discuss ethical duties? Do they use the formal standards of ABA Formal Opinions, such as “realistic possibility of success?” Or the formal standards of the penalty statutes, such as “substantial authority?” Do they invoke patriotism and civic duties and a special duty to the tax system? Do they talk about these duties as if they are rarely or commonly fulfilled by others? Do they use words lawyers commonly use, or do they use more tax-profession-specific words?

## B. *Study Methodology*

Although this research is not intended to be its U.S. equivalent, it is similar methodologically to a set of interviews of Irish tax practitioners about their perceptions of ethics in tax practice.<sup>181</sup> Those interviews were used in two studies. In one, those interviews were combined with similar interviews of tax practitioners in the UK, and, in the other, the interviews were combined with a test of moral reasoning.<sup>182</sup> The first was a study of the link between ethics and risk management, and the second a study of the impact of firm size on moral reasoning.<sup>183</sup>

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*Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. R. 1291 (2019). Legal scholars have used the method in other fields. See, e.g., Zahr K. Said, *Craft Beer and the Rising Tide Effect: An Empirical Study of Sharing and Collaboration among Seattle's Craft Breweries*, 23 LEWIS & CLARK L. REV. 355 (2019).

<sup>181</sup> See Elaine M. Doyle, Jane Freckall Hughes & Keith W. Glaister, *Linking Ethics and Risk Management in Taxation: Evidence from an Exploratory Study in Ireland and the UK*, 86 J. OF BUS. ETHICS 177 (2009) [hereinafter Doyle, *Linking Ethics*].

<sup>182</sup> Doyle, *Linking Ethics*, *supra* note 181; Doyle, *Ethics in Tax Practice*, *supra* note 165, at 627–629.

<sup>183</sup> Doyle, *Linking Ethics*, *supra* note 181; Doyle, *Ethics in Tax Practice*, *supra* note 165, at 623.

Like the study on the link between ethics and risk management, this study is exploratory.<sup>184</sup> In some sense, especially as it is the first qualitative study of U.S. tax lawyers, it is preliminary.<sup>185</sup> For example, it does not test any hypotheses. We approached the project with a desire to discover rather than verify.<sup>186</sup> Our research attitude was pragmatic, aiming for a project that would prove useful to tax lawyers, teachers, and researchers.<sup>187</sup>

We used interviews because we were interested in the personal experiences of tax lawyers.<sup>188</sup> Our interest centered on how tax lawyers experience ethical tensions and how they discuss duties.<sup>189</sup> The project was not intended to quantify or to investigate differences.<sup>190</sup> We wanted rich data: revelations in detail of the lawyers' motivations and understandings and the context of their practices.<sup>191</sup> We wanted to give the readers "a sense of the complexity of the reality" of these lawyers' practices.<sup>192</sup> We needed interviewees who were likely to have rich experiences and the ability to discuss them meaningfully. Toward that end, like the Irish interviewers, we used purposive sampling, meaning we looked for what we expected to be information-rich cases.<sup>193</sup>

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<sup>184</sup> Exploratory research is concerned primarily with discovery. Lisa M. Given, *Exploratory Research*, in THE SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH METHODS (Lisa M. Given ed., 2008), available at <https://methods.sagepub.com/reference/sage-encyc-qualitative-research-methods/n166.xml> [<https://perma.cc/9MRJ-CRRX>] (last visited Feb. 22, 2022).

<sup>185</sup> Not all exploratory research sets-up subsequent research, but, as preliminary research, this project does. See Given, *supra* note 184.

<sup>186</sup> See *id.* As exploratory research, it is not confirmatory.

<sup>187</sup> See *id.* Exploratory research is often characterized by a pragmatic attitude. The pragmatic issue is whether or not the project proves useful to improving how humans cope with the world. BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 65.

<sup>188</sup> In empirical research, interviews are useful when human experience, especially questions of "how," are the subject matter. BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 127.

<sup>189</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 127.

<sup>190</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 127.

<sup>191</sup> See Doyle, *Ethics in Tax Practice*, *supra* note 165, at 627. "Rich" qualitative data reveals complexities. "Rather than merely recording events, people, and places," rich or "thick" descriptions are used "to present and explore the multifaceted complexities of the situation being studied, the intentions and motivations of the actors involved, and the context of the situation." Sherry Marx, *Rich Data*, in THE SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH METHODS (Lisa M. Given ed., 2008), available at <https://methods.sagepub.com/reference/sage-encyc-qualitative-research-methods/n408.xml> [<https://perma.cc/TR8E-4BB9>] (last visited Feb. 22, 2022).

<sup>192</sup> See Marx, *supra* note 191.

<sup>193</sup> Purposive sampling is "the deliberate seeking out of participants with particular characteristics, according to the needs of the developing analysis and emerging theory." Janice M. Morse, *Purposive Sampling*, in THE SAGE ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH METHODS (Michael S. Lewis-Beck et al. eds., 2004) available at <https://methods.sagepub.com/reference/the-sage-encyclopedia-of-social-science-research-methods/n774.xml?fromsearch=true> [<https://perma.cc/TN8Q-LVPH>] (last visited Feb. 22, 2022). "[T]heoretical sampling (in which participants are deliberately sought according to

We looked for quality of information, not quantity. The focus on the quality of the information means that the preparation before the interviews, and the analysis of the interviews, was more useful to our goals than simply increasing the number of interviews conducted.<sup>194</sup> We were not interested in a large sample size. With the importance of the preparation and analysis, the number of interviews in a qualitative study is typically 5-25.<sup>195</sup> In the Irish research, there were ten interviewees.<sup>196</sup>

The ten Irish interviewees had been selected on the basis of likelihood of providing rich information: all were partners (or at a similar rank in an organization), and thus likely to have sufficient experience, and they came from varied types of firms such that their views were more likely to be generalizable.<sup>197</sup> The ten, assured of confidentiality, agreed to be interviewed in response to an email solicitation that broadly described the nature of the research.<sup>198</sup>

We decided to draw interviewees from among those lawyers who are board-certified as tax specialists. Board-certification was a practical way to ensure that the interviewees had a material amount of relevant experience and a practice centered on tax law. All certifying states require a minimum number of years in practice, a percentage of practice devoted to tax, professional references as to expertise, a substantive examination, and ongoing educational requirements.<sup>199</sup> These requirements ensured our interviewees were tax lawyers and not merely lawyers who occasionally practice or who occasionally were interested in tax issues, as a member of a

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information required by the analysis as the study progresses.”] The Irish interviewees used a blend of convenience (that is, at-hand) and purposive sampling. Doyle et al., *Linking Ethics*, *supra* note 181, at 177, 185.

<sup>194</sup> The idea that the more interviews the better would be a misunderstanding of the qualitative methodology. BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 140–41.

<sup>195</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 140–41.

<sup>196</sup> Doyle et al., *Linking Ethics*, *supra* note 181, at 185.

<sup>197</sup> Doyle et al., *Linking Ethics*, *supra* note 181, at 185.

<sup>198</sup> Doyle et al., *Linking Ethics*, *supra* note 181, at 185.

<sup>199</sup> See *Standards For Certification Of Lawyers Specializing in Tax Law*, STATE BAR OF ARIZ. (Jan. 8, 2020), <https://www.azbar.org/media/mhbk3zko/tax-law-standards-approved-1-8-2020.pdf> [<https://perma.cc/5XHX-3FQF>]; *Legal Specialization*, THE STATE BAR OF CAL., <http://www.calbar.ca.gov/Attorneys/Legal-Specialization> [<https://perma.cc/8RRW-HELM>] (last visited Feb. 1, 2022); *Tax Law Certification*, THE FLA. BAR, <https://www.floridabar.org/about/cert/cert-applications-and-requirements/cert-tx/> [<https://perma.cc/Q4UY-PAT2>] (last visited Feb. 1, 2022); *Louisiana Board of Legal Specialization, Tax Law Standards*, LA. STATE BAR ASS'N (Jan. 18, 2020) <https://www.lsba.org/Specialization/TaxLaw.aspx?Area=Standards> [<https://perma.cc/BW94-NGZR>]; *Federal Taxation Law, Attorney Information and Standards*, OHIO STATE BAR ASS'N (Feb. 2018), <https://www.ohiobar.org/globalassets/cle-and-certification/2019-specialists-standards/fed-tax-standards.pdf> [<https://perma.cc/UW3G-JTLG>]; *Texas Board Of Legal Specialization, Standards For Attorney Certification*, STATE BAR OF TEX. (Nov. 8, 2018) <https://content.tbs.org/pdf/attstdtx.pdf> [<https://perma.cc/HSA5-SVRV>].

state bar tax section might be. As described below, almost all of our interviewees had more than 20 years' experience and were in firm sizes of one to over 1,000.

Limiting our potential interviewees to those who are board-certified meant only drawing from the six states that certify tax specialists: Arizona, California, Florida, Louisiana, Ohio, and Texas.<sup>200</sup> However, these states are not so unique that those practicing tax within them would not be of interest to those outside these states. These six states have 34% of the U.S. population; 31% of the lawyers; 35% of the personal income; 34% of the gross domestic product; and 335 of the Fortune 500 Companies.<sup>201</sup>

We counted 890 board-certified tax specialists (out of about 414,000 lawyers in these states).<sup>202</sup> The specialization boards maintain contact information for the persons certified.<sup>203</sup> We used this information to email potential interviewees with a short description of the project and an interview

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<sup>200</sup> *Supra* note 199.

<sup>201</sup> *Quick Facts, United States*, U.S. CENSUS BUREAU (July 1, 2021), <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/GH6N-A9TT>] (last visited Feb. 22, 2022); *GDP and Personal Income, Interactive Table*, BEA, (Oct. 1, 2021) <https://apps.bea.gov/iTable/iTable.cfm?reqid=70&step=1&isuri=1&acrdrn=1#> [<https://perma.cc/26VX-ZCEP>] (last visited Feb. 22, 2022); *Regional Data, GDP and Personal Income, Interactive Table*, BUR. ECON. ANAL. (BEA) (Oct. 1, 2021), <https://apps.bea.gov/iTable/iTable.cfm?reqid=70&step=1&isuri=1&acrdrn=1> [<https://perma.cc/RTP3-6BTS>] (last visited Feb. 22, 2022); *Fortune 500*, FORTUNE, <https://fortune.com/fortune500/2021/search> [<https://perma.cc/7UJA-HAPT>] (last visited Feb. 22, 2022).

<sup>202</sup> All counts and categorizations of board-certified tax lawyers were accurate as of Aug. 23, 2021. On the number of lawyers in these states, see *New ABA Data Reveals Rise in Number of U.S. Lawyers, 15 Percent Increase Since 2008*, AM. BAR ASS'N (2021), [https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new\\_aba\\_data\\_reveals/](https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals/) [<https://perma.cc/NW5J-HGG6>] (last visited Feb. 22, 2022).

<sup>203</sup> *Directory*, STATE BAR OF ARIZ., <https://www.azbar.org/for-lawyers/practice-tools-management/member-directory/> [<https://perma.cc/ZX6X-BZHP>] (last visited Feb. 1, 2022); *Certified Specialist Search*, THE STATE BAR OF CAL., [https://apps.calbar.ca.gov/members/ls\\_search.aspx](https://apps.calbar.ca.gov/members/ls_search.aspx) [<https://perma.cc/7QRY-RMSV>] (last visited Feb. 1, 2022); *Tax Law Certified Lawyers*, THE FLA. BAR, <https://www.floridabar.org/about/cert/cert-tx-mbrs/> [<https://perma.cc/TRX4-D7PJ>] (last visited Feb. 1, 2022); *Louisiana Board of Legal Specialization Specialists*, LA. STATE BAR ASS'N, <https://www.lsba.org/Specialization/Specialist.aspx?Spec=Tax> [<https://perma.cc/8PVD-3WN3>] (last visited Feb. 1, 2022) (using Ms./Mr.); *Attorney Directory*, OHIO STATE BAR ASS'N, <https://www.ohiobar.org/public-resources/find-a-lawyer/> [<https://perma.cc/CN9K-MK3L>] (last visited Feb. 1, 2022) (filter by "Certified Specialists Federal Taxation Law"); *Find a Lawyer, for the public*, STATE BAR OF TEX., [https://www.texasbar.com/AM/Template.cfm?Section=Find\\_A\\_Lawyer&Template=/CustomSource/MemberDirectory/Search\\_Form\\_Client\\_Main.cfm](https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&Template=/CustomSource/MemberDirectory/Search_Form_Client_Main.cfm) [<https://perma.cc/ZRE2-LQ8C>] (last visited Feb. 1, 2022) (scroll down to "Board Certified in" and select the dropdown menu; then select "tax law"; then click "submit").

request. We also used this information, along with the online biographies of potential interviewees, to select potential interviewees who were engaged in tax planning. We were interested only in specialists who were practicing in law firms.<sup>204</sup> Only 101 of the certified specialists are women (11.3%), and so we decided to first contact women who were board-certified, to ensure that the study included a fair number of accounts from women.<sup>205</sup> Thirty-eight of these women were not working in law firms, were working only in tax controversies, or were not actively practicing law.<sup>206</sup> Of the 63 board-certified women who were actively engaged in tax planning practice at law firms, 14 were interviewed (22.2%). Thus, while we started with a quota strategy, due to our time and resource constraints and the high positive response rate of the women, and bearing in mind the typical range of qualitative study sample sizes, we ended up interviewing a remarkable share of the women who are board-certified tax lawyers.<sup>207</sup>

As mentioned above, this research seeks to answer three research questions. Those questions were not posed to the interviewees. The research questions were for us to answer based on our analysis of the collective set of interviews.<sup>208</sup> In order to create a conversation likely to be useful to answering the research questions, the interviews were semi-structured with a set of open-ended questions.<sup>209</sup> The strategy was to use short questions to elicit long answers.<sup>210</sup> These interview questions generally were about the joys and stresses of practice, what distinguishes good and bad tax lawyers, what distinguishes good and bad tax plans, the duties of tax lawyers, advice for

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<sup>204</sup> As explained above, lawyers who are employed in accounting or other non-law firms are not authorized to practice law. *See supra*, Part II.A.1. (Bar).

