Challenging the Adversarial Approach to Taxpayer Representation

Loren D. Prescott Jr.
CHALLENGING THE ADVERSARIAL APPROACH TO TAXPAYER REPRESENTATION

Loren D. Prescott, Jr.*

I. INTRODUCTION

Each year U.S. taxpayers prepare and file tax returns with the federal government which summarize information that serves as the basis for the assessment of federal income tax. Because ours is a self-assessment system, the Internal Revenue Service (IRS) must examine returns as part of an effort to ensure that all taxpayers are complying with the internal revenue laws. Naturally, taxpayers are motivated to report transactions in a way that minimizes tax liability. Equally important to taxpayers, however, is a return that minimizes the likelihood of examination, given the time and expense associated with IRS audits and the much publicized concern over IRS abuse of taxpayer rights. The conflict between the government's need for information and the taxpayer's interest in minimizing both tax liability and disclosure creates an adversarial relationship between the IRS and taxpayers that threatens governmental efforts to test for taxpayer compliance.

The adversarial nature of the tax compliance process is, in part, a product of the way in which the legal profession has characterized taxpayer interaction with the IRS. In ethics opinions issued for the purpose of defining the role of the lawyer as taxpayer representative, the profession takes the position that the tax compliance process involves a dispute between two adversaries—the taxpayer and the IRS—and should be treated as an adversarial proceeding warranting partisan advocacy on the part of the tax-

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payer's lawyer.\textsuperscript{1}

Although adoption of the adversary model in this setting is consistent with both taxpayer attitudes toward the compliance system and with the traditional duties assumed by the lawyer during representation of a client, it fails to consider fundamental differences between the return preparation and examination process and traditional adversary proceedings. In addition, the refusal of one party to volunteer information to another, a trademark of adversary proceedings, poses a serious threat to governmental efforts to promote taxpayer compliance.

This Article begins with a description of the adversary system and its use in the traditional dispute resolution setting.\textsuperscript{2} It then explores the use of the adversary system as a vehicle for resolving disputes between taxpayers and the IRS and suggests that use of the adversary system in this context is both theoretically inappropriate and practically inconsistent with societal interests.\textsuperscript{3} This Article concludes with a proposal designed to address the most serious problem associated with the use of the adversary model in this context: inadequate disclosure of information on tax returns.\textsuperscript{4}

\section*{II. THE ADVERSARY MODEL OF DISPUTE RESOLUTION}

The adversary model is characterized primarily by the use of an impartial and passive decision-maker.\textsuperscript{5} This decision-maker—the judge, jury, or both, in the trial setting—considers the evidence presented by the parties and resolves the dispute by rendering a decision based solely on information obtained from the parties. The decision-maker's impartiality creates a sense of fairness, which encourages the parties and society in general to respect judicial

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\textsuperscript{1} See infra Part III.

\textsuperscript{2} See infra Part II.

\textsuperscript{3} See infra Part III.

\textsuperscript{4} See infra Part IV.

\textsuperscript{5} See \textsc{Model Code of Professional Responsibility} EC 7-19 (1981) [hereinafter \textsc{Model Code}] (stating that the advocate's preparation and presentation allows the tribunal to keep an open mind and render impartial decisions); \textit{id.} EC 7-20 (stating that the adjudicative process requires an informed, impartial tribunal); \textit{id.} EC 7-33 (positing the goal of the legal system as the adjudication of cases before impartial tribunals); \textit{id.} EC 7-39 (recognizing the importance of preserving the impartiality of the tribunal); \textsc{Charles W. Wolfram, Modern Legal Ethics} 564 (1986) (stating that judge and jury are both neutral and passive); Murray L. Schwartz, \textit{The Zeal of the Civil Advocate}, in \textsc{The Good Lawyer: Lawyers' Roles and Lawyers' Ethics} 150, 153 (D. Luban ed., 1973) [hereinafter Schwartz, \textit{Zeal}] (describing the adversarial tribunal as unbiased and passive).
decisions.\textsuperscript{6} In addition, neutrality distinguishes the adversary model from a commonly used alternative—the inquisitorial system\textsuperscript{7}—by minimizing concerns associated with governmental influence over decisions.\textsuperscript{8}

In addition to being neutral, the decision-maker in an adversarial proceeding is also passive.\textsuperscript{9} In the litigation setting the fact
finder considers only the issues and evidence presented by the parties and has little opportunity to explore the issues outside the scope of the debate. Insistence on passivity follows from the theory advanced by some scholars that an active decision-maker formulates theories and conclusions prematurely and is therefore unable to consider all evidence objectively. Advocates of passivity also argue that it provides the decision-maker with the opportunity to benefit fully from the partisan arguments advanced by the parties. These scholars contend that, unlike judges in the inquisito-

and passive); Schwartz, Zeal, supra note 5, at 153 (describing the adversarial tribunal as unbiased and passive).

10. Professor Landsman states:

If the lawyers fail to carry out their duty, development of the case will be impeded, and the adversary process may be undermined. Failure of counsel may also draw the judge into the contest either in search of material truth or in an attempt to ensure a balanced presentation. In either situation, judicial intervention can interfere with the neutral evaluation of the case.

LANDSMAN, supra note 7, at 4.

11. See HAZARD, supra note 7, at 121 (stating that the adversary system is characteristic of trial procedures in common law countries); LANDSMAN, supra note 7, at 49 ("[T]he inquiring judge [in an inquisitorial system] is more likely to act upon his biases than is his adversarial counterpart."); Lon L. Fuller, The Adversary System, in TALKS ON AMERICAN LAW 34 (H. Berman ed., 2d ed. 1971) ("An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it."); Fuller & Randall, supra note 6, at 1160 ("But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention."). But see LUBAN, supra note 6, at 72 (describing conclusions about an inquisitorial judge's inability to remain unbiased as "untested speculations from the armchair").

12. See MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 4 (1975) (stating that the adversary system not only takes the fact of disagreement into account but takes advantage of it to produce a judgment informed by contrasting points of view); Byrne, supra note 8, at 204 ("For there are two sides to every question, so the best way to get to an answer is by arguing each side before an impartial and, insofar as possible, enlightened arbiter of fact and law."); Fuller, supra note 11, at 35 ("The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation."); Fuller & Randall, supra note 6, at 1161 (stating that the decision-maker can feel confident in making the correct decision only with the benefit of the "intelligent and vigorous advocacy on both sides" offered by the adversary mode). But see Marvin E. Frankel, The Search for Truth: An Umpireal View, 123 U. PA. L. REV. 1031, 1042 (1975) [hereinafter Frankel, Search]. Frankel states:

The ignorance and unpreparedness of the judge are intended axioms of the system. The "facts" are to be found and asserted by the contestants. The judge is not to have investigated or explored the evidence before trial. No one is to have done it for him . . . . Without an investigative file, the Ameri-
rial system, the passive and impartial decision-maker of the adversary system is more likely to render a correct decision due to the unbiased and detached mindset encouraged by the system.

Active party participation and control, the other major feature of the adversary system, serves as both a corollary of the system's insistence on a passive and impartial decision-maker and as a feature of independent importance. Motivated by a desire to prevail and benefiting from a unique knowledge of the facts surrounding the dispute, the parties engage in a thorough investigation and, with the assistance of counsel, prepare and present a case in support of their respective positions. The result is a party-centered

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13. See Professor Landsman's description of the inquisitorial system, supra note 7. See also HAZARD, supra note 7, at 120 (stating that the judge in an inquisitorial system determines law and finds facts by his own active investigation and inquiries).
14. See Robert J. Kutak, The Adversary System and the Practice of Law, in THE GOOD LAWYER, supra note 5, at 174 (arguing that use of the adversary system will lead to a greater number of correct results than the inquisitorial system). But see Fuller, supra note 11, at 45 (stating that the adversarial system alone is not sufficient to guarantee correct results). Fuller states:

If that participation [by the party] is to be meaningful it must take place within an orderly frame, and it is the duty of the judge to see to it that the trial does not degenerate into a disorderly contest in which the essential issues are lost from view. Furthermore, when the party is given through his attorney an opportunity to present arguments, this opportunity loses its value if argument has to be directed into a vacuum. To argue his case effectively, the lawyer must have some idea of what is going on inside the judge's mind. A more active participation by the judge—assuming it stops short of a prejudgment of the case itself—can therefore enhance the meaning and effectiveness of an adversary presentation.

15. See LANDSMAN, supra note 7, at 44.

Adversary theory holds that if a party is intimately involved in the adjudicatory process and feels that he has been given a fair opportunity to present his case, he is likely to accept the results whether favorable or not. Assuming this theory is correct, the adversary process will serve to reduce post-litigation friction and to increase compliance with judicial mandates.

16. See HAZARD, supra note 7, at 120; LANDSMAN, supra note 7, at 24-25. Participation also furthers the goal of respecting and preserving the dignity of the individual by preliminarily acknowledging the legitimacy of a party's claim and providing the party with an opportunity to present the position for consideration in an adjudicatory setting. See Alan Donagan, Justifying Legal Practice in the Adversary System, in THE GOOD LAWYER, supra note 5, at 130 (arguing that provisional acceptance of a position advanced as legitimate preserves the dignity of the individual); Schwartz, Zeal, supra note 5, at 154-55 ("[P]ersons involved either voluntarily or involuntarily in an adjudicatory system are entitled, as a matter of self-realization, to untrammeled freedom to present their causes."); Sward, supra note 7, at 310 (discussing the need
and contentious proceeding\textsuperscript{17} in which each side presents the strongest possible case through argument, the introduction of evidence, and challenges to evidence introduced by the opponent.\textsuperscript{18}

In theory, active party participation promotes proper identification and clarification of the issues, thorough investigation of the relevant facts, and forceful presentation of a party's position.\textsuperscript{19}

to give litigants the fullest voice possible to preserve individual dignity).

17. See Sward, \textit{supra} note 7, at 302 n.3 (describing the contentious nature of the adversary system); see also Roscoe Pound, \textit{The Causes of Popular Dissatisfaction with the Administration of Justice}, 40 AM. L. REV. 729, 738-39 (1906) (stating that the American system uses judges as umpires to regulate a game between opposing counsel).

The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to "get error into the record," rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations "to affect credit," which have made the witness stand "the slaughter house of reputations." It prevents the trial court from restraining the bullying of witnesses, and creates a general dislike, if not fear, of the witness-function, which impairs the administration of justice.

\textit{Id.} (citation omitted).

18. See \textit{FREEDMAN}, \textit{supra} note 12, at 9 (discussing the strongest possible case presented by each side); \textit{LANDSMAN}, \textit{supra} note 7, at 21-22 (challenging evidence introduced by the opponent—primarily through cross-examination and the use of affidavits—and developed as a means of protecting the neutral decision-maker from prejudicial evidence introduced by those willing to abuse the party control feature of the adversary system); Schwartz, Zeal, \textit{supra} note 5, at 153 (stating that "the parties have the responsibility of prosecuting and presenting their own best cases").

19. See \textit{HAZARD}, \textit{supra} note 7, at 128 ("[T]he primary benefit of the [adversary] system is often said to be the promotion of truth."); Byrne, \textit{supra} note 8, at 204 (stating that the adversary system is "the greatest legal engine ever invented for the discovery of truth") (quoting 3 \textsc{John Henry Wigmore, Evidence in Trials of Common Law} 1367 (1923)); Marvin E. Frankel, \textit{The Conflict Between Self Interest and Justice}, 16 \textsc{Judge's J.}, at 8, 10 (1977) [hereinafter Frankel, \textit{Conflict}] ("The very premise of our adversary system... is that partisan advocacy on both sides of a case will best promote the ascertainment of truth and right results." (citing \textit{Herring v. New York, 422 U.S. 853, 862 (1975)})). According to Landsman:

The judicial process is generally used to satisfy two objectives: first, the search for truth, and second, the resolution of disputes between contending parties. Although most court systems seek to accomplish both these goals, the procedural mechanisms best suited to the achievement of each are different. Where judges are assigned an active, inquisitorial part in the litigation process, they will be expected to undertake an uninhibited search for truth. Perhaps the best examples of this approach are to be found in the justice systems of the Socialist states of Eastern Europe. Where judges are assigned a neutral and passive function, however, they will, in all likelihood, be expected to devote their energies to resolving the disputes framed by the
Collectively, these features are intended to ensure that the decision-maker will be fully apprised of all relevant factual information before making a decision. In practice, however, the benefits anticipated from party participation are often unrealized. The antagonistic nature of the system encourages the parties to present only that information which supports their respective positions; the competitive approach adopted by the parties as a necessary adjunct to an adversary proceeding eliminates any incentive to cooperate in assembling the complete factual record, which the decision-maker needs for a proper resolution of the dispute. As a result, parties handicap their opponents by selectively withholding information acquired during preparation of the case.

The resulting problem with access to information is addressed, in part, by the rules of discovery and burdens of proof designed litigants. The American adversary system has traditionally accepted the latter approach and thereby favored the goal of resolving disputes.

LANDSMAN, supra note 7, at 3.

20. See LANDSMAN, supra note 7, at 37-38 (commenting that through party control, the adversary system encourages full examination of the evidence by the party that finds itself at a “factual disadvantage”). Professor Landsman also observes that party participation and control ensures that the result obtained will suit the parties involved, thereby avoiding “impositional costs.” See id. at 38; see also HAZARD, supra note 7, at 121 (commenting on the importance of party participation to the individual involved in the proceeding); WOLFRAM, supra note 5, at 568 (commenting on how voting fosters citizen participation).

21. See LANDSMAN, supra note 7, at 37-38 (suggesting that parties may gather and introduce information selectively); Sward, supra note 7, at 302 (stating that adversarial fact-finding is one of the major weaknesses of the adversary system); see also KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 241-42 (1985) (describing the importance of “information control” in both criminal and civil litigation); Schwartz, Professionalism, supra note 6, at 677 (“Putting one’s best foot forward by stepping on the feet of the other side makes sense because of the presence of an impartial arbiter.”).

22. See Alex Wilson Albright, The Texas Discovery Privileges: A Fool’s Game?, 70 TEX. L. REV. 781, 785 (1992) (“The adversary system creates incentives . . . to keep the results of investigations confidential to prevent any benefit from accruing to the opponent.”); Kutak, supra note 14, at 175 (acknowledging the right of parties to withhold information from opponents and, in some circumstances, to misrepresent the facts); Sward, supra note 7, at 317 (“[A]dversarial adjudication encourages people actively to cover up facts that could lead to a more accurate portrayal of truth . . . . In theory, discovery rules are supposed to alleviate this problem.”).

23. See Frankel, Search, supra note 12, at 1054 (addressing “our rigid insistence that the parties control the evidence until it is all ‘prepared’ and packaged for competitive manipulation”); Sward, supra note 7, at 327 (commenting that the use of discovery devices represents a modification in the adversary system designed to provide equal access to information). See generally FED. R. CIV. P. 26 (mandating voluntary disclosure of information by parties in federal court proceedings).

24. See Kutak, supra note 14, at 177 (explaining that procedural rules, including the right of cross-examination and distribution of burdens of proof, help to ensure that
to minimize the negative impact of partisan behavior.\footnote{See Fuller & Randall, supra note 6, at 1216 (“Partisan advocacy finds its justification in the contribution it makes to a sound and informed disposition of controversies. Where this contribution is lacking, the partisan position permitted to the advocate loses its reason for being.”).} Nevertheless, abuse of the discovery process,\footnote{See Luban, supra note 6, at 51. The rules of discovery, initiated to enable one side to find out crucial facts from the other, are used nowadays to delay trial or to impose added expenses on the other side; conversely, one might respond to an interrogatory by delivering to the discoverer tons of miscellaneous documents to run up their legal bills or to conceal a needle in a haystack. Id; see also Sward, supra note 7, at 317 (stating that discovery has become a “weapon in the adversary arsenal”).} differences in the resources and abilities of the parties,\footnote{See Wolfram, supra note 5, at 568 (stating that imbalance in resources creates unfairness); Frankel, Conflict, supra note 19, at 10 (“A deeply inherent flaw [in the adversary system] is the mismatching of the contestants. The unequal resources of clients and (frequently corresponding) inequalities in the skills of their lawyers blight the vision of a fairly balanced contest.”).} and the natural reluctance of one party to assist the other raise questions about the ability of the adversary system to provide all parties with a fair forum for the resolution of disputes.\footnote{See Landsman, supra note 7, at 52 (stating it is inappropriate when the parties must continue to interact, as in the case of disputes between family members or between labor and management, and in situations not involving disputes, such as name changes, adoption, and uncontested divorce); Byrne, supra note 8, at 210 (stating it is inappropriate for intercorporate disputes, situations not involving disputes—including decisions involving the health care of family members—and consumer complaints); Sward, supra note 7, at 318 (stating it is inappropriate in situations not involving disputes).} The legal profession is an essential part of the adversary system.\footnote{See Landsman, supra note 7, at 4 (noting that the adversary system has come to rely on “a class of skilled professional advocates to assemble and to present the testimony upon which decisions will be based.”); Fuller & Randall, supra note 6, at 1160 (“Without the participation of someone who can act responsibly for each of the parties, this essential narrowing of the issues becomes impossible.”).} The lawyer assists clients in accessing the legal system by identifying legal claims, gathering evidence, preparing a case for trial, and advocating on behalf of the client's position during an adversarial proceeding. Undoubtedly it is the role of the lawyer as
client advocate, together with the importance lawyers place on victory, that explains the legal profession's commitment to the adversary model and its reluctance to participate in addressing the problems associated with adversarial dispute resolution.⁴⁰

The lawyer's ethical duty of loyalty to the client creates an obligation to represent the client's interests "zealously within the bounds of the law." The object of this duty is to maximize the likelihood that the client will prevail.³ In the context of an adversarial proceeding, the lawyer is free to pursue the objectives of the client, confident that partisan advocacy will benefit the decision-maker without prejudicing the rights of others.³³ Lesser but equally important ethical duties owed to others³⁴ impose a duty of honesty on the lawyer³⁵ and an obligation to disclose information

30. See HAZARD, supra note 7, at 128 (stating that the use of a partisan advocate inhibits the search for truth); Frankel, Conflict, supra note 19, at 10 (suggesting that the "quality of diminished adversariness" found in small claims court is due to the absence of lawyers).

31. See MODEL CODE, supra note 5, EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . ."); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1983) [hereinafter MODEL RULES] ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); LUBAN, supra note 6, at 57 ("The duty of a lawyer in an adversary proceeding is therefore one-sided partisan zeal in advocating her client's position.").

32. See MODEL CODE, supra note 5, EC 7-23 ("The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client."); LUBAN, supra note 6, at 11 ("When acting as an advocate, a lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client will prevail."); Fuller & Randall, supra note 6, at 1161 (stating that the advocate presents the case in a manner most favorable to the client); see also Schwartz, Zeal, supra note 5, at 150 (describing the obligation to maximize the likelihood of client success as the "Duty of Professionalism").

33. See MODEL RULES, supra note 31, pmbl. § 7 ("When an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."); Schwartz, Professionalism, supra note 6, at 677 ("Lawyers are justified in using methods and seeking results with which they may personally disagree because of faith in the ability of the arbiter to reach a correct decision."); see also LUBAN, supra note 6, at 12 n.1 (stating the assumption that "partisanship" and "nonaccountability" represent lawyers' ethics).

34. See LANDSMAN, supra note 7, at 5 ("Since the rough-and-tumble of adversary procedure exacerbates the natural tendency of advocates to seek to win by any means available, the adversary system employs rules of ethics to control the behavior of counsel.").

35. See MODEL CODE, supra note 5, DR 7-102(A)(5) (prohibiting a lawyer from knowingly making a false statement of fact or law); MODEL RULES, supra note 31, Rule 4.1(a) (prohibiting a lawyer from knowingly making a false statement of fact or law); see also Kutak, supra note 14, at 175 ("[T]he adversary system assumes basic honesty among its participants.").
in very limited situations. Generally, however, the lawyer's primary obligation centers on the duty of loyalty to the client. Consistent with that duty, the lawyer usually withholds unsolicited information and other assistance from opponents in the interest of promoting client objectives. The adversary system sanctions the lawyer's attitude of indifference to the interests and objectives of the opponent.

A number of conclusions may be drawn from this analysis of the adversary system. First, the lawyer's duty of loyalty to the client is an integral and essential part of the adversary system. Second, the adversary system permits the ethical duty of loyalty to manifest itself in the form of partisan advocacy. Conduct typically found in adversarial proceedings—contentiousness, nondisclosure, abuse of the discovery process, to name a few—admittedly prejudices the rights of others in some circumstances. Nonethe-

36. See MODEL RULES, supra note 31, Rule 4.1(b) (prohibiting a lawyer from knowingly failing to disclose a material fact when necessary to prevent a criminal or fraudulent act); cf. MODEL CODE, supra note 5, DR 7-102(A)(3) (stating that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal.").

37. See MODEL CODE, supra note 5, EC 5-1. The Model Code states: The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client. Id. (footnote omitted).

38. See MANN, supra note 21, at 155 ("For the defense attorney, winning almost always entails helping the client to conceal facts."); Albright, supra note 22, at 785 (stating that the adversary system encourages advocates to keep investigative results from opponents); Kutak, supra note 14, at 174-76 (noting that there is no obligation to volunteer information). But because the duty of fairness owed to the opponent contemplates that the parties and their lawyers will answer all questions honestly, see supra note 35 and accompanying text, the ability to ask the right questions will determine the level of honesty received. See Kutak, supra note 14, at 175. But see FED. R. CIV. P. 26 (imposing a duty on parties in federal court proceedings to disclose relevant information voluntarily).

39. See Kutak, supra note 14, at 182 ("A lawyer is not required to share his or her competence with others and may be indifferent to the incompetence of an adversary."). See generally Schwartz, Professionalism, supra note 6, at 673 (discussing the "Principle of Nonaccountability"). Professor Schwartz defines the responsibilities of the advocate in the form of the Principles of Professionalism and Nonaccountability. Noting first that the Principle of Professionalism requires the lawyer to maximize the likelihood that the client will prevail, he proceeds with the questions of accountability by observing that "[w]hen acting as an advocate for a client according to the Principle of Professionalism, a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved." Id.

40. See supra notes 23-28 and accompanying text.
less, adversarial proceedings tolerate such partisan behavior because the prejudicial effects of partisanship are addressed by party participation and procedural rules, leaving the decision-maker and the parties in a position to benefit from partisanship without concern over its negative effects. Thus, partisan advocacy is a product of, and is justified by, its role in adversarial proceedings.

This relationship between partisan behavior and adversarial proceedings raises a serious question about the need for limits on the use of partisanship in other dispute resolution settings. If partisan advocacy is truly an element of the adversary system, how can a lawyer's partisan advocacy be justified when representing a client outside of traditional adversary proceedings? Lawyers perform a wide variety of tasks and serve clients in a number of different roles. Can the use of partisan advocacy be justified in representational settings that are not, or not wholly, adversarial? Admittedly, the nature of a particular representational setting may justify the use of partisan advocacy. In all cases, however, use of the partisan approach to dispute resolution embraced by the adversary system must be justified, both in terms of benefits provided and detriments controlled.

