

ETHICS RULING ON LEGAL OPINIONS IN TAX SHELTER INVESTMENT OFFERINGS

I. INTRODUCTION

A revised Formal Opinion concerning attorney's opinions in tax shelter investment offerings was released by the Standing Committee on Ethics and Professional Responsibility of the American Bar Association on January 29, 1982.¹ Such an ethical opinion was sorely needed for the guidance of tax lawyers and as a reaffirmation to the public that the bar is capable of policing itself.² Although ABA ethics opinions are not a basis for disciplining attorneys, they are a source of guidance for both the disciplinary committees of local bar associations and for the attorneys themselves. This opinion provides the guidance that has long been sought by all parties concerned.

Formal Opinion 346 (Revised) takes a relatively hard line on the issue of preparation of tax shelter opinions which will be included in tax shelter offering materials and relied upon by offerees. It states that lawyers should make inquiry as to all underlying facts surrounding the matter, take reasonable steps to assure that issues which will possibly involve an Internal Revenue Service challenge are fully and fairly addressed in the offering materials, and provide an opinion, where possible, regarding the likely outcome of potential litigation.³

II. THE PROBLEM

At present the nation is in the grips of a litigation explosion and the tax court is no exception. In April 1981, 36,246 cases were pending in the tax court; it was estimated that between 2,500 and 3,000 of these were tax shelter cases.⁴ The Internal Revenue Service's attack on tax shelters began in the early 1970s and continues in earnest today.⁵ Although the possibility of IRS prosecution curbs some of the more outlandish tax practices, many attorneys feel that observation of

1. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 346 (Revised 1982) [hereinafter cited as Op. 346]. This Opinion supersedes Formal Op. 346 (June 1, 1981).

2. Masters, *ABA Unit Tables Tax Shelter Ethics Opinion*, Legal Times of Wash., May 25, 1981, at 4, col. 1, quoting ABA TAX SECTION Chairman Harvie Branscomb, Jr.

3. Op. 346, *supra* note 1.

4. Remarks by U.S. Tax Ct. Judge Arthur L. Nims III, San Fran., March 1981.

5. One commentator noted that "[b]y design, through *in terrorem* legislation, the Commissioner discourages tax shelters." Machtinger, *New Attacks on Tax Shelters by the Courts, the Administration, and the Internal Revenue Service*, 1974 So. CALIF. TAX INST. 623, 624 (1974).

ethical standards is a *sine qua non* of practicing in the tax area. A more realistic threat to the status of the profession as a whole, and to the self-assessing tax system, is the general impression of many inexperienced outsiders that sham and corner-cutting in the tax shelter area is an acceptable and customary part of tax practice.⁶ The ABA Section on Taxation believes the proliferation of certain types of tax shelters presents many serious problems, especially those which depend upon anticipated tax results that probably would not be upheld if challenged by the IRS.⁷

Certainly, tax advisers need not have moral qualms about instructing their clients in the art of saving taxes and assisting them in minimizing their tax burdens.⁸ Today, however, tax shelters, once clever yet innocent devices, often present benefits that do not exist or involve outrageous contrivances.⁹ Such shelters heighten the theory of taxpayer inequality and tax law inequity.¹⁰

Formal Opinion 346 (Revised) addresses the lawyer's legal and ethical duties and responsibilities in rendering tax shelter opinions, which he knows will be included among the tax shelter offering materials and relied upon by offerees, and narrows the broad and complicated subject of professional standards to a reasonable guide. This Opinion is also timely in that lately the Treasury Department's Gen-

6. Comm. on Standards of Tax Practice, Guidelines to Tax Practice, 31 TAX LAW. 551 (1978).

7. ABA Section of Taxation, *Statement on Proposed Rule Amending Circular 230 With Respect to Tax Shelter Opinions*, 34 TAX LAW. 745 (1981). The text of the proposed rule may be found in 47 Fed. Reg. 56,144 (1982) (to be codified at 31 C.F.R. pt. 10) (proposed Dec. 15, 1982).

8. In *Commissioner v. Newman*, 159 F.2d 848, 850-51 (2nd Cir. 1947) (Hand, J., dissenting), *cert. denied*, 331 U.S. 859 (1947), Judge Learned Hand said:

Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.