<sup>205</sup> We counted as women those lawyers identified by “Ms.” in a directory or having typically feminine first names.

<sup>206</sup> These determinations were made on the basis of information provided in bar directories, firm websites, and, in some instances, by broader internet searches. Those counted as not actively practicing law include those listed in bar directories without information for an employer, email contact information, or a functioning website, as well as those indicated as not actively practicing law and those for whom internet searches provide no, or the most minimal, indication of current professional activity.

<sup>207</sup> Time constraints are a significant limitation on sample size; only so many interviews can be analyzed carefully. BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 139. Quota sampling is seeking a targeted number of interviews with a selected subgroup. Michael P. Battaglia, *Quota Sampling*, in ENCYCLOPEDIA OF SURVEY RESEARCH METHODS (Paul J. Lavrakas ed., 2008), <https://methods.sagepub.com/reference/encyclopedia-of-survey-research-methods/n431.xml?fromsearch=true> [<https://perma.cc/3RK8-LHBP>] (last visited Feb. 22, 2022). We did not have a specific number of interviews in mind, but we wanted to ensure women were included, and given the small number of board-certified tax specialists who were women coupled with our time constraints, we decided to conduct as many interviews as possible with women first.

<sup>208</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 158.

<sup>209</sup> *See Doyle, Ethics in Tax Practice, supra* note 165, at 627. BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 158.

<sup>210</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 192.

aspiring tax lawyers, and how situations demanding close professional judgements tend to arise and be resolved. The interviewer was not a pollster with a questionnaire. The goal was dynamic conversation.<sup>211</sup> In order to respond to spontaneous developments in the conversation, the interviewer did not stick to questions as if following a script.<sup>212</sup> The task of the interviewer was to participate in the conversation while guiding it towards relevance to the research questions.<sup>213</sup>

The interviews were conducted from May through October 2021. The interviews were conducted *via* Zoom with each one taking one-half to one hour. Some interviewees participated from their offices, and others from their homes. The interviewees consented to being recorded. The recordings were auto-transcribed. The transcripts were edited into standard written English, though some conversational expressions were retained to preserve the personal voice of the interviewees. The video recording was useful for resolving some transcription issues as it contained body language providing additional information regarding what was being communicated. Though the initial email to the interviewees provided the right to review and edit the transcript, no one asked to do so.

The transcripts were then coded: the text broken into units categorized by meaning.<sup>214</sup> This enabled the research questions to be answered.<sup>215</sup> The categories used were taken both directly from the interviews (data-driven) and from the relevant literature (concept-driven).<sup>216</sup> The relevant literature included the articles, bar opinions, laws, and regulations described above in Part II.<sup>217</sup>

Given the small number of board-certified tax lawyers who are women, their concentration in a small number of states, and the potentially sensitive nature of their remarks about their colleagues, clients, and conduct, steps have been taken to protect confidentiality. Unlike with the Irish interviews, there is no table setting out the firm profile of interviewees or the location of their practice.<sup>218</sup> References to practice locations have been minimized.

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<sup>211</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 218.

<sup>212</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 156.

<sup>213</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 165.

<sup>214</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 231.

<sup>215</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 231.

<sup>216</sup> Concept-driven coding uses codes developed in advance, while data-driven coding refers to the researcher developing the code from studying the interview. BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, at 227–28, 231.

<sup>217</sup> BRINKMAN & KVALE, INTERVIEWS, *supra* note 174, . at 313–15.

<sup>218</sup> See Doyle et al., *Linking Ethics*, *supra* note 181, at 186.

## IV. The Lawyers and the Interviews

### A. *The Lawyers*

The credibility of this study turns on the credibility of the interviewees. Thus, it is important to describe the experience, backgrounds, and specializations of the interviewees, along with their firm sizes. It also adds credibility to know something about the interviewees beyond what might be quantified: something of their personalities, what they enjoy about their practice, how they see themselves and the tax bar, and their perspective on the tax systems in which they work. Given that the interviews occurred during the COVID pandemic, the study would be incomplete without mentioning the pandemic's impact on the interviewees.

#### 1. *Qualifications, Personalities, and Specializations*

The interviewees tended to be very experienced: almost all of them (12 of 14) had more than 20 years' experience, and almost half (6 of 14) had more than 30 years'. One was a solo practitioner, four were in firms of no more than ten, three were in firms of 40-100, two were in firms of 150-499, and the remaining four were in firms of more than 500 lawyers. Their practices were all located in metropolitan statistical areas of more than one million, with more than half (8 of 14) in areas of more than five million and two in areas of more than ten million. Almost all of them (12 of 14) had LLM degrees in taxation. Three were also licensed as CPAs. The vast majority (10 of 14) had served in significant bar leadership positions (such as chairing committees). Over one-third (5 of 14) had taught tax law as adjunct faculty members.

They were extraordinarily generous to help with this project. With their busy practices, not to mention their billing rates, the lost opportunity costs were significant. Their willingness to be interviewed was obviously essential to the project. They expressed their interest in the project otherwise as well. Almost one-third were worried that their tax practice might not be sufficiently representative to be useful.<sup>219</sup> Others emphasized that their perspectives were particular to their practices.<sup>220</sup> One cautioned about the threat of an "unreliable narrator" to the research.<sup>221</sup> One recommended a book, and another forwarded relevant articles.<sup>222</sup>

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<sup>219</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #3, *supra* note 2; Interview Transcript #13 (October 7, 2021) (on file with authors); Interview Transcript #14 (October 18, 2021) (on file with authors).

<sup>220</sup> Interview Transcript #5 (July 7, 2021) (on file with authors); Interview Transcript #8 (July 16, 2021) (on file with authors).

<sup>221</sup> Interview Transcript #7, *supra* note 1.

<sup>222</sup> Interview Transcript #6 (July 7, 2021) (on file with authors); Interview Transcript #8, *supra* note 220.

At the end of each interview, the interviewer noted a word or two about the interviewee. Those words: friendly, informal, professional, thoughtful, loquacious, intense, concise, sophisticated, reflective, articulate, stressed, high energy, blunt, funny, polite, colorful, rambling, pleasant, and intimidating. One spoke of her interest in Florentine tax history, one was happy to chat about Southeastern Conference football, and another talked about “cocaine cowboys” and her former practice in criminal law.<sup>223</sup> They all enjoyed talking tax, and many talked about specific techniques and transactions.<sup>224</sup> One lectured the interviewer (at length) on the importance of a particular tax case, and another quickly criticized the interviewer’s topic coverage in a tax class.<sup>225</sup> “Shy” was not a label for any of the interviewees.

There was a mix of specializations among the interviewees: individual income taxation, estate planning, tax exempt organizations, mergers and acquisitions, business formations and transactions, investment partnerships and joint ventures, real estate, cross-border transactions, and state and local taxation. Given that almost all had practiced more than 20 years, and some close to twice that, they had a broad range of experiences. One said, “I’m old. I’ve been doing this a very long time. So, at this point I’ve kind of done it all.”<sup>226</sup> More than one-third had significant experience in state and local taxation. More than one-third had significant experience in controversy work. Others expressed their aversion to controversy work.<sup>227</sup> One was so averse to conflict that she even disliked negotiating transactions.<sup>228</sup> Another said, “I don’t ever, ever want to go to court. I don’t want to write a brief. I don’t want to petition. But give me a spreadsheet and I am your girl, you know.”<sup>229</sup> One highlighted how her type of work was dependent on the economy: if “M&A activity is in a lull and real estate is hot, I end up doing a lot more real estate partnerships and such.”<sup>230</sup> One somewhat complained of how sticky one’s reputation specialization can be; having started out working, writing, and speaking in international tax, but now focusing more in other areas, she is continually referred international work.<sup>231</sup> One doubted some tax lawyers were quite as specialized as they advertise: “when I came downtown

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<sup>223</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #6, *supra* note 222; Interview Transcript #13, *supra* note 219.

<sup>224</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #3, *supra* note 2; Interview Transcript #6, *supra* note 222; Interview Transcript #11 (September 28, 2021) (on file with authors).

<sup>225</sup> Interview Transcript #3, *supra* note 2; Interview Transcript #4 (July 6, 2021) (on file with authors).

<sup>226</sup> Interview Transcript #3, *supra* note 2.

<sup>227</sup> Interview #1, *supra* note 3; Interview Transcript #6, *supra* note 222; Interview Transcript #14, *supra* note 219.

<sup>228</sup> Interview Transcript #8, *supra* note 220.

<sup>229</sup> Interview Transcript #14, *supra* note 219.

<sup>230</sup> Interview Transcript #8, *supra* note 220.

<sup>231</sup> Interview Transcript #9 (July 16, 2021) (on file with authors).

I realized that all of these tax lawyers more senior and experienced than I was, lawyers I really respect, they do crap work too. . . . Their websites might say one thing, but they do what they need to pay the bills.”<sup>232</sup> Two expressed frustrations with others not understanding what it is they do.<sup>233</sup> With one, it was frustration with her colleagues: there are “1,000 lawyers here. And so the calls! The FBAR questions. Please don’t call me anymore on that. ‘Can you look at my 401k plan?’ No. ‘I have an ERISA question.’ ‘No.’”<sup>234</sup> But the other expressed it with her family: “Sometimes family members will ask me a question. I go, ‘yeah I guess that’s right.’ Then they’re like, ‘wait, aren’t you a tax lawyer?’ Yeah but I don’t know what the first-time homeowner’s exception is. That’s not what I do.”<sup>235</sup>

## 2. Professional Paths

The interviewees have varied professional paths. One started out in the military.<sup>236</sup> One had burnt out as a criminal lawyer.<sup>237</sup> Another had aspired to a law enforcement career.<sup>238</sup> Others wanted to avoid adversarial work.<sup>239</sup> One of these women said she was “very happy to have stumbled” into tax practice after applying to an LLM program only because the job market was terrible the year she graduated with her JD.<sup>240</sup> As mentioned, all but two of the interviewees had tax LLMs. One who did not questioned the importance of the advanced degree: she started work “for a pittance” in a tax boutique where her hard work and willingness to take the work others did not want paved her way to “the 40th floor.”<sup>241</sup> Another (who had the advanced tax degree) told a similar story about how she wound up with her particular expertise: her willingness to do work in an area no one else wanted, combined with volunteering to teach as an adjunct in that area in order to learn it better.<sup>242</sup> Two cited the influence of their introductory tax professors on their paths into tax. One said she fell in love with tax because her first tax professor “used the Internal Revenue Code like a jungle gym.”<sup>243</sup> Another said it was her first tax professor conveying the tax law’s “symmetry where the pieces kind of fit together” that got her interested in tax.<sup>244</sup> But, she added, it was

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<sup>232</sup> Interview Transcript #11, *supra* note 224.

<sup>233</sup> Interview Transcript #6, *supra* note 222.

<sup>234</sup> Interview Transcript #10 (July 16, 2021) (on file with authors).

<sup>235</sup> Interview Transcript #9, *supra* note 231.

<sup>236</sup> Interview Transcript #4, *supra* note 225.

<sup>237</sup> Interview Transcript #13, *supra* note 219.

<sup>238</sup> Interview Transcript #7, *supra* note 1.

<sup>239</sup> Interview #1, *supra* note 3; Interview Transcript #6, *supra* note 222; Interview Transcript #14, *supra* note 219.

<sup>240</sup> Interview Transcript #14, *supra* note 219.

<sup>241</sup> Interview Transcript #11, *supra* note 224.

<sup>242</sup> Interview Transcript #9, *supra* note 231.

<sup>243</sup> Interview Transcript #7, *supra* note 1.

<sup>244</sup> Interview Transcript #3, *supra* note 2.

the fact that many people she respected were impressed by her interest in such a difficult field that made her commit.<sup>245</sup>

The importance of mentors was mentioned by two of the interviewees. The lawyer who committed to tax because it impressed others started her career at the Service. She soon asked herself, “Do I really want to be the little lady sitting. . . in her rocker on the nursing home porch, rocking and going ‘oh my God I wasted my life,’ right?”<sup>246</sup> A mentor saved her from wasting her life outside tax law by convincing her she could “have a good moral career” and “feel good about yourself at the end of the day” by working to uphold the rule of law.<sup>247</sup> One relayed what she said to her mentor before she left for another firm:

[I told him that] “other than my parents I don’t know anyone else who has. . . had a bigger impact on the person I am today, as a parent, as a spouse, as a community member. But most of all, as a lawyer. I do the same things you do. The Internal Revenue Code sits right in front of me, in front of my right hand because that’s where you keep yours. And I sit in my chair the same way when I’m talking to a client. And my handwriting looks like yours. That’s how big of an imprint you had on me.” And I did say, “I hope that if I got nothing else from you it is your ability to make clients feel safe.”<sup>248</sup>

In sharp contrast, one very experienced lawyer said she had come to change her mind on several points as a matter of experience and probably would have arrived at her current views much sooner had she been mentored in a firm.<sup>249</sup> But she started her tax practice solo, explaining: “I kind of did it ass backwards, because everybody told me I couldn’t [go into a firm]. . . [I] was much too, having been in a criminal [law] background, I was much too high strung and might tell a senior partner where to go and how to get there.”<sup>250</sup>

Two different lawyers mentioned serving as mentors. One said it was important “because there are a lot of traps out there” and it helps “knowing you have somebody in your court looking out for you.”<sup>251</sup> She said she gives them advice on substantive matters as well as when it is “okay to leave your job” or “fire that client” or “go to your boss and tell them that’s not right, that’s not the norm, or whatever.”<sup>252</sup> Another said that criticizing younger tax lawyers without being willing to mentor them was a “real chicken shit kind of a thing” to do.<sup>253</sup>

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<sup>245</sup> Interview Transcript #3, *supra* note 2.

<sup>246</sup> Interview Transcript #3, *supra* note 2.

<sup>247</sup> Interview Transcript #3, *supra* note 2.

<sup>248</sup> Interview Transcript #7, *supra* note 1.

<sup>249</sup> Interview Transcript #13, *supra* note 219.

<sup>250</sup> Interview Transcript #13, *supra* note 219.

<sup>251</sup> Interview Transcript #14, *supra* note 219.

<sup>252</sup> Interview Transcript #14, *supra* note 219.

<sup>253</sup> Interview Transcript #11, *supra* note 224.