Confusion surrounding the use of partisan advocacy by the lawyer outside of the typical courtroom setting is largely the result of the legal profession's failure to address adequately the duties of lawyers when serving as advisor or as advocate outside of a traditional adversarial proceeding. The legal profession's rules of professional conduct now acknowledge the varied roles played by a

41. See Wolfram, supra note 5, at 566 (observing that the truth is revealed through the evaluation of positions by others and concluding that the fact-finder is best able to determine the truth by witnessing this "reciprocating process of proof and challenge to proof"). But see Luban, supra note 6, at 71 (speculating that the adversarial process will not always eliminate "non-facts").

42. See generally Frankel, Search, supra note 12 (suggesting alternatives to the adversary system); Nathan L. Posner, Truth, Justice and the Client's Interest: Can the Lawyer Serve All Three, 60 JUDICATURE 111, 111 (1976) (suggesting that "[a]dversary procedures must be amended and altered if we seek a better determination of where the truth lies").

43. In many cases the objectives of the parties provide the incentive necessary to encourage the parties to self-police, thereby minimizing the negative impact of partisanship. For example, lawyers frequently assume the role of advocate when representing clients involved in negotiations unrelated to an adversary proceeding. See infra note 170 and accompanying text for a discussion of this use of partisan advocacy. In other cases, however, unequal bargaining positions and the absence of an incentive to cooperate create a situation in which partisan advocacy simply enhances the disadvantage already imposed on one party. See Luban, supra note 6, at 68-70.
lawyer in the course of representing a client and make some attempt to distinguish the duties of the advocate from those of the lawyer when serving in nonadvocate roles. With the single exception of the treatment afforded the role of intermediary, however, these rules fail to identify roles in which the use of partisan advocacy is both inappropriate and unjustified. This leaves members of the profession with the impression that the ethical duty of loyalty contemplates the use of partisan advocacy in all representational settings.

The failure of the profession's ethics rules to address the unique nature of federal income tax practice has prompted considerable debate over both the role of the lawyer as taxpayer representative and the nature of the federal tax return preparation and examination process. The tax return preparation and examination process is significantly different than a traditional adversary proceeding: the return preparation process is conducted without adversarial input and the taxpayer's opponent is a governmental agency responsible for representing society's interest in promoting

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44. Following an initial description of the lawyer as client representative, officer of the legal system, and public citizen, the preamble to the Model Rules identifies five distinct roles played by the lawyer as client representative: advisor, advocate, negotiator, intermediary, and evaluator. See MODEL RULES, supra note 31, pmbl.; cf. Schwartz, Zeal, supra note 5, at 671 (distinguishing between the lawyer as advocate and nonadvocate in an article published five years before completion of the ABA Model Rules). Previous efforts of the profession to define the ethical duties of its members addressed only the role of the lawyer as advocate. See WOLFRAM, supra note 5, at 689 ("The 1908 Canons of Ethics and the 1969 Code of Professional Responsibility gave little attention to nonlitigation functions of lawyers."); Harry A. Blackmun, Thoughts About Ethics, 24 EMORY L.J. 1, 12 (1975) ("[B]oth the old Canons and the new Code primarily concern the lawyer only as a party in the adversary process.").

45. Compare MODEL RULES, supra note 31, Rules 2.1-2.3 (dealing with the lawyer as advisor, intermediary, and evaluator) with id. Rules 3.1-3.9 (forwarding the lawyer as advocate).


47. The Model Rules seem to confirm the profession's approval of traditional advocacy outside of adversarial proceedings by imposing the duties of the advocate on the lawyer serving as advocate in nonadjudicative proceedings. See MODEL RULES, supra note 31, Rule 3.9.

48. See infra notes 91-96 and accompanying text.

49. See infra notes 194-98 and accompanying text.
Nevertheless, the legal profession characterizes the tax compliance process as adversarial, a conclusion used by lawyers to justify the use of partisan advocacy on behalf of clients during the preparation and subsequent examination of returns.

III. THE LAWYER AS THE TAXPAYER REPRESENTATIVE

The tax lawyer serves taxpayers as both advisor and advocate. As advisor, the lawyer assists taxpayers in evaluating the tax consequences of past and proposed transactions, recommends reporting positions in keeping with the taxpayer's natural objective of minimizing tax liability, counsels taxpayers on the manner in which information must be disclosed to the IRS, and advises on the possible imposition of penalties relating to both the positions taken and to adequate disclosure of those positions on the return. As advocate, the lawyer represents the interests of taxpayers during the audit and administrative appeals process conducted by the IRS, and when necessary, in subsequent judicial appeals. Although the issues raised by the use of partisan advocacy outside of traditional adversary proceedings relate to representation of taxpayers in all but the judicial setting, the scope of this Article is

50. See generally infra Parts III.A-B. (explaining the proper role of an attorney in preparation and examination of the tax return).
51. See infra Part III.
53. The lawyer may also serve as tax return preparer. For a discussion of the duties of the lawyer as return preparer, see infra notes 126-31 and accompanying text.
54. Consideration of the lawyer's role as taxpayer advocate in administrative appeals before the IRS and in litigation and judicial appeals is beyond the scope of this Article. On the subject of adversarial representation of clients, it is worth noting that not all commentators agree on the use of partisan advocacy by lawyers when representing clients in the traditional litigation setting. Compare FREEDMAN, supra note 12, at 5 (arguing that partisan advocacy is fundamental to the adversarial system) and Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship, 83 YALE L.J. 1060 (1976) (arguing that the use of partisan advocacy is a requirement of the system of justice) and Fuller & Randall, supra note 6, at 1160 ("It is only through the advocate's participation that the hearing may remain ... a public trial of the facts and issues.") with LUBAN, supra note 6, at 60-63 (acknowledging the distinction between criminal and civil proceedings and the use of partisan advocacy in criminal cases as a means of furthering the goal of curtailting the power of the state over its citizens) and Schwartz, Zeal, supra note 5, at 160.
limited to an examination of the tax compliance process and the lawyer's role as taxpayer representative, and more specifically, to the preparation of the tax return and its subsequent examination by the IRS.  

A. Preparation of the Tax Return

The process of preparing and filing the annual income tax return includes both a consideration of the tax consequences associated with financial transactions engaged in by the taxpayer during the year and an evaluation of the need to report information relating to those transactions on the return. The lawyer retained to assist in this evaluation and reporting process provides the taxpayer with an assessment of the impact each transaction has on tax liability. If the tax treatment of a particular transaction is uncertain or subject to dispute, the lawyer offers advice designed to resolve doubt in favor of the taxpayer and thereby minimize tax liability. Guided by the duty of loyalty to the client, the tax lawyer as advocate maximizes the taxpayer's chances of success in a future dispute over questionable return positions by recommending mini-

(acknowledging the importance of partisan advocacy in criminal proceedings but challenging its use in civil litigation).

55. Many of the observations made in this Article with respect to the use of adversarial representation apply with equal force to the representation of taxpayers during the administrative appeals process conducted by the IRS. However, a study of that element of the compliance system is beyond the scope of this Article.

56. See Steven E. Kaplan et al., An Examination of Tax Reporting Recommendations of Professional Tax Preparers, 9 J. ECON. PSYCHOL. 427, 429 (1988) (stating that tax practitioners approach their duty to clients by considering the law, the institutional characteristics of the tax system, including what triggers an audit, and interaction with IRS personnel).

57. See Special Comm. on the Lawyer's Role in Tax Practice, The Ass'n of the Bar of the City of New York, The Lawyer's Role in Tax Practice, 36 TAX LAW. 865, 877 (1983) [hereinafter New York City Bar Report] (explaining that a tax lawyer must act as loyal taxpayer advocate and resolve doubts in favor of the client); see also MODEL CODE, supra note 5, EC 7-3 (stating that when an attorney is serving as an advocate, the attorney should resolve doubt in favor of the client insofar as permitted by law).

58. For purposes of this discussion it is essential to distinguish between "questionable positions" and those the taxpayer is prohibited by law from asserting. IRS Commissioner Jerome Kurtz once defined "questionable position" in the context of return disclosure as "a position that is knowingly inconsistent with published regulations, rulings or cases." Jerome Kurtz, Remarks to the American Institute of Certified Public Accountants, 103 Daily Tax Rep. (BNA) J-3 (1977), reprinted in BERNARD WOLFMAN & JAMES P. HOLDEN, ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE 37 (2d ed. 1981). This definition is, however, incomplete in the sense that it does not include all "debatable" return positions—all positions the taxpayer has a right to litigate. Thus, a "questionable position" is any nonfrivolous return position.
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mal disclosure of information relating to those positions on the
taxpayer's return.59

Use of partisan advocacy by tax lawyers in connection with
the representation of taxpayers is consistent with the role of advo-
cate contemplated by the legal profession's rules of ethics.60 However,
the return preparation process includes features that set it
apart from traditional adversary proceedings. Moreover, the use
of partisan advocacy during preparation of the return produces
unusual results not contemplated by adversary theory.61 To fully
understand the impact of partisan advocacy on the tax compliance
system, it is first necessary to consider the nature of the tax return
preparation and examination process.

The IRS is charged with responsibility for collection of the
proper amount of tax from each taxpayer at the least cost to the
public.62 Because taxpayer compliance is essential to the success of
this country's self-assessment system,63 much of the IRS's work in-

Cf. MODEL CODE, supra note 5, DR 7-102(A)(2) (a lawyer may not "[k]nowingly ad-
vance a claim or defense that is unwarranted under existing law, except that he may
advance such claim or defense if it can be supported by good faith argument for an
extension, modification, or reversal of existing law"); MODEL RULES, supra note 31,
Rule 3.1 ("A lawyer shall not bring or defend a proceeding ... unless there is a basis
for doing so that is not frivolous, which includes a good faith argument for an exten-
sion, modification or reversal of existing law.").

59. See generally supra Part III.A. (explaining the proper role of an attorney in
preparation of the tax return); infra Part III.B. (explaining the proper role of an at-
torney in subsequent examinations of tax returns).

60. See supra notes 29-39 and accompanying text.

61. For a discussion of this issue, see infra notes 166-207 and accompanying text.

62. See I.R.S. Policy Statement P-1-1 (Dec. 18, 1993), 1 INTERNAL REVENUE
MANUAL: ADMINISTRATION (CCH) 1303-25 ("The purpose of the Internal Revenue
Service is to collect the proper amount of tax revenue at the least cost; serve the
public by continually improving the quality of our products and services; and per-
form in a manner warranting the highest degree of public confidence in our integrity,
efficiency and fairness."); see also A.B.A. Comm'n on Taxpayer Compliance,
Report and Recommendations on Taxpayer Compliance, 41 TAX LAW. 329, 339 (1988)
[hereinafter Taxpayer Compliance Report] ("The objective [of the IRS] is not simply
to collect as much as possible in taxes, but rather to collect the correct amount in
taxes."); Lawrence B. Gibbs, Tax Reform: An Opportunity for a Fresh Start in Tax
Administration, 6 AM. J. TAX POL'Y 1, 4 (1987) (summarizing the tensions between
the taxpayer and tax administrator caused by the new IRS mission to "collect the
proper amount of tax revenues at the least cost to the public").

63. See Ryan J. Donmoyer, Deputy Commissioner Defends Income Tax Against
Alternatives, 68 TAX NOTES 1338 (1995) (noting a 83% voluntary compliance rate
according to IRS Deputy Commissioner Michael P. Dolan); accord United States v.
Arthur Young & Co., 465 U.S. 805, 815-16 (1984) (describing the system as one re-
quiring voluntary compliance); Couch v. United States, 409 U.S. 322, 335 (1973)
(describing the system as one requiring voluntary compliance).
Involves compliance testing. In recent years the ability of the IRS to evaluate compliance by taxpayers has been enhanced by the third-party reporting requirements—a comparison of information included on a taxpayer's return with information provided in reports filed with the IRS by third parties. However, much of the information included on income tax returns remains outside the reach of the third party reporting requirements and therefore can be verified only through the examination of returns. Thus, the ability of the IRS to select and examine income tax returns is an essential part of the compliance testing process.

Because the IRS cannot audit every return filed in a given

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64. See 1 INTERNAL REVENUE MANUAL: AUDIT (CCH) 4015.1 (June 29, 1984), at 7006 [Hereinafter IRM: AUDIT] (“The mission of the service is to encourage and achieve the highest possible degree of voluntary compliance with the tax laws and regulations and to conduct itself so as to warrant the highest degree of public confidence in its integrity and efficiency.”).


66. See Taxpayer Compliance Report, supra note 62, at 334 (stating that not all information can be verified through computer matching); see also I.R.C. § 7601(a) (1994) (making a general obligation to examine returns); id. § 7602(a)(1) (authorizing the examination of taxpayer records in connection with the examination of returns); United States v. Little, 753 F.2d 1420, 1436 (9th Cir. 1984) (noting that examining agents may investigate taxpayer treatment of issues). For a discussion of the IRS's ability to gather information during an internal revenue audit, see infra note 191 and accompanying text.

67. See Taxpayer Compliance Report, supra note 62, at 331 (“Tax audits and examinations are the key to effective enforcement.”); HELEN V. TAUCHEN ET AL., TAX COMPLIANCE: AN INVESTIGATION USING INDIVIDUAL TCMP DATA (National Bureau of Economic Research Working Paper No. 3078 23-24, 1989) (explaining that the IRS believes that examination of returns promotes compliance both directly—revenue increases attributable to additional taxes and penalties—and indirectly—those examined become more compliant and others concerned about being caught react in a similar fashion); see also Jeffrey A. Dubin et al., Penny-Wise and Pound Foolish: New Estimates of the Impact of Audits on Revenue, 35 TAX NOTES 787 (1987) [hereinafter Dubin et al., Penny-Wise] (discussing the impact of taxpayer compliance measures on the total revenue collected); Joint Comm. on Taxation, Routes to Better Tax Compliance, 19 TAX NOTES 1187 (1983) (discussing a broad range of solutions for improving taxpayer compliance).
The IRS selects a small number of returns for examination each year in order to monitor taxpayer compliance and maintain in each taxpayer's mind a healthy concern over the possibility of audit. The process used by the IRS to select returns for audit is complex and closely guarded, but it is clear that the selection process is based almost entirely on a review of the information included on the return. Returns that include all relevant

68. See Dubin et al., Penny-Wise, supra note 67, at 791 (noting the "2-3 percent audit rates of the early 1970s"); see also id. at 790 (noting that that audit rate for individuals declined from 2 1/2% to just over 1% and corporate audit rates declined from 9 1/2% to 3% during the period from 1977 to 1986). In the early years of the income tax, the Bureau of Internal Revenue followed a policy of reviewing nearly every return filed. See HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 14 (1979) (citing 1919 COMMISSIONER OF INTERNAL REVENUE REP. 18). That practice was abandoned by the Bureau in recognition of the growing number of returns filed each year and the concern expressed by lawmakers and others over the backlog of unaudited returns. See id. at 15-17.

69. See Taxpayer Compliance Report, supra note 62, at 350 ("Enforcement efforts . . . are profitable, and, apart from their effects on specific taxpayers, can send deterrence messages to the general public.").

70. See James Alm et al., Estimating the Determinants of Taxpayer Compliance with Experimental Data, 45 NAT'L TAXJ. 107, 112 (1992) [hereinafter Alm et al., Estimating] (making the connection that compliance increases with increases in income and audit rates and decreases with decreases in tax rates); James Alm et al., Deterrence and Beyond: Toward a Kinder, Gentler IRS, in WHY PEOPLE PAY TAXES 311, 311-13 (Joel Slemrod ed., 1992) [hereinafter Alm et al., Deterrence] (commenting that some taxpayers place more weight on the chance of being audited than it deserves, thereby increasing compliance); Ann D. Witte & Diane F. Woodbury, The Effect of Tax Laws and Tax Administration on Tax Compliance: The Case of the U.S. Individual Income Tax, 38 NAT'L TAX J. 1, 7 (1985) (suggesting a higher probability of audit and increased number of notices sent to taxpayers following IRS review of returns produce higher level of compliance).


72. See Taxpayer Compliance Report, supra note 66, at 364 (stating that currently when the IRS computer identifies a return as possibly problematic, it "is then reviewed by a tax examiner or revenue agent in a service center. This agent or examiner decides if the return should be audited and, in many cases, also selects the items or issues that will be the initial focus of the audit."); Boris I. Bittker, Professional Responsibility and the Preparation of Federal Income Tax Returns, in PROFESSIONAL
information about a reported transaction provide the IRS with the opportunity to evaluate the nature of the transaction, identify the issues raised by the taxpayer’s treatment of the transaction, and consider the need for governmental review of the taxpayer’s resolution of the issue. On the other hand, returns which include minimal information limit the ability of the government to engage in this essential review process. Thus, the taxpayer’s ability to control the nature and amount of information disclosed on a tax return directly affects the process utilized by the IRS in selecting returns for examination.

Tax return disclosure is, in large part, a function of the return itself. Every taxpayer has a legal obligation to file a correct return, and a return that does not contain the information requested by the IRS—either by way of a specific request on the return itself, or by submitting a written declaration under penalty of perjury—limits the ability of the government to engage in this essential review process. It is of course clear that our federal self-assessment system presupposes that the government will rely to a considerable degree on the income tax return as filed in deciding which returns to select for office or field audit, as well as in deciding what items should be subjected to further scrutiny in respect of those returns that are selected for audit.

It is of course clear that our federal self-assessment system presupposes that the government will rely to a considerable degree on the income tax return as filed in deciding which returns to select for office or field audit, as well as in deciding what items should be subjected to further scrutiny in respect of those returns that are selected for audit.

Bittker, Professional Responsibility, supra, at 245.

73. Cf. Karyl A. Kinsey, Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data, in WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 259, 280-81 (Joel Slemrod ed., 1992) (suggesting that in the absence of supplemental disclosure, the government will continue to have more trouble with unreported income than with inflated deductions).

74. Regarding the sufficiency of the return, see Commissioner v. Lane Wells Co., 321 U.S. 219, 223 (1944) (discussing the importance of tax returns in gathering information, furthering uniformity, and making the administration of the system more efficient).

75. See, e.g., Wiseley v. Commissioner, 13 T.C. 253, 256 (1949) (holding that a taxpayer is not permitted to plead ignorance to the duty to file a correct return); Valverde v. Commissioner, 53 T.C.M. (CCH) 628, 629 (1987) (acknowledging the taxpayer’s obligation to file a correct return). The obligation to file a correct return follows from the representation made by the taxpayer in the jurat on the return as well as the minimum reporting standards imposed on taxpayers by relevant penalty provisions of the Internal Revenue Code. See I.R.C. § 6065 (requiring written declaration under penalty of perjury); id. § 6662 (regarding accuracy related penalty provision); id. § 6663 (regarding fraud penalty provision); Treas. Reg. § 31.6065(a)-1 (1960) (regarding verification of returns); see also Leroy Jewelry Co. v. Commissioner, 36 T.C. 443, 445 (1961) (holding on the duty to file correct return discussed in the context of I.R.C. § 6653 negligence penalty); Treas. Reg. § 1.1461-1(a)(3) (as amended in 1993) (“Each year’s return should be complete in itself, and taxpayers shall ascertain the facts necessary to make a correct return.”).
or pursuant to other disclosure guidelines—does not satisfy this requirement. The taxpayer’s reporting obligations end with the filing of a correct return; taxpayers have no obligation to volunteer information to the IRS. It is therefore incumbent upon the government to request from the taxpayer the information needed to assess the treatment of transactions reported on a return.

Notwithstanding this need for information, the IRS imposes few affirmative disclosure requirements on taxpayers. The variety of transactions that form the basis for questionable return positions, the administrative problems inherent in collecting and evaluating information received, and society’s interest in mini-

76. Specific requests for information may take the form of (1) line item requests—for example, each taxpayer must fill in all relevant portions of an income tax return, (2) questions posed with respect to particular types of income or deductions—for example, the questions on Schedule B relating to foreign trust accounts and on Schedule E relating to personal use of rental property, and (3) requests for information imposed through the use of forms designed to address specific types of transactions. See generally Deborah Lohse, Tax Report: A Special Summary and Forecast of Federal and State Tax Developments, WALL ST. J., Feb. 22, 1995, at A1 (explaining that taxpayers must “flag” wash sales on Schedule D).

77. See, e.g., Treas. Reg. § 1.351-3(a) (1996) (requiring shareholders to file a statement that includes all information relevant to a § 351 transfer with the tax return); id. § 1.302-4(a)(1) (requiring disclosure of information related to waiver of I.R.C. § 302(b)(3), which deals with family attribution rules); id. § 1.1033(a)-2(c)(2) (regarding disclosure of “[a]ll of the details in connection with an involuntary conversion of property at a gain”).

78. Bittker, Professional Responsibility, supra note 72, at 252-53 (“Indeed, the fact that the Regulations explicitly require disclosure of certain items might be taken to imply that the taxpayer need disclose only those items that are so specified by the Service . . . .”).

79. See id. at 253 (arguing that the volume of information produced by taxpayers in response to the imposition of a supplemental disclosure requirement would prevent the IRS from taking full advantage of the additional information); James P. Holden, Practitioners’ Standard of Practice and the Taxpayer's Reporting Position, 20 CAP. U. L. REV. 327, 343 (1991) [hereinafter Holden, Practitioner’s Standard] (“Disclosure incentives will result in an increased volume of disclosure, necessitating reasonable audit review of disclosures if they are to be meaningful.”). However, this ignores the effect that preparation and filing of the rider has on the taxpayer and the tax lawyer. As in the case of contracts for which the Statute of Frauds requires a writing, the effect of disclosure in writing forces the taxpayer to reassess the position taken and consider its merits, given the potential for careful review by a third party. See E. ALLAN FARNsworth, CONTRACTS § 6.1, at 394 (2d ed. 1990) (“The suretyship provision performs an important cautionary function, by bringing home to the promisor the significance of the promise and preventing ill-considered and impulsive promises.”); see also George Guttman, Change the IRS Forms? It’s Just Not That Simple, 68 TAX NOTES 648 (1995) (discussing how recent efforts to reform the return preparation and filing process suggest that the system is pursuing simplification at the expense of disclosure).
mizing governmental intrusion on the privacy rights of taxpayers. Failure to collect supplementary information has a societal cost, however. The government’s ability to identify issues raised by a taxpayer’s treatment of transactions on a return largely depends upon taxpayer compliance with mandatory disclosure requirements and taxpayer choices relating to supplemental disclosure of information. When a taxpayer chooses to minimize disclosure of information relating to transactions reported on a return, it often prevents the IRS from identifying and considering questionable return positions.

Thus, the effectiveness of the tax compliance testing system, in many respects, depends upon the taxpayers it seeks to test. If taxpayers cooperate by sharing relevant information with the IRS, the agency can better select for examination those returns most in need of review. Conversely, if taxpayers refuse to cooperate with the IRS by minimizing disclosure of the information needed by the government to assess the need for review of returns, tax compliance suffers. Of the two, the latter is a more accurate description.