Furthermore, it must be realized that attorney-authored tax shelter opinions are relied upon by two types of clients, promoters and offerees, alike; the former in structuring the venture and the latter in determining whether or not to invest. Op. 346, *supra* note 1, at 1.

9. Sax, *Lawyer Responsibility in Tax Shelter Opinions*, 34 TAX LAW. 5 (1980) [hereinafter cited as Sax].

10. *Id.* at 5 & n.24; STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, 94TH CONG., 1ST SESS., OVERVIEW OF TAX SHELTERS (Comm. Print 1975):

When the great majority of taxpayers perceive that a few wealthy taxpayers escape tax almost completely in return for making investments which may not even be sensible from an economic standpoint, it becomes hard to convince them that the tax system is truly fair and progressive. The resulting disrespect for the law and reduced compliance therewith may entail a hidden revenue loss which is far in excess of the loss measured by the deductions claimed by those who participate in the shelters.

eral Counsel and the Commissioner of the IRS have been increasingly expressing their concern about the role of the tax attorney who, by writing tax shelter opinions, controls access to the tax shelter marketplace.¹¹ Indeed, both have recently gone so far as to suggest Treasury Department regulation of the matter, by use of its statutory mandate to discipline its practitioners, if the bar fails to do so.¹² Fortunately, Formal Opinion 346 (Revised) fills the need for reasonable standards.

Basically, the Opinion addresses three types of tax shelter opinions: (1) the *false opinion*, which ignores or minimizes serious legal risks or misstates facts or the law, either knowingly or through gross incompetence; (2) the *assumed facts opinion*, which does not speak to the *actual* facts, either by disclaiming knowledge of the accuracy of the facts, by discussing legal issues without relating the law to the facts, by failing to analyze the critical facts, or by discussing purely hypothetical facts; and (3) the *reasonable basis opinion*, which points out that there is a reasonable basis for claiming certain tax benefits but fails to express, when actually known, any opinion regarding the likelihood that the promoted tax benefits will be realized or sustained by a court if attacked by the IRS.¹³

11. Sax, *supra* note 9, at 15.

12. In fact the Treasury Department did release a proposed rule that "would amend regulations governing practice before the Internal Revenue Service to set standards for the providing of opinions used in the promotion of tax shelters." See Tax Shelters; Practice Before the Internal Revenue Service, 45 Fed. Reg. 58,594 (1980) (Proposed Rule).

The proposed rule would require a practitioner who provides an opinion for a tax shelter to exercise due diligence in representing the facts and Federal tax aspects of the transactions, and in assuring that the opinion is accurately and clearly described in any discussion of tax aspects appearing in the offering materials. The proposed rule would allow a practitioner to provide an opinion for a tax shelter only if the opinion concluded that it was more likely than not that the bulk of the tax benefits on the basis of which the tax shelter had been promoted are allowable under the tax law.

This Treasury Department proposed rule for attorneys was unanimously criticized at a hearing before Treasury officials because of fears that the Treasury was attempting to regulate the conduct of attorneys who are its adversaries. Because of the provision forbidding practitioners to write tax shelter opinions unless they are confident that the "bulk" of expected benefits will "more likely than not" be realized, the Chairman of the New York City Bar Association claimed, "The proposed standard goes much too far, [i]t proscribes conduct that is ethical, proper and in accordance with the standards of the legal profession." Other comments focused on a provision requiring that practitioners exercise "'due diligence' to assure that a tax shelter opinion discloses facts with regard to important federal tax aspects, states a conclusion with regard to each aspect and is accurately described in offering materials." See Masters, *Bar Groups Hit Tax Shelter Proposals*, Legal Times of Wash., Dec. 1, 1980, at 4, col. 2.

The proposed rule was never adopted.

13. Op. 346, *supra* note 1, at 7.

III. THE SOLUTION — GUIDELINES UNDER
FORMAL OPINION 346 (REVISED)

Formal Opinion 346 (Revised) outlines the general ethical guidelines for the above concerns. While issued guidelines are a beginning, the law of professional responsibility has always been ambiguous. The stricter the official pronouncements, the more guidance the individual lawyer is given. Therefore, for the purposes of this comment, the issued guidelines have been rephrased in the form of disciplinary rules.