### 3. *Enjoying Tax Law*

What did these lawyers enjoy about their work? Minimizing clients' taxes "makes me smile," said one.<sup>254</sup> Two mentioned enjoying specific types of projects.<sup>255</sup> One mentioned getting to know her clients, and another becoming friends with them.<sup>256</sup> Some said solving their client's problems or otherwise helping them.<sup>257</sup> They specifically enjoyed teaching the clients about the tax issues or "translating" for them, with one noting that clients who read the documents closely and really want to understand were more enjoyable.<sup>258</sup> But more lawyers said what they enjoyed was working with their colleagues: bouncing and kicking ideas around, teaching younger lawyers, and working to get everyone on the same page.<sup>259</sup> One explained:

I like puzzles and I find [tax work] intellectually challenging and, simultaneously, I also really enjoy the people that I work with because they are. . . very bright. . . My point is that it's fun to work on problems that are difficult and complex, I think. I like exchanging ideas and thoughts and the creativity of solving the problems with people who are similarly enjoying that challenge.<sup>260</sup>

Another said, "I like the people and I like solving the puzzles."<sup>261</sup> Indeed, the intellectual puzzle was the most common explanation of what these lawyers enjoy: "I like finding the path. It feels like doing crossword puzzles;"<sup>262</sup> and "Ah, it's a puzzle to me. I like taking the pieces and making sure they fit together;"<sup>263</sup> or, "I love working through thorny issues and trying to, step by step figure it out."<sup>264</sup> One put it as, "I like going down those rabbit holes."<sup>265</sup>

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<sup>254</sup> Interview Transcript #4, *supra* note 225.

<sup>255</sup> Interview Transcript #7, *supra* note 1; Interview Transcript #9, *supra* note 231.

<sup>256</sup> Interview Transcript #2 (June 11, 2021) (on file with authors); Interview Transcript #12 (September 29, 2021) (on file with authors).

<sup>257</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #2, *supra* note 256; Interview Transcript #5, *supra* note 220; Interview Transcript #8, *supra* note 220; Interview Transcript #12, *supra* note 256.

<sup>258</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #2, *supra* note 256; Interview Transcript #8, *supra* note 220.

<sup>259</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #6, *supra* note 222; Interview Transcript #11, *supra* note 224; Interview Transcript #12, *supra* note 256; Interview Transcript #13, *supra* note 219.

<sup>260</sup> Interview Transcript #6, *supra* note 222.

<sup>261</sup> Interview Transcript #13, *supra* note 219.

<sup>262</sup> Interview Transcript #3, *supra* note 2.

<sup>263</sup> Interview Transcript #4, *supra* note 225.

<sup>264</sup> Interview Transcript #5 (quoted), *supra* note 220; Interview Transcript #6, *supra* note 222; Interview Transcript #9, *supra* note 231; Interview Transcript #12, *supra* note 256; Interview Transcript #13, *supra* note 219.

<sup>265</sup> Interview Transcript #9, *supra* note 231.

#### 4. *Descriptions of the Tax Bar, the Tax System, and Themselves*

Most of the interviewees, at some point in the interview, described themselves. One said she was “one of the happier lawyers.”<sup>266</sup> Three described themselves as “conservative.”<sup>267</sup> One of the others said, “I always question myself because I’m terrified of doing something wrong,” while another said she is “always worried [a transaction] wasn’t done right. . . [a]nd it’s just out there, waiting.”<sup>268</sup> Three expressed their comfort with the great amounts of money at stake; one put it, “I will say that, originally, I used to be bothered by the number of zeros that were at issue. The number of zeros doesn’t matter to me anymore.”<sup>269</sup>

One lawyer said, “I lay it on the line. People like that about me.”<sup>270</sup> Another explained that what others like about her is that she does not get “lost in the details.”<sup>271</sup> A third, in an energized and entertaining tone said, “People say I’m strange.”<sup>272</sup> Only one spoke much about the time required of her position. Over three decades into her career, she said “I haven’t really met anybody like me that still can work 80 hours a week,” explaining that she doesn’t “particularly have any home responsibilities, I don’t cook, I don’t clean, I don’t do anything, I just work, but not everybody’s like me. Everybody else kind of wants to go home.”<sup>273</sup> In contrast, though delivered in an interview that was as equally entertaining, another said “I’m not terribly ambitious,” explaining she wanted to do a good job, make a decent amount of money doing it, and spend more time with her family.<sup>274</sup>

Several described the tax bar. One, when the interviewer mentioned the generous response to the invitation to be interviewed, speculated that it was not due to generosity but rather to tax lawyers liking “to talk about themselves.”<sup>275</sup> Another thought the project might establish that “this profession really needs some social help,” adding that she thought more tax lawyers should know that they are supposed to have fun at professional events: “you know, have a drink, and enjoy each other’s company, find out about each other’s kids.”<sup>276</sup> Another said that tax lawyers are “by nature very conservative folks,” who “love the detail; love the complexity; and have this

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<sup>266</sup> Interview Transcript #8, *supra* note 220.

<sup>267</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #9, *supra* note 231; Interview Transcript #10, *supra* note 234.

<sup>268</sup> Interview Transcript #7, *supra* note 1; Interview Transcript #12, *supra* note 256.

<sup>269</sup> Interview Transcript #4, *supra* note 225; Interview Transcript #6, *supra* note 222 (quoted); Interview Transcript #10, *supra* note 234.

<sup>270</sup> Interview Transcript #4, *supra* note 225.

<sup>271</sup> Interview Transcript #8, *supra* note 220.

<sup>272</sup> Interview Transcript #13, *supra* note 219.

<sup>273</sup> Interview Transcript #10, *supra* note 232.

<sup>274</sup> Interview Transcript #11, *supra* note 224.

<sup>275</sup> Interview Transcript #5, *supra* note 220.

<sup>276</sup> Interview Transcript #1, *supra* note 3.

love [of] getting it right.”<sup>277</sup> Echoing this last point, another said that tax lawyers “want to be able to tell people, ‘here are the rules— you follow them, you won’t have problems.’”<sup>278</sup> Specifying the tax lawyers she knew at “reputable firms” who are involved in the “ABA Section of Taxation,” one praised “their commitment to tax law and their commitment to excellence,” saying that these lawyers “are not dabblers.”<sup>279</sup> Another: “tax lawyers can be pretty scary, I mean, all in all, it’s a pretty intelligent group.”<sup>280</sup> One cited her doctor:

One time I had a doctor who said to me that he had as patients a lot of different lawyers, and he felt like the tax lawyers that he had known were more on the cerebral side of the bar or the nerdier side, you could say. Whereas the litigators were on the Student Council President side. They were a little more the jocks or whatever from high school.<sup>281</sup>

This same lawyer pondered the social costs and benefits of concentrating so much cerebral activity:

I have to tell you that I’ve gone to an awful lot of ABA tax section meetings over the years. Decades I’ve been going to those meetings and sat through countless hours of presentations, and I do always have one recurring, overriding thought when I am listening to presentations by these brilliant people, these smart people, that all this brain power is being devoted to basically (big picture) arguing about the allocation of resources between the public sector and the private sector. It’s really how much money is going to go to the government, and how much money is not going to go to the government, is going to the private sector. . . . I can’t tell you how many times I’ve had the thought that, “is this really the way that we ought to be allocating our resources as a society? What if all the same brain power was devoted to finding a cure for cancer?” So even though I’m enjoying what I’m doing from a standpoint of, does your work have meaning, what’s the place, what’s your role in society, what are you contributing? Big picture, I’ve asked myself many times whether, although I enjoy it, whether it’s satisfying in that regard.<sup>282</sup>

None of the interviewees thought there was a widespread failure of ethics among tax lawyers. Only three of the interviewees said they could identify any particular bad tax lawyers.<sup>283</sup> One of those said that they were in the

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<sup>277</sup> Interview Transcript #8, *supra* note 220.

<sup>278</sup> Interview Transcript #3, *supra* note 2.

<sup>279</sup> Interview Transcript #7, *supra* note 1.

<sup>280</sup> Interview Transcript #14, *supra* note 219.

<sup>281</sup> Interview Transcript #6, *supra* note 222.

<sup>282</sup> Interview Transcript #6, *supra* note 222.

<sup>283</sup> Interview Transcript #2, *supra* note 256; Interview Transcript #4, *supra* note 225; Interview Transcript #6, *supra* note 222.

minority.<sup>284</sup> Another said, “I don’t know how many bad tax lawyers I’ve met,” explaining that bad tax lawyers “can’t last.”<sup>285</sup> Another said she would not want to say that any lawyer is bad at the job.<sup>286</sup> Another focused on her city, saying there is “nobody that jumps out at me as a bad tax lawyer” here.<sup>287</sup> She added, “I would say, some are more experienced than others, right, in certain matters, and I’m sure people could say that about me.”<sup>288</sup>

How did the interviewees perceive the tax system as such, and their role in it? Only one expressed personal satisfaction in minimizing taxes.<sup>289</sup> But, though always asked about the duties of tax lawyers, only two mentioned Circular 230. One thought it might be relevant but was uncertain, saying that since lawyers are agents of their state courts, “I always perceived Circular 230 as an extension [of that principle], that I’m sort of an agent of the government. Right?”<sup>290</sup> Another said she thought it was important for young tax lawyers to understand Circular 230 so that, as it was with her, it would always be in the back of one’s mind (along with the penalty statutes) when giving advice, even if not giving a formal opinion.<sup>291</sup>

A lawyer who mentioned duties to the tax system said it came from the Model Rules having that “thing about lawyers having that special relationship, to the quality (I can’t remember) the quality of justice and truth, justice and the American way or something.”<sup>292</sup> She said, like all lawyers, tax lawyers have a duty to uphold the law so that the system works.<sup>293</sup> She repeatedly emphasized the rule of law, generally, but also put it in the context of tax practice:

The rule of law, these rules that allow us all to not live in a banana republic or strong man wins. You know. . . it keeps the weak among us protected from the overly strong and aggressive and ambitious. . . The orderly society, it all depends on these rules and our job is to make sure people understand them. It’s a narrow little area. But it’s really cool. There are other areas that maybe are interesting. But ours is so fundamental to life. Right? Taxes, money, and loss of property, as a result of unfair governmental taking. We’ve got, I think the best area of practice.<sup>294</sup>

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<sup>284</sup> Interview Transcript #2, *supra* note 256.

<sup>285</sup> Interview Transcript #10, *supra* note 234.

<sup>286</sup> Interview Transcript #7, *supra* note 1.

<sup>287</sup> Interview Transcript #11, *supra* note 224.

<sup>288</sup> Interview Transcript #11, *supra* note 224.

<sup>289</sup> Interview Transcript #4, *supra* note 225.

<sup>290</sup> Interview Transcript #11, *supra* note 224.

<sup>291</sup> Interview Transcript #8, *supra* note 220.

<sup>292</sup> Interview Transcript #3, *supra* note 2.

<sup>293</sup> Interview Transcript #3, *supra* note 2.

<sup>294</sup> Interview Transcript #3, *supra* note 2.

She was the only interviewee who discussed her political philosophy of taxation. She emphasized the politics of taxation in American history: “this country was founded, because individuals were concerned that a foreign, far away government was exacting things from them in exchange for what? They saw them, as basically being cash cows for money to go somewhere else, to do something, somewhere else.”<sup>295</sup> She described taxes as “what we get to contribute to the society we want,” and that if the system worked perfectly, then:

we’d be paying for as many services [as we] collectively want. Not like you get a bill at the end of the year: this is what you use [so] this is what you owe. But with a kind of a rough approximation we’d be paying into a system to get you know that collective service that, to some extent, is going to benefit folks who aren’t paying in at all, and some folks may be actually paying a little more than what they’re using.<sup>296</sup>

She criticized those who do not consider taxpaying a moral issue.<sup>297</sup> Although she thought that, for a great many Americans, “taxes have become this dirty word where they feel like they’re being taken advantage of by their government to have to pay anything at all,” she added that even they “understand they have to pay what they do have to pay.”<sup>298</sup> Two others said no one wants to pay taxes.<sup>299</sup> One of them said that it is “not ever a pleasant experience for anyone to put your hard-earned money to the government.”<sup>300</sup> But neither these two, nor any of the other interviewees, expressed doubt as to widespread understanding that taxes due must be paid.

Two of the lawyers said that tax collectors and tax lawyers have the same task: getting to the right answer, at least when the system works right.<sup>301</sup> One of them described the Service as “not necessarily the adversarial party. . . . [T]hey are just the other party, and it’s not us versus them.”<sup>302</sup> The other one, who was the lawyer who emphasized upholding the rule of law in the tax system, had an equal criticism for collectors and private lawyers who take “super aggressive positions not supported by any guidance.”<sup>303</sup>

One lawyer thought that it was “kind of unfair” that the Service “write[s] a lot of the rules.”<sup>304</sup> Another observed how the staff cuts at the Service had

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<sup>295</sup> Interview Transcript #3, *supra* note 2.

<sup>296</sup> Interview Transcript #3, *supra* note 2.

<sup>297</sup> Interview Transcript #3, *supra* note 2.

<sup>298</sup> Interview Transcript #3, *supra* note 2.

<sup>299</sup> Interview Transcript #5, *supra* note 220.

<sup>300</sup> Interview Transcript #9, *supra* note 231.

<sup>301</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #3, *supra* note 2.

<sup>302</sup> Interview Transcript #1, *supra* note 3.

<sup>303</sup> Interview Transcript #3, *supra* note 2.