81. See Taxpayer Compliance Report, supra note 66, at 331 (commenting that benefits attributable to strategies for enhancing taxpayer compliance must outweigh increased invasion of privacy and additional burdens imposed on taxpayers).
82. See infra note 151 (quoting Professor Bittker on the purpose of tax returns and whether taxpayers should disclose information voluntarily). One example of voluntary taxpayer disclosure appears in Deupree v. Commissioner, 1 T.C. 113 (1942), where the taxpayer, who had received compensation income in the form of an annuity the taxpayer believed was not currently taxable, included the following statement in his return: “The Proctor & Gamble Company paid (during 1938) $50,000.00 to the Connecticut General Life Insurance Company for an annuity starting at age seventy. This amount is not included in the salary here reported.” Id. at 117.
83. See New York City Bar Report, supra note 57, at 882 (“As a consequence of the aggressive positions taken by many taxpayers and the limited number of returns that can be effectively audited, the Government loses revenue it should receive, resulting in an inequitable sharing of the tax burden among taxpayers, and, most important, a growing disrespect for the fairness of the tax system.”).
84. See Kurtz, supra note 58, at 37 (“The reason that we have to struggle with the problem of how a questionable issue may be presented on the tax return is that our voluntary compliance system gives to the taxpayer who has entered into a transaction with uncertain tax consequences significant opportunity to decide how to report the transaction on his or her return.” (emphasis omitted)).
of the situation confronting the IRS. Under the present system, taxpayers frequently take aggressive positions on returns in the interest of minimizing tax liability. These taxpayers limit disclosure of information relating to aggressive return positions in an effort to handicap IRS efforts to identify and debate the issues raised by these return positions during examination of the return.\(^5\) By playing the “audit lottery”—taking a favorable return position that the IRS would likely challenge, knowing that the risk of detection is minimal if the position appears on the return without disclosure—taxpayers enjoy the benefits associated with questionable return positions while prevailing over the IRS on those positions by default.\(^6\)

A taxpayer interested in exploiting the opportunity to take aggressive positions without disclosure naturally expects advice from counsel consistent with that objective. Predictably, the lawyer retained to represent a taxpayer during the return preparation

85. See generally Bittker, Federal Income Tax, supra note 80, at 485-90 (noting that taxpayers withhold information from the government as a means of protecting their privacy); Arthur R. Miller, Tax Compliance Versus Individual Privacy: A Conflict Between Social Objectives, in INCOME TAX COMPLIANCE: A REPORT OF THE ABA SECTION OF TAXATION INVITATIONAL CONFERENCE ON INCOME TAX COMPLIANCE 173, 175 (1983) [hereinafter Miller, Tax Compliance]. Other reasons have been offered for the reluctance of taxpayers to cooperate with governmental efforts to enforce the revenue laws. See Alm et al., Deterrence, supra note 70, at 313-14 (suggesting that a better use of tax revenues may change the way people look at paying taxes, and thereby change attitudes about disclosure); John S. Carroll, How Taxpayers Think About Their Taxes: Frames and Values, in WHY PEOPLE PAY TAXES, supra note 70, at 43, 46 (noting that the desire to avoid an Internal Revenue audit encourages taxpayers to minimize disclosure); Robert J. Haws, A Brief History of American Resistance to Taxation, in INCOME TAX COMPLIANCE, supra, at 113 (noting the historic negative attitude of citizens toward taxation).

86. When a position appears on a return without disclosure, it appears in the form of a conclusion offered without support. In the absence of information flagging the controversial nature of the position and explaining the rationale behind the taxpayer’s conclusion, the government is left with a reported, but undisclosed, return position.

87. See Michael C. Durst, The Tax Lawyer’s Professional Responsibility, 39 U. FLA. L. REV. 1027, 1035 (1987) (“[W]hen a person takes a questionable position on a tax return, ‘he or she may be effectively “resolving” the disputed issue’ in the taxpayer’s favor.”) (citing Kurtz, supra note 84, at 37); Jerome Kurtz et al., Discussion on “Questionable Positions,” 32 TAX LAW. 13, 15 (1978) (quoting IRS Commissioner Jerome Kurtz as saying: “taxpayers can feel with some justification today that where they take a questionable position on their returns . . . there is a good chance that they will prevail because the return will not be examined . . . ”); cf. LUBAN, supra note 6, at 75 (discussing the concept of individual dignity in the context of the adversary model and noting the distinction between a person pursuing what the person is entitled to and pursuing everything the person can get).
process responds to client expectations and the ethical duty of loyalty by assuming the role of advocate. As taxpayer advocate, the lawyer resolves doubts on questionable positions in favor of the client and maximizes the chances of prevailing on those positions by advising the taxpayer to minimize disclosure of information not specifically requested by the return or the internal revenue laws. The profession’s rules of ethics, which fail to restrict the use of partisanship to services rendered in traditional adversarial settings, encourage this use of partisan advocacy by the tax lawyer. Nevertheless, a number of factors—the nature of the return preparation process, the significance of the government’s role as enforcement officer, and the importance of taxpayer compliance—strongly suggest that the use of partisan advocacy is not justified in this setting.

Because the legal profession’s Canons of Ethics failed to address the roles and corresponding duties of the tax lawyer, tax experts engaged in a debate during the early years of tax practice about the role of the tax advisor and the nature of the return preparation process. For example, a taxpayer decision to omit cash receipts from gross income might involve disclosure even though the amount received is not reported, given the government’s need to consider the taxpayer’s decision to exclude the amount from income. Similarly, the decision to report an expenditure as a deduction does not eliminate the importance of supplemental disclosure if the government is to consider the rationale behind the deduction.

88. See MODEL CODE, supra note 5, EC 7-3 (“While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law.”).
89. See supra note 87. The question of disclosure is an issue even in the most extreme cases. For example, a taxpayer decision to omit cash receipts from gross income might involve disclosure even though the amount received is not reported, given the government’s need to consider the taxpayer’s decision to exclude the amount from income. Similarly, the decision to report an expenditure as a deduction does not eliminate the importance of supplemental disclosure if the government is to consider the rationale behind the deduction.
90. See supra notes 42-47 and accompanying text.
91. ABA CANONS OF PROFESSIONAL ETHICS (1908). The legal profession recognized the Canons of Ethics, promulgated by the American Bar Association in 1908, as the governing body of ethical standards until 1969 when the ABA approved the Model Code of Professional Responsibility. MODEL CODE, supra note 5. The profession subsequently amended the Code in 1983 with the issuance of the Model Rules of Professional Conduct. MODEL RULES, supra note 31. See generally WOLFRAM, supra note 5, at 48-63 (discussing the history, rationale, function, and application of lawyer codes of ethics).
92. See John M. Maguire, Conscience and Propriety in Lawyer’s Tax Practice, 13 TAX L. REV. 27, 30-31 (1957) (acknowledging the lack of guidance provided by the Canons of Ethics and calling for the development of a specialized body of rules dealing with the ethics of tax practice); Francis C. Oatway, Motivation and Responsibility in Tax Practice: The Need for Definition, 20 TAX L. REV. 237, 244 (1965) (making a similar proposal); see also Marvin K. Collie & Thomas P. Marinis, Jr., Ethical Considerations on Discovery of Error in Tax Returns, 22 TAX LAw. 455, 460 (1969) (“The legal profession has never felt the need to designate a separate body of rules to govern the lawyer’s conduct in the area of tax practice.”).
preparation process. The IRS’s role as both tribunal and opponent, together with the obvious threat to tax compliance posed by a taxpayer’s ability to limit disclosure on a return, prompted a number of commentators to endorse a standard for professional conduct that would impose on lawyers duties to the government as well as the client. Other commentators were less troubled by the unusual nature of the return preparation process and supported an adversarial approach to the return preparation process out of loyalty to the traditional attorney-client relationship and concern over the government’s lack of impartiality. Debate over the nature of the process and the lawyer’s duties as taxpayer advisor prompted a study by the ABA Section of Taxation in 1962 and led ultimately to official guidance from the American Bar Association (ABA).

93. See, e.g., Bittker, Professional Responsibility, supra note 72, at 233; Edmond Cahn, Ethical Problems of Tax Practitioners, 8 TAX L. REV. 1 (1952); Norris Darrell, Responsibilities of the Lawyer in Tax Practice, in WILLIAM M. TRUMBLE, MATERIALS ON THE LAWYER’S PROFESSIONAL RESPONSIBILITY 291 (1957); Norris Darrell, The Tax Practitioner’s Duty to His Client and His Government, 7 PRAC. LAW. 23 (1961); Mark H. Johnson, Does the Tax Practitioner Owe a Dual Responsibility to His Client and to the Government?—the Theory, 15 TAX INST. 25 (1963); Maguire, supra note 92; Merle H. Miller, Morality in Tax Planning, in PROCEEDINGS OF NEW YORK UNIVERSITY DECEMBER INSTITUTE ON FEDERAL TAXATION 1067 (1952); Randolph E. Paul, The Responsibilities of the Tax Advisor, 63 HARV. L. REV. 377 (1950) [hereinafter Paul, Responsibilities].

94. See Maguire, supra note 92, at 36 (“In matters of taxation the lawyer is often doubly charged, owing fidelity both to client and to Treasury.”); Oatway, supra note 92, at 254 (“Most will agree that some form of dual responsibility to both client and government does exist.”); Thomas N. Tarleau, Ethical Problems in Dealing with Treasury Representatives, 8 TAX L. REV. 10, 11 (1952) (“[B]ecause of the tax practitioner’s dual responsibility, he is obliged to reveal every fundamental fact which is pertinent to the issue under consideration.”).

95. See Boris I. Bittker, Professional Responsibility in Representing Taxpayers, in PROFESSIONAL RESPONSIBILITY, supra note 72, at 270 [hereinafter Bittker, Representing Taxpayers]; Johnson, supra note 93, at 31 (noting that taxpayers will have confidence in the system only if convinced that they will receive adequate representation—a goal achieved most effectively by insisting that lawyers serve taxpayers as traditional advocates); Randolph E. Paul, The Lawyer as a Tax Advisor, 25 ROCKY Mtn. L. REV. 412, 429 (1953) [hereinafter Paul, Lawyer].

Except where the rules of practice dictate otherwise tax proceedings in the Treasury are predominantly adversary proceedings calling for no higher ethical standards than those imposed upon attorneys engaged in general practice. . . . Treasury representatives are subject to many pressures, and as a rule their conduct closely resembles the conduct of attorneys in private litigation.

Id; Bittker, Representing Taxpayers, supra, at 270.

Ethics Committee in the form of Formal Opinion 314. In Formal Opinion 314, the ABA Ethics Committee began its consideration of the ethical responsibilities of the tax lawyer with the following statement:

Certainly a lawyer's advocacy before the Internal Revenue Service must be governed by "the same principles of ethics which justify his appearance before the Courts." But since the service, however fair and impartial it may try to be, is the representative of one of the parties, does the lawyer owe it the same duty of disclosure which is owed to the courts? Or is his duty to it more nearly analogous to that which he owes his brother attorneys in the conduct of cases which should be conducted in an atmosphere of candor and fairness but are admittedly adversary in nature? The Committee concluded that the IRS lacks the impartiality necessary for treatment as a true tribunal and, therefore, must be characterized as an opponent when defining the ethical duties of the tax lawyer. Characterization of the government as an adversary inevitably led the Committee to invoke the adversary sys-

97. For the sake of simplicity, this Article will refer to the ABA Standing Committee on Ethics and Professional Responsibility and its predecessor, the Committee on Professional Ethics, as the ABA Ethics Committee. See Durst, supra note 87, at 1031 n.11.
99. Id. at 671 (citing Canon 26, which provides that "[a] lawyer openly, and in his true character, may render professional services . . . in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts").
100. The Committee made the following observations about the IRS:

The Internal Revenue Service is neither a true tribunal, nor even a quasi-judicial institution. It has no machinery or procedure for adversary proceedings before impartial judges or arbiters, involving the weighing of conflicting testimony of witnesses examined and cross-examined by opposing counsel and the consideration of arguments of counsel for both sides of a dispute. While its procedures provide for "fresh looks" through departmental reviews and informal and formal conference procedures, few will contend that the service provides any truly dispassionate and unbiased consideration to the taxpayer. Although willing to listen to taxpayers and their representatives and obviously intending to be fair, the service is not designed and does not purport to be unprejudiced and unbiased in the judicial sense.

Id.
101. See Durst, supra note 87, at 1032 ("The committee determined that the Service is an adversary, not a 'true tribunal' . . . ").
and use the profession's *Canons of Ethics*—rules dedicated
to the conduct of lawyers as advocates—to define the ethical re-
sponsibilities of the tax lawyer. The opinion admonished lawyers
to respect the ethical duties of candor and fairness, loyalty to the
law, and commitment to the profession and justice but otherwise imposed no obligation on the lawyer that would compromise
the duty of loyalty to the client. Accordingly, the opinion stated
that the tax lawyer must avoid statements and omissions that mis-
lead the IRS but is under no obligation to disclose weaknesses in
the client’s case and is free to recommend a return position most
favorable to the client if there is a reasonable basis for that posi-
tion. Consistent with its endorsement of the adversarial ap-

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102. *See id.* at 1034 (“The opinion recognized no considerations distinguishing the preparation of a return from any other adversarial act.”); *Falk, supra* note 52, at 646 (“Opinion 314 began with the premise that the Service and the tax lawyer are adversaries.”); *cf. Bittker, Representing Taxpayer, supra* note 95, at 274 (“Unless tax practice is unique, and I do not think it is, the standards and practices that have developed in the conduct of adversary proceedings elsewhere are bound to influence, and more likely to dominate, the conduct of proceedings before the Service.”).

103. *See supra* note 44.

104. *See Formal Op. 314, supra* note 98, at 671 (“It is unprofessional and dishonorable to deal other than candidly with the facts . . . in the presentation of causes. These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.”) (*quoting Model Code, supra* note 5, Canon 22).

105. *See id.* at 671-72 (“No client . . . is entitled to receive nor should any lawyer render . . . any advice involving disloyalty to the law whose ministers we are.”) (*quoting Model Code, supra* note 5, Canon 32).

106. *See id.* at 671 (A lawyer “should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.”) (*quoting Model Code, supra* note 5, Canon 29).

107. *See id.* at 672 (“In all cases, with regard both to the preparation of returns and negotiating administrative settlements, the lawyer is under a duty not to mislead the Internal Revenue Service deliberately and affirmatively, either by misstatements or by silence or by permitting his client to mislead.”).

108. *See id.* (“[A]s an advocate before a service which itself represents the adversary point of view, where his client’s case is fairly arguable, a lawyer is under no duty to disclose its weaknesses, any more than he would be to make such a disclosure to a brother lawyer.”); *see also Fredric G. Corneel, Guidelines for Tax Practice Second, 43 Tax Law. 297, 311 (1990) (stating that the lawyer’s obligation to tell the truth does not require disclosure of relevant facts and law to the IRS); cf. Stamm Int’l Corp. v. Commissioner, 90 T.C. 315 (1988) (holding that a settlement that cost the IRS approximately $700,000 would not be set aside due to the ignorance of government counsel).

109. *See Formal Op. 314, supra* note 98, at 672 (“[A] lawyer who is asked to advise his client in the course of the preparation of the client’s tax returns may freely urge the statement of positions most favorable to the client just as long as there is reasonable basis for those positions.”). The “reasonable basis” standard established by Formal Opinion 314 has been the subject of considerable debate among commen-
approach to the return preparation process, the Committee made the following statement regarding disclosure on returns:

[Where the lawyer believes there is a reasonable basis for a position that a particular transaction does not result in taxable income, or that certain expenditures are properly deductible as expenses, the lawyer has no duty to advise that riders be attached to the client’s tax return explaining the circumstances surrounding the transaction or the expenditures.]

The reasonable basis standard represented an effort on the part of the legal profession to modify the traditional duty of the advocate in situations involving the most aggressive of return positions. Presumably, the Committee believed that positions which failed to satisfy the reasonable basis standard represented such a threat to the taxing system that counseling avoidance or disclosure of these positions—advice representing a clear departure from traditional partisan advocacy—could be justified. However, the reasonable basis standard did not alter the partisan behavior of tax lawyers; in practice, the lawyers used the standard to justify recommending nondisclosure of nearly any nonfrivolous position.

The profession’s failure to define and enforce the


111. In commenting on the reasonable basis standard in 1985, the ABA Ethics Committee confirmed that its intention in Formal Opinion 314 was to establish a higher reporting standard:

The Committee is informed that the standard of “reasonable basis” has been construed by many lawyers to support the use of any colorable claim on a tax return to justify exploitation of the lottery of the tax return audit selection process. This view is not universally held, and the Committee does not believe that the reasonable basis standard, properly interpreted and applied, permits this construction.

ABA Comm. on Ethics and Professional Responsibility, Formal Op. 85-352 (1985), reprinted in 39 TAX LAW. 631, 631 (1986) [hereinafter Formal Op. 85-352]; see also Kenneth L. Harris, Resolving Questionable Positions on a Client’s Federal Tax Return: An Analysis of the Revised Section 6694(a) Standard, 47 TAX NOTES 971, 972 (1990) [hereinafter Harris, Resolving Questionable Positions] (explaining that the reasonable basis standard probably intended a high reporting standard); Philipps et al., It's Not Easy, supra note 109, at 611 (also stating that the reasonable basis may have been intended as a relatively high reporting standard).

112. The Task Force Report issued by the ABA Committee on Standards of Tax Practice in connection with the release of Formal Opinion 85-352, the successor to Formal Opinion 314, makes the following observation:
reasonable basis standard established by Formal Opinion 314,\(^{113}\) together with the lack of guidance offered tax practitioners by subsequent revisions in the profession's rules of ethics,\(^{114}\) prompted the ABA Ethics Committee to revisit the question of tax return disclosure in 1985 in Formal Opinion 85-352.\(^{115}\)

The Committee began its reconsideration of the lawyer's duties as tax return advisor\(^{116}\) by implicitly endorsing the conclusion of Formal Opinion 314 that the return preparation process should

Doubtless there were some tax practitioners who intended "reasonable basis" to set a relatively high standard of tax reporting. Some have continued to apply such a standard. To more, however, if not most tax practitioners, the ethical standard set by "reasonable basis" had become a low one. To many it had come to permit any colorable claim to be put forth; to permit almost any words that could be strung together to be used to support a tax return position.


[T]he force of the term 'reasonable basis' has eroded over the ensuing 20 years of usage. It is not surprising that this erosion has occurred, given that no one has been enforcing the standard—no one appears to have been cautioning or disciplining practitioners who inadvertently or intentionally violated the reasonable basis standard.


113. See ABA Section of Taxation Proposed Revision to Formal Opinion 314 (May 21, 1984), reprinted in Bernard Wolfman & James P. Holden, Ethical Problems in Federal Tax Practice 71 (2d ed. 1985) [hereinafter Prop. Rev. to Op. 314] ("The 'reasonable basis' standard of practice promulgated in Formal Opinion 314 has been the subject of misinterpretation and misapplication, to the extent that it has been construed to support the use of any colorable claim to justify exploitation of the lottery of the tax return audit selection process."); Handelman, supra note 109, at 95 (concluding that concern over exploitation of the audit lottery prompted action by the ABA Committee on Ethics and Professional Responsibility in the form of Formal Opinion 85-352).

114. See also Collie & Marinis, supra note 92, at 460 n.16 (noting that during work by the ABA on the 1969 Model Code, "the Chairman of the ABA Tax Section's Committee on Standards of [Tax] Practice, inquired of the Tax Section Committee whether the revision of the Canons of Ethics should provide special rules for tax lawyers. Such survey found the Committee overwhelmingly opposed to such an approach"). See generally MODEL CODE, supra note 5 (containing no special ethical requirements for tax attorneys); MODEL RULES, supra note 31 (containing no special ethical requirements for tax attorneys).


116. The guidelines established by the Committee in Formal Opinion 314 continue to apply with respect to lawyers representing taxpayers in negotiations with the IRS. See infra note 138.
be treated as an adversarial proceeding\textsuperscript{117} and that the tax lawyer's duties are those of an advocate.\textsuperscript{118} On the question of return disclosure, the Committee abandoned the reasonable basis standard and focused instead on the lawyer's assessment of each reporting position:

Thus, where a lawyer has a good faith belief in the validity of a position . . . that a particular transaction does not result in taxable income or that certain expenditures are properly deductible as expenses, the lawyer has no duty to require as a condition of his or her continued representation that riders be attached to the client's tax return explaining the circumstances surrounding the transaction or the expenditures.\textsuperscript{119}

The Committee concluded that a lawyer can have a good faith belief in the validity of a position only if there is "some realistic possibility of success if the matter is litigated,"\textsuperscript{120} but acknowledged that "[a] lawyer can have a good faith belief in this context even if the lawyer believes the client's position probably will not pre-

\textsuperscript{117} In fact, the opinion does not take a firm position on the adversarial nature of the process. The Task Force Report on Formal Opinion 85-352 suggests that the opinion does not characterize the return preparation process as an adversarial proceeding. See Task Force Report, supra note 112, at 640. This disclaimer notwithstanding, the Committee's description of the tax return as a report that "may be the first step in development of an adversarial relationship between the client and the Internal Revenue Service" and its continued endorsement of an approach to representation that permits nondisclosure on returns in all but the most egregious circumstances is strong evidence of the adversarial nature of the process. See Durst, \textit{supra} note 87, at 1046 ("On the whole, the opinion seems to reaffirm the view of the return as an adversarial document."); Falk, \textit{supra} note 52, at 647 ("Opinion 352 partially reverts to the view that tax returns are adversarial."); Philips \textit{et al.}, \textit{It's Not Easy}, \textit{supra} note 109, at 612 n.139 (concluding that the Opinion 85-352 "lends credence to the adversarial viewpoint"). For further evidence in support of the Committee's endorsement of the process as adversarial, see \textit{infra} note 121.

\textsuperscript{118} See \textit{Formal Op. 85-352, supra} note 115, at 632 ("The ethical standards governing the conduct of a lawyer in advising a client on positions that can be taken in a tax return are no different from those governing a lawyer's conduct in advising or taking positions for a client in other civil matters."). Formal Opinion 85-352 acknowledges that the tax lawyer serves as both advisor and advocate—a departure from Formal Opinion 314 prompted by the profession's recognition in the \textit{Model Rules of Professional Conduct} of the various roles of the lawyer—but nevertheless sanctions adversarial conduct in reliance on the \textit{Model Rules}. See \textit{id}. (citing MODEL RULES, \textit{supra} note 31, Rules 1.2(d), 3.1).

\textsuperscript{119} \textit{Id}. at 633.

\textsuperscript{120} \textit{Id}; see Falk, \textit{supra} note 52, at 654 (criticizing the Committee's use of legal realism).
vail.”

Standards of conduct for tax practitioners established by the Treasury Department’s Rules of Practice—commonly referred to as Circular 230—and by the tax return preparer penalty provisions of the Internal Revenue Code also offer insight into the nature of the return preparation process and the role played by the lawyer as tax return advisor. Following an unsuccessful effort during the 1980s to characterize the return preparation process as nonadversarial, the Treasury Department acquiesced to the adversarial approach urged upon it by the legal profession by adopting a “realistic possibility” standard not unlike the standard developed by the ABA Ethics Committee in Formal Opinion 85-352. Under Circular 230, a tax practitioner preparing a return or advising on return positions may recommend any position believed to have at least a one-in-three chance of being sustained on the merits without discussing either the need for supplemental dis-

121. Formal Op. 85-352, supra note 115, at 633 (citations omitted); see Model Code, supra note 5, EC 7-4 (“The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.”); Model Rules, supra note 31, Rule 3.1, cmt. 2 (“[A]n action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail.”); see also Falk, supra note 52, at 657 (proclaiming that any position supported by “some reasoned support” should satisfy the good faith belief standard established by Formal Opinion 85-352).