1. *A lawyer shall not participate in the preparation or issuance of a tax shelter opinion unless and until all relevant information including, but not limited to, the structure and intended operation of the proposed venture is fully disclosed. A lawyer shall have complete access to all relevant information.*

A "tax shelter" as used in the opinion, is an investment which offers significant benefits to the taxpayer in either or both of the following ways. For federal income tax or federal excise tax purposes, the tax shelter would provide deductions in excess of income from the investment, thereby reducing income from other sources in a given year, and/or it would provide credits, in excess of the tax on investment income, which offset taxes on income from other sources in a given year.¹⁴ A "tax shelter opinion," as used herein, is advice given by a lawyer concerning the federal tax law applicable to a tax shelter which is contained in offering sales promotion materials directed to persons other than the client who retains the lawyer to render the opinion.¹⁵ An offeror will generally seek expert legal advice concerning

14. *Id.* at 1, n.1. Excluded from the definition are investments including "municipal bonds; annuities; family trusts; qualified retirement plans; individual retirement accounts; stock option plans; securities issued in a corporate reorganization; mineral development ventures, . . . and [certain] real estate . . ." *Id.*

15. The term "tax shelter opinion" also includes "the tax aspects or tax risks portion of the offering materials prepared by a lawyer whether or not a separate opinion letter is issued."

The term does not . . . include rendering advice solely to the offeror or reviewing parts of the offering materials, so long as neither the name of the lawyer nor the fact that a lawyer has rendered advice concerning the tax aspects is referred to at all in the offering materials or in connection with sales promotion efforts. In this case the lawyer has the ethical responsibility of assuring that in the offering materials and in connection with sales promotion efforts there is no reference to the lawyer's name or to the fact that a lawyer has rendered tax advice. The term also does not include the case where a small group of investors negotiate the terms of the arrangement directly with the offeror of securities and depend for tax advice concerning the investment entirely upon advisors other than the lawyer engaged to represent the offeror.

Id. at 2.

the effects of such an investment before making the offer public. Formal Opinion 346 (Revised) requires the lawyer to make an honest assessment and to write an accurate opinion. The lawyer must be fully informed as to all the information at the client's disposal. The Opinion states that the lawyer should follow the Canons and Ethical Considerations of the Model Code in issuing any tax shelter opinion.¹⁶ The goal of the Opinion is to eliminate the abusive tax shelter which has as its sole economic purpose the generation of tax benefits by employing the exaggerated valuation of assets and other critical mischaracterizations.¹⁷ If the attorney assures himself that he has been fully informed by the client, he cannot plead ignorance of the facts.

2. A lawyer shall, prior to preparing a tax shelter opinion for issuance, make inquiry as to all relevant facts. A lawyer must satisfy himself that the material facts are accurately and completely stated in the offering materials and that representations pertaining to intended future activities are clearly identified, reasonable, and complete.

The lawyer's primary responsibility is to his client. Recognition of this is the starting point for any consideration of the professional responsibility of a tax lawyer.¹⁸ In the area of issuing tax shelter opinions, the lawyer functions more as an adviser than as an advocate.¹⁹ As such, he is required whenever possible to give his professional opinion as to the ultimate decision of a court.²⁰ Complete and accurate facts are required to make this determination.

The lawyer who gives, either intentionally or recklessly, a misleading false opinion violates the Disciplinary Rules of the Code of Professional Responsibility.²¹ Such an opinion clearly exceeds the

16. *Id.* at 4, n.3. The footnote lists some of the "axiomatic norms" to be followed. Canon 1 of the Code states: "A lawyer should assist in maintaining the integrity and competence of the legal Profession." Additionally, Canon 6 states: "A lawyer should represent a client competently."

This footnote also lists the ethical consideration examined by the authors of Formal Opinion 346 (Revised) in establishing their guidelines; EC 1-5, EC 6-1, EC 6-4, EC 6-5, EC 7-1, EC 7-3, EC 7-5, EC 7-6, EC 7-8, EC 7-10, EC 7-22, and EC 7-25.