<sup>304</sup> Interview Transcript #1, *supra* note 3.

reduced their capacity to audit returns.<sup>305</sup> Another lamented the decline in service:

I find IRS very stressful. I find dealing with them and not being able to talk to anyone stressful. You know, I loved the days when, you remember the practitioner's hotline? It was a number, and somebody might really answer it. It doesn't exist anymore. I mean it does. But it doesn't: nobody has an answer for anything. . . . I don't see the same quality of people working there. . . . I mean the regs don't seem [] like the same quality. I see the practitioners doing more and being more up on stuff than I see the Service being.<sup>306</sup>

Three complained about state and local tax systems. One of them said: "That's one thing that I enjoy about federal practice. . . ; it's pretty darn clear. You know what the rules are. We don't have that at the state and local level of tax."<sup>307</sup> Another said that at the federal level "oftentimes you have a lot more cases, revenue rulings, and all these different sources you can look at. While in the states it's like, 'oh golly why can't they be more forthcoming here?'"<sup>308</sup> The third, the one who consistently expressed concern about the rule of law, took the criticism much further. She said that at the state and local level, it is "really not possible for businesses [operating across multiple state and local tax jurisdictions] to be completely compliant even if they want to be," because there are too many rules, too many changes, "too many moving parts," and there is no "commitment. . . to educating the public, before enforcement."<sup>309</sup> Two of these lawyers who criticized the lack of guidance at the state and local level also criticized unfairly aggressive collectors.<sup>310</sup> Another one said she had a former assessor on "speed dial" for consultations when she was under pressure to deal with a recent referendum-passed tax change.<sup>311</sup> She expressed considerable frustration with the confusion caused by her state's tax legislation by popular vote: "only the California voters would vote to increase property taxes during the pandemic."<sup>312</sup>

## 5. COVID

In one sense, the impact of COVID was obvious in this project: all of the interviews were conducted *via* Zoom. Restrictions on in-person interactions varied across the country during this period but remained in place. It is

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<sup>305</sup> Interview Transcript #5, *supra* note 220.

<sup>306</sup> Interview Transcript #13, *supra* note 219.

<sup>307</sup> Interview Transcript #11, *supra* note 224.

<sup>308</sup> Interview Transcript #5, *supra* note 220.

<sup>309</sup> Interview Transcript #3, *supra* note 2.

<sup>310</sup> Interview Transcript #3, *supra* note 2.; Interview Transcript #11, *supra* note 224.

<sup>311</sup> Interview Transcript #10, *supra* note 234.

<sup>312</sup> Interview Transcript #10, *supra* note 234.

doubtful that, prior to the pandemic, it would have been practical to arrange interviews online, but, at the time these interviews were conducted, the interviewer and interviewees were at ease with the technology.

Few actually mentioned the pandemic, however. One lawyer complained about the fact that her office was again open and that she was expected to be there.<sup>313</sup> But another looked forward to being back in the office so that her home life, involving challenges such as her baying hound dog, would no longer interrupt her Zoom sessions.<sup>314</sup> One person described the impact of sending the staff out of the office:

You know COVID, we sent the staff home. So, if I have 70 invoices to go to clients, who do you think has to scan them to myself and label them and send them to the clients? And then they all write back, and they want the link for a credit card, or they have a question about an outstanding invoice on page four. It's just this endless cycle of nonsense. That's really stressful. I come in on Saturday, sometimes, just to do invoices. Then they all have to get put into the system. So, the volume of what I have now—you almost just can't stop. And the mail—I mean the staff is at home. It doesn't get the mail opened.<sup>315</sup>

Another described the impact on her family: she had no childcare for her infant on the day the interview took place, since her nanny had tested positive the day before.<sup>316</sup>

## B. *The Interviews*

The heart of this project was the dynamic conversations with the interviewees about the practice of tax law. In discussing the joys, stresses, and nature of their tax practices, as well as their advice to up-and-coming tax lawyers, the interviewees were articulate and frank. They emphasized the intellectual demands of the practice, described the challenges (and the balancing act involved) of advising clients, and also talked about the challenges of pulling it all together for the client, billing the client, and being able to defend what one has done.

### 1. *Scholarly Nature of Tax Practice*

As mentioned, the tax education credentials of the interviewees were impressive: almost all had graduate degrees in taxation, and over one-third had taught tax law. In reflecting on what it takes to be successful in the tax field, one explained: “[Y]ou have to become scholarly. Even if you think

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<sup>313</sup> Interview Transcript #13, *supra* note 219.

<sup>314</sup> Interview Transcript #3, *supra* note 2.

<sup>315</sup> Interview Transcript #10, *supra* note 234.

<sup>316</sup> Interview Transcript #9, *supra* note 231.

you're not scholarly, you have to become scholarly."<sup>317</sup> It's the nature of what tax lawyers do. As one interviewee said: "[T]hey're not calling me in to make the easy calls."<sup>318</sup> As another put it: clients "go to a tax lawyer because it's a very complicated transaction. It has nuances. There are layers that are involved. . . you have got to keep going in that rabbit hole. You've got to keep digging and digging and digging."<sup>319</sup>

Even though many had been practicing over 30 years, they emphasized research. One considered doing her own research as essential to being a good tax lawyer.<sup>320</sup> Sometimes the lawyer has to research because she's not familiar with the type of transaction involved.<sup>321</sup> Sometimes it is to test her own tax-savings plan, and other times to improve someone else's plan.<sup>322</sup> Sometimes it is a search for a "loophole."<sup>323</sup> Sometimes it is due to a recent change in the law.<sup>324</sup> Often, it is simply because there is limited authority.<sup>325</sup> One explained it as follows:

It is crazy how often an issue comes up that you would think is an everyday issue. This must come up all the time in deals. Yet, there is absolutely no legal authority for what the answer should be. And then you're sort of trying to back into it by virtue of analogous situations and areas of the code and you're trying to figure out what might be some analogous situations where you can justify the position that you want to take. Even sometimes, you don't even have a preference you just need to know which way to go, and the law isn't there.<sup>326</sup>

The need to research throughout one's career explains the emphasis placed on the continuing need to study beyond researching for a particular client. One who had been practicing nearly 40 years described it as being "still in school."<sup>327</sup> She said a good tax lawyer has to know the Code and the Treasury Regulations but also the current events in the tax world.<sup>328</sup> Another said that tax is "much more complicated than other areas of the law. It's always changing. . . . You could spend all day reading blogs, and not get to your own work."<sup>329</sup> Another explained that being board-certified requires her to participate in 35 hours of continuing legal education each year, but she

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<sup>317</sup> Interview Transcript #10, *supra* note 234.

<sup>318</sup> Interview Transcript #1, *supra* note 3.

<sup>319</sup> Interview Transcript #9, *supra* note 231.

<sup>320</sup> Interview Transcript #4, *supra* note 225.

<sup>321</sup> Interview Transcript #9, *supra* note 231; Interview Transcript #12, *supra* note 256.

<sup>322</sup> Interview Transcript #2, *supra* note 256; Interview Transcript #5, *supra* note 220.

<sup>323</sup> Interview Transcript #14, *supra* note 219.

<sup>324</sup> Interview Transcript #10, *supra* note 234.

<sup>325</sup> Interview Transcript #3, *supra* note 2; Interview Transcript #5, *supra* note 220.

<sup>326</sup> Interview Transcript #8, *supra* note 220.

<sup>327</sup> Interview Transcript #10, *supra* note 234.

<sup>328</sup> Interview Transcript #10, *supra* note 234.

<sup>329</sup> Interview Transcript #9, *supra* note 231.

actually does perhaps 50 hours each year.<sup>330</sup> Others mentioned their involvement in producing continuing legal education programs.<sup>331</sup> One identified the essence of good tax lawyering as “Currency. And I’m not talking money. I think that we never stop learning, and I think that the more we stay in our offices and continue doing what we do by rote, the staler we get and the less effective we are.”<sup>332</sup> She described what she reads to stay current, but she emphasized the importance of her state bar and her department’s meetings:

I think, you meet, and you sit with, and you attend the meetings with the brightest and best. And from there, so much of it is osmosis. Just by hearing it, you know what’s going on. And the more you hear, the more you get into it, the more you talk the talk. And in the firm, we have the meetings, and the associates keep you up to date. What you don’t know, you seek out. I think you have to stay current.<sup>333</sup>

## 2. *Serving Tax Clients*

The tax lawyers’ research and ongoing educational activities ultimately are, of course, to serve their clients. Several lawyers said they enjoyed getting to know their clients, and even some described them as their friends.<sup>334</sup> One divided her clients into two types:

The same thing I enjoy about my practice is the same thing I hate about my practice. It’s the clients. There are good clients who are very appreciative, and you want to help out and you can do good things for, and then there are clients who drive you to drinking.<sup>335</sup>

Other lawyers divided their clients into those who expected to be told what to do and those who expected to understand the pros and cons of the alternatives.<sup>336</sup> Mostly, the lawyers understood their job as describing options and explaining the tax and non-tax consequences of those options.<sup>337</sup> Several emphasized the importance of being honest about the options and respecting

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<sup>330</sup> Interview Transcript #2, *supra* note 256.

<sup>331</sup> Interview Transcript #6, *supra* note 222; Interview Transcript #13, *supra* note 219.

<sup>332</sup> Interview Transcript #13, *supra* note 219.

<sup>333</sup> Interview Transcript #13, *supra* note 219.

<sup>334</sup> Interview Transcript #2, *supra* note 256; Interview Transcript #12, *supra* note 256.

<sup>335</sup> Interview Transcript #1, *supra* note 3.

<sup>336</sup> Interview Transcript #2, *supra* note 256; Interview Transcript #6, *supra* note 222; Interview Transcript #9, *supra* note 231.

<sup>337</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #2, *supra* note 256; Interview Transcript #3, *supra* note 2; Interview Transcript #4, *supra* note 225; Interview Transcript #8, *supra* note 220; Interview Transcript #14, *supra* note 219.

the client's choice of option.<sup>338</sup> Some added they tell their clients how they would choose if it were their choice.<sup>339</sup>

One said she tries to help the client understand "why they should go a certain way."<sup>340</sup> Yet, she said, sometimes, unsophisticated clients do not understand and push back and "[i]t's stressful trying to help them understand, without making it seem like I'm making things complicated."<sup>341</sup> These clients "get in their own way" because their success in running their business leads them to "assume that they're very good at making *this* decision as well."<sup>342</sup> Another lawyer expressed the stress with clients not working in their own best interest, adding that sometimes it is due to someone in the job there that has little experience and "wants to micromanage something they don't understand."<sup>343</sup> Another interviewee said it is easier to advise the smaller businesses because, in the "larger corporations, oh my gosh: just the bureaucracy to get to somebody who really understands it."<sup>344</sup>

### 3. *Clients' Tax-Savings Expectations*

What are the tax-savings expectations of the clients? Two said their clients neither want to overpay nor underpay their tax, accepting "they have to pay what they do have to pay."<sup>345</sup> One of these echoed another's explanation that her clients having produced their own wealth makes them more risk adverse in tax planning; she added that her clients "want to to sleep at night" and "really want it right" when it comes to tax planning.<sup>346</sup> Another lawyer thought the types of individuals who become tax lawyers can struggle with the expectations of individuals who go into business:

[Tax lawyers] are by nature very conservative folks. Most of us who do tax law are the kind of people who love the detail; love the complexity; and have this love [of] getting it right. A lot of our clients are used to making business choices all the time that are full of risk. They just need to understand what the level of risk is, and whether it's an acceptable amount of risk.<sup>347</sup>

Another focused on the client's risk tolerance as key to deciding if she wanted the client, explaining that the client and the lawyer need to be a "good

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<sup>338</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #2, *supra* note 256; Interview Transcript #4, *supra* note 225; and Interview Transcript #14, *supra* note 219.

<sup>339</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #14, *supra* note 219.

<sup>340</sup> Interview Transcript #8, *supra* note 220.

<sup>341</sup> Interview Transcript #8, *supra* note 220.

<sup>342</sup> Interview Transcript #8, *supra* note 220.

<sup>343</sup> Interview Transcript #3, *supra* note 2.

<sup>344</sup> Interview Transcript #11, *supra* note 224.

<sup>345</sup> Interview Transcript #3, *supra* note 2 (quoted); Interview Transcript #10, *supra* note 234.

<sup>346</sup> Interview Transcript #10, *supra* note 234, echoing Interview Transcript #2, *supra* note 256.

<sup>347</sup> Interview Transcript #8, *supra* note 220.

match” for one another.<sup>348</sup> Nevertheless, even when a client is a good match, she repeated what others said about the importance and stress of managing the client’s expectations.<sup>349</sup> One potential stress factor mentioned by several lawyers is managing those expectations when the clients come with their own plans, often based on what they have read or heard.<sup>350</sup> The lawyer with clients who drive her to drink said some clients expect the lawyer to just do what the client wants.<sup>351</sup>

#### 4. *Duties to Clients*

In terms of duties to the client, the lawyers mostly emphasized competence. In general, this means doing what is necessary to be a true expert: being current and excelling at research.<sup>352</sup> One lawyer added that being competent also meant declining to work outside her expertise.<sup>353</sup> Another, in her characteristically humorous way, emphasized the tenacity required to be competent, and that it is more important than being paid.

I will spend five or six hours on something, and you would be like begging me to stop. You’d be like “stop, you can’t bill” and I’d be like, “but this person isn’t asking me to get it wrong.” . . . It doesn’t matter if I lose a day. . . . We have to nail this. We have to get it done. . . . It takes some tenacity, to get to the best answer that you can get to 24/7.<sup>354</sup>

When it comes to getting the best tax-savings answer, there was consistent emphasis on understanding the client’s non-tax goals.<sup>355</sup> One lawyer took pride in focusing on the business side, being able to relate the business and tax impacts of the decision.<sup>356</sup> Others described the task as finding the lowest tax cost to accomplish the business goals, taking care not to lose sight of the business impacts of the tax plan.<sup>357</sup> Another relayed the importance of reminding the clients of their non-tax goals, lest they become impractically

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<sup>348</sup> Interview Transcript #9, *supra* note 231.

<sup>349</sup> Interview Transcript #9, *supra* note 231, echoing Interview Transcript #2, *supra* note 256; Interview Transcript #14, *supra* note 219.

<sup>350</sup> Interview Transcript Interview Transcript #1, *supra* note 3; Interview Transcript #2, *supra* note 256; Interview Transcript #7, *supra* note 1.

<sup>351</sup> Interview Transcript #1, *supra* note 3.

<sup>352</sup> Interview Transcript #2, *supra* note 256; Interview Transcript #3, *supra* note 2; Interview Transcript #5, *supra* note 220; Interview Transcript #6, *supra* note 222; Interview Transcript #8, *supra* note 220; Interview Transcript #12, *supra* note 256.

<sup>353</sup> Interview Transcript #9, *supra* note 231.