123. See generally I.R.C. § 6694 (1994) (creating a penalty relating to the understatement of taxpayer liability by return preparer).

124. Following release of Formal Opinion 85-352 in 1985, the Treasury Department issued a proposal to amend its Rules of Practice that included an endorsement of a nonadversarial approach to the preparation of tax returns. See infra note 156 and accompanying text. The proposal met with considerable resistance from professional groups and eventually was withdrawn in favor of the litigation-based standard endorsed by the legal profession. See, e.g., New York State Bar Ass’n Tax Section, Comments on Proposed Modification of Circular 230, 34 Tax Notes 1113 (1987). See generally Durst, supra note 87, at 1051 n.86 (discussing the Treasury’s proposal and method of imposing a penalty).

125. See 31 C.F.R. § 10.34(a)(1) (adopting the realistic possibility standard).

126. The Rules of Practice impose standards of conduct on attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others qualifying to practice before the IRS. See id. § 10.3.

127. See id. § 10.34(a)(4)(i) (defining “realistic possibility” as “a one in three . . . likelihood of being sustained on [the] merits”). Although Formal Opinion 85-352 makes no attempt to quantify the realistic possibility of success standard, the report issued concurrently with the opinion suggests that a position having at least a 33% chance of success should meet the standard. See Task Force Report, supra note 112, at 638-39.
closure or possible exposure to penalties. In addition, these rules permit a practitioner not serving as a return preparer to recommend any other nonfrivolous position provided the practitioner explores with the taxpayer the applicability of the accuracy-related penalty and the opportunity to avoid the penalty through disclosure. Similarly, the return preparer penalty provision utilizes the realistic possibility standard in connection with an evaluation of the role played by a return preparer in assisting with the preparation of a return. Section 6694 imposes a $250 penalty on return preparers who knowingly prepare a return containing an undisclosed or frivolous position that does not have at least a one-in-three chance of being sustained on the merits.

Thus, the standards imposed on lawyers by both the Rules of Practice and the Internal Revenue Code's preparer penalty provision are wholly consistent with the approach taken by the legal profession in defining the nature of the return preparation process and the lawyer's duties as advisor: The lawyer may serve as taxpayer advocate by resolving doubt on questionable positions in favor of the taxpayer, by evaluating the propriety of return positions through an assessment of the likelihood of success at trial, and by discussing with the client the possible imposition of penalties with respect to the most questionable of positions.

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128. See 31 C.F.R. § 10.34(a)(1) (prohibiting a return preparer from signing a return containing a position that fails to satisfy this standard). The practitioner's duty to discuss disclosure in the context of taxpayer penalties was first acknowledged by the legal profession in Formal Opinion 85-352 in recognition of the § 6661 substantial understatement penalty. See infra note 274. The reference in Circular 230 to the accuracy-related penalty is made in recognition of the consolidation of many taxpayer penalty provisions, including penalties for substantial understatement, negligence, and disregard of rules and regulations, into the § 6662 accuracy-related penalty provision. See generally I.R.C. § 6662(a), (d) (regarding a substantial understatement of income tax). For a discussion of the substantial understatement penalty, see infra notes 208-36 and accompanying text.

129. See 31 C.F.R. § 10.34(a)(1)(ii); see also supra note 128 (discussing the practitioner's duty to discuss disclosure in the context of taxpayer penalties).

130. See I.R.C. § 6694(a)(1); Treas. Reg. § 1.6694-2(a)(1) (as amended in 1991) (utilizing the realistic possibility standard). For purposes of the return preparer penalty provisions, "income tax return preparer" is defined to include a paid preparer who prepares all or a substantial portion of a return. See I.R.C. § 7701(a)(36)(A); see also Treas. Reg. § 1.6694-1(b)(2) (as amended in 1991) (distinguishing between signing and nonsigning preparers).

B. Examination of the Return

The internal revenue audit provides the government with an opportunity to gather information needed to confirm that the taxpayer has filed a correct return. During examination of a return, the examining agent reviews taxpayer records primarily in an effort to substantiate items claimed as deductions and to identify receipts properly characterized as income but not reported as such by the taxpayer. Thus, the internal revenue audit is inherently invasive and often time-consuming. It is also threatening to return positions which, if discovered during examination of the return, might result in the assessment of additional tax, penalties, and interest. For these and other reasons, taxpayers who acknowledge the importance of the audit process to society may nevertheless assume an adversarial position relative to the examining agent, recognizing that cooperation through voluntary disclosure increases the likelihood that return positions will be discovered and challenged.

The lawyer retained to represent a taxpayer during examination of a return responds to client expectations and to the professional duty of loyalty owed to the client by assuming the role of advocate and taking all steps necessary to maximize the likelihood that the client will prevail. During examination of the return, the lawyer assists the taxpayer in complying with the agent’s requests for information but, in true adversarial form, warns against voluntary disclosure of information. During negotiations with the examining agent, the lawyer vigorously defends return positions reviewed by the agent through argument and reference to favorable authorities but avoids calling to the agent’s attention other issues not considered during the audit. Obviously, this partisan approach to the return examination process hinders the IRS in its effort to ensure that taxpayers comply with the Internal Revenue laws. Nevertheless, the legal profession endorses the role of the lawyer as taxpayer advocate during audit of a return.

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132. See Saltzman, supra note 71, ¶¶ 8.03, 8.06(1)(a), 8.06(3)(a); Haims, supra note 71, §§ 24.05[1], 24.09. See generally Taxpayer Compliance Report, supra note 66, at 339-41 (discussing the various forms of noncompliance).

133. See Holden, New Professional, supra note 112, at 212-15 (finding that taxpayers are in favor of compliance but resist the idea of their own participation in an internal revenue audit).


135. See Haims, supra note 71, § 24.09[3][c].

136. See infra note 137 and accompanying text.
In Formal Opinion 314, the ABA Ethics Committee responded to the lack of guidance provided by the legal profession’s Canons of Ethics with the following statement endorsing the lawyer’s role as advocate during negotiations with the IRS:

In the absence of either judicial determination or of a hypothetical exchange of files by adversaries, counsel will always urge in aid of settlement of a controversy the strong points of his case and minimize the weak; this is in keeping with Canon 15, which does require “warm zeal” on behalf of the client. Nor does the absolute duty not to make false assertions of fact require the disclosure of weaknesses in the client’s case and in no event does it require the disclosure of . . . confidences, unless the facts in the attorney’s possession indicate beyond reasonable doubt that a crime will be committed.  

The role of the lawyer as taxpayer representative following preparation and filing of a return was not reconsidered by the Committee in Formal Opinion 85-352. Therefore, this statement in Formal Opinion 314 continues to govern the ethical conduct of lawyers engaged to represent taxpayers during the audit stage of the compliance process.

As advocate, the lawyer represents the interests of the taxpayer in negotiations with the examining agent in an effort to maximize the chances of prevailing on issues raised during the audit. However, the duty of loyalty to the client is subject to duties that the lawyer owes to the government. Although the lawyer has no obligation to volunteer information, the lawyer must respect the ethical duty of fairness owed to every opponent and the derivative duty, acknowledged in Formal Opinion 314, to avoid misleading the IRS deliberately, either by misstatement or silence.

137. Formal Op. 314, supra note 98, at 672; see Durst, supra note 87, at 1030-31; Falk, supra note 52, at 643-51.

138. Formal Opinion 85-352 was limited to an evaluation of a lawyer’s duties in connection with advising on positions taken by taxpayers on returns. See Formal Op. 85-352, supra note 115, at 632 (“This position reconsiders and revises only that part of Opinion 314 that relates to the lawyer’s duty in advising a client of positions that can be taken on a tax return.”); see also Phillips, supra note 109, at 610 (“Opinion 314 still has effect with respect to dealing with the IRS after an audit has begun . . . .”).

139. See Corneel, supra note 108, at 311 (“[W]e are under no legal or ethical obligation to volunteer to the Service information adverse to the client or to urge the client to do so.”).

140. See supra note 107.
The resulting obligation to answer questions honestly and provide relevant information on request, while subject to the duty to maintain client confidences, nevertheless promotes a level of taxpayer cooperation needed during examination of the return. However, cooperation received from the taxpayer and counsel is "passive" in the sense that it is available only in response to requests for information and, consistent with the adversarial nature of the process, is offered only to the extent necessary to comply with the request.

The Treasury Department's Rules of Practice do little to alter either the adversarial nature of the process or the lawyer's role as taxpayer advocate. In fact, the duties described in Circular 230 simply confirm that those general ethical duties observed by the lawyer when representing clients should be respected when representing taxpayers before the IRS. Circular 230 defines the ethical duty of fairness to the opponent as an obligation to submit non-privileged records and information in response to a proper and lawful request made by a representative of the IRS, a duty to exercise due diligence in preparing documents submitted to the IRS, and a duty to ascertain the accuracy of representations made to the IRS. In Circular 230 the ethical duty of competent representa-
tion requires counsel to advise clients when they have failed to comply with the internal revenue laws. Conduct prohibited by the legal profession’s rules of ethics is also proscribed by the Rules of Practice: A practitioner may be suspended or disbarred from practice before the IRS following suspension or disbarment from the practice of law in any state. The Rules of Practice make no effort to modify the adversarial approach to taxpayer representation by imposing duties on the lawyer and other tax practitioners that are owed to the government in recognition of their role as members of the tax bar and out of concern over the effects of partisanship on the tax compliance process. Thus, the rules promulgated by the legal profession and the Treasury Department endorse the lawyer’s traditional role of advocate in the context of the representation of taxpayers.

C. Questioning Adversarial Representation of Taxpayers

Is adversarial representation of taxpayers justified in the context of the return preparation and examination process? The an-

laws. Unless the position is reasonable, meritorious and made in good faith, a practitioner has not exercised the necessary diligence imposed upon him or her. The due diligence standard cannot be met by a position advanced principally to exploit the audit selection process, a position that serve [sic] as a mere “arguing” position advanced solely to obtain leverage in the bargaining process of settlement negotiation within the IRS, a position that would serve merely to avert a successful charge that the return is false or fraudulent, or a position that has no practical and realistic possibility of being sustained in the courts.


145. See 31 C.F.R. § 10.21 (duty to inform client of failure to comply with internal revenue laws); cf. MODEL CODE, supra note 5, DR 6-101(A)(1) (requiring competency); MODEL RULES, supra note 31, Rule 1.1 (regarding the duty of competence); id. Rule 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client . . . .”).

146. See 31 C.F.R. § 10.50 (granting the Treasury Secretary the authority to suspend or disbar a practitioner for incompetence or disreputable conduct); id. § 10.51(g) (defining “disreputable conduct” to include “disbarment or suspension from practice as an attorney”).
swer lies in an examination of both the tax compliance process and adversary theory. Partisan advocacy has positive and negative implications. Thus, whether its use is justified in contexts other than traditional adversarial proceedings depends on a comparison of the benefits derived from its use with its detrimental effects.

1. The nature of the tax compliance system

The legal profession insists that advocacy on behalf of taxpayers is both appropriate and mandated by its rules of professional conduct. In 1966 the ABA Ethics Committee concluded in Formal Opinion 314 that adversarial representation of taxpayers was justified by the government's inability to serve as impartial tribunal as well as opponent. In 1985 the Committee affirmed its position on the use of advocacy in this setting by observing in Formal Opinion 85-352 that "the filing of the tax return may be the first step in a process that may result in an adversary relationship between the client and the IRS." Is this an accurate portrayal of the tax compliance system or merely an excuse offered in support of the traditional approach to client representation?

The observations made by the ABA Ethics Committee about the dual role of the IRS and the possibility of future disputes between taxpayers and their government are beyond dispute, and both factors must be considered when analyzing the nature of the dispute resolution process utilized by the IRS. However, the role of the IRS and the potential for disagreement represented by an aggressive return position should not serve as the basis for characterizing a compliance process that in all cases precedes an actual dispute between a taxpayer and the government. The tax return is the taxpayer's report to the government of the financial transactions engaged in during the year. It summarizes the taxpayer's computation of tax liability and the information relating to transactions which play a part in that computation. Similarly, the in-

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147. See MODEL RULES, supra note 31, Rule 1.3 cmt. 1.
148. See supra notes 100-03 and accompanying text.
149. Formal Op. 85-352, supra note 115, at 632; see also supra note 117 (discussing the conclusion of the ABA Committee on Standards of Tax Practice with respect to the adversarial nature of the tax compliance process).
150. See Falk, supra note 52, at 648 n.23 (stating that a tax return serves a "disclosure, reporting and self-assessment function"); Handelman, supra note 109, at 90 (describing the tax return as a "disclosure and self-assessment document").
151. Questions regarding the adversarial nature of the return preparation process are to some extent a function of the purpose of tax returns. On that subject, Profes-
ternal revenue audit—a necessary compliment to the return preparation and filing process—offers the government the opportunity to gather additional information necessary to confirm that the treatment of transactions on the return is consistent with the internal revenue laws. Both the tax return and the subsequent audit are necessary steps in the tax compliance process; neither is part of a forum for the resolution of disputes between taxpayers and the IRS.

The ABA Section of Taxation described the return preparation process in much the same way in its 1984 Proposed Revision to Formal Opinion 314:

To serve its disclosure and assessment function a tax return must provide a fair report of matters affecting tax liability. The complications of the tax law, the inadequacy of Internal Revenue Service audits, the impracticability of training revenue agents to achieve expertness and the flexibility available to the taxpayer in legitimately resolving to his own advantage numerous doubtful issues resulting from those complexities, impose a substantial burden upon the government.

This description of the tax return preparation and compliance sor Bittker offers the following:

At bottom, our difficulties in this area may stem from uncertainty about the function of the federal income tax return: If we view it as expressing the taxpayer’s opinion of his legal liability, he has discharged his obligation to the government by expressing his opinion honestly—by including those receipts that he honestly believes are taxable and excluding those he honestly believes are excludable, and so on with respect to deductions, credits, and exemptions. If the return’s function is viewed in this way, it seems to me that the practitioner’s obligations when he prepares a return is to insist that it reflect his honest belief, based on his professional experience and skill, and to the proper treatment of inclusions, exclusions, deductions, and so on, based on the facts as he knows them. On the other hand, if the return is viewed as a statement by the taxpayer of what the government ought to know in order to make the most efficient use of its auditing facilities, then the taxpayer ought to call attention to all debatable items, because these are obviously the ones that would be most productive of revenue if subjected to examination.

Bittker, Professional Responsibility, supra note 72, at 254. Compare Professor Bittker’s statement with:

“Well, I guess the question is how much obligation the taxpayer has to reveal all the things we are talking about if they add not very much at all to the final declaration of tax liability. Should the burden not be on the tax administrator to verify the taxpayer’s claims by examination of his books and records?”

Kurtz et al., supra note 87, at 19 (quoting panelist Bill Smith).

152. See supra notes 132-33 and accompanying text.

The legal profession's failure to endorse the position advanced by the Tax Section prompted the Treasury to endorse a similar proposal in changes to the Rules of Practice circulated for comment in 1986:

The area of tax return preparation and advice given with respect to positions on tax returns clearly reflects a practitioner's dual responsibility. A tax return is not a submission in an adversary proceeding. Rather, the tax return serves a disclosure, reporting and self-assessment function. It is a citizen's report to the government of his or her relevant activities for the year. To serve its disclosure and assessment function, a tax return must . . . provide a fair report of matters affecting tax liability. The complexities of the tax and the limited number of tax return examinations the IRS is able to perform impose a substantial burden upon the government. Hence, the representations made on tax returns must accurately reflect the facts, and positions taken on tax returns must be supportable by the law.

Both statements describe a compliance system that can function properly only with the cooperation and assistance of taxpayers. How then does the legal profession justify its continued support of an adversarial approach to the return preparation process, an approach that encourages limited disclosure of information and thereby undermines the government's effort to promote taxpayer compliance? The ABA Committee on Standards of Tax Practice addressed this question in its Task Force Report on Formal Opinion 85-352:

[Formal Opinion 85-352] does not state that the general ethical guidelines governing advocacy in litigation are determinative, or suggest that tax returns are adversarial proceedings. To the contrary, a tax return initially serves a disclosure, reporting, and self-assessment function. It is the citizen's report to the government of his or her rele-

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154. Id.
155. See supra note 117 (discussing the reaffirmation by the ABA Ethics Committee of the adversarial nature of the return preparation and filing process in Formal Opinion 85-352).
vant activities for the year. The Opinion says that because some returns, particularly aggressive ones, may result in an adversary relationship, there is a place for consideration of the ethical considerations regarding advocacy. Thus, the Opinion blends the ethical guidelines governing advocacy with those applicable to advising, from which the new ethical standard is derived.157

The Task Force Report offers an equally accurate description of the tax compliance process but fails to explain the legal profession’s continued support in Formal Opinion 85-352 for the characteristically adversarial attitude of both taxpayer and tax lawyer toward disclosure of positions on tax returns in an admittedly nonadversarial setting.158 Thus, the legal profession refuses to acknowledge that the use of partisan advocacy—an approach to taxpayer representation that leads to limited disclosure on tax returns—is inconsistent with both the nature and purpose of the tax compliance system.

Similarly, lawyers are unwilling to relinquish their role as advocate during representation of taxpayers involved in internal revenue audits. Admittedly, the case for partisan advocacy is more persuasive in the context of an audit, if only because of the presence of an IRS agent representing the interests of the government.159 Undoubtedly, it is this difference between return preparation and return examination that justifies the more cautious approach taken by the ABA Section of Taxation in commentary on the nature of the audit process: “It may be that upon commencement of an audit Internal Revenue Agents take adversarial positions, despite formal admonitions to operate ‘in a fair and impartial manner, with neither a government nor a taxpayer point of view.’ But prior to commencement of such an adversarial relation-

158. See Handelman, Constraining, supra note 109, at 95 n.88.

The [Task Force] Report acknowledges that the opinion authorizes reporting, without disclosure, positions that the lawyer has concluded and advised the client the courts would reject if forthrightly advanced. Only by assuming the stance as adversary could a lawyer justify advising a client thus informed to report the position without similarly advising the Service. Id. (citation omitted).

159. The government’s enhanced ability to protect its interests during the examination process must also contribute to the lack of attention paid to partisan advocacy in this setting. See infra notes 199-203 and accompanying text for a discussion of the advantages enjoyed by the government during examination of a return.
ship different considerations apply. Examining agents, who assume the role of government advocate, may invite an adversarial response from taxpayers and their representatives. However, an agent's departure from the IRS guidelines does not justify recharacterization of an otherwise nonadversarial process. The purpose of the internal revenue audit is to confirm compliance, not to resolve disputes. Disputes between taxpayers and the government are the product of the audit process. Nevertheless, the possibility of a dispute does not justify an adversarial approach to the audit process and the resulting lack of cooperation that undermines the effectiveness of the compliance testing system.

In view of the legal profession's natural reluctance to abandon traditional adversarial representation of taxpayers, it is necessary to explore further the nature of the tax compliance process and its relationship to traditional adversarial proceedings. Despite its nonadversarial nature, is the tax compliance process sufficiently similar to a traditional adversarial proceeding to justify the uncooperative attitude of private litigants adopted by the taxpayer and the tax lawyer? Or is the return preparation and examination process so different, both in form and purpose, that continued use of adversarial representation cannot be justified? The issues raised by these questions are considered in the discussion that follows on the application of adversary theory in the tax compliance setting.

2. The return preparation and examination process as an adversarial proceeding

Use of the adversary model is premised on the existence of a dispute between parties that is best resolved by an impartial decision-maker who relies on information presented by the parties to

161. See Falk, supra note 52, at 648 (addressing the submission of returns).

The disclosure and self-assessment purposes of tax returns more cogently explain the view of tax submissions as nonadversarial. Our system of tax returns depends heavily upon fair dealing with the government. Paying taxes is not a battle aiming at the government's defeat. Rather, it is a collective obligation of citizenship. Failure to obey the law can result in an adversarial proceeding, but obeying the law is something one does for the government, not against it.

Id. (footnotes omitted); see also Gordon L. Gidlund, Voluntary Compliance and the Taxman's Friend: Points to Consider When Criminal Investigation Follows Tax Audit, 67 TAXES 513, 514 (1989) (suggesting that the return examination process should be cooperative rather than adversarial).
render a decision and thereby resolve the dispute. Partisan-
ship—and the resulting unwillingness of one party to cooperate
with another—is a necessary product of the need to provide the
decision-maker with the benefits of a thorough examination of the
facts surrounding the dispute without jeopardizing impartiality
through active participation. Judges presiding over adversary
proceedings use procedural rules to police partisanship and ensure
that information provided by the parties is both relevant and reli-
able. Together, these elements of the adversary system provide
the parties and the decision-maker with the benefits of advocacy
while minimizing the negative impact of partisanship.

The IRS serves as the decision-maker in the context of the tax
return preparation and examination process. Although the role
of decision-maker does not require the IRS to resolve a dispute—an
actual dispute of the type contemplated by the adversary sys-
tem does not arise until the examining agent challenges a return
position on which the taxpayer is unwilling to concede—it never-
theless places the government in the position of evaluating the
propriety of positions taken by the taxpayer on a return. The IRS
is not, however, an impartial and passive decision-maker. Indeed,
the IRS, represented by the examining agent, is an active
decision-maker as well as a partisan opponent. The IRS con-
ducts its own investigation much like the judge in inquisitorial pro-

162. See supra notes 5-14 and accompanying text.
163. See supra notes 15-20 and accompanying text.
164. See LUBAN, supra note 6, at 11 (stating that the lawyer can be confident that
the negative impact of partisanship will be addressed by a decision-maker so that the
rights of other parties are not prejudiced); Pound, supra note 17, at 738 ("Hence in
America we take it as a matter of course that a judge should be a mere umpire, to
pass upon objections and hold counsel to the rules of the game, and that the parties
should fight out their own game in their own way without judicial interference.").
165. See supra note 33 and accompanying text.
166. As noted:

Examination's authority to resolve issues is derived from its authority to
make determinations of tax liability under IRC § 6201. It has broad
authority to consider and weigh conflicting factual information, data, and
opinions. Using professional judgment in accordance with auditing stan-
dards, it makes findings of fact and applies Service position on issues of law
to determine the correct tax liability.
Phil Brand, IRS Alternative Dispute Resolution Techniques, 71 TAX NOTES 529, 532
(1996) (citation omitted); see also supra notes 99-101 (discussing the adversarial re-
lationship between the taxpayer and the IRS).
167. See supra note 100 and accompanying text.
168. See New York City Bar Report, supra note 57, at 876 ("A tax dispute is
heard initially by an agency whose employees are frequently no more objective than
taxpayers . . . ").
ceedings and therefore is not forced to rely exclusively on the parties to provide all information needed to resolve issues. In addition, the dual role of the government as both decision-maker and opponent precludes the IRS from enjoying the benefits of the partisan debate between adversaries contemplated by the adversary system. These differences between the tax compliance system and traditional adversarial proceedings suggest that the use of partisan advocacy cannot be justified by analogy to the traditional adversarial system used for the resolution of disputes.