17. Address of R. H. Mundheim, Esquire, *Abusive Tax Shelters and Developing Standards for Tax Attorneys* (Jan. 18, 1980), reprinted in 15 TAX NEWSLETTER (BNA) at J-1 (1980).

18. Canon 7 of the CODE OF PROFESSIONAL RESPONSIBILITY provides that "[a] lawyer should represent a client zealously within the bounds of the law."

19. Op. 346, *supra* note 1, at 4.

20. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3 (1979).

21. *Id.* at DR 7-101. The specific Disciplinary Rules which would be violated include:

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

lawyer's duty to represent his client zealously in such a situation. By failing to disclose matters he is required by law to reveal, the lawyer is assisting the offeror in knowingly illegal or fraudulent conduct.²² Formal Opinion 346 (Revised) takes this ethical duty a step further. It concludes that a lawyer gives a false opinion when he knowingly relies upon information asserted by the offeror to be true, but which further inquiry by the lawyer would have revealed to be false.²³

The Opinion states that reckless or conscious disregard of information, which strongly indicates that it is materially false or misleading and on which the attorney relied in formulating his tax opinion, constitutes dishonest and fraudulent conduct.²⁴ The Opinion establishes the violative knowledge standard to be that knowledge required to sustain a section 10b-5 recovery,²⁵ rather than a lower negligence

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101 (B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship except as required under DR 7-102 (B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

See also EC 7-10.

22. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (A) (3) (1979).

23. Op. 346, *supra* note 1, at 3. One case has held a lawyer liable for both conspiracy to sell unregistered securities and conspiracy to defraud, when the attorney failed to inquire further into the facts prior to acting upon them.

[C]ongress equally could not have intended that men holding themselves out as members of these ancient professions should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess.

United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964).

24. Op. 346, *supra* note 1, at 3.

25. 17 C.F.R. § 240.10b-5 (Supp. 1981). In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), the United States Supreme Court resolved a split of authority among the courts of appeals as to whether liability under section 10 (b) or Rule 10 (b)-5 could be predicated on simple negligence. The Court held that there could be no private cause of action for damages "in the absence of any allegation of 'scienter'—intent to deceive, manipulate or defraud." A number of courts have subsequently found that reckless conduct may satisfy the scienter element. See, e.g., *Nelson v.*

standard as under section 17 (a) of the Securities Act.²⁶

Additionally, false opinions caused by a lawyer's gross incompetence, indifference, inadequate preparation under the circumstances, consistent failure to perform obligations,²⁷ or neglect²⁸ are all in violation of the Opinion.

The Opinion incorporates by reference ABA Formal Opinion 335²⁹ which established the guidelines a lawyer should follow when furnishing an assumed facts opinion in connection with the sale of unregistered securities. Opinion 346 (Revised) describes in detail the extent to which a lawyer should verify the facts on which he bases his tax shelter opinion.³⁰ Thus, if the essential underlying information

Serwold, 576 F.2d 1332 (9th Cir.) (attorney's omission of material facts of which he had knowledge constitutes actionable recklessness), *cert. denied*, 439 U.S. 970 (1978); Sanders v. John Nuveen & Co., 554 F.2d 790 (7th Cir. 1977) (misstatements based on a mistaken, but honest, belief constitute negligence); Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033 (7th Cir. 1977) (reckless omission of material facts), *cert. denied*, 434 U.S. 875 (1977). Sax, *supra* note 9, at 21-22, n.102.

26. 15 U.S.C. § 17 (K) (c) (1976).

27. Op. 346, *supra* note 1, at 3. Such conduct would also violate DR 6-101 (A), which provides:

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (A) (1979).

28. Neglect involves indifference and consistent failure to carry out the obligations of the client which the lawyer has assumed, or a conscious disregard for the responsibility owed to the client. It usually involves more than a single act or omission and thus differs from ordinary negligence. It cannot be found if the acts or omissions were inadvertent or the result of an error of judgment made in good faith. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1273 (1973).

29. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 335 (1974).