<sup>354</sup> Interview Transcript #10, *supra* note 234.

<sup>355</sup> Interview Transcript #2, *supra* note 256; Interview Transcript #4, *supra* note 225; Interview Transcript #5, *supra* note 220; Interview Transcript #8, *supra* note 220; Interview Transcript #9, *supra* note 231; Interview Transcript #13, *supra* note 219.

<sup>356</sup> Interview Transcript #8, *supra* note 220.

<sup>357</sup> Interview Transcript #2, *supra* note 256; Interview Transcript #4, *supra* note 225; Interview Transcript #13, *supra* note 219.

focused on tax-savings.<sup>358</sup> Another perspective on the importance of the non-tax goals related it to surviving legal challenge: a business purpose as a substantive necessity for a tax-savings plan.<sup>359</sup>

In addition to knowing the client's non-tax motivation, the lawyer needs to know all of the relevant facts in order to apply the law.<sup>360</sup> Gathering the facts, and verifying any information provided by third-parties, were described by one as hallmarks of good tax advice.<sup>361</sup> Two of the lawyers complained of clients being an obstacle to gathering the facts because they do not understand why they need to provide certain facts.<sup>362</sup> One said a recurring challenge is "prying the last three years' returns out of" the client's hands because they have already paid their accountant to file those returns.<sup>363</sup> She said it is a delicate issue because many of her clients are "70-year-old men who have this sort of bravado" and they "don't want to seem like they don't know something," so she has to "coax" the information out of them with gentle explanations.<sup>364</sup> She expressed her frustration with this not being how it should work, but concluded this kind of political managing gets the best result for the client.<sup>365</sup>

Several other duties were mentioned by the interviewees. One mentioned the necessity of "comply[ing]" with one's "ethics."<sup>366</sup> The duty of loyalty, which requires knowing who your client is, and concern for preserving privilege and confidentiality, were also mentioned.<sup>367</sup> One lawyer talked about the duty to be attentive to the client, even if it means talking to the client five times a day.<sup>368</sup> Another talked about the duty to be organized and responsive.<sup>369</sup> Others mentioned candor and honesty.<sup>370</sup>

One of the interviewees described the good tax lawyer as one who "really works hard to get the client where the client wants to go in a way that's entirely appropriate."<sup>371</sup> Two of the interviewees described good tax lawyers as being creative. One emphasized the willingness and ability to step back

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<sup>358</sup> Interview Transcript #5, *supra* note 220.

<sup>359</sup> Interview Transcript #9, *supra* note 231.

<sup>360</sup> Interview Transcript #5, *supra* note 220.

<sup>361</sup> Interview Transcript #4, *supra* note 225.

<sup>362</sup> Interview Transcript #8, *supra* note 220; Interview Transcript #11, *supra* note 224.

<sup>363</sup> Interview Transcript #11, *supra* note 224.

<sup>364</sup> Interview Transcript #11, *supra* note 224.

<sup>365</sup> Interview Transcript #11, *supra* note 224.

<sup>366</sup> Interview Transcript #9, *supra* note 231.

<sup>367</sup> Interview Transcript #6, *supra* note 222; Interview Transcript #9, *supra* note 231; Interview Transcript #10, *supra* note 234; Interview Transcript #11, *supra* note 224.

<sup>368</sup> Interview Transcript #5, *supra* note 220; Interview Transcript #10, *supra* note 234.

<sup>369</sup> Interview Transcript #6, *supra* note 222.

<sup>370</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #4, *supra* note 225; Interview Transcript #7, *supra* note 1.

<sup>371</sup> Interview Transcript #10, *supra* note 234.

from cookie-cutter solutions and tailor a solution for the client.<sup>372</sup> The other emphasized the willingness to be “creative within the law” and go against the grain of what is usually done.<sup>373</sup> Sounding similar to those who emphasized creativity were two who thought good lawyers were deal-makers, not deal-breakers.<sup>374</sup> One of them said that the relevant “skill is finding a lawful way to get the deal done.”<sup>375</sup> The other warned against getting “lost” in the details and adding complexity that impedes the deal.<sup>376</sup>

But creativity has its limits, and ultimately, there may be a duty to disappoint the client. As one who had described one of the joys of practice as finding the angles that work for the client said: “I feel like you beat it up, and if there is no angle, then you[’ve] got to tell them. That’s your job, and if they don’t like it, they don’t like it, but that’s your job.”<sup>377</sup> Another: “I think a good tax attorney has to be willing to say ‘you can’t get there from here.’”<sup>378</sup> Still another said that, at some point, she tells the client “it’s just too much risk. Don’t do this.”<sup>379</sup> One said that the willingness to make this call rather than bend to the client is “what makes the difference between a good lawyer and not.”<sup>380</sup> It is stressful “not being able to give the clients the answer they want,” admitted one interviewee, who described her clients as “wonderful” and the work the clients do as “really good.”<sup>381</sup> But another said that if she concludes that the plan that has been discussed is really not a good one, then “I don’t feel so bad about telling them.”<sup>382</sup>

### 5. Teamwork

One of the lawyers mentioned the duty of working well with others who are advising the client.<sup>383</sup> Indeed, almost all of the interviewees mentioned the importance of teamwork in their practice.<sup>384</sup> Several interviewees said they enjoyed working with others.<sup>385</sup> The enjoyment of teamwork was so

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<sup>372</sup> Interview Transcript #2, *supra* note 256.

<sup>373</sup> Interview Transcript #12, *supra* note 256.

<sup>374</sup> Interview Transcript #7, *supra* note 1; Interview Transcript #8, *supra* note 220.

<sup>375</sup> Interview Transcript #7, *supra* note 1.

<sup>376</sup> Interview Transcript #8, *supra* note 220.

<sup>377</sup> Interview Transcript #3, *supra* note 2.

<sup>378</sup> Interview Transcript #5, *supra* note 220.

<sup>379</sup> Interview Transcript #8, *supra* note 220.

<sup>380</sup> Interview Transcript #1, *supra* note 3.

<sup>381</sup> Interview Transcript #14, *supra* note 219.

<sup>382</sup> Interview Transcript #12, *supra* note 256.

<sup>383</sup> Interview Transcript #5, *supra* note 220.

<sup>384</sup> Interview Transcript #1, *supra* note 3; Interview Transcript #2, *supra* note 256; Interview Transcript #5, *supra* note 220; Interview Transcript #6, *supra* note 222; Interview Transcript #7, *supra* note 1; Interview Transcript #8, *supra* note 220; Interview Transcript #9, *supra* note 231; Interview Transcript #10, *supra* note 234; Interview Transcript #11, *supra* note 224; Interview Transcript #12, *supra* note 256; Interview Transcript #13, *supra* note 219.

<sup>385</sup> See *supra* Part 3.

important to one that she predicted that law students who “don’t learn how to work together and collaborate” are not going to be happy.<sup>386</sup> But the interviewees valued teamwork not just for their personal enjoyment but also for its substantive superiority over going it alone.<sup>387</sup> One said that reaching out to other experts was a mark of an excellent tax lawyer.<sup>388</sup> One explained the benefit:

[I] love working with [this particular associate] because her brain works totally different than mine. She is very much the trees. I’m very much the forest. And we get the best outcomes for the client when we work together to pull out of each. You know, I’m challenging her, she’s asking me questions and by the end of the discussion we both have a path forward that may have not been what I originally thought, but it’s going to be very thought out and probably the best option for the client.<sup>389</sup>

Another lawyer limited her consultations to her partners: she has to do as much work with associates as she does without them in order to “get comfortable, making sure they didn’t miss any issues.”<sup>390</sup>

While some emphasized the teamwork within the firm, there was more emphasis on working with outside experts. Those included friends to whom one could turn.<sup>391</sup> But, more often, it was the client’s other experts involved in the brainstorming, giving their own perspectives, and helping keep the lawyer within her own expertise.<sup>392</sup> One lawyer said, “I could not do my job without all the wonderful, brilliant CPAs and other professional advisors” on her clients’ teams.<sup>393</sup> Between the team members within the law firm and those outside, one said the phone calls could have 20 people.<sup>394</sup>

Four of the lawyers reported that agreement among team members helps the client accept whatever the advice is.<sup>395</sup> However, six lawyers identified other advisors as the source of problematic ideas.<sup>396</sup> Interviewees criticized advisors who were CPAs, financial planners, and lawyers who were not tax

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<sup>386</sup> Interview Transcript #6, *supra* note 222.

<sup>387</sup> *E.g.*, Interview Transcript #5, *supra* note 220; Interview Transcript #9, *supra* note 231; Interview Transcript #10, *supra* note 234; Interview Transcript #11, *supra* note 224.

<sup>388</sup> Interview Transcript #10, *supra* note 234.

<sup>389</sup> Interview Transcript #14, *supra* note 219.

<sup>390</sup> Interview Transcript #8, *supra* note 220.

<sup>391</sup> Interview Transcript #10, *supra* note 234.

<sup>392</sup> Interview Transcript #2, *supra* note 256; Interview Transcript #5, *supra* note 220; Interview Transcript #9, *supra* note 231.

<sup>393</sup> Interview Transcript #7, *supra* note 1.

<sup>394</sup> Interview Transcript #14, *supra* note 219.

<sup>395</sup> Interview Transcript #4, *supra* note 225; Interview Transcript #5, *supra* note 220; Interview Transcript #11, *supra* note 224; Interview Transcript #12, *supra* note 256.

<sup>396</sup> Interview Transcript #3, *supra* note 2; Interview Transcript #4, *supra* note 225; Interview Transcript #5, *supra* note 220; Interview Transcript #7, *supra* note 1; Interview Transcript #9, *supra* note 231; Interview Transcript #11, *supra* note 224.

experts.<sup>397</sup> One lawyer was particularly concerned about advisors who charge very high fees and claim intellectual property protection for their advice.<sup>398</sup> Three were especially critical of “consultants.”<sup>399</sup> One said these were advisors who do not “need a license to do what they do, and they peddle a bill of goods.”<sup>400</sup> Another criticized their “entrepreneurial mentality when it comes to taxes.”<sup>401</sup> One explained that the problem is that

they don’t think like lawyers think. They are not trained to catch the things that we are trained to catch and look at. So, while I’m a tax lawyer, I know a certain amount of maritime law; I know real estate law; I understand . . . contracts; successions and wills, estate planning, probate procedure. I mean, I know a lot about a lot of different areas law because it interfaces with tax. . . . I don’t think that they take this holistic approach with respect to a particular issue or transaction that a lawyer does.<sup>402</sup>

Communications was another problematic area for teamwork. One interviewee said that sending emails to too many team members impedes resolving issues and that it is better to have a call “with the right one or two people. . . because you’re able to ask questions and able to spitball” ideas.<sup>403</sup> Perhaps, more importantly, several worried about team members sharing communications, which can confuse the client who does not understand the issues and can also risk discoverability if a non-lawyer team member is involved.<sup>404</sup>

## 6. *Planning Advice*

Of course, the goal of the teamwork is to advise the client on tax minimization. The lawyers said there is a duty to tell the client “no” at some point and to keep creativity within the legal limits. But it is the ambiguity that provides the space for creative planning:

[In] tax law, like all other laws, there are areas where it’s not clear. When there is ambiguity within the law, and you can defend that position, you’re pushing the envelope but in a reasonable manner. So, to me a good tax

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<sup>397</sup> Interview Transcript #3, *supra* note 2; Interview Transcript #4, *supra* note 225; Interview Transcript #5, *supra* note 220; Interview Transcript #7, *supra* note 1; Interview Transcript #9, *supra* note 231; Interview Transcript #11, *supra* note 224.

<sup>398</sup> Interview Transcript #5, *supra* note 220.

<sup>399</sup> Interview Transcript #3, *supra* note 2; Interview Transcript #7, *supra* note 1; Interview Transcript #11, *supra* note 224.

<sup>400</sup> Interview Transcript #7, *supra* note 1.

<sup>401</sup> Interview Transcript #3, *supra* note 2.

<sup>402</sup> Interview Transcript #11, *supra* note 224.

<sup>403</sup> Interview Transcript #11, *supra* note 224.

<sup>404</sup> Interview Transcript #9, *supra* note 231; Interview Transcript #10, *supra* note 234; Interview Transcript #11, *supra* note 224.

planning idea is something that might take lack of clarity, but with enough support coming up with a good result.<sup>405</sup>

In seeking such a good result, one lawyer mentioned the importance of considering the “intent of what Congress or IRS or whatever meant.”<sup>406</sup> Another emphasized flexibility in a tax-savings plan, and another longevity.<sup>407</sup> One criticized “hyper-technical” reasoning.<sup>408</sup> One described good plans as “ideas that flow.”<sup>409</sup> Another:

It can be very tempting to go tripping down the primrose path with a particular idea and not stepping back and asking yourself, wait[:] does the rhythm of the code allow this? Zoom back from the placement of a comma that you’re relying on, or a particular word in a statute. What does the rhythm of the code say?<sup>410</sup>

Another put the issue as whether a plan relies upon statutes and cases or relies on putting “together a lot of unrelated principles” that “don’t quite link together.”<sup>411</sup> Similarly, another said that a good tax plan has

the support, the authority, an analysis of cases and revenue rulings and all that kind of stuff. Sometimes I have ideas that seem like they’re kind of out there and a little bit aggressive or whatever and then I rein myself in and say, “you know if it were that easy somebody would have done it before. So that can’t be right.” If I think I’ve come across a new idea, it’s an easy quick way to fix something, I’ll usually say to myself this has to be wrong, because somebody else would have done it if it works that way. So, we’re going to have to do this the hard way, and the hard way is that you study it, you look at it from all different angles and you find support for it.<sup>412</sup>

Three of the lawyers described their suspicion of trendy ideas that circulate among tax advisors. One of them warned against the “cattle mentality” of the “various cycles” in tax-savings ideas in which advisors reason “everybody else is doing [it], so it should be fine.”<sup>413</sup> A lawyer involved in a national study group, which she praised at points during the interview, noted the same risks of trends: “I never thought those syndicated conservation easements worked. I never thought they worked. And even in my national study group when people were talking about how great they were and how great, I mean I just

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<sup>405</sup> Interview Transcript #8, *supra* note 220.