But the absence of an impartial decision-maker does not preclude the use of adversarial representation in other settings. In the case of private negotiations, for example, the use of partisanship is premised on the fact that overzealousness will neither benefit nor harm either party. In theory, when adversarial conduct becomes intolerable, the resulting impasse sends both parties in search of other opportunities. In the remaining cases the interest in establishing and maintaining a relationship keeps adversarial attitudes in check. Unlike negotiations between private parties, however, disputes between taxpayers and the IRS do not arise out of a mutually beneficial relationship that encourages the parties to avoid abuse of the adversary system. There is no "stalemate" safe harbor available to assure both parties that an unreasonable approach taken by one or the other can result in no worse than maintaining the status quo. Indeed, a stalemate during examination of a return can result in the issuance of a revenue agent's report recommending changes in the taxpayer's return and the assessment of additional tax. Although rules of conduct make some attempt to address the potential for abuse of the adversarial process by IRS personnel and taxpayer advocates, these rules, even if en-

169. See supra note 12 and accompanying text.
170. See Bittker, Representing Taxpayers, supra note 95, at 271 ("In view of the revenue agent's undisputed authority to ask questions, to issue subpoenas, and to assess a deficiency if he is not satisfied with what he has learned, I see no ground for insisting upon the kind of disclosure that some commentators seem to demand.").
171. See Karin Skadden, Accounting News, 37 TAX NOTES 835, 837 (1987) (suggesting that the Taxpayer Bill of Rights included in Omnibus Budget Reconciliation Act of 1989 will serve as a Code of Conduct for the IRS); see also Lawrence B. Gibbs, Tax Reform: An Opportunity for a Fresh Start in Tax Administration, 6 AM. J. TAX POL'Y 1 (1987) (containing remarks by IRS Commissioner Lawrence B. Gibbs regarding review of the IRS professional and ethical standards to improve relations between the taxpayer and the IRS); John D. Johnson, The IRS Commitment to Professional Ethics, 7 AM. J. TAX POL'Y 105 (1988) (containing remarks by Assistant IRS Commissioner John D. Johnson regarding improving the quality of tax ad-
forced, cannot supply the more effective cooperative attitude present in the private sector by reason of the desire to establish and preserve a relationship.

That is not to say that some form of partisanship does not have its place in negotiations between the taxpayer and the IRS. In order to maximize the likelihood of a correct decision, the tax compliance system should provide the IRS, as decision-maker, with access to all information, theories, and arguments relevant to the issue under consideration. Because the partisan presentations made by participants in adversarial proceedings have proven to be one of the most useful sources of information available to the decision-maker, this aspect of partisanship should prove equally valuable to the IRS when considering return positions. However, other consequences associated with the use of partisan advocacy—specifically the uncooperative attitude of participants and the resulting reluctance to share information that is characteristic of adversary proceedings—must be considered separately to ensure that the IRS obtains similarly beneficial results.

The competitive and uncooperative attitude of parties involved in adversarial dispute resolution is largely the product of party participation and control, the other fundamental characteristic of adversarial proceedings. Motivated by a desire to prevail, each party prepares its best case, a process that includes withholding information from the opponent in an effort to enhance the likelihood of success. The adversary model assumes that each party is equally capable of representing its own interests and therefore relies on the competitive nature of the process to ensure that one party's reluctance to share information is addressed by an
equally effective investigation conducted by the opponent.\footnote{177} In practice, however, litigants are rarely so evenly matched that the uncooperative attitude of one is fully offset by the abilities of the other.\footnote{178} For that reason, every adversarial proceeding utilizes discovery rules and other procedural devices designed to minimize the negative effect of partisanship.\footnote{179} Indeed, the importance of free access to information in federal court proceedings is illustrated by the recent addition of mandatory disclosure requirements to the discovery provisions of the Federal Rules of Civil Procedure.\footnote{180} Thus, the use of partisanship in the tax return preparation and examination setting can be justified only by taking similar steps to protect both the taxpayer and the government from the effects of partisan advocacy.\footnote{181}

Like the parties in traditional adversary proceedings, the participants involved in the tax compliance process are not evenly matched. The nature of the task confronting the IRS,\footnote{182} together with the challenges faced by the agency in attracting, training, and retaining employees,\footnote{183} have led some to characterize the agency as

\footnote{177. Cf. Landsman, \textit{supra} note 7, at 4 (commenting that lawyers who fail to carry out their duty as advocates undermine the adversary process); Fuller & Randall, \textit{supra} note 6, at 1216 (noting that adjudication is neither fair nor effective when only one party is represented by counsel).

178. \textit{See supra} note 27.

179. \textit{See supra} notes 21-27 and accompanying text.

180. \textit{See generally} \textsc{Fed. R. Civ. P. 26} (mandating disclosure of specified types of information without regard to whether a request for such information has been issued by another party). This change in the federal discovery rules was prompted, in part, by recommendations made by scholars regarding the need for a voluntary disclosure rule. \textit{See}, e.g., Wayne D. Brazil, \textit{The Adversary Character of Civil Discovery: A Critique and Proposals for Change}, 31 \textsc{Vand. L. Rev.} 1295, 1348-61 (1978); William W. Schwarzer, \textit{The Federal Rules, The Adversary Process, and Discovery Reform}, 50 \textsc{U. Pitt. L. Rev.} 703 (1989).


A taxpayer who takes a position without believing that it is correct is using his return as a first step in an adversary process. As in any court proceeding, he should tell his adversary ... what the issue is that needs to be resolved. This information is important so that the issue can be directly addressed and so that it is not avoided either because the return is not audited or because the issue is not found.

\textit{Id.}

182. \textit{See supra} note 153 and accompanying text.

183. \textit{See} N. Jerold Cohen, \textit{It Always Looks Better When You Look Back}, 46 \textsc{Tax Law.} 683, 686 (1993) ("[The IRS] has been plagued [during the past decade] by the loss of middle level, experienced agents. With this loss of experience has come a deterioration in the quality of audits ... ").
an unfairly equipped opponent. Naturally, taxpayer advocates respond by noting that the government’s resources and ability as decision-maker to endorse its own position more than make up for any advantage the taxpayer may enjoy through the use of partisanship and the resulting ability to control information. While there is some truth in both positions, the fact remains that the taxpayer and the IRS are not the evenly matched opponents contemplated by the adversary model.

Surprisingly, the tax compliance system addresses the problems of partisanship by departing from the adversary system’s solution to party inequality. Rather than adopt a policy of full disclosure—a policy furthered in adversary proceedings by the rules of discovery—the tax return preparation and examination process permits taxpayers to withhold information on most return positions from the government through nondisclosure on a return and through the refusal to volunteer information during an audit.

The government’s complex audit selection process and the seemingly limitless ability of the IRS to collect information from a taxpayer during examination of the return may offset to some extent the obvious advantage enjoyed by the taxpayer through information control. However, these tools do not assist in the identifica-

184. See Steven J. Willis, Masks, Magic, and Games: The Use of Tax Law as a Policy Tool, 4 Am. J. Tax Pol’y 41, 59 (1985) (describing the IRS as an unrepresented opponent); see also Falk, supra note 52, at 647-48 (noting that the nonadversarial proposal advanced by the ABA Section of Taxation was based, in part, on the premise that “because the government is not a fairly equipped opponent, a tax return is not governed by the usual rules of adversary proceedings.”).

185. See supra note 170. Compare, however, the following:

[S]ome non-criminal matters, such as administrative hearings, can raise the same issues of the state versus subjects and should be treated similarly; we may call these “quasi-criminal” matters. It makes sense for this reason to speak of the “criminal defense paradigm” rather than simply the “criminal defense context.” The criminal defense paradigm includes any litigation context in which zealous advocacy is justified by virtue of the fact that we have political reasons to aim at prophylactic protection from the state, even at the expense of justice.

LUBAN, supra note 6, at 63.

186. In their proposal to revise Formal Opinion 314, the ABA Tax Section addressed this issue:

The lawyer should then represent his client’s interests, consistent with the Rules of the [Model Rules of Professional Conduct (MRPC)] and with the preamble to the MRPC, which provides that “when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.”


187. See supra notes 84-87 and accompanying text.

188. See supra notes 139-42 and accompanying text.
tion of issues hidden on the return through nondisclosure. Unlike a plaintiff in a civil action who must plead in a manner designed to alert the opponent to the issues raised by the cause of action, the taxpayer is rarely required to call to the government's attention the issues raised by positions taken on a return. Consequently, the government's ability to eliminate the advantage enjoyed by the taxpayer is limited. It arises in those situations where the examining agent successfully identifies issues hidden on a return and proceeds with an investigation of those issues by soliciting information from the taxpayer through an inquiry and an administrative summons when necessary. If an examining agent fails to identify hidden positions on a return, the taxpayer escapes detection and thereby secures an advantage that the rules of discovery attempt to eliminate in traditional adversarial proceedings.

189. See Conley v. Gibson, 355 U.S. 41, 45-47 (1957) (holding that a party is required to plead in a manner sufficient to alert opponent to the issues raised by the claims asserted).

190. See supra notes 74-82 and accompanying text; see also Corneel, supra note 108, at 305 ("It is appropriate to assist the client in structuring a transaction and reporting it on the return in the way least likely to be subject to audit, provided we do not mislead the Service.").

191. See I.R.C. § 7602(a)(1)-(2) (1994) (authorizing use of the administrative summons and a means of providing the government with access to relevant records and testimony); id. § 7609 (authorizing use of third-party summons). For a detailed examination of the Service's use of the administrative summons, see Saltzman, supra note 71, § 13.01.

192. Recognizing that a position taken on a return will not be challenged unless the return is audited, lawyer and taxpayer play the audit lottery by engaging in "creative disclosure"—the inclusion of information on the return in a manner that satisfies the obligation to disclose without calling attention to the position and risking audit. See Falk, supra note 52, at 648 n.21 ("Because the great preponderance of returns are not audited, the taxpayer's reporting position is necessarily relied on by the Internal Revenue Service and is rarely in fact subjected to adversarial review.") (quoting Letter from James B. Lewis, Chairman, ABA Section of Taxation, to Robert O. Hetledge, ABA Ethics Committee (June 4, 1985)); Kurtz et al., supra note 87, at 15 ("[I]t is very difficult to run a tax system with a small audit coverage, and with the complexities that we have in our system, where that transaction then gets buried with thousands of others on a return . . . .") (quoting IRS Commissioner Jerome Kurtz).

193. See supra notes 23-28 and accompanying text. However, in criminal proceedings the adversary system intentionally creates an advantage in favor of the accused. See Luban, supra note 6, at 60 ("We want to handicap the state in its power even legitimately to punish us, for we believe as a matter of political theory and historical experience that if the state is not handicapped or restrained ex ante, our political and civil liberties are jeopardized."); Schwartz, Zeal, supra note 5, at 155-56 (describing differences between the criminal and civil litigation systems and the concern over conviction of the innocent that justifies the duties and burdens imposed on prosecutors).
Finally, the adversary model contemplates that each party will maximize the likelihood of success by presenting its best case and by challenging the positions taken by the opponent. But similar debate occurs only in very limited situations within the tax compliance system. For example, during preparation of the return, the IRS cannot scrutinize the taxpayer's positions. Similarly, during examination of a return, the IRS's ability to scrutinize taxpayer positions is handicapped by limitations placed on the scope of the audit, the agent's success in identifying undisclosed return positions, and the complexity and sophistication of the taxpayer positions that often push agents beyond their limited training and experience.

In theory, the examining agent has the ability to overcome many of these obstacles. The agent can address limited disclosure on returns during the audit with specific inquiries as well as a series of general questions designed to identify unreported income

194. See supra note 18 and accompanying text.
195. See Durst, supra note 87, at 1034 (stating that the “hallmark of an adversarial proceeding” is the opposing counsel’s critical scrutiny of all of the lawyer’s statements, which explains the low disclosure standard even though chances are low that a tax return will ever be critically scrutinized); Rowen, supra note 96, at 249 (“The premise of the adversary system, that the two adversaries will be in an equal position to uncover and present the facts, is unrealistic as applied to the current tax system.”); see also Harris, Resolving Questionable Positions, supra note 111, at 975 (stating that the practitioner has a duty to help the taxpayer fulfill the reporting obligation but violates this duty by encouraging noncompliant conduct); Kurtz, supra note 58, at 60 (stating that taxpayers often put the most favorable interpretation on questionable issues due to the voluntary compliance system).
196. See Kurtz et al., supra note 87, at 15 (“[A]s the taxpayer's financial matters become more extensive and complex, the audit itself, while it may be done with frequency, is only a sampling of transactions—it is not an audit of 100% of the transactions.” (quoting IRS Commissioner Jerome Kurtz)); Rowen, supra note 96, at 249 (noting that the scope of audits is narrow because of limited government resources); see also infra note 203 (discussing comprehensive Taxpayer Compliance Measurement Program (TCMP) audits).
197. See Rowen, supra note 96, at 249.

The premise of the adversary system, that the two adversaries will be in an equal position to uncover and present the facts, is unrealistic as applied to the current tax system. While the government's disadvantage is overcome somewhat by the rule that places the burden of proof on the taxpayer, this rule only applies when an issue has been raised; it does not help the government to uncover the issue.

Id.
198. See SALTZMAN, supra note 71, ¶ 8.05(1)(b); Rowen, supra note 96, at 249 (“While the government has many able agents, it is unrealistic to think that the government can adequately instruct all of its agents in the complexities of the law in such a manner that they can uncover most doubtful questions.”).
and items inconsistent with the taxpayer’s lifestyle. The agent may respond to incomplete responses and uncooperative taxpayers by issuing an administrative summons or may simply resolve all doubt in favor of the government by rejecting the taxpayer’s position and shifting the burden of proof to the taxpayer on appeal.

These information-gathering and procedural tools have their place, to be sure. However, their effectiveness depends upon the agent’s ability to identify issues requiring investigation, a task made more difficult by the taxpayer’s decision to hide questionable positions on a return. Because an undisclosed return position appears on a return like any other transaction—conspicuous perhaps by its subject matter but not by its questionable nature—identification of these in the absence of a comprehensive audit of taxpayer transactions is the exception rather than the rule.

Differences between the tax compliance system and traditional adversary proceedings notwithstanding, the legal profession insists that the use of partisan advocacy is both justified and necessary. The government is a formidable opponent. It has seemingly

199. See generally SALTZMAN, supra note 71, ¶ 8.06 (describing the service procedures for field examinations); Haims, supra note 71, ¶ 24.04[6], at 24-15 (describing the “economic reality audit,” which is designed to consider the lifestyles and net worth of self-employed taxpayers); William L. Raby & Burgess J. W. Raby, Financial Status Audits—The Sound and The Fury, 71 TAX NOTES 515 (1996) (discussing IRS economic reality program).

200. See Haims, supra note 71, ¶ 24.09[3][c], at 24-37 (discussing IRS summons power); see also supra note 191 and accompanying text (discussing when an administrative summons is appropriate).

201. See generally Leo P. Martinez, Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases, 39 HASTINGS L.J. 239 (1988) (discussing a proposed shift in the burden of proof from the taxpayer to the IRS). The issue of burden of proof has been the subject of considerable debate in recent years, prompting lawmakers to propose legislation that would shift the burden of proof to the IRS. The most recent proposal offered by 1996 presidential candidate Bob Dole is summarized in Sheryl Stratton, Shifting the Burden of Proof to the IRS: Considering the Possibilities, 72 TAX NOTES 1328 (1996).

202. See supra notes 86, 198.

203. The only truly comprehensive audit conducted by the IRS occurs in the context of the controversial TCMP, a program designed to gather information from the results of detailed audits for the purpose of revising the Discriminant Income Function (DIF) used in the complex computer-assisted process of selecting returns for audit. See George Guttman, Taxpayer Compliance Measurement Program: Is It Necessary?, 67 TAX NOTES 1282 (1995) (discussing the history of TCMP, its uses, limitations, and future); see generally SALTZMAN, supra note 71, ¶ 8.03 n.8 (referring to the service’s procedures in the TCMP); 1973-1992 RESEARCH, supra note 65, at 13-14 (explaining how the IRS gathers its estimates of underpaid income through the TCMP); Dubin et al., Tax Cheaters, supra note 72, at 241 (discussing the small amount of empirical work concerning tax compliance).
unlimited resources and technical expertise plus the unique ability as decision-maker to pass judgment on taxpayer’s return positions. This enormous advantage must be countered with partisan advocacy if the taxpayer is to have any chance of success.204

What is it about the IRS that warrants this level of concern over the rights of the individual? Clearly, the agency’s dual role as opponent and decision-maker makes it a unique adversary. Further, the IRS becomes particularly imposing when individuals within the agency stray from the IRS’s mission statement by abusing their discretionary authority.205 Abuse of power during the internal revenue audit—asking unnecessary or irrelevant questions, unwarranted use of the administrative summons, threatening unjustifiable assessments or action against a taxpayer or tax practitioner to gain advantage during an audit—threatens the rights of taxpayers, the livelihood of tax practitioners, and the reputation and effectiveness of the taxing system.206 However, concern over the possible abuse of governmental power during the examination of a return does not justify action taken by the taxpayer to avoid the audit process altogether. Furthermore, the use of partisan advocacy during the audit of a return does not further the goal of limiting the abuse that arguably justifies its use; it merely enhances the taxpayer’s chances of success by default. Effective measures taken to address concerns over the potential for abuse of governmental power during the examination process would expose the use of partisanship in this setting as no more than an advantage

204. See supra note 185. However, some contend that the stakes are higher during an audit because disclosure may be sufficient to trigger a criminal investigation, leaving the taxpayer with no information to withhold in the interest of avoiding self-incrimination. See Kutak, supra note 14, at 177 (describing the state as an opponent with a “monopoly of coercive power within the community” and acknowledging the “enormous resources [available] to exercise that power”). See generally Bittker, Federal Income Tax, supra note 80 (discussing the public’s right to know and the individual’s right to privacy); Gidlund, supra note 161 (providing guidelines for when a tax audit leads to a criminal investigation).

205. See supra note 62 and accompanying text; see also Brian Erard, The Influence of Tax Audits on Reporting Behavior, in WHY PEOPLE PAY TAXES, supra note 73, at 95, 96 (speculating that the IRS can encourage future compliance by treating taxpayers fairly); Gibbs, supra note 62, at 6 (stating that the IRS must be “as ready to recognize the rights of the taxpayer as we are to protect the rights of the Government” (quoting IRS Commissioner Lawrence B. Gibbs)).

206. Cf. I.R.S. Policy Statement P-6-10 (Nov. 26, 1979) 1 INTERNAL REVENUE MANUAL: ADMINISTRATION (CCH) 1218-19 (“Internal Revenue Service officials and employees must bear in mind that the public impact of their official actions can have an effect on respect for tax laws and on voluntary compliance far beyond the limits of a particular issue or case.”).
enjoyed by the individual at the expense of the system. 207

IV. TAX RETURN DISCLOSURE: DEFINING THE DUTIES OF TAXPAYERS AND TAX LAWYERS

Because the tax return preparation and examination process does not fit within the adversary model, applicable rules should redefine the relationship between the taxpayer, the tax advisor, and the IRS as nonadversarial. This simple declaration follows from the preceding analysis and should be embraced as a fundamental tenet upon which to base the duties of taxpayers and their advisors. Realistically, however, such a statement will have little effect on the conduct of those engaged in the preparation and examination of tax returns. A declaration is a useful first step, to be sure. However, the need for an effective and efficient taxpayer compliance testing system demands that more be done to prevent taxpayers and their representatives from legitimately misleading the IRS about the nature of return positions.

A change in the disclosure standard applicable to taxpayers can and should address the threat posed by a taxpayer's failure to disclose questionable return positions. The proposal described below explores the problem of limited disclosure in the context of a new standard that would require adequate disclosure of information relating to any return position not supported by all relevant existing authorities. The proposal also addresses the need for changes in the standards applicable to tax practitioners, given their ability to influence the behavior of their clients and the relationship of practitioner standards to taxpayer standards. The process that emerges from these proposed changes would remain somewhat adversarial but also would minimize the negative effects of partisanship. Therefore, this process would ensure that both taxpayers and the IRS are in a position to consider the issues raised by return positions and engage in a debate that promotes taxpayer compliance.

207. The resources available for use by the examining agent during audit of a return are, in large part, a response to the uncooperative approach taken by taxpayers during preparation and examination of returns. The agent has little need for the administrative summons and the power to assess and shift the burden of proof to the taxpayer when dealing with a taxpayer who is forthcoming with all relevant information. Thus, the taxpayer's adversarial attitude, the government's power to compel discovery, and the government's power to shift the burden to the taxpayer all seem to respond to each other. Elimination of these would enhance taxpayer compliance and address concerns over the possible abuse of governmental power.
A. A Proposal for a Higher Taxpayer Disclosure Standard

Currently, the substantial understatement penalty included in the accuracy-related penalty provisions of the Internal Revenue Code encourages disclosure of supplemental information relating to return positions. This penalty provision utilizes a standard based on the concept of "substantial authority" to identify return positions for which supplemental disclosure is necessary. A taxpayer need not disclose return positions supported by substantial authority in order to protect against imposition of the penalty. However, when a taxpayer reports a position on a return that is not supported by substantial authority and the position results in a substantial understatement of income tax, the accuracy-related penalty is imposed unless the position satisfies the recently adopted "reasonable basis" standard and is adequately disclosed on the return. The purpose of the substantial understatement


209. For a discussion of the meaning of "substantial authority" see infra notes 214-20 and accompanying text.

210. See I.R.C. § 6662(d)(2)(B)(i); Treas. Reg. § 1.6662-4(d)(1) (as amended in 1995) ("If there is substantial authority for the tax treatment of an item, the item is treated as if it were shown properly on the return for the taxable year in computing the amount of the tax shown on the return.").

211. See I.R.C. § 6662(d)(1)(A) (defining "substantial understatement of income tax" as an understatement exceeding the "greater of—(i) 10 percent of the tax required to be shown on the return... or (ii) $5,000").

212. See id. § 6662(d)(2)(B)(ii)(I); Treas. Reg. § 1.6662-4(e)(2)(i) (as amended in 1995) (stating that the disclosure exception is not effective in the absence of a reasonable basis for the position). The reasonable basis standard was added to the accuracy related penalty provision of the Internal Revenue Code in 1993 in an effort to elevate the reporting standard applicable to taxpayers. See H.R. REP. No. 103-111, at 754 (1993), reprinted in 1993-3 C.B. 167, 330 ("The committee believes that the 'frivolous' standard does not sufficiently discourage taxpayers and preparers from taking unreasonable return positions. Accordingly, to encourage compliance, the committee believes that a tougher standard should be imposed."); cf. Treas. Reg. § 1.6662-3(c)(1) (as amended in 1995) (disclosure of position not supported by reasonable basis does not preclude imposition of accuracy related penalty for disregard of the rules and regulations).

213. See I.R.C. § 6662(d)(2)(B)(ii); see also Treas. Reg. § 1.6662-4(a) (as amended in 1995) (understatement of income tax reduced by that portion for which there is adequate disclosure). The Treasury Regulations include detailed rules on what constitutes adequate disclosure for purposes of the accuracy related penalty and the I.R.C. § 6694 preparer penalty. See Treas. Reg. § 1.6662-4(f) (as amended in 1995); Treas. Reg. § 1.6694-2(c)(3) (as amended in 1992). One commentator suggests that disclosure is adequate only when it accomplishes the objective of alerting the IRS to a questionable return position. See John André LeDuc, The Legislative Response of the 97th Congress to Tax Shelters, the Audit Lottery, and Other Forms of
penalty provision is sound: provide taxpayers with an economic incentive to disclose information on questionable return positions. However, the effectiveness of the standard—its ability to promote behavior that minimizes the misleading effects of nondisclosure—largely depends upon the meaning assigned to the term “substantial authority.”