30. Op. 346, *supra* note 1, at 5 (quoting Formal Op. 335):

[T]he lawyer should, in the first instance, make inquiry of his client as to the relevant facts and receive answers. If any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect; or are suspect; or are inconsistent; or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry. The extent of this inquiry will depend in each case upon the circumstances; for example, it would be less where the lawyer's past relationship with the client is sufficient to give him a basis for trusting the client's probity than where the client has recently engaged the lawyer, and less where the lawyer's inquiries are answered fully than when there appears a reluctance to disclose information.

Where the lawyer concludes that further inquiry of a reasonable nature would not give him sufficient confidence as to all the relevant facts, or for any other reason he does not make the appropriate further inquiries, he should refuse to give an opinion. However, assuming that the alleged facts are not incomplete in a material respect, or suspect, or in any way inherently

appears inconsistent or incomplete, the lawyer should be aware that further inquiry is necessary. The character of the person supplying the information must also be considered in determining whether further inquiry is necessary. The lawyer is justified in relying upon the material facts if his inquiry reveals that the appraisal or projection relied upon is reasonably well supported and complete.³¹

3. *A lawyer shall, in the preparation or issuance of a tax shelter opinion, relate the law to the actual facts to the extent ascertainable. A lawyer shall, when addressing issues based on future activities, clearly identify facts he has assumed.*

The tax lawyer may be asked by the promoter to address his tax shelter opinion to hypothetical or assumed facts, or merely to analyze the relevant tax law without addressing specific facts.³² A lawyer should not issue an opinion in which he has (1) failed to analyze crucial facts, (2) disclaimed responsibility for inquiring into the accuracy of facts, or (3) discussed pure hypotheticals.³³ In this situation, the lawyer must consider the Disciplinary Rules regarding concealment or a knowing failure to disclose that which, by law, ought to be revealed.³⁴

The Code of Professional Responsibility is silent on the matter of the lawyer who deliberately ignores the actual facts or abstains from inquiry regarding the facts upon which he is relying, and whose client

inconsistent, or on their face or on the basis of other known facts open to question, the lawyer may properly assume that the facts as related to him by his client, and checked by him by reviewing such appropriate documents as are available, are accurate.

The essence of this opinion . . . is that, while a lawyer should make adequate preparation including inquiry into the relevant facts that is consistent with the above guidelines, and while he should not accept as true that which he should not reasonably believe to be true, he does not have the responsibility to "audit" the affairs of his client or to assume, without reasonable cause, that a client's statement of the facts cannot be relied upon.

31. Op. 346, *supra* note 1, at 6.

32. Sax, *supra* note 9, at 32.

33. It is proper, however, to assume facts which are not currently ascertainable, such as the method of conducting future operations of the venture, so long as the factual assumptions are clearly identified as such in the offering materials, and they are reasonable and complete. Op. 346, *supra* note 1, at 6.

Obviously, an attorney's opinion . . . is worthless . . . if unspecified but vital facts are not considered . . . If an attorney furnishes an opinion based on hypothetical facts which he made no effort to verify and if he knows that his opinion will be relied upon as the basis for a substantial distribution of unregistered securities, a serious question arises as to the propriety of his professional conduct.

SEC Securities Act Release No. 4445 (Feb. 2, 1962).

34. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (A) (3) (1979).

approves or even solicits such conduct. However, the Model Rules of Professional Conduct³⁵ seem to condone such conduct by introducing the concept of independent evaluation.³⁶ The Model Rules state that the quality of an independent evaluation depends on the freedom and extent of the investigation upon which it is based. Under some circumstances a lawyer's evaluation may be limited³⁷ because certain issues or sources are categorically excluded, the scope of search may be limited by time constraints, or persons with relevant information do not cooperate. The Proposed Model Rules state that any such limitations should be disclosed within the evaluation report. If the client then refuses to comply with the terms upon which the evaluation was to be made, the lawyer's obligations are then determined by law, referring to the terms of the client's agreement and the surrounding circumstances.³⁸ There is no counterpart to the Model Rules in the current Code of Professional Responsibility. The essence of this new rule is that it provides general standards to govern evaluations prepared on a client's behalf for use by third persons. Such evaluations necessarily involve tension between obligations to