<sup>406</sup> Interview Transcript #14, *supra* note 219.

<sup>407</sup> Interview Transcript #12, *supra* note 256; Interview Transcript #13, *supra* note 219.

<sup>408</sup> Interview Transcript #3, *supra* note 2.

<sup>409</sup> Interview Transcript #10, *supra* note 234.

<sup>410</sup> Interview Transcript #7, *supra* note 1.

<sup>411</sup> Interview Transcript #5, *supra* note 220.

<sup>412</sup> Interview Transcript #6, *supra* note 222.

<sup>413</sup> Interview Transcript #8, *supra* note 220.

never thought they worked.”<sup>414</sup> Mentioning the trend she was seeing at the moment, the third lawyer remarked:

I’m not doing the new thing right now, right, which is a spinoff of micro captives. . . . [T]hose have been suggested to some of my clients. . . . [O]f course, the conservation movement stuff that came up a couple years ago was suggested to some of my clients, all of whom I told, “no, no, no, no.” We had conservation easement clients. Those were legitimate. There was actual property being donated to the EPA or whatever. . . . But these micro captives right now[:] the CPAs, the lawyers, swear up and down these are all perfectly fine yada, yada, yada. . . . I have been engaged in micro captives, true micro captives where there’s legitimate insurance and everything like that. But these new things are bogus. But they’ve got a revenue ruling, and they’re ready to fight with the IRS. But I’ve told clients “no, you can go for it but not with my signature.”<sup>415</sup>

One claimed a bad tax plan is one that smells bad and is just too good to be true.<sup>416</sup> Another said that though a bad plan may make your stomach turn or just not sound right, the essential question to ask is simple: what is the business purpose?<sup>417</sup>

### 7. *Formal Opinions*

Only one of the lawyers said formal opinion-writing was a regular part of her practice.<sup>418</sup> One for whom it was not a regular part of her practice explained when she might suggest a formal opinion:

I think my professional duties are to explain to the client what the impact of their decision is. How clear the law is. And if the law is not clear, what would be the consequence of them taking that position. So, I mean if you think about opinion standards, you look at something, and you could give a “should” opinion. You might not be asked to give an opinion. But it’s not 100%. Maybe there’s a small factual issue that you haven’t done due diligence on or something like that. But you’re pretty darn comfortable that this is a “should.” To me, my professional duty there is different than if I thought the law was fairly unclear. To where I thought, well, maybe we’re really pushing the envelope. But the client really wants to push the envelope. My professional duty I feel is to let them know. . . . how clear the answer is or not, and then based on that, advise them as to how to take measures to do what is right. In other words, if you are taking this return position, should you get an opinion? Should you have a memo? . . . But I take that professional

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<sup>414</sup> Interview Transcript #10, *supra* note 234.

<sup>415</sup> Interview Transcript #1, *supra* note 3.

<sup>416</sup> Interview Transcript #4, *supra* note 225.

<sup>417</sup> Interview Transcript #9, *supra* note 231.

<sup>418</sup> Interview Transcript #6, *supra* note 222.

responsibility very seriously as to sort of not doing things that I think jeopardize the client because I never want to receive a phone call that they're being audited and somehow my advice was the cause of that audit without the proper guidance to them.<sup>419</sup>

### 8. Accuracy-Related Penalties

Only four of the interviewees mentioned the accuracy-related penalties.<sup>420</sup> One said simply that she did not practice near the penalty lines.<sup>421</sup> One said that in the planning stage she thought about the reporting position standards and would ask: “[W]hat authority do we have? Do we need to make a disclosure?”<sup>422</sup> Another said she does not want her clients audited, much less penalized, and so, in terms of confidence in the position, she leans “towards something at least 70%.”<sup>423</sup> However, she said that the nature of her practice means she often discusses potential penalties with the client, and respects their decision, so long as she would not be penalized for advising it.<sup>424</sup> Another said she never wants a client to be penalized, so she always thinks about what can be done to protect the client, such as requesting a ruling, writing a formal opinion, or, perhaps, just writing a memo “that summarizes the law so if there is an auditor and they see this memo they might not even go down that road, because you cut it off at the beginning.”<sup>425</sup> This lawyer understood this as part of thinking for your clients who do not have a grasp of the penalty regimes.<sup>426</sup> One said discussing potential penalties with clients depends on the practice area:

In my cryptocurrency practice. . . the market moves way faster than the government can put out a guidance on, [so] we're always thinking about [potential penalties]. We're always discussing that. You know, there are many times, where it may not be my colleague's client, but I'll call my colleague and say “hey, what do you think of this?” Or. . . do you think a situation like this warrants a disclosure on an income tax return?. . . So, when you just don't know because there's just not enough guidance, you definitely think about them more. And you definitely also advise your clients. It's very important to make sure your clients know that the position they're taking may not be accepted by the government. . . . So, there are some areas where you're like, “I just don't know and there's nobody I can go ask [because]

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<sup>419</sup> Interview Transcript #8, *supra* note 220.

<sup>420</sup> Interview Transcript # 1; Interview Transcript #5, *supra* note 220; Interview Transcript #8, *supra* note 220; Interview Transcript #12, *supra* note 256.

<sup>421</sup> Interview Transcript #2, *supra* note 256.

<sup>422</sup> Interview Transcript #7, *supra* note 1.

<sup>423</sup> Interview Transcript #1, *supra* note 3.

<sup>424</sup> Interview Transcript #1, *supra* note 3.

<sup>425</sup> Interview Transcript #8, *supra* note 220.

<sup>426</sup> Interview Transcript #8, *supra* note 220.

nobody knows.” And so, you document your files, you advise the client. I go back to the risk threshold client right, the client who says “No, I don’t want to deal with it. Take the most conservative approach and advise my CPA for the most conservative [approach].. ..” Then there are the clients that are like, “Well, let me play the law audit lottery. You don’t know it. The government doesn’t know it. If you need to make a disclosure, let’s make a disclosure. But let’s just see how it goes.”<sup>427</sup>

### 9. *Professional Self-Defense*

Five of the lawyers raised the risks to themselves that inappropriate advice to the client may bring. One of them mentioned accepting a client’s decision to risk penalties but not being willing to do anything that would subject herself to penalties.<sup>428</sup> Others mentioned the risk of losing their license and career by violating professional ethics standards.<sup>429</sup> One said she explains the boundary to some clients by saying that, if it is crossed, then “that becomes my career and unless you want to support me for the rest of my life then I’m not doing it.” And most of them say, “oh no, I don’t want to do that.”<sup>430</sup> Another said tax lawyers “don’t want to be worrying about malpractice” but “want to sleep at night” and “our kids to have shoes on their feet” and not be “visiting us in the pokey.”<sup>431</sup> When asked what advice she would give to new tax lawyers, one said:

[B]e careful ... who you trust. I’d tell them to document everything in writing that may not seem [like it needs to be documented]. I’ve been sued for malpractice one time. . . . [T]he client swore to me that they had done lots of tax credit deals and they could use the credits. I kept saying individuals have a hard time using them and “nope we can use them.” And sure enough when tax season came, they couldn’t. You know, it was a hard lesson to learn, and I am very sensitive to it.<sup>432</sup>

### 10. *Pulling it Together*

One interviewee described the end result for the tax attorney: “doing the documents and making sure the documents conform to all of the issues that have been discussed and cover all those bases” and pulling “together all the different components [to] make sure that the client either has their issues addressed or understands why they can’t be.”<sup>433</sup> Another emphasized the

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<sup>427</sup> Interview Transcript #9, *supra* note 231.

<sup>428</sup> Interview Transcript #1, *supra* note 3.

<sup>429</sup> Interview Transcript #3, *supra* note 2; Interview Transcript #9, *supra* note 231; Interview Transcript #12, *supra* note 256.

<sup>430</sup> Interview Transcript #12, *supra* note 256.

<sup>431</sup> Interview Transcript #3, *supra* note 2.

<sup>432</sup> Interview Transcript #14, *supra* note 219.

<sup>433</sup> Interview Transcript #5, *supra* note 220.

“ability to communicate. So not only to listen[, b]ut also to explain in a way that the client understands.”<sup>434</sup> She said this meant not talking “big words” or “lawyerese.”<sup>435</sup> What she wants is to make “sure they understand. I want everybody to understand what they’re doing as best as they can.”<sup>436</sup> With respect to explaining what is going on, another interviewee said what she is “able to do is take tax concepts and usually break them down and explain them to clients in a way that’s understandable. And I think that’s important.”<sup>437</sup> Another lawyer, who also emphasized making sure the documents work right, emphasized the work needed for clear communication:

I’ve also taken a long time to learn how to be clear without too much code and reg [because, otherwise,] it’s incomprehensible to the client and it’s incomprehensible to their advisors. It’s only useful to me down the road. It is not useful to them. So, I work incredibly hard on every single communication, even my emails. . . . I’m very careful. I try to be clear. I try to be clear, even if it’s 8 o’clock or 10.<sup>438</sup>

One said that what clients like about her style is that “I lay it on the line.”<sup>439</sup> Another said what she thought was important was being clear about her uncertainty:

But I think, to me, it’s always, I[’ve] got to give the client an answer. In order to do that, sometimes I, very infrequently, will say there is just no law and I’m not finding anything analogous, and this is like unique enough that I can’t just guess the answer. And then other times [I can say] that, by virtue of analogy, I think this is the answer, but there is a risk. So, I think what makes it easier is the ability to provide an answer, when you can, which is almost all the time, you can, but with the proper caveat. Then being able to recommend, what is the next step. . . .<sup>440</sup>

### 11. *Billing*

Nine of the lawyers mentioned time and billing. Two mentioned how many hours they work. One just said she worked “really long hours, too long.”<sup>441</sup> The other was more specific. Saying she bills at \$1200 an hour (under pressure by her partners to raise it to \$1800), she reported working

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<sup>434</sup> Interview Transcript #12, *supra* note 256.

<sup>435</sup> Interview Transcript #12, *supra* note 256.

<sup>436</sup> Interview Transcript #12, *supra* note 256.

<sup>437</sup> Interview Transcript #5, *supra* note 220.

<sup>438</sup> Interview Transcript #10, *supra* note 234.

<sup>439</sup> Interview Transcript #4, *supra* note 225.

<sup>440</sup> Interview Transcript #8, *supra* note 220.

<sup>441</sup> Interview Transcript #11, *supra* note 224.

“80 hours a week, Friday nights, Saturday.”<sup>442</sup> Of course, not all of those hours are billed. She complained of her partners not understanding that the work of tax lawyers is not like that of M&A lawyers, and while the latter in her firm bill 2600 hours a year, she only bills 1500.<sup>443</sup> She said sometimes she may be unable to bill for work but needs to do it in order to get to the right answer, and that, if she thinks “17 drafts on something” is appropriate, then the “last few drafts are on me,” not on the client’s bill.<sup>444</sup> Another one who put her sense of professional duties above the likelihood of being paid was the lawyer who described a particular estate planning client worth \$100 million as a “cheap SOB” but one that you have to follow-up with regardless.<sup>445</sup> One said she might not get paid when a client did not “like what I said” but accepted that risk when she felt she had a “moral and legal obligation” to say it.<sup>446</sup>

Another said her biggest struggle is to capture her time, as she wants to put the client above the fee, and to get to know the client in order to do a good job, but that it is a struggle to know how to bill that.<sup>447</sup> One simply said, “I don’t like charging a ton of money to a client.”<sup>448</sup> Another said that, as she works in a middle market, her clients are especially fee sensitive, and so she often refers them for what their CPA can do more cost effectively.<sup>449</sup> Another complained of the occasional situations in which she has “to go back and. . . do a lot of paperwork to explain why you did what you did” in an argument with a client over a bill.<sup>450</sup>

Four lawyers mentioned inappropriate billing as a marker of a bad tax lawyer. One thought some intentionally overcomplicated deals in order to bill more.<sup>451</sup> One complained of tax lawyers who charge clients to come up with a “brainiac idea” that will not work.<sup>452</sup> Similarly, another said some tax lawyers made “a lot of money” by “purposely” and “willfully” being blind.<sup>453</sup> Another identified a high fixed fee as “the first clue” that someone is pushing an inappropriate strategy.<sup>454</sup>

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<sup>442</sup> Interview Transcript #10, *supra* note 234.

<sup>443</sup> Interview Transcript #10, *supra* note 234.

<sup>444</sup> Interview Transcript #10, *supra* note 234.

<sup>445</sup> Interview Transcript #13, *supra* note 219.

<sup>446</sup> Interview Transcript #3, *supra* note 2.

<sup>447</sup> Interview Transcript #12, *supra* note 256.

<sup>448</sup> Interview Transcript #4, *supra* note 225.

<sup>449</sup> Interview Transcript #8, *supra* note 220.

<sup>450</sup> Interview Transcript #3, *supra* note 2.

<sup>451</sup> Interview Transcript #9, *supra* note 231.

<sup>452</sup> Interview Transcript #12, *supra* note 256.

<sup>453</sup> Interview Transcript #4, *supra* note 225.

<sup>454</sup> Interview Transcript #5, *supra* note 220.

## V. Conclusion

This study was the first qualitative empirical study of U.S. tax lawyers. Its interviews provide a rich source of information on who tax lawyers are, how they experience ethical tensions, and how they discuss ethical duties. This information provides at least partial answers to the three research questions identified below. It also opens areas for future studies and provides insight into tax practice and tax lawyers that can be used by the tax bar and those who teach tax.

### A. *Answering the Research Questions*

We had three research questions. Our first question was: who are U.S. tax lawyers? Our interviewees were highly experienced, had a variety of practice types, and practiced in firms of all sizes. We anticipated that our conversations with them would help us better understand who U.S. tax lawyers are. Our second question was how they experience ethical tensions in their practice? We thought we might hear of tensions with clients and co-workers, as well as tensions in articulating appropriate advice. Our final question was how is it that the lawyers discuss their ethical duties. With concepts and language from seven decades of law, regulations, official guidance, and commentary to draw on, what did tax lawyers use in discussing their ethical duties?