The Treasury Department’s regulations define “substantial authority” as an objective standard applied through a consideration of law and relevant facts. In an attempt to quantify the standard, the regulations compare “substantial authority” to other standards with established definitions:

The substantial authority standard is less stringent than the “more likely than not” standard (the standard that is met when there is a greater than 50-percent likelihood of the position being upheld), but more stringent than the reasonable basis standard (the standard which, if satisfied, generally will prevent imposition of the penalty under section 6662(b)(1) for negligence).

According to the regulations, substantial authority supports a return position only if “the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment.” The regulations adopt a broad definition of “authority” for this purpose and assign greater or

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Intentional or Reckless Noncompliance, 18 TAX NOTES 363, 386 (1983) [hereinafter LeDuc, Legislative Response] (“Taxpayers need only ask themselves whether an IRS agent, knowing the law, who read the return and associated disclosure, could recognize the issue raised.”).


215. Id.; cf. I.R.C. § 6662(d)(2)(C)(i)(II) (noting that substantial authority does not apply to returns relating to tax shelters unless the taxpayer reasonably believed that the tax treatment of such item was more likely than not the proper treatment); 31 C.F.R. § 10.33(a)(4) (1995) (using the “more likely than not standard” in the context of return positions relating to tax shelters).

216. Treas. Reg. § 1.6662-4(d)(3)(i) (as amended in 1995). The regulations add that auditors consider all relevant authorities, including those unsupportive of the taxpayer's treatment of the position, when determining the existence of substantial authority. See id.

217. The regulations define “authority” for purposes of the substantial authority standard as including only the following:

Applicable provisions of the Internal Revenue Code and other statutory provisions; proposed, temporary and final regulations construing such statutes [sic]; revenue rulings and revenue procedures; tax treaties and regulations thereunder, and Treasury Department and other official explanation of such treaties; court cases; congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of
lesser weight to authorities based on a variety of factors including the nature of the authority, its age, and the similarity of facts considered by the authority to the position taken by the taxpayer.\footnote{218} Indeed, the regulations acknowledge the significance of decisions rendered by the U.S. circuit courts of appeals in a special rule; this rule treats the substantial authority standard as satisfied in the case of a position supported by a decision issued by the circuit court to which the taxpayer has a right of appeal.\footnote{219} Using these guidelines, taxpayers and their advisors must weigh the authorities both for and against every return position and conclude objectively on the existence of substantial authority before deciding on how that position should be reported on the taxpayer's return.\footnote{220}


[A] case or revenue ruling having some facts in common with the tax treatment at issue is not particularly relevant if the authority is materially distinguishable on its facts, or is otherwise inapplicable to the tax treatment at issue. An authority that merely states a conclusion ordinarily is less persuasive than one that reaches its conclusion by cogently relating the applicable law to pertinent facts.


\footnote{220} Because substantial authority is an objective test, the taxpayer's belief that there is substantial authority for a position is irrelevant. See Treas. Reg. § 1.6662-
Problematically, the substantial authority standard establishes a threshold that is too low to ensure the disclosure of all positions in which the government has a legitimate interest. Because authority in support of a position qualifies as substantial even when the position has less than a fifty percent chance of being upheld, many positions on which the government could prevail remain outside the scope of this penalty provision. In fairness to the government, it could modify the standard to permit nondisclosure only in situations where the taxpayer's chance of prevailing is greater than fifty percent. Setting aside the unavoidable debate over the ability of taxpayers and tax practitioners to predict accurately the chances of success, even this higher standard denies the government access to information on positions that, while questionable from the government's standpoint, nevertheless may merit debate. Supreme Court decisions addressing questions raised by the internal revenue laws—particularly those questions considered by the Court in response to disagreements among the circuit courts of appeal—affirm the importance of allowing both taxpayers and the IRS to advance positions contrary to established authority.

In order to provide the government with the information needed to test for taxpayer compliance and, when appropriate, to advance its own valid but debatable positions, the rules should require disclosure of return positions whenever any recognized authority exists that is contrary to the taxpayer's position. The rules and regulations should limit "recognized authority" for this purpose to those currently used in determin-

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4(d)(3)(i) (as amended in 1995). However, if a taxpayer takes an undisclosed position that results in an underpayment of tax, the IRS will not impose a substantial understatement penalty if there was reasonable cause for the underpayment and the taxpayer acted in good faith. See I.R.C. § 6664(c)(1). For a discussion of this "reasonable cause...[and] in good faith" exception, see infra note 238.

221. See supra note 210 and accompanying text.

222. See Holden, Practitioner's Standard, supra note 79, at 342 (noting that a "more likely than not" standard could be used to enhance the effectiveness of the substantial understatement penalty).

whether a return position satisfies the substantial authority standard. Used in the context of the substantial understatement penalty provision, this standard requires adequate disclosure of information relating to questionable return positions. To accomplish disclosure, the government subjects taxpayers to a penalty for a substantial understatement of income tax attributable to an undisclosed return position for which any recognized authority exists that is not supportive of the taxpayer’s position. Incorporation of this standard into the existing substantial understatement penalty provision would result in the following change to § 6662(d)(2)(B) of the Internal Revenue Code:

(B) REDUCTION FOR UNDERSTATEMENT DUE TO POSITION OF TAXPAYER OR DISCLOSED ITEM—The amount of the understatement under subparagraph (A) shall be reduced by that portion of the understatement which is attributable to—

(i) the tax treatment of any item by the taxpayer if there is or was no recognized substantial authority contrary to for such treatment, or

(ii) any item if—

(I) the relevant facts affecting the item’s tax treatment are adequately disclosed in the return or in a statement attached to the return, and

(II) there is a reasonable basis for the tax treatment of such item by the taxpayer.

Consider the advantages associated with this proposal. First, the disclosure standard addresses concern over the misleading effects of nondisclosure by requiring taxpayers to disclose information relating to all return positions in which the government may have an interest. Admittedly, the IRS will not pursue some po-

224. See supra note 217. Admittedly, use of the recognized authority standard prevents the government from advancing a legal theory in the absence of authority—a privilege enjoyed by taxpayers. See Treas. Reg. § 1.6662-4(d)(3)(ii) (as amended in 1995) (“[A] taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision.”). However, the government has the unique ability to “create” authority by issuing a revenue ruling or other agency release and therefore has the power to trigger taxpayer disclosure with respect to issues the agency considers worthy of debate.

225. For a discussion of adequate disclosure, see supra note 213.

226. The underlined text indicates additions to the statute; crossed-out text indicates deletions to the statute.

227. Cf. Handelman, Constraining, supra note 109, at 92-93 (“If the client wishes to file a return, not as a report and self-assessment document, but as the ‘first step in
sitions for which there is both supporting and contrary authority. In the interest of minimizing the administrative burden imposed, this proposal should expressly exclude these positions from the disclosure requirement.228 The remaining return positions—including those strongly favoring either the government or the taxpayer—will appear on tax returns with the supplemental information needed to ensure that the government has the opportunity to consider and debate the merits of the taxpayer’s position.

a process that may result in an adversarial relationship between the client and the I.R.S. 'fair notice' should be given that the position is ‘aggressive.’” (emphasis added).

228. Although this proposal appears to impose a greater burden on taxpayers, in fact they will find it easier to comply because it eliminates judgments on the persuasiveness of authority from the evaluation process. See supra notes 216-20 and accompanying text. However, enhanced taxpayer disclosure further complicates the review process now engaged in by the IRS. See LeDuc, Legislative Response, supra note 213, at 386 (concern over the agency's ability to review disclosure documents submitted by taxpayers may have prompted Congress to limit disclosure by endorsing the “substantial authority” standard when the penalty provision was added to the Internal Revenue Code in 1982). The administrative burden imposed by this proposal on the government can and should be addressed through the periodic publication of a list of positions for which no supplemental disclosure is required. For example, if the IRS takes a position in a revenue ruling that is consistent with the position reported by the taxpayer, the existence of other contrary authority on the issue should not trigger supplemental disclosure. Certainly, the new standard could be designed to trigger disclosure whenever a return position deviates from a written policy established by the IRS; indeed, this approach was originally embraced by the IRS but was rejected by Congress in favor of the “substantial authority” standard. See id.; IRS STUDY, supra note 181 (“The Task Force believes that disclosure of the issue should be required in either of two circumstances: (1) the taxpayer’s position lacks substantial authority; or (2) the issue has been specifically identified by IRS as one that IRS wishes to address.”). But this alternative imposes on the government the task of anticipating and addressing the new theories developed by creative tax planners and advanced by taxpayers on returns without disclosure. For this reason, the government should define the scope of the disclosure requirement based on its interest in specific issues and its ability to review supplemental disclosure. To the extent that issues raised by return positions do not require review by the IRS, published guidance made available to taxpayers and their advisors should limit disclosure. The idea of the periodic publication of a list is consistent with the I.R.C. § 6662(d)(2)(D) requirement that the IRS publish a list of positions for which the IRS believes there is no substantial authority. See I.R.C. § 6662(d)(2)(D) (1994); see also, Rev. Proc. 95-55, 1995-52 I.R.B. 34 (addressing “substantial authority” under I.R.C. § 6662 as required by I.R.C. § 6662(d)(2)(D)); H.R. REP. No. 101-247, at 1390 (1989), reprinted in 1989 U.S.C.C.A.N. 2860.

[T]he bill requires the IRS to publish not less frequently than annually a list of positions for which the IRS believes there is no substantial authority and which affect a significant number of taxpayers. The purpose of this list is to assist taxpayers in determining whether a position should be disclosed in order to avoid the substantial understatement penalty.

Id.
In addition, under this proposal the process of evaluating the need for disclosure is far less cumbersome and subjective than under the existing approach. Rather than identify all relevant authorities, weigh each for relative importance and persuasiveness and conclude on the existence of substantial authority, the taxpayer and tax advisor need only identify the existence of any recognized authority in conflict with the proposed return position. Indeed, the proposal shifts responsibility for considering the relative strength of return positions from taxpayers to the government and in so doing simplifies the return preparation process for taxpayers while exploiting the expertise and resources of the government. Questions will remain regarding the applicability of authority to unusual or untested return positions, but taxpayers will always be in the position to resolve the uncertainty surrounding these positions in their favor provided that information related to those positions is adequately disclosed on the return.

Of course, critics will argue that any effort to enhance disclosure by taxpayers is inconsistent with the policy of minimizing the intrusiveness of the tax compliance system. Certainly, lawmakers and the IRS should consider the privacy rights of taxpayers and the invasive nature of the taxpayer reporting system when shaping policies relating to the collection of information from taxpayers. However, with concern over taxpayer privacy largely addressed by other legislation, the remaining objections raised over the invasiveness of the information-gathering process must yield to the legitimate need of the government for information, a need most obvious in the case of taxpayers who report questionable positions on

229. Cf. Handelman, Constraining, supra note 109, at 103-04 (advocating a "single relevant authority" standard that would rely on a narrowed definition of "authority" to test the validity of return positions without resort to "weigh[ing].").

230. See generally Miller, Tax Compliance, supra note 85 (arguing that tax collecting functions may, at times, undercut taxpayer privacy); LeDuc, Legislative Response, supra note 228 (noting that Congress may have doubted the IRS’s ability to review taxpayer disclosure statements when endorsing the “substantial authority” standard).

231. See generally Privacy Act, 5 U.S.C. § 552a (1994) (providing safeguards against invasions of personal privacy by federal agencies); Bittker, Federal Income Tax, supra note 80 (noting the existing rule which addresses taxpayer privacy); Archie W. Parnell, Jr., The Right to Privacy and the Administration of the Federal Tax Laws, 31 TAX L. 113 (1977) (discussing the evolution of the right to privacy and the Tax Reform Act of 1976); David E. Joyce, Note, Raiding the Confessional—The Use of Income Tax Returns in Nontax Criminal Investigations, 48 FORDHAM L. REV. 1251 (1980) (noting the dilemma a criminal defendant faces when tax reports are used as adverse evidence).
returns. Indeed, the fact that information provided on tax returns in response to a heightened disclosure standard is the same information taxpayers ultimately volunteer during examination of the return to support return positions questioned by the examining agent considerably weakens these objections. Thus, this proposal asks taxpayers to give up only the ability to play the audit lottery by hiding questionable positions from the government in an effort to avoid examination and debate.

Another potential concern is the advantage supplemental disclosure provides to the government, an already formidable opponent. A heightened disclosure standard could provide the government with the information needed to make a case against the taxpayer, thereby strengthening the government’s position in the audit, administrative appeals, and litigation forums. Overzealous pursuit of unpaid taxes, often at the expense of taxpayer rights, has left the agency with a reputation that justifies the caution practiced by taxpayers and their representatives as well as the protective measures endorsed recently by Congress. Nevertheless, the taxpayer reporting and return examination process remains, at least in theory, devoted to the collection of information needed to evaluate taxpayer compliance. The fact that some examining agents tarnish the reputation of the IRS and its compliance testing process by abusing the discretion vested in them explains why many will oppose this proposal. But if these valid concerns over abuse of power within the IRS are addressed separately, the compliance testing system—and its dependence on taxpayer disclosure—can be acknowledged as an essential component of the revenue raising system deserving of the advantages provided by this proposal.

Finally, the effectiveness of a standard that imposes on tax-

233. See Bittker, Federal Income Tax, supra note 80, at 490. Of course, this represents only a theoretical argument in favor of return disclosure. Suggesting that in all cases what is included on the return will inevitably be disclosed by the taxpayer during an audit presumes that the return will be selected for audit and that the auditor will request information on the transaction in question. Neither assumption is valid in practice.
235. See generally James T. Towe, Is the IRS Above the Law? Potential Remedies for Taxpayers Damaged by Unlawful IRS Conduct, 55 MONT. L. REV. 469 (1994) (detailing the range of statutory remedies available to vindicate violations of taxpayer privacy).
payers an obligation to volunteer information to an adversary must be considered. Penalties assessed in recent years suggest that taxpayers remain willing to withhold information on return positions; extremely low audit rates, together with the relatively small penalty imposed by the substantial understatement penalty, provide little incentive to comply. Certainly, changes in the economic risk associated with the refusal to disclose will affect taxpayer behavior. For this reason, both the amount of the penalty and its relationship to other civil penalty provisions in the Internal Revenue Code should be revisited. However, the first step must be to

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236. But see Holden, Practitioner's Standard, supra note 79, at 330 ("While empirical data on the point is not available, numerous experienced practitioners confirm that the substantial understatement penalty provided a much needed element of discipline by giving taxpayers an economic reason to evaluate the quality of their tax return positions.").

237. The substantial understatement penalty began as an addition to tax equal to 10% of the underpayment attributable to the return position. See I.R.C. § 6661(a) (1985). The penalty was increased to 20% by the Tax Reform Act of 1986 (TRA 1986). See Tax Reform Act of 1986, Pub. L. No. 94-514, §1504, 1996 U.S.C.C.A.N. (100 Stat.) 2085, 2743. An increase to 25% was included in the Omnibus Budget Reconciliation Act of 1986 (OBRA). See Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 (codified in scattered sections of 26 U.S.C.). The substantial understatement penalty was incorporated into the section 6662 accuracy-related penalty provision in 1989, resulting in one 20% penalty. See I.R.C. § 6662(a) (1994). The debate over the "proper" amount of the penalty continues. See Alfred Blumstein, Models for Structuring Taxpayer Compliance, in INCOME TAX COMPLIANCE, REPORT OF THE ABA SECTION OF TAXATION INVITATIONAL CONFERENCE ON INCOME TAX COMPLIANCE 161 (1983) (concluding that increasing the risk of detection, increasing penalties, increasing taxpayers' perceived risk of detection, or changing the tax structure may enhance taxpayer compliance). Given the relationship between the probability of detection and tax return disclosure, Blumstein suggests that a penalty designed to encourage disclosure must vary in amount with the probability of detection; in formula form, the penalty would be equal to the underpayment divided by the probability of detection. Id. at 164-66. Thus, very high penalties would accompany a low risk of detection.

238. In addition to a change in the amount of the substantial understatement penalty, two other modifications in this penalty scheme should be considered. First, the substantial understatement penalty should be removed from the accuracy-related penalty provision so that the economic incentive provided by the penalty as means of encouraging disclosure is not diminished by factors unrelated to disclosure. To effectively encourage disclosure in all circumstances, the substantial understatement penalty must always present a threat to taxpayers considering nondisclosure. Consider the taxpayer who intends to take a return position that is inconsistent with a ruling issued by the IRS. Because taking such a position constitutes the disregard of internal revenue rules and regulations, it subjects the taxpayer to the accuracy-related penalty relating to negligence or disregard of the rules and regulations. See I.R.C. § 6662(b)(1). The accuracy-related penalty is imposed with respect to underpayments attributable to one or more of the five circumstances described in section 6662(b). Thus, only one 20% penalty is imposed irrespective of the number of
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change the nature of the disclosure obligation imposed by the substantial understatement penalty.

Since its inception in 1982, the substantial understatement penalty has been considered by most experts as a provision imposing a fee for the privilege of withholding information from the government.\(^{239}\) Unlike other civil penalties to which tax-

“violations.” See Treas. Reg. § 1.6662-2(e) (as amended in 1995) (underpayment attributable to both negligence and substantial understatement of income tax is subject to only one accuracy-related penalty); Treas. Reg. § 1.6662-4(b)(6), example 2 (as amended in 1995) (illustrating the effect of the 1989 consolidation of penalties by applying pre-1989 law to a fact pattern justifying imposition of separate penalties for negligence and substantial understatement of income tax). Consequently, a taxpayer in this situation is left with no independent incentive to disclose. For this reason, the substantial understatement penalty must be a penalty imposed in addition to other penalties so that an independent incentive to disclose is provided in all situations. Cf. STAFF OF THE JOINT COMMITTEE ON TAXATION, 100TH CONG., DESCRIPTION OF TAX PENALTIES 27-28 (Joint Comm. Print 1988) [hereinafter JOINT COMMITTEE REPORT].

Some have argued that it is inappropriate to impose the negligence or fraud penalty and an understatement penalty with respect to the same underpayment of tax because the understatement penalties were designed to apply without proving fault on the part of the taxpayer (which is a necessary element in proving negligence or fraud). On the other hand, it may be appropriate to permit the imposition of both penalties with respect to the same underpayment in appropriate circumstances, because the understatement penalties and the negligence and fraud penalties are targeted at different aspects of the taxpayer’s behavior.

Id.

Second, the “reasonable cause and good faith” exception to the accuracy-related penalty provision should be limited to penalties other than the substantial understatement penalty. See I.R.C. § 6664(c)(1); Treas. Reg. § 1.6664-4(a) (as amended in 1995). Elimination of this exception would return the penalty to its pre-1989 status as a “no-fault” penalty. See I.R.C. § 6661(c) (making a reasonable cause and good faith exception available at the option of the Commissioner); Treas. Reg. § 1.6661-6(a) (1985) (making a reasonable cause and good faith exception available at the option of the Commissioner). Because disclosure is the objective furthered by imposition of the penalty, and because taxpayers always have the option of disclosing, a taxpayer’s reasons for failing to disclose, however reasonable they may be, are not germane to the penalty and therefore should not be considered. See Holden, Practitioner’s Standard, supra note 79, at 330, 342 (advocating a return to a “no-fault” substantial understatement penalty). However, elimination of the “reasonable cause and good faith” exception will reintroduce concern over the ability of a taxpayer to rely on the advice of the tax advisor regarding the need for disclosure. See H.R. REP. NO. 101-247, at 1392-94 (1989), reprinted in 1989 U.S.C.C.A.N. 2862-64 (detailing the reasons for adoption of an exception to the accuracy-related penalty). Compare Treas. Reg. § 1.6662-4(g)(4)(i)(B) (as amended in 1995) (noting that reasonable reliance in good faith on the opinion of a professional tax advisor triggers the exception) with id. § 1.6661-5(b) (1985) (noting that reliance on the advice of a tax professional does not necessarily justify government’s use of the exception).

239. See Durst, supra note 87, at 1065-69 (examining the history of the legislation creating the substantial understatement penalty, the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), and concluding that the penalty was intended to provide a financial disincentive to taxpayers interested in playing the audit lottery);
payers may be subject, the original “no fault” character of this penalty provided taxpayers with an economic incentive to disclose without raising the minimal “reasonableness” standard of behavior imposed on taxpayers by the negligence penalty. With the


The costs of compliance, from the taxpayer’s standpoint, consist of the value of the taxes and other expenses paid as well as the effort required for timely and accurate compliance with the laws. The benefits to the taxpayer from compliance stem from negative consequences avoided. The negative consequences of noncompliance arise from the possibility that the taxpayer will be audited and identified as a noncomplier, the original tax liability plus interest and penalties will have to be paid, and criminal charges may be brought.

The expected benefit to the taxpayer of noncompliance equals the value of failing to pay tax without detection, minus the chance of being caught times the perceived costs, if caught. An increase in the probability of detecting noncompliance or an increase in the level of the potential penalty imposed generally will raise the incentive for compliance. The deterrent effect of penalties is therefore integrally related to both the likelihood of detection and the severity of the penalties.

JOINT COMMITTEE REPORT, supra note 238, at 17.

Characterization of the penalty as an “incentive” or “toll charge” suggests that the substantial understatement penalty encourages, but does not mandate, disclosure. In fact, a number of commentators conclude that Congress did not intend to establish an affirmative obligation to disclose when it created the substantial understatement penalty in 1982. See Durst, *supra* note 87, at 1074 (“While there certainly is some moral opprobrium involved in violating the section 6661 standard, there are also indications that, in the view of Congress and others involved directly in tax compliance, the taxpayer retains the ultimate decision whether to violate the standard in return for bearing the risk that the penalty will be imposed.”); Holden, *Practitioner’s Standard*, supra note 79, at 331 (stating that “[t]he 1982 enactment of the substantial understatement penalty . . . did not create a normative taxpayer standard of conduct, requiring either substantial authority or disclosure on the return”). But see Harris, *Resolving Questionable Positions*, supra note 111, at 975 (“In enacting the substantial understatement penalty, Congress made the decision that a taxpayer who takes an undisclosed return position that is not supported by substantial authority fails to satisfy his basic obligation to the tax system.”).

240. See Durst, *supra* note 87, at 1069.

If Congress had intended “substantial authority” to be a normatively binding standard, it could have established “substantial authority” as a standard for all tax understatements, with the provision that the amount of liability be considered in determining whether the authority relied on by the taxpayer was “substantial.” Alternatively, the statute could have provided for a graduated penalty based on the amount of liability involved. These or similar options would have enabled Congress, much less ambiguously, to establish “substantial authority” as a binding normative standard. The current statutory structure, in contrast, supports the view that the
elimination of the "no fault" feature in 1989, the case for a normative standard became stronger.\textsuperscript{241} More importantly, however, the disclosure standard established through the use of the substantial understatement penalty must be characterized as a normative obligation in order to characterize properly the failure to comply through disclosure as an affirmative wrong against the system, rather than as a harmless election to which the taxpayer is entitled.\textsuperscript{242} This new normative obligation will prompt many taxpayers to respond with disclosure in the interest of filing a correct return.\textsuperscript{243} Those remaining—the taxpayers who are prepared to disregard reporting obligations in the interest of maximizing the chances of prevailing on questionable issues—must be encouraged by the threat of penalty.

But even these measures will not change the attitudes of those taxpayers who withhold information as a means of avoiding an internal revenue audit. Given the obvious connection between supplemental disclosure and the probability of audit—one commentator describes the supplemental disclosure form used by the IRS as the "Please Audit Me Now" form\textsuperscript{244}—failure to address taxpayer concerns over the fairness of the return examination process will impede efforts to encourage supplemental disclosure by taxpayers.

Recent efforts made by Congress and the IRS to curtail overzealous conduct by government representatives during the audit process are a promising start to what will necessarily be a long-term effort to reform the audit process and change taxpayer attitudes

\textsuperscript{241} For a discussion of the substantial understatement penalty as a "no fault" provision, see supra note 238. Cf Holden, Practitioner's Standard, supra note 79, at 330 ("[A]nother consequence of the no-fault character of the section 6661 penalty... was the fact that it did not establish a normative standard of taxpayer conduct.").

\textsuperscript{242} See IRS STUDY, supra note 181 ("Making appropriate disclosures is an integral part of preparing a proper return and should not be optional even if the taxpayer would prefer to run the risk of a penalty rather than make the disclosure."); Harris, Resolving Questionable Positions, supra note 111, at 975.

\textsuperscript{243} See Taxpayer Compliance Report, supra note 62, at 355 (discussing the impact of normative standards on taxpayer compliance).

\textsuperscript{244} See Philipps et al., It's Not Easy, supra note 109, at 603 (referring to form 8275); see also Corneel, supra note 108, at 9 (explaining that the use of riders submitted with returns gives the government a "sporting chance" at detecting noncompliance).
toward return examination as an essential element of the taxpayer compliance testing process.  

B. The Lawyer's Duty to the Taxpayer and the Taxing System

The lawyer's duty as taxpayer representative is to advise clients on how to comply with the internal revenue laws. This duty manifests itself in the return preparation and examination context as an obligation to advise taxpayers with respect to both the validity of return positions and the need for disclosure. Tax lawyers also are subject to general ethical duties—duties that often require the lawyer to take affirmative action in response to client misconduct. These duties must be examined and reevaluated in light of the higher standard for disclosure imposed on taxpayers by the proposal advanced above.

1. Advising on return positions

Taxpayers are entitled to seek any lawful objective defined by the internal revenue laws. The lawyer serving as taxpayer advisor and representative is ethically obligated to advise and assist clients in seeking those lawful objectives. When the law is un-
clear, the tax lawyer may resolve doubt in favor of the taxpayer.\textsuperscript{249} But unlike lawyers engaged in other areas of practice,\textsuperscript{250} tax lawyers may not take client loyalty to its logical extreme by recommending any nonfrivolous position. Rather, lawyers representing taxpayers may recommend only those positions satisfying the higher “realistic possibility of success” standard adopted by the ABA Ethics Committee in Formal Opinion 85-352.\textsuperscript{251} Although well-intentioned—the higher reporting standard was designed to discourage taxpayers from taking the most aggressive of return positions—the “realistic possibility of success” standard actually prevents lawyers from assisting taxpayers in advancing the most aggressive of nonfrivolous return positions.\textsuperscript{252}

The Internal Revenue Code's substantial understatement of Error Under the Federal Tax Law, 42 TAX LAW. 515, 522 (1988) [hereinafter Harris, Requiring the Correction] (discussing how the ethical duty of competence requires the lawyer to advise clients on what the law requires); Holden, Practitioner’s Standard, supra note 79, at 350 (concluding that the lawyer’s duties as tax advisor must be defined by taxpayer duties and therefore are necessarily limited to advice on what the law requires).

\textsuperscript{249} See MODEL CODE, supra note 5, EC 7-3 (“While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law.”); Cornel, supra note 108, at 305.

\textsuperscript{250} See MODEL CODE, supra note 5, EC 7-4.

[The lawyer’s] conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

\textsuperscript{Id.}; see also MODEL RULES, supra note 31, Rule 1.2(d) (“[A lawyer] may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”).

The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

\textsuperscript{Id.}, Rule 3.1 cmt. 2.

\textsuperscript{251} Although Formal Opinion 85-352 fails to define “realistic possibility of success” quantitatively, the Task Force Report issued concurrently with the opinion suggests that the Committee intended for this standard to be higher than “nonfrivolous.” See infra note 257; cf. Michael B. Lang, Commentary on Return Preparer Obligations, 3 FLA. TAX REV. 128, 142 (1996) (noting that authors of a leading treatise conclude that lawyers should be permitted to recommend all disclosed nonfrivolous return positions) (citing BERNARD WOLFMAN ET AL., STANDARDS OF TAX PRACTICE ¶ 204.2.4.2, at 80-81 (3d ed. 1995)).

\textsuperscript{252} Indeed, the profession’s decision to address the problem of aggressive return positions in this manner actually protects a taxpayer’s opportunity to report without disclosure; instead of mandating disclosure in appropriate situations, this approach sacrifices the taxpayer’s right to advance the most questionable of return positions in the interest of protecting the remainder from supplemental disclosure.
penalty provision imposes a similar reporting threshold on taxpayers directly. While taxpayers may avoid the substantial understatement penalty by adequately disclosing a questionable return position, this disclosure safe harbor is effective only if the position also satisfies the new “reasonable basis” standard. Although “reasonable basis” remains undefined, the treasury regulations describe the standard as higher than nonfrivolous. Thus, the substantial understatement penalty holds taxpayers to a higher reporting standard by penalizing taxpayers for taking positions not satisfying the “reasonable basis” standard, notwithstanding adequate disclosure of those positions.

Admittedly, these restrictions do not prevent taxpayers from advancing nonfrivolous return positions. Taxpayers remain free to raise any nonfrivolous position in the context of a refund suit, a


254. Treasury’s failure to define “reasonable basis” is evidenced by those sections of the treasury regulations reserved for the definition. See Treas. Reg. § 1.6662-3(b)(3)(i) (as amended in 1995); id. § 1.6662-7(d)(1) (1995).

255. See id. § 1.6662-3(b)(3)(ii) (as amended in 1995) (describing “reasonable basis” as “significantly higher than the not frivolous.”).

256. This standard effectively raises the reporting standard for taxpayers—for example, the standard that addresses the legitimacy of a return position—by eliminating the disclosure safe harbor in the case of return positions not satisfying the “reasonable basis” standard. See id. § 1.6662-3(c)(1) (as amended in 1995) (disclosure exception relating to penalty for disregard of the rules and regulations available only if taxpayer has a “reasonable basis” for the position); H.R. REP. No. 103-111, at 754 (1993), reprinted in 1993-3 C.B. 167, 330 (“The committee believes that the ‘frivolous’ standard does not sufficiently discourage taxpayers and preparers from taking unreasonable return positions. Accordingly, to encourage compliance, the committee believes that a tougher standard should be imposed.”); see also J. Timothy Philippis et al., What Part of RPOS Don’t You Understand? An Update and Survey of Standards for Tax Return Positions, 51 WASH. & LEE L. REV. 1163, 1180 (1994) [hereinafter Philippis et al., RPOS] (describing the new “reasonable basis” standard as a higher reporting standard); Richard C. Stark, Let’s Reconsider the ‘Reasonable Basis’ Standard, 59 TAx NOTES 1845, 1845 (1993) (referring to the “reasonable basis” standard as a “minimum standard”).

257. A taxpayer may advance a legal theory in the tax setting in one of two ways: (1) the taxpayer can take a position on the return based on that legal theory and pursue the issue in litigation commenced in the U.S. Tax Court following rejection of the theory by the government, see I.R.C. § 6213(a); or (2) the taxpayer can omit the position from the return, pay the tax on the resulting liability and raise the legal theory in a refund action brought in a U.S. district court or the U.S. Federal Court of Claims, see id. § 7402(a); 28 U.S.C. § 1491 (1996). The Task Force Report issued concurrently with Formal Opinion 85-352 contemplated that the most aggressive of return positions—those failing to meet the “realistic possibility of success” standard—should be advanced by taxpayers in refund suits:

If the [realistic possibility of success] standard is not met, the position may be advanced by payment of the tax and claim for refund, which necessarily
process that ensures that the most questionable of positions will receive the government's full attention. However, exclusive use of this refund suit approach limits a taxpayer's ability to litigate issues in the Tax Court and thereby denies some taxpayers—those unable to pay the tax associated with the disputed position—their day in court.

The importance of equal access to the Tax Court alone is sufficient reason to eliminate this restriction on reported positions. The case for reform becomes even more compelling by acknowledging that use of the “reasonable basis” standard in the substantial understatement penalty disclosure safe harbor actually discourages disclosure in those cases in which supplemental disclosure is needed most. These compromises need not be made. Instead, the validity of return positions and the need for supplemental disclosure of those positions should be evaluated separately. Taxpayers should be permitted to advance any nonfrivolous position on a tax return, and counsel should be free to assist

sets forth in detail each ground upon which a refund is claimed. A position may be advanced in litigation if it is not frivolous. The lawyer may bring a proceeding, and assert an issue therein, if there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. In such a context good faith does not require that there be a possibility of success that is “realistic.”

Task Force Report, supra note 112, at 639 (citing MODEL CODE, supra note 5, DR 7-102(A)(2); MODEL RULES, supra note 31, Rule 3.1).

258. The Internal Revenue Code contemplates that taxpayers will litigate nonfrivolous positions in the Tax Court. See I.R.C. § 6673(a)(1)(B) (creating a presumption in favor of the right to litigate nonfrivolous positions by authorizing the imposition of sanctions for litigating a “frivolous or groundless” position).

259. This troubling result has prompted criticism from a number of commentators. See Gwen T. Handelman, Caring Reasonably, 20 CAP. U. L. REV. 345 (1991) [hereinafter Handelman, Caring]; Harris, Resolving Questionable Positions, supra note 111, at 975; Holden, Practitioner's Standard, supra note 79, at 342; Philipps et al., RPOS, supra note 256, at 1184; Stark, supra note 256, at 1846.

260. See Handelman, Constraining, supra note 109, at 98 (“[T]he client’s right to litigate liability before payment may necessitate adopting a debatable position in reporting tax liability on the return . . . .”); Holden, Practitioner's Standard, supra note 79, at 334 (“If a taxpayer is entitled to test . . . [any non-frivolous] position before the Tax Court without having to pay the associated tax liability, the taxpayer presumably has the right to report such a position on the tax return.”); Philipps et al., RPOS, supra note 256, at 1184 (“The taxpayer is entitled to a prepayment forum in which to assert his position. This is the raison d'etre of the Tax Court and is a fundamental feature of the federal tax enforcement process.”) (citations omitted).

261. This change in the taxpayer reporting standard can be accomplished by eliminating the reasonable basis standard found in the accuracy-related penalty provision of the Code. See I.R.C. § 6662(d)(2)(B)(ii)(II) (using the “reasonable basis” standard in substantial understatement penalty); Treas. Reg. § 1.6662-3(c)(1) (as amended in 1995) (using the “reasonable basis” standard in penalty for disregard of
clients in pursuing these return positions.262 This liberal reporting standard protects every taxpayer’s right to litigate in all judicial forums and encourages compliance with the higher taxpayer disclosure standard by allowing maximum freedom to advance debatable return positions. Disclosure—a necessary compliment to a relaxed reporting standard—is left to address the threat posed by aggressive return positions without artificially limiting a taxpayer’s right to advance positions.

2. The duty to recommend disclosure

Lawyers have no affirmative duty to recommend disclosure of return positions under current practice guidelines.263 Given the confusion surrounding the nature of the current disclosure standard and the lawyer’s natural aversion to voluntary disclosure, failure of the ethics rules and the Rules of Practice to address the duty to recommend disclosure is not surprising. But by characterizing the disclosure standard established by the substantial understatement penalty as an affirmative disclosure obligation, the lawyer becomes ethically obligated to recommend disclosure. The rules and regulations). This proposal enjoys the support of other commentators. See James P. Holden, Constraining Aggressive Return Advice: A Commentary, 9 VA. TAX REV. 771, 773 (1990) [hereinafter Holden, Constraining]; Philipps et al., RPOS, supra note 256, at 1184.

262. The Rules of Practice and the I.R.C. § 6694 preparer penalty provision currently measure the conduct of lawyers serving as tax advisors based on this “nonfrivolous” standard. See I.R.C. § 6694(a)(3); 31 C.F.R. § 10.34(a)(1)(ii) (1996) (“nonfrivolous” standard applied in defining duties of tax return advisor); Treas. Reg. § 1.6694-2(c)(1) (as amended in 1992) (“nonfrivolous” standard applied to disclosed positions for purposes of preparer penalty); see also id. § 1.6662-3(c)(1) (as amended in 1995) (utilizing “nonfrivolous” standard in the context of the disclosure exception to substantial understatement penalty prior to amendment in 1993). Thus, the only change required by this proposal involves replacement of the “realistic possibility of success” standard in Formal Opinion 85-352 with the “nonfrivolous” standard to be used exclusively for evaluating the validity of return positions. This change conforms the duty of the tax lawyer to the basic ethical standard applied to lawyers in other areas of practice. See Sacher v. United States, 343 U.S. 1, 9 (1952) (stating that lawyers should not press even “farfetched and untenable” claims); MODEL CODE, supra note 5, DR 7-102(A)(2); MODEL RULES, supra note 31, Rule 3.1; FREEDMAN, supra note 12, at 9 (citing MODEL CODE, supra note 31, DR 7-102(A)(2)); cf MODEL RULES, supra note 31, Rule 3.1 (“A lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”).

263. See Formal Op. 85-352, supra note 116, at 633; see also 31 C.F.R. § 10.34(a)(1)(ii) (limiting practitioner duties to advice on the possible imposition of penalties and the opportunity to avoid penalties through disclosure); infra note 269 (questioning whether recommending disclosure of return positions is necessary).
profession's ethics rules and the Rules of Practice should acknowledge the lawyer's duty to recommend disclosure in those situations in which taxpayers are required to support return positions with adequate disclosure.

Consistent with the approach taken in defining the taxpayer standard of disclosure, the standard applied to lawyers involved in the preparation of returns should be based on the concept of "recognized authority"—if any recognized authority exists that conflicts with the position reported on the return, the taxpayer must adequately disclose the position in order to prevent misleading the government as to the nature of the position. As modified, the provision in Circular 230 addressing the role of the lawyer as tax return preparer and advisor would prohibit the lawyer from signing any return that includes an undisclosed position for which there is any recognized authority in conflict with the position and would require the lawyer to recommend disclosure whenever the nature of the position triggered the taxpayer duty to disclose:

§ 10.34 Standards for Advising With Respect to Tax Return Positions and for Preparing and Signing Returns.

(a) Standards of Conduct – Realistic-possibility Recognized authority standard. A practitioner may not sign a return as a preparer if the practitioner determines that the return contains a position for which there exists any recognized authority contrary to the position that does not have a realistic possibility of being sustained on its merits (the realistic possibility standard) unless the position is not frivolous and is adequately disclosed to the Service. A practitioner may not advise a client to take a position on a return, or prepare the portion of a return on which a position is taken, unless —

(i) The practitioner determines that no recognized authority exists which is contrary to the proposed return position the position satisfies the realistic possibility standard; or

(ii) The position is not frivolous and the practitioner recommends adequate disclosure of the position and advises the client of any opportunity to avoid the accuracy-related penalty in section 6662 of the Internal

264. See supra notes 224-25 and accompanying text.
Revenue Code of 1986 by adequately disclosing the position and of the requirements for adequate disclosure.265

Corresponding changes would be required in the § 6694 preparer penalty provision:

(a) Understatement Due to Unrealistic-Undisclosed Positions - If -

(1) any part of any understatement of liability with respect to any return or claim for refund is due to a position for which there was any recognized authority contrary to the position not a realistic possibility of being sustained on its merits,

(2) any person who is an income tax return preparer with respect to such return or claim knew (or reasonably should have known) of such position, and

(3) such position was not disclosed as provided in section 6662(d)(2)(B)(ii) or was frivolous,

such person shall pay a penalty of $250 with respect to such return or claim unless it is shown that there is reasonable cause for the understatement and such person acted in good faith.

This effort to redefine the duties of the tax lawyer also should include modifications in the rules of ethics as interpreted by Formal Opinion 85-352. Realistically, however, it will be the Rules of Practice and the Internal Revenue Code's penalty provisions, rather than the ethics rules, which compel tax lawyers to recommend disclosure.266

265. Changes in Circular 230 also would include replacement of the provision defining “realistic possibility” with a similar provision defining “recognized authority.”

266. The Rules of Practice apply to all tax practitioners and carry with them the threat of suspension or disbarment. See 31 C.F.R. §§ 10.34(b), 10.52 (subjecting practitioners to discipline only for violations arising out of conduct which is willful, reckless, or the result of gross incompetence); see also id. §§ 10.50, 10.51(g) (defining the power to disbar practitioners and defining “disreputable conduct”). In contrast, the legal profession’s rules of ethics are enforceable by state action only to the extent that the rules are adopted by each state. To date, no state has taken action to adopt the guidelines established in either Formal Opinion 314 or Formal Opinion 85-352. See Holden, Practitioner’s Standard, supra note 79, at 340. The profession’s rules of ethics provide guidance and encourage the pursuit of ethical goals but are otherwise of limited value in encouraging desired conduct from tax lawyers. Focus on the Rules of Practice in lieu of the rules of ethics is also appropriate given the importance of imposing a uniform set of standards on all tax practitioners in an effort to avoid singling out lawyers and thereby encouraging taxpayers to seek advice from
Equally important is the duty to recommend disclosure during examination of the return. Formal Opinion 314 suggests that lawyers should recommend correction of statements that mislead the IRS\textsuperscript{267} while the Rules of Practice state only that errors discovered by the lawyer should be called to the attention of the taxpayer.\textsuperscript{268} Undoubtedly, confusion over the lawyer's duties in this situation stems from the more fundamental issue of error correction and the taxpayer's duty to file an amended return.\textsuperscript{269} In fact, some commentators suggest that error correction is exclusively a function of tax liability, thereby minimizing the importance of information reporting.\textsuperscript{270} But the nature and importance of the taxpayer disclo-

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\textsuperscript{267} See Formal Op. 314, \textit{supra} note 98, at 672 ("The difficult problem arises where the client has in fact misled but without the lawyer's knowledge or participation. In that situation, upon discovery of the misrepresentation, the lawyer must advise the client to correct the statement ....").

\textsuperscript{268} See 31 C.F.R. § 10.21.

Each attorney ... who ... knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client is required by the revenue laws of the United States to execute, shall advise the client promptly of the fact of such noncompliance, error, or omission.

\textit{Id.}; see Corneel, \textit{supra} note 108, at 306.

With respect to client conduct that may lead to certain ... civil penalties—such as a penalty under section 6662[]—the professional's obligation is merely to warn the client. Nevertheless, it would be highly unusual for this firm to participate in conduct certain to lead to civil tax penalties; indeed we will generally not participate when a civil penalty to the taxpayer would more likely than not result if the return were audited and all of the facts were presented to a court.

\textit{Id.}

\textsuperscript{269} See generally Badaracco v. Commissioner, 464 U.S. 386, 393 (1984) ("Internal Revenue Code does not explicitly provide either for a taxpayer's filing, or for the Commissioner's acceptance, of an amended return."); Corneel, \textit{supra} note 108, at 303 n.18 (questioning whether the failure to disclose information on a return can constitute an "error" given the confusion over the duty to file an amended return); Harris, \textit{Requiring the Correction}, \textit{supra} note 248 (exploring the question whether a taxpayer has an affirmative duty to file an amended return).

\textsuperscript{270} This raises the question: What is an "incorrect" return. Is it incorrect when a taxpayer fails to disclose as required by the proposed standard or only when the return position in question proves to be "incorrect"? If measured by the need for an amended return, the nature of the problem caused by the taxpayer's conduct may provide the answer. For example, Lang suggests that the taxpayer should consider filing an amended return when the error "has a significant effect on the taxpayer's tax liability" but also includes in the lawyer's duties an obligation to advise that the law does not require the filing of an amended return. \textit{See Lang, supra} note 251, at 143-44; \textit{see also} Bittker, \textit{Professional Responsibility}, \textit{supra} note 72 (stating that if the purpose of a tax return is simply to support the taxpayer's conclusion regarding tax liability, the return is correct as long as liability is correct). Clearly, this approach minimizes the importance of information reporting and its value to the IRS both in
sure standard make a taxpayer's failure to disclose as troubling as a misstatement of tax liability. For this reason, these rules should treat the failure to disclose as an error requiring correction and should require the lawyer to recommend correction through disclosure, either pursuant to an amended return or during audit of the return.

3. When the taxpayer refuses to disclose

How should the lawyer respond to a taxpayer's refusal to comply with the proposed disclosure standard? Voluntary withdrawal is an option available to lawyers in most cases, but a true advocate does not withdraw from an engagement out of concern over a taxpayer's refusal to assist an opponent by voluntarily disclosing information. Indeed, Formal Opinion 85-352 confirms that the lawyer has no ethical obligation to respond to a taxpayer's re-

selected returns for audit and in selecting transactions to test during audit. If information reporting is considered essential to the success of the compliance testing system, the failure to include information on a return in satisfaction of the taxpayer disclosure standard should be treated as a failure to file a correct return.

271. See Darrell, supra note 93, at 27 (explaining that the lawyer has an affirmative obligation to recommend the filing of an amended return); see also American Inst. of Certified Pub. Acct., Statement on Responsibilities in Tax Practice No. 7 § .04 (1988); Lang, supra note 251, at 143-44 ("The preparer should advise the taxpayer that the law does not require the filing of an amended return to correct the error, but that if the error has a significant effect on the taxpayer's tax liability, the taxpayer should consider filing an amended return to correct the error." (citations omitted)).

Does changing this to a normative duty make the failure to disclose tantamount to filing an incorrect return, thereby violating the civil and criminal provisions relating to the duty to file a correct return? In the context of the section 7206 jurat regarding "true and correct" returns, Phillips suggests that as long as the taxpayer believes the requirement has been met, there is no violation. Phillips et al., RPOS, supra note 256, at 1184 n.91.

272. There is a clear distinction between failure to disclose on the return and silence during the audit, and the refusal to respond to a question from the agent during the audit. The latter is clearly wrong; the former is the subject of this Article. See supra notes 75-78 and accompanying text.

273. See Model Code, supra note 5, DR 2-110(C) (addressing permissive withdrawal); Model Rules, supra note 31, Rule 1.16(b) (addressing permissive withdrawal). Withdrawal is not permitted, however, when it will have a prejudicial effect on the client. See Model Code, supra note 5, DR 2-110(A)(2); Model Rules, supra note 31, Rule 1.16(b); see also Model Code, supra note 5, EC 7-8 ("In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment."); id. EC 7-9 ("[W]hen an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.").
fusal to disclose information on questionable return positions. 274 But by recharacterizing the taxpayer disclosure standard as a normative duty, current ethical guidelines become a license to disregard a client's refusal to comply with the internal revenue laws. Thus, the nature and importance of taxpayer disclosure demands that lawyers be compelled to respond when a client refuses to disclose.