#### 1. *Who Are U.S. Tax Lawyers?*

The study was designed to answer the three research questions set forth above.<sup>455</sup> Although a quantitative study of the tax bar would be useful to answer the first question, that was not this project's design. We sought to learn about the tax bar from the interviewees. The tax bar was described as smart and committed to ongoing study.<sup>456</sup> Despite some characterizations of these smart lawyers as nerds or unable to understand the purpose of social functions, they were also described as quite social.<sup>457</sup> We hear this especially in comments about enjoying teamwork.<sup>458</sup> Perhaps the sociability is related to the dislike for adversarial practice several mentioned.<sup>459</sup> It is interesting that, unlike many of the commentators on tax practice, the interviewees did not describe a widespread ethical failure among tax lawyers; only a few said they could identify some bad tax lawyers, but none thought there were a great many.<sup>460</sup>

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<sup>455</sup> See *supra* Part A

<sup>456</sup> See *supra* Part 4; Part 1.

<sup>457</sup> See *supra* Part 3.

<sup>458</sup> See *supra* Part 5.

<sup>459</sup> See *supra* Part 2.

<sup>460</sup> See *supra* Part 4; Part 4; Part 11

Listening to what the interviewees had to say about themselves, and specifically what it is they enjoy about their practice, we would conclude that tax lawyers are, in a word: “puzzlers.”<sup>461</sup> The pleasure the interviewees took in the intellectual aspects of their profession stands out.<sup>462</sup> They enjoyed getting the puzzle right.<sup>463</sup> Ideally, they wanted the clients to appreciate the puzzle. But even if clients failed to appreciate the same details as the lawyer, they wanted their clients to at least understand the law’s relationship to facts and goals and, at times, its uncertainty.<sup>464</sup> It was, the interviewees concluded, frustrating if the clients misunderstood those puzzle pieces.<sup>465</sup>

Without exception, the interviewees seemed professionally satisfied.<sup>466</sup> When asked what they enjoyed or what stressed them in their work, the answers to the first flowed far quicker.<sup>467</sup> Even the one who worked 80 hours a week and had no home life seemed to love tax.<sup>468</sup> The research required into client matters, and the ongoing need to keep abreast of legal changes and tax literature, did not prompt complaints.<sup>469</sup> The intellectual demands and the teamwork of the practice seemed satisfying.<sup>470</sup> This is particularly interesting in light of the empirical research that shows increased job satisfaction makes one more likely to recognize ethical issues in tax practice.<sup>471</sup>

## 2. *How Do U.S. Tax Lawyers Experience Ethical Tensions?*

Our second research question was about how tax lawyers experience ethical tensions. We were interested in learning about their experience regarding situations in which there is, or may be, a conflict of principles or expectations or a conflict with a person to whom the lawyer owes duties.<sup>472</sup> Not surprisingly, given the prominence of puzzle-like language they used, they experienced tension around getting the advice right.<sup>473</sup> The challenge of advising a client was particularly tense in areas in which there was little guidance, which could be the case in cutting-edge areas like cryptocurrency, but also with very routine-seeming transactions. It was especially the case with state and local tax issues.<sup>474</sup> Other challenges to getting the advice right was dealing with poor quality ideas proposed by the client or the client’s other

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<sup>461</sup> See *supra* Part 3; Part 1; Part 2; Part 6; Part 7; and Part 8.

<sup>462</sup> See *supra* Part 3; Part 1; Part 2; Part 6; Part 7; and Part 8.

<sup>463</sup> See *supra* Part 3; Part 1; Part 2; Part 6; Part 7; and Part 8.

<sup>464</sup> See *supra* Part 3; Part 1; Part 2; Part 6; Part 7; and Part 8.

<sup>465</sup> See *supra* 6; Part 7; and Part 8.

<sup>466</sup> See *supra* Part 4.

<sup>467</sup> See *supra* Part 3.

<sup>468</sup> See *supra* Part 4; Part 11.

<sup>469</sup> See *supra* Part 3; Part 1; and Part 6.

<sup>470</sup> See *supra* Part 3; and Part 5.

<sup>471</sup> See *supra* Part III.

<sup>472</sup> See *supra* Part A

<sup>473</sup> See *supra* Part 2; Part 3; Part 4; Part 6; Part 8.

<sup>474</sup> See *supra* Part 3; Part 6; Part 7; Part 8.

advisors.<sup>475</sup> On each of these points, they echoed the informal literature on providing good advice.<sup>476</sup>

They also echoed that literature in describing the tension around managing clients.<sup>477</sup> There is a practical need to manage the client, and especially to get the right information out of clients, such as their non-tax goals.<sup>478</sup> The lawyers sought to inform the clients of their options, but tensions surfaced when clients got in their own way and worked against their best interests.<sup>479</sup> On the one hand, they accepted the client as the decision-maker, but on the other hand, they experienced difficulties keeping the client focused on the points most important to making a good decision.<sup>480</sup>

The need to balance these needs created tension in communications with clients.<sup>481</sup> What matters most is being clear on uncertainty and its consequences.<sup>482</sup> This uncertainty has to be explained without lawyerese, but accurately enough that the client can assess both the risks and the options for reducing the risks.<sup>483</sup> Some reported tension with team-wide communications that could be misunderstood by the client, or not protected by the attorney-client privilege.<sup>484</sup>

Lawyers have a duty to serve the clients but, of course, they bill the clients to do so, and therein lies a different kind of tension. Some mentioned the billing-related tension caused by sharing the field with accountants.<sup>485</sup> This can arise if the client will not provide work done by the accountants for review by the lawyer on the grounds that the accountants were already paid to do it.<sup>486</sup> And it can arise when the lawyer must refer work to the accountants because the accountants work at a lower rate.<sup>487</sup> There was tension with clients being unable to value the tax lawyer's service. In some situations this led to lawyers working despite knowing they would not be paid for all of their time.<sup>488</sup> There was also some tension with law firm partners who failed to understand the nature of tax practice.<sup>489</sup> Another billing-related stress was how to account for time spent becoming familiar with the client, which is necessary for serving the client, but at the same time is not the same as time

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<sup>475</sup> See *supra* Part 3; Part 5.

<sup>476</sup> See *supra* Part A.

<sup>477</sup> See *supra* Part 1; Part 2; Part 3; Part 2; Part 3; Part 4; Part 10; Part 11.

<sup>478</sup> See *supra* Part 4; Part 10.

<sup>479</sup> See *supra* Part 2; Part 3; and Part 4.

<sup>480</sup> See *supra* Part 2; Part 3; and Part 4.

<sup>481</sup> See *supra* Part 3; Part 5; Part 6; Part 7; Part 8; Part 10.

<sup>482</sup> See *supra* Part 3; Part 5; Part 6; Part 7; Part 8; Part 10.

<sup>483</sup> See *supra* Part 3; Part 5; Part 6; Part 7; Part 8; Part 10.

<sup>484</sup> See *supra* Part 3; Part 5; and Part 6.

<sup>485</sup> See *supra* Part 11.

<sup>486</sup> See *supra* Part 4.

<sup>487</sup> See *supra* Part 11.

<sup>488</sup> See *supra* Part 11.

<sup>489</sup> See *supra* Part 11.

spent in researching or advising on specific issues.<sup>490</sup> And a more general stress was simply not wanting to bill “a ton.”<sup>491</sup>

### 3. *How Do U.S. Tax Lawyers Discuss Ethical Duties?*

How do lawyers discuss their professional duties? When asked about duties, the interviewees spoke almost as if reading from the Model Rules. One of the most common words used was “competence,” which is the title of the first rule in the first chapter of the Model Rules.<sup>492</sup> Their mention of loyalty, confidentiality, and organization and promptness—that is, diligence—also sounded like a recitation of the titles of specific Model Rules.<sup>493</sup> The interviewees talked about the importance of giving the tax client a straightforward and honest assessment of the situation that enabled the client to make an informed decision and then abiding by the client’s decision.<sup>494</sup> A description could not map more squarely on the Model Rules for communication, providing advice, and the allocation of authority between the client and the lawyer.<sup>495</sup>

While at first it may not be surprising that tax lawyers sounded like lawyers when asked about duties, it’s worth taking a second look at the history of analyzing tax lawyer duties.<sup>496</sup> In light of that long and complex history, it is surprising the tax lawyers did not use more tax-practice-specific language. ABA Formal Opinion 85-352 sets “realistic possibility of success” as the return position standard.<sup>497</sup> For almost 40 years, this has been the specific guidance on how the Model Rules apply to return positions.<sup>498</sup> But none of the interviewees mentioned that tax-specific standard. They also did not explain their providing advice in terms of the “reasonable basis” or “substantial authority” standards from the accuracy-related penalty statutes.<sup>499</sup>

Their failure to mention these terms in no way suggests their practices fall short. Their explanations regarding providing advice described the process of researching and weighing the relative importance of authorities as precisely what Congress intended the substantial authority standard to cover:

<sup>490</sup> See *supra* Part 11.

<sup>491</sup> See *supra* Part 11.

<sup>492</sup> See *supra* Part 4; MODEL RULES OF PRO. CONDUCT R. 1.1 (Competence) (AM. BAR ASS’N 2020).

<sup>493</sup> See *supra* Part 4; MODEL RULES OF PRO. CONDUCT r. 1.3 (Diligence), r. 1.6 (Confidentiality of Information), r. 1.7 (Conflicts of Interest: Current Clients) (AM. BAR ASS’N 2020).

<sup>494</sup> See *supra* Part 2; Part 3; Part 4.

<sup>495</sup> See *supra* Part 1; MODEL RULES OF PRO. CONDUCT r. 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), r. 1.4 (Communications), r. 2.1 (Advisor).

<sup>496</sup> See *supra* A

<sup>497</sup> See *supra* Part 1.

<sup>498</sup> See *supra* Part II.A.1.

<sup>499</sup> Some of the interviewees did mention the risk of penalties. But, even then, none mentioned specific standards, such as “reasonable basis” or “substantial authority.” See *supra* Part 8.

emulating judges' legal decision-making.<sup>500</sup> But this is not so much to credit Congress as it is to recognize that the approach reflects how lawyers are trained. Lawyers are trained to sort authorities and then weigh those in support and those contrary to the position. The interviewees also never used the term "economic substance," but consistently emphasized the importance of (non-tax) business goals.<sup>501</sup> They did not tie it to an accuracy-related penalty, though one spoke of "business purpose" as a substantive requirement.<sup>502</sup> The importance of non-tax goals in tax planning was discussed a great deal, as it has long been in the informal advice literature rather than in technical terms.<sup>503</sup>

Circular 230 almost escaped mention. One had a sense it governed her, but no clear sense of what that meant.<sup>504</sup> Another described it as something in the background of providing advice but made no other comment about it.<sup>505</sup> It is somewhat surprising that none of these lawyers mentioned Circular 230, inasmuch as their careers largely overlap with its rise in prominence over the last four decades.<sup>506</sup> Perhaps these lawyers have followed both its rise and fall and did not mention it because its relevance to return preparation and advising is now uncertain; however, it seems more likely that anyone who had followed it closely would have mentioned it. Perhaps Circular 230 is not particularly prominent since most of it reads like the Model Rules.<sup>507</sup> As to the tax-specific guidance in Circular 230, the return preparation standard for undisclosed positions incorporates substantial authority, which the interviewees described informally.<sup>508</sup> And the current guidance on written advice requires using relevant facts and applying the law to the facts, much like these interviewees described their process of providing advice without citing Circular 230.<sup>509</sup> As a shared set of professional standards with a single enforcer, Circular 230 theoretically unites CPAs and tax lawyers into a federal tax profession.<sup>510</sup> However, the interviewees' near silence on Circular 230 is exceeded by their complete silence on the idea of CPAs and tax lawyers belonging to a single tax profession. Given the bar's long-standing and continuing insistence on professional separation, this last point is not surprising.<sup>511</sup>

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<sup>500</sup> See *supra* Part 2; Part 6; and Part 8.

<sup>501</sup> See *supra* Part 4 and Part IV.B.6.

<sup>502</sup> See *supra* Part 4.

<sup>503</sup> See *supra* Part 1; Part 2; Part 3.

<sup>504</sup> See *supra* Part 4.

<sup>505</sup> See *supra* Part 4.

<sup>506</sup> See *supra* Part 3.

<sup>507</sup> See *supra* Part II.A.3.

<sup>508</sup> See *supra* Part II.A.3.

<sup>509</sup> See *supra* Part II.A.3.

<sup>510</sup> See *supra* Part II.A.3.

<sup>511</sup> See *supra* Part 1.

When explaining their duties in advising clients, the interviewees sounded like the writers of the early, informal advice literature. They shared the decades-old emphasis on research, teamwork, the difficulty of getting facts from the clients, keeping the client focused on non-tax goals, being skeptical of overly-technical and trendy plans, being willing to tell the client “no,” and the importance of being a deal-maker rather than a deal-breaker.<sup>512</sup> It seems that, despite the decades of complex developments in accuracy-related penalty statutes and Circular 230 and ABA Formal Opinions, when asked about how to advise clients, tax lawyers sound today much like those who wrote before most of the history of those formal standards occurred.<sup>513</sup>

None of the interviewees claimed that tax lawyers have a special duty to the tax system.<sup>514</sup> This is surprising given how long such a duty has been discussed.<sup>515</sup> After all, the casebooks open with it.<sup>516</sup> Also absent were appeals to patriotism and civic duties that were the origins of the special duty to the system, as well as any mention of a duty to be involved in tax reform.<sup>517</sup> One of the interviewees described a duty to the system but it was a duty to the rule of law, generally, and not a special need to protect the tax system as such.<sup>518</sup> In the original debate over such a duty, one of the specific concerns was the audit lottery undermining the self-assessment system.<sup>519</sup> None of the interviewees worried about that, perhaps because disclosure requirements today are specified by law.<sup>520</sup> Those earlier advocates for a special duty to the tax system also worried about the widespread failure of ethics among tax lawyers.<sup>521</sup> But the interviewees expressed no such worry.

By avoiding tax-specific terms and duties, the interviewees underscored their identity as lawyers rather than tax professionals. Yet, unlike perhaps what we would expect of lawyers, the interviewees did not describe the tax agencies as adversaries or invoke a duty of zealous advocacy. The distinction between advocate and advisor is, however, clearly expressed in the Model Rules.<sup>522</sup> It is also found in the informal literature on advising.<sup>523</sup> The tax bar has long recognized this distinction, and prominent members criticized the PR Committee for failing to acknowledge it in issuing Formal Opinion 85-352.<sup>524</sup>

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<sup>512</sup> See *supra* Part 1; Part 2; Part 3; Part 2; Part 4; Part 5; Part 6; Part 8.