Is the lawyer obligated to disclose that which the taxpayers fail to disclose? The concept of independent disclosure, particularly if made against the a client's wishes, is inconsistent with both the duty of loyalty to the client and the duty to protect client confidences. Nevertheless, lawyers are ethically obligated to disclose under some circumstances. The ethical duty of candor prohibits lawyers from knowingly failing to disclose material facts to a tribunal whenever disclosure is necessary to prevent a client from committing a criminal or fraudulent act. 275 A similar duty is imposed on lawyers with respect to third parties, 276 but only the duty owed to tribunals mandates disclosure even in the case of client confidences. 277 Thus, the lawyer's ethical duty to volunteer to the

274. Formal Opinion 85-352 describes the lawyer's duty as follows: in the role of advisor, the lawyer should counsel the client as to whether the position is likely to be sustained by a court if challenged by the IRS, as well as of the potential penalty consequences to the client if the position is taken on the tax return without disclosure. Section 6661 of the Internal Revenue Code imposes a penalty for substantial understatement of tax liability which can be avoided if the facts are adequately disclosed or if there is or was substantial authority for the position taken by the taxpayer. Competent representation of the client would require the lawyer to advise the client fully as to whether there is or was substantial authority for the position taken in the tax return. If the lawyer is unable to conclude that the position is supported by substantial authority, the lawyer should advise the client of the penalty the client may suffer and of the opportunity to avoid such penalty by adequately disclosing the facts in the return or in a statement attached to the return. If after receiving such advice the client decides to risk the penalty by making no disclosure and to take the position initially advised by the lawyer in accordance with the standard stated above, the lawyer has met his or her ethical responsibility with respect to the advice.

Formal Op. 85-352, supra note 111, at 633 (emphasis added); see also New York City Bar Report, supra note 57, at 876 (stating that there is no duty to withdraw, absent evidence of criminal or fraudulent conduct).

275. See MODEL RULES, supra note 31, Rule 3.3(a)(2); cf. MODEL CODE, supra note 5, DR 7-102(A)(3) ("A lawyer shall not] [c]onceal or knowingly fail to disclose that which he is required by law to reveal."); id. EC 7-23 (describing and justifying duty of candor toward tribunal).

276. See MODEL RULES, supra note 31, Rule 4.1(b); see also id., Rule 3.4 (duty of fairness to opposing party and counsel); MODEL CODE, supra note 5, DR 7-102(A)(3) (duty to reveal information when mandated by law).

277. See MODEL RULES, supra note 31, Rule 3.3(b); cf. id. Rule 4.1(b) (providing
IRS information not disclosed by a client is a function of the role played by the IRS: tribunal or opponent.278

Although the IRS functions as both tribunal and opponent within the tax compliance process, it is uniformly treated as an opponent for purposes of defining the duties of lawyers and other tax practitioners.279 Indeed, the ABA Model Rules of Professional Conduct, which treat administrative agencies as tribunals when conducting nonadjudicative proceedings,280 nevertheless treat agencies as opponents when engaged in negotiations and other bilateral transactions.281 The agency's role as decision-maker should not be ignored. Nevertheless, differences between the IRS and a traditional tribunal, together with the "bilateral" nature of the compliance process, offer a compelling case in favor of treating the IRS as an opponent. Equally important are the practical consequences associated with disclosure by counsel: the lawyer who shares information with the IRS satisfies the taxpayer's legal obligation to disclose rather than an ethical duty to assist a tribunal

that there is no duty to disclose client confidences protected by Rule 1.6). In the case of disclosure made to third parties, the duty to protect client confidences may be compromised only when necessary to prevent the client from committing a criminal act involving death or substantial bodily harm. See id. Rule 1.6(b)(1).

278. The remaining question is whether a taxpayer's failure to disclose constitutes "criminal or fraudulent conduct" for purposes of defining the lawyer's duty of disclosure to tribunals. Failure to disclose is not a crime. See Formal Op. 314, supra note 98, at 672.

Nor does the absolute duty not to make false assertions of fact require the disclosure of weaknesses in the client's case and in no event does it require the disclosure of his confidences, unless the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed. A wrong, or indeed sometimes an unjust, tax result in the settlement of a controversy is not a crime.

Id.; see also 31 C.F.R. § 10.20(a) (acknowledging duty to disclose information to the IRS, subject to ethical duty to protect client confidences).

279. See supra notes 100-01 and accompanying text; see also 31 C.F.R. § 10.20(a) (discussing role of IRS as tribunal suggested by acknowledgment in rule of the lawyer's duty to protect client confidences).

280. See MODEL RULES, supra note 31, Rule 3.9.

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Id. Rule 3.9 cmt. 1.

281. See id. Rule 3.9 cmt. 3 ("[Rule 3.9] does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4 [addressing transactions with others].").
and, in the process, assists the opposition in contravention of the duty of loyalty to the client. For these reasons, lawyers have no ethical duty to disclose what a client refuses to disclose.

Logically, the other alternative available to lawyers confronted with a client's refusal to disclose is withdrawal. But because withdrawal is almost always available to those lawyers who find client conduct morally objectionable, the issue is whether lawyers should be required to terminate an engagement when a taxpayer refuses to comply with the mandatory disclosure requirement. Further, the question of mandatory withdrawal is of practical consequence only in a limited set of circumstances. Lawyers retained as return preparers are already subject to rules effectively mandating withdrawal whenever a taxpayer refuses to comply with the taxpayer disclosure standard. In addition, lawyers

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282. See id. Rule 4.1 cmt. 1 ("A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."); cf. Falk, supra note 52, at 650 (concluding that the IRS falls somewhere between a true tribunal and a traditional opponent).

283. See Harris, Requiring the Correction, supra note 248, at 523 (tax lawyer has no duty to disclose client error). Indeed, the lawyer is ethically obligated to remain silent, given the duty to protect client confidences. See MODEL RULES, supra note 31, Rule 1.6 (duty to protect client confidences); id. Rule 4.1(b) (duty to protect client confidences supersedes duty of truthfulness to others).

284. See supra note 273.

285. See 31 C.F.R. § 10.34(a)(1) (prohibiting practitioners from signing returns reflecting positions that fail to satisfy the "realistic possibility" standard). The penalty imposed on return preparers with respect to undisclosed positions effectively prevents the preparer from signing a return containing an undisclosed position that fails to satisfy the "realistic possibility" standard. See I.R.C. § 6694(a) (1994); Treas. Reg. § 1.6694-2(a)(1) (as amended in 1992). Although Formal Opinion 85-352 does not directly address the ethical obligations of the lawyer serving as return preparer, the Task Force Report issued concurrently with the opinion deals with the issue:

To avoid conflict with obligations imposed upon tax return preparers, the lawyer should first determine whether the position meets the ethical [realistic possibility of success] standard. If not, the lawyer must counsel the taxpayer not to assert the position, and, unless this advice is accepted by the client, the lawyer may not prepare the return, and pursuant to Rule 1.16(a) must withdraw from further representation involving advice as to the position taken on the return. Only if the position meets the standard may the lawyer prepare the return, sign it, and present it to the client.

Task Force Report, supra note 112, at 639. A preparer who refuses to sign a return may nevertheless be subject to a penalty as a "nonsigning preparer" if the preparer completed a substantial portion of the return before withdrawal. See I.R.C. § 7701(a)(36)(A) (person preparing a substantial portion of a return qualifies as an "income tax return preparer"); Treas. Reg. § 1.7701-15(b) (as amended in 1980) (discussing "substantial preparation"). To provide nonsigning preparers with an opportunity to avoid the penalty, the regulations consider the disclosure requirement satisfied if the preparer advises the taxpayer that the position lacks substantial authority and therefore may subject the taxpayer to the substantial understatement
serving as tax return advisors rarely confront an opportunity to withdraw—indeed, these practitioners may never learn of a client’s decision to withhold information from the IRS because the engagement ends before the client files the return. The remaining role—taxpayer representative during the return examination process—presents a more difficult question: must the lawyer withdraw when the taxpayer refuses to supplement a deficient return by voluntarily disclosing information during the audit.

The ABA Model Rules require a lawyer to withdraw from an engagement when continued representation will result in a violation of the ethics rules or other law. In most cases client misconduct does not trigger mandatory withdrawal. In fact, the Model Rules actually contemplate that representation may continue provided the lawyer does not further the improper purpose pursued by the client. Nevertheless, the lawyer’s continued presence as counsel can serve to confirm in the minds of others that a client is advancing a position with “clean hands.” Certainly, counsel’s presence during the audit of a return lends credibility to taxpayer positions, especially if the lawyer has established with IRS representatives a reputation for truthfulness and respect for both the internal revenue laws and the rules governing the conduct of tax practitioners. Thus, continued representation of a client who refuses to comply with the taxpayer disclosure standard may mislead the IRS, thereby violating the ethical duty of candor and fairness.

The ethical duty of candor and fairness was first described in the 1908 Canons of Ethics: “It is unprofessional and dishonorable
to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.”289 This duty—now incorporated in the “dishonesty rule” of the ABA Model Rules290—was interpreted by the ABA Ethics Committee in Formal Opinion 314 as imposing on tax lawyers “a duty not to mislead the IRS deliberately, through misstatement or silence, or by permitting the client to mislead.”291 The Committee’s interpretation clearly contemplates action on the part of lawyers representing clients who mislead the IRS by failing to disclose.292 But the high level of candor demanded by the dishonesty rule cannot be met by a lawyer whose response is limited to a disclosure recommendation that proves unacceptable to the client.293 Rather, lawyers must respond by withdrawing as counsel for any taxpayer who insists on withholding information from the

289. ABA CANONS OF ETHICS, Canon 22 (1908).

290. See MODEL RULES, supra note 31, Rule 8.4(c) (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation); cf. MODEL CODE, supra note 5, DR 1-102(A)(4); see also Peter R. Jarvis & Bradley F. Tellam, The Dishonesty Rule—A Rule With a Future, 74 OR. L. REV. 665, 669 (stating that the dishonesty rule—DR 1-102—is “substantially equivalent to, but somewhat broader than, Canon 22” (citing the ABA Comm. on ABA Formal Opinion 337 (1974))).


292. See Handelman, Constraining, supra note 109, at 98 (“Failure to disclose a position inconsistent with the lawyer’s reasoned legal judgment (or prediction of success if litigated) would be misrepresentation.”); Holden, Constraining, supra note 261, at 774 (“If it is established that a taxpayer does indeed have a normative, Code-imposed ‘must’ duty to disclose positions lacking substantial authority, then one can accept rather easily the proposition that the adviser has an ethical duty to advise disclosure and perhaps a responsibility to withdraw from rendering advice with respect to the return in question if that advice is not accepted.”); cf. Jarvis & Tellam, supra note 290, at 669 (lawyer’s failure to disclose facts that might be necessary to avoid misleading another violates dishonesty rule (citing the ABA Comm. on ABA Formal Opinion 337 (1974))). Given the nature and purpose of the disclosure standard proposed above—to minimize the misleading effects of undisclosed return positions—a taxpayer’s refusal to disclose should be treated as presumptively misleading. Cf. id. at 673 (“[T]he threshold for potential detrimental reliance under the dishonesty rule was clearly set at a very low level.”) (citing the ABA Comm. on ABA Informal Opinion 84-1507) (emphasis added)).

293. Cf. MODEL RULES, supra note 31, Rule 1.2 cmt. 7 (continued representation of those who reject advice from counsel is permitted as long as the lawyer does not participate in client misconduct).
IRS. A lawyer who fails to terminate an engagement under these circumstances permits the client to mislead the IRS and thereby violates the dishonesty rule. Thus, lawyers confronted with a client who insists on limiting disclosure of information must withdraw to avoid violation of the dishonesty rule; indeed, because continued representation will trigger the dishonesty rule, withdrawal is mandated by the Model Rules.

In general, a lawyer is required to withdraw from an engagement if continued representation would result in a violation of the ethics rules or other laws. See Model Code, supra note 5, DR 2-110(B); Model Rules, supra note 31, Rule 1.16(a)(1). In addition, withdrawal is permitted in a variety of circumstances, including situations in which the client insists on a course of action the lawyer believes to be criminal or fraudulent or that the lawyer believes to be repugnant or imprudent. See Model Code, supra note 5, DR 2-110(C); Model Rules, supra note 31, Rule 1.16(b)(1), (3). Formal Opinion 314 contemplates that withdrawal may be the only course of action available to the lawyer whose continued representation of a client may mislead the IRS:

The difficult problem arises where the client has in fact misled but without the lawyer's knowledge or participation. In that situation, upon discovery of the misrepresentation, the lawyer must advise the client to correct the statement; if the client refuses, the lawyer's obligation depends on all the circumstances. Fundamentally, subject to the restrictions of the attorney-client privilege imposed by Canon 37, the lawyer may have the duty to withdraw from the matter. If for example, under all the circumstances, the lawyer believes that the service relies on him as corroborating statements of his client which he knows to be false, then he is under a duty to disassociate himself from any such reliance unless it is obvious that the very act of disassociation would have the effect of violating Canon 37. Even then, however, if a direct question is put to the lawyer, he must at least advise the service that he is not in a position to answer.

Formal Op. 314, supra note 98, at 672; cf. 31 C.F.R. §§ 10.0-.101 (establishing that an attorney may be subject to disciplinary proceedings if that attorney knows of and allows violation of the IRS regulations by a client). It is interesting to note that the Canons of Ethics upon which Formal Opinion 314 was based did not address the question of mandatory withdrawal:

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

ABA Canons of Ethics, Canon 16 (1908) (emphasis added).

Because counsel for the taxpayer will be aware of the client's refusal to disclose and the consequences associated with the refusal to disclose, the failure to respond, either through independent disclosure or withdrawal, makes the lawyer a party to the misrepresentation in violation of the dishonesty rule. With disclosure eliminated as an option for the lawyer, withdrawal is the only means available of avoiding the dishonesty rule.

See Model Rules, supra note 31, Rule 1.16(a)(1) (requiring withdrawal whenever continued representation will result in a violation by the lawyer of the ethics rules or other law); id. cmt. 2 (referring to client demand that lawyer engage in unethical or illegal conduct); cf. ABA Canons of Ethics, Canon 16 (mandating withdrawal if the client persists in wrongdoing against members of the judicial sys-
of Practice of a mandatory withdrawal provision will ensure that all tax practitioners are compelled to withdraw from representing any taxpayer who refuses to comply with the taxpayer disclosure standard during examination of a return.297

V. FINAL THOUGHTS

If society is sufficiently committed to the importance of an effective taxing system designed around self-assessment, it must acknowledge that such a system, by its very nature, is a cooperative effort between taxpayers and the government and that the effectiveness of the system is threatened by taxpayers and tax lawyers who treat the return preparation and examination process as an adversarial proceeding in which vigorous advocacy of positions will produce a winner and a loser. In fact, all taxpayers lose when an individual assumes an aggressive position on a return and, with an interest in maximizing the chances of prevailing on the issue, limits disclosure of the position on the return as a means of preventing detection and the possibility of challenge during an audit. To the extent that these taxpayers prevail by default on issues the government would have challenged successfully, the resulting tax savings enjoyed by one taxpayer becomes an additional burden assumed by the rest of society.298

To be sure, all taxpayers have the right to resolve doubt in their favor and, when appropriate, to challenge existing law by taking aggressive return positions. Nevertheless, the right to advance questionable positions must carry with it the obligation to be forthcoming with information related to that position sufficient to ensure that the debate necessary to protect the taxing system will occur. The taxpayer disclosure standard proposed above will satisfy this objective if taxpayers comply with the standard by adequately disclosing questionable return positions. Unfortunately, neither the normative nature of the obligation nor the threat of penalties will assure a favorable response from taxpayers, in large

297. This use of the rules of professional ethics to address the problem of aggressive return positions is the subject of considerable debate. See, e.g., New York State Bar Ass'n Tax Section, supra note 124, at 1116 (citing New York City Bar Ass'n, 36 TAX LAw. at 882-83).

298. See Taxpayer Compliance Report, supra note 62, at 338 ("[S]ome people will take advantage of their fellow citizens by deliberately understating their own liabilities.").
part, because the risk of detection is and will remain extremely low. Consequently, the success of this proposal ultimately depends on the attitude of taxpayers toward the taxing system. Taxpayers must share a genuine belief in the importance of taxpayer compliance and the ability of the taxing system to assess and collect the correct amount of tax from every taxpayer.\textsuperscript{299} In addition, the audit process must be acknowledged by taxpayers as an important and necessary component of the compliance testing system. Finally, given that disclosure will significantly increase the likelihood of audit,\textsuperscript{300} taxpayers must be assured that the burden shouldered by audited taxpayers is no greater than absolutely necessary. Indeed, failure to address taxpayers' perception of audits as experiences to be avoided at all cost will cripple efforts to facilitate a free exchange of information between taxpayers and their government.

These observations illustrate that enhanced taxpayer disclosure will contribute little to the effort to promote taxpayer compliance if other weaknesses in the compliance testing system do not receive similar attention. Perhaps the most important of these involves the conduct of IRS personnel. The government must join with taxpayers and tax practitioners in accepting responsibility for the adversarial nature of the return preparation and examination process.\textsuperscript{301} The overzealous behavior of examining agents and other IRS personnel encourages an adversarial response from taxpayers and their representatives. In addition, the aggressive and at times condescending approach toward taxpayers taken by some at the IRS explains the agency's tarnished image\textsuperscript{302} as well as the need

\textsuperscript{299} See \textit{id.} at 351 ("The weight of research evidence also suggests that perceptions of the fairness of the tax system affect the compliance decisions of taxpayers, particularly among those with high opportunity." (citations omitted)).

\textsuperscript{300} This assumes that all supplemental information disclosed by taxpayers will be considered by the IRS, an assumption that is, at best, optimistic. Apart from the effect of disclosure on taxpayers, \textit{see supra} note 79, both the ability and willingness of the IRS to evaluate the information submitted by taxpayers will have a profound effect on taxpayer cooperation. \textit{See Handelman, Constraining, supra} note 109, at 107 (noting possible administrative problems associated with IRS review of information provided through enhanced disclosure standard); \textit{Taxpayer Compliance Report, supra} note 66, at 356 (noting that confidence in the system will suffer if information submitted to the IRS goes unused).

\textsuperscript{301} \textit{Cf.} Prop. Rev. to Op. 314, \textit{supra} note 113, at 71 ("It may be that upon commencement of an audit Internal Revenue Agents take adversarial positions, despite formal admonitions to operate 'in a fair and impartial manner, with neither a government nor a taxpayer point of view.'" (citation omitted)).

\textsuperscript{302} \textit{See Taxpayer Compliance Report, supra} note 62, at 353 (regarding the negative image of the IRS).
for recent legislative and administrative action taken for the purpose of establishing and protecting taxpayer rights. These protective measures are an important first step, to be sure. However, taxpayers must also be assured that government representatives are held to the same high standard of conduct imposed on taxpayers and their representatives and, when appropriate, are penalized for deviating from that standard. By establishing a standard of conduct to which all parties are subject, the tax compliance system becomes less threatening to taxpayers who are then less likely to perpetuate the current practice of information control in the interest of defending against the overzealous internal revenue agent.

Finally, consider the role of the lawyer as advisor, return preparer, and taxpayer representative and the impact that this proposal will have on the adversarial representation of taxpayers. Tax lawyers must recommend disclosure whenever disclosure is mandated by the taxpayer disclosure standard and must disassociate themselves from clients who refuse to adopt such advice. Admittedly, characterization of the taxpayer disclosure standard as "normative" changes the way in which lawyers approach the question of disclosure—encouraging taxpayers to withhold information on questionable return positions is an option available only when disclosure is truly voluntary. But forcing lawyers to withdraw when a client refuses to disclose represents a more fundamental change in the nature of taxpayer representation that undoubtedly will prompt concern over the right to representation and the impact of self-representation on the tax compliance system. Nevertheless, this change in the traditional approach to taxpayer representation naturally follows from the taxpayer's normative duty to disclose and the nature and importance of the tax compliance system.

The complexity of the internal revenue laws, the volume of returns filed by taxpayers each year, and the limited ability of the IRS to audit returns for compliance combine to form a compliance testing system that is forced to rely on private practitioners for assistance in promoting taxpayer compliance. Tax lawyers are

303. See supra note 234.
304. See Handelman, Constraining, supra note 109, at 98 ("[H]aving either to withdraw from representing a client pursuing a right of access to the Tax Court or to prejudice the client's position in subsequent litigation, impinges on the rights of the client who is entitled to the assistance of counsel in minimizing tax liability within the bounds of the law."); Harris, supra note 248, at 527 (requiring withdrawal would restrict access to representation).
bound to represent their clients zealously within the bounds of the law but must also be mindful of the overriding societal importance of taxpayer compliance and the effect that traditional partisan representation can have on IRS efforts to select and audit returns. The resulting compromise prevents lawyers from using all means available to secure client objectives but only to the extent that information control is no longer a weapon available for use against the IRS. Once the taxpayer satisfies the disclosure requirement, counsel is free to advocate on behalf of taxpayer positions; indeed, adequate disclosure of return positions justifies the lawyer’s use of partisan advocacy in negotiations with the IRS by addressing the issue of party inequality and thereby allowing the lawyer to focus on the objectives of the client, confident that a partisan presentation of the client’s position will not prevent the IRS from protecting the interests of the government.

Taxpayers and their representatives must join with the IRS in a cooperative effort designed to promote taxpayer compliance. Taxpayers must acknowledge the importance of the compliance testing system and the government’s need for information that only the taxpayer can provide. Tax practitioners must respect their dual responsibility—duties to both clients and the system—and must be prepared to put the good of the system ahead of client loyalty when clients refuse to disclose. Finally, compliance test-

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305. See Handelman, Constraining, supra note 109, at 93 (“Disclosure can preserve the client’s rights, without permitting an adviser unilaterally to define law along the contours of the client’s interest.”); see also supra note 175 and accompanying text (noting that once the disclosure requirement is satisfied, advocates may argue on behalf of client).

306. Taxpayer education is an essential part of this process. See Taxpayer Compliance Report, supra note 62, at 332 (noting the importance of efforts dedicated to educating taxpayers on the importance of compliance); id. at 354 (“To improve taxpayers’ cooperation with the Internal Revenue Service and increase their willingness to comply, we recommend that the IRS take a more active role in educating taxpayers and providing assistance to those who need it.”).

307. See Darrell, supra note 93, at 38 (“[I]t may be thought that this obligation of the lawyer should be at least as, if not more, strict and rigid when he is facing the Treasury, the thought here being that a tax matter is not simply a matter between taxpayer and Treasury but between taxpayer and Treasury and other taxpayers.”); Maguire, supra note 92, at 44 (“The private lawyer in a tax controversy realizes that on the other side are his Government and the community of which he is a member.”); Taxpayer Compliance Report, supra note 62, at 354 (acknowledging the dual responsibility of tax practitioners: to promote taxpayer compliance and to advance client interests). In contrast, Oatway states:

It is quite probable that most practitioners when faced with such an opportunity to make a contribution to the effective operation of the tax system
ing must be designed and administered by the government in a manner that encourages the cooperative behavior that, in the end, will determine whether the IRS succeeds in its mission to promote taxpayer compliance.

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turn in the right direction. But they probably do so in response to their own citizenship and moral consciousness rather than in response to a clearly enunciated professional responsibility.

Oatway, supra note 92, at 247.