<sup>513</sup> See *supra* Part 1.

<sup>514</sup> See *supra* Part 4; Part 6; Part 8.

<sup>515</sup> See *supra* Part 4.

<sup>516</sup> See *supra* Part 4.

<sup>517</sup> See *supra* Part 4.

<sup>518</sup> See *supra* Part 4.

<sup>519</sup> See *supra* Part 4.

<sup>520</sup> See *supra* Part 2.

<sup>521</sup> See *supra* Part 4.

<sup>522</sup> See *supra* Part 1.

<sup>523</sup> See *supra* Part 3; Part 4.

<sup>524</sup> See *supra* Part 3; Part 4.

When they spoke of their duties, it can be said the interviewees emphasized the duty to solve the puzzle.<sup>525</sup> Earlier writers held a convenient pragmatism in which good tax advice protected both the client and the tax system, and perhaps this conviction endures.<sup>526</sup> With their emphasis on intelligence and research and keeping current, the interviewees emphasized the intellectual integrity of tax advising.<sup>527</sup> The intellectual integrity was more important than satisfying the client, or even getting paid by the client.<sup>528</sup> Thus, they emphasized their professional independence.

While their commitment to intellectual integrity was obvious, so was their understanding of professional self-defense. A very early commentator had talked about the reckoning of tax law “on earth and not in heaven” and in the lawyer’s dollars, and the interviewees sounded similar.<sup>529</sup> One said she abided by her client’s choice, even if it meant a penalty for the client, but that she would not go along with anything that would risk a penalty on herself.<sup>530</sup> Getting the puzzle wrong also means a malpractice risk. One spoke of the lessons she learned from a malpractice suit.<sup>531</sup> There was mention of losing one’s livelihood.<sup>532</sup> And, perhaps as evidence of the chilling effect of the criminal prosecutions of tax shelter promoters, another mentioned the risk of being put into the pokey and one’s children being shoeless as the result of crossing the line.<sup>533</sup> Perhaps professional self-defense reflects the duty to one’s dependents, as well as to one’s firm and oneself.

### B. *Pragmatic Reflections on the Answers*

Our aim with this study was to provide useful insights to the tax bar, tax teachers, and to those who research professional responsibility. Our reflections on the answers to the research questions leads us to some specific suggestions. Some of our suggestions reflect ways in which this research may help the tax bar support tax lawyers. We are also led to encourage those who teach tax to emphasize certain points and, perhaps, address new topics and use new methods. We believe that researchers may find a great many opportunities for follow-up, and we identify what we think are some of the more obvious ones.

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<sup>525</sup> See *supra* Part 3; Part 2; Part 3; Part 6; Part 7; Part 8.

<sup>526</sup> See *supra* Part 2; Part 3; Part 4.

<sup>527</sup> See *supra* Part 3; Part 2; Part 3; Part 6; Part 7; Part 8.

<sup>528</sup> See *supra* Part 2; Part 3; Part 4; 11.

<sup>529</sup> See *supra* Part 3; Part 9.

<sup>530</sup> See *supra* Part 9.

<sup>531</sup> See *supra* Part 9.

<sup>532</sup> See *supra* Part 9.

<sup>533</sup> See *supra* Part 9.

### 1. *State Bar Tax Sections*

As did the early writers on informal advice, the interviewees emphasized the importance of research and keeping current.<sup>534</sup> For many state bars, providing quality continuing education courses is a priority. The interviewees were generous in participating in the project, and they also were interested in its outcome.<sup>535</sup> This suggests tax lawyers are interested in what tax lawyers do and how they do it. Professional ethics is, ultimately, a matter of professional custom. But professional ethics education is usually focused on the Model Rules and the law of lawyering. Continuing education committees might find significant interest in courses focused on customary practices among tax lawyers as such, grounded in discussions of practices rather than doctrines. There may be particular interest among tax lawyers in learning how others handle the time investment required to get to know the client, and how others handle situations in which a good quality job requires work for which the lawyer likely will not be paid.<sup>536</sup> That tax lawyers may be competing with CPAs makes the billing issues particularly important, especially if the structure of law firms and expectations of non-tax law partners pushes billing rates of tax lawyers further from their counterparts in accounting firms.<sup>537</sup>

It has been over half a century since the ABA tax section's members first sought formal ethics guidance for tax lawyers. State bar tax sections could seek guidance from their own ethics experts. In light of *South Dakota v. Wayfair* and the growth of online commerce, state and local tax issues are more important than ever.<sup>538</sup> Yet the state and local resources tax lawyers need to consider in advising clients are much less developed than at the federal level, as are the processes used by the state and local tax agencies.<sup>539</sup> One interviewee believed that even if a business wants to be “completely compliant” with its many sub-national tax obligations, the number of rules, the “moving parts,” and the lack of education from the agencies prevents it.<sup>540</sup> The state bar tax sections might seek guidance on how their lawyers should navigate these situations. The professional standards developed in the federal tax context may be much less useful in the state and local contexts insofar as there is much less guidance.

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<sup>534</sup> See *supra* Part 1.

<sup>535</sup> See *supra* Part BPart 1.

<sup>536</sup> See *supra* Part 4; Part 11.

<sup>537</sup> See *supra* Part 4; Part 11.

<sup>538</sup> See *South Dakota v. Wayfair, Inc.* 138 S.Ct. 2080 (2018) (out-of-state seller's physical presence in taxing state is not necessary for state to require online seller to collect and remit its sales tax).

<sup>539</sup> See *supra* Part 4.

<sup>540</sup> See *supra* Part 4.

## 2. *Teaching Future Tax Lawyers*

Those who teach tax law should note how intellectually demanding long-time tax lawyers continue to find it.<sup>541</sup> We should prepare students to meet the field's intellectual demands over the long term. We should ensure they have a sufficient business and finance education to understand non-tax goals.<sup>542</sup> We should teach the accuracy-related penalty standards, especially economic substance and substantial authority so that these may always be in the back of their minds and so that they know when to bring them forward.<sup>543</sup> The interviewees also persuaded us as to the importance of teaching tax students more about communication, and also teaching them to work more as team members.<sup>544</sup> On these points, as well as on educating our students on methods for developing good relationships with clients, law professors may benefit from learning from colleagues elsewhere in the university.

## 3. *Follow-up Research*

Those who research the tax bar as a profession might investigate how representative our interviewees are. There have been no large studies of the demographics of the tax bar, and it would be interesting, and perhaps useful, on some points. For example, almost all of the interviewees had an LLM, and about 20% were CPAs.<sup>545</sup> How representative of the tax bar is that? The vast majority had served in significant bar leadership positions, and some specifically mentioned the importance of bar activities. How involved in the bar are tax lawyers?<sup>546</sup> The design of the study meant we did not have any interviewees from the states that do not certify tax specialists.<sup>547</sup> Are there notable differences between tax lawyers in states that do and do not certify specialists? Are there differences within a state between the lawyers who are and are not certified as specialists? We also excluded lawyers who were not working in law firms. How do non-firm lawyers differ from tax lawyers who work in law firms?

The most obvious questions are those raised by our interviewing only women. We did not set out to study women tax lawyers as such. By our count, only about 7% of the board-certified tax specialists in the country are women actively practicing tax planning in law firms.<sup>548</sup> We set out to be sure to include a significant number of these women in the study, but their willingness to participate soon filled the time we had for interviews. We were

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<sup>541</sup> See *supra* Part 1.

<sup>542</sup> See *supra* Part 2; Part 3; Part 4; Part 10; Part 11.

<sup>543</sup> See *supra* Part 7; Part 8; Part 9.

<sup>544</sup> See *supra* Part 5; Part 10.

<sup>545</sup> See *supra* Part 1.

<sup>546</sup> See *supra* Part 1.

<sup>547</sup> See *supra* Part B

<sup>548</sup> See *supra* Part B Of the 890 board-certified tax specialists, only 63 were board-certified women actively engaged in tax planning practice at law firms/

surprised by the low number of women who fit our interviewee criteria. Would only 7% of the tax sections in those states have been women who fit our interviewee criteria? How many members of the tax bar are women?<sup>549</sup> How does it compare to women who practice tax as CPAs?

A different, but perhaps even more interesting, question is whether women are more likely to participate in a study on the profession. The interviewees received an email from a law professor they did not know who taught in another state at a state school none of them had attended. If we had set out to test gender differences in willingness to participate, would we have found that men would participate at the same rate? If men had been interviewed, would they have described their duties, clients, other lawyers, and the tax system differently? Would men have talked about their kids and childcare, their responsibilities in the home, the special care required of coaxing information from some male clients, their fear of making mistakes, and the time they were sued for malpractice?<sup>550</sup> Maybe. If Michelle had interviewed these male lawyers, would the interviews have been more interesting than if Michael had interviewed them? Maybe.

Quantitative investigation into the distribution of tax lawyers among firm sizes and specializations and the relation between the two might help those interested in professional responsibility understand the differences in issues faced by lawyers in different practices. Our interviewees were in firms of all sizes, and their practices were in various specializations.<sup>551</sup> As a qualitative rather than a quantitative study, we have no basis on which to say how firm size or specialization affected the interviews. But we can note for further study how some of the interviewees' practices may not fit common expectations. We believe the common expectations would be that lawyers in smaller firms were focused on estate planning, and that formal opinion-writing is a usual practice in larger firms. Yet, the solo tax lawyer gave planning advice in cutting-edge, transactional areas and had significant international practice experience.<sup>552</sup> And, though the one lawyer who said formal opinions were a usual part of her practice was in a firm of over 500, the other lawyers in firms of that size said opinion-writing was not a usual part of their practice.<sup>553</sup>

A fundamental issue for this research is: who counts as a tax lawyer? There are many tax practice specializations. In light of the differences in legal issues and client types across those specializations, do they have more that differentiates than unites them? Might we count as tax lawyers only those

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<sup>549</sup> 29.3% of the members of the ABA tax section are female. Among the practice area sections, the only one with a lower female membership percentage is construction law with 28.8%. AM. BAR ASS'N, GOAL III REPORT 2022: THE DEMOGRAPHIC DIVERSITY OF THE ABA'S LEADERSHIP AND MEMBERS 18 (2022).

<sup>550</sup> See *supra* Part 4; Part 5; Part 4.

<sup>551</sup> See *supra* Part 1.

<sup>552</sup> See *supra* Part 8.

<sup>553</sup> See *supra* Part 7.

who spend most of their billable time researching and advising on tax issues? If we did so, then lawyers who do not work in law firms may be most likely to count as tax lawyers, even though working outside a law firm means they may not be authorized to “practice law” under the Model Rules.<sup>554</sup> Moreover, a lawyer who handles various aspects of business transactions or estate planning may spend more time on non-tax issues precisely because the lawyer already has tax expertise. There is a great deal of routine work that requires an understanding of tax but not necessarily much research. Indeed, this may be the type of work on which some tax lawyers most add value for their clients. But, if we counted based on hours devoted exclusively to tax research and advising, that work would not count for much. There is also no obvious way to define tax lawyers in terms of expertise. Board-certification evidences expertise, but it is an underinclusive approach. Interest in tax law evidenced by bar tax section membership could be overinclusive.

Given the interviewees’ emphasis on the intellectual demands of tax work and their enjoyment of its puzzle aspects, researchers interested in professional responsibility might explore the connection between intellectual integrity and ethical integrity. Can the latter be reduced to the former? It is interesting that the tax lawyers enjoyed the complexity of the tax law, as the tax law is often criticized for its complexity. This complexity may become more easily managed by artificial intelligence, which may mean tax lawyers find their work less satisfying in some regards. For the interviewee drawn to the tax code as a jungle gym, or the one who listened to its rhythm, or the one who saw its symmetry, or the one who most enjoyed working with smart colleagues on hard problems, how will developments in artificial intelligence affect their sense of intellectual satisfaction?<sup>555</sup> How will it affect their approach to uncertainty, risk, and providing advice?

Professional responsibility researchers will no doubt pause on two findings of this study. The first is that none of these tax lawyers raised a special duty to the tax system. Discussion about such a duty is about as old the discussion of ethics among tax lawyers.<sup>556</sup> Yet, these lawyers seemed unfamiliar with it. Does it matter? When that discussion began, there was no statutory requirement to make a special disclosure if a return position has only a reasonable basis, or for a return position to have substantial authority if there was no special disclosure, nor did the specific provisions on economic substance and tax shelters exist.<sup>557</sup> But do those considerations exhaust the meaning of any such duty, at least when combined with the Model Rules? Appeals to patriotism and civic duties may be more romantic, and perhaps even more inspiring, than appeals to the law and the Model Rules, but is there

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<sup>554</sup> See *supra* Part 1.

<sup>555</sup> See *supra* Part 2; Part 3; Part 5; Part 6.

<sup>556</sup> See *supra* Part 4.

<sup>557</sup> See *supra* Part 2; Part 4.

any reason to believe the latter two are insufficient to protect both the client and the tax system?<sup>558</sup>

The second finding likely to cause pause is the positive impression of the tax bar. There has been so much commentary, both academic and journalistic, about the ethical failings of tax advisors that no doubt many readers will question the interviewees' generally positive assessment.<sup>559</sup> It is true they discussed trendy but problematic tax planning ideas—inappropriate conservation easement and micro-captive insurance plans being specifically mentioned as examples.<sup>560</sup> And they mentioned unethical billing practices.<sup>561</sup> But, unlike the generation that began the debate over a special duty to the tax system, and unlike many contemporary commentators, these interviewees did not speak of widespread ethical failures among the bar. This disconnect between the impression of academic commentators and the impression of these highly-experienced tax lawyers may well warrant exploration.

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<sup>558</sup> The issue is whether the content of the rules and standards are what they should be, not how to increase compliance.

<sup>559</sup> See *supra* Part 4; Part 4.

<sup>560</sup> See *supra* Part 6.

<sup>561</sup> See *supra* Part 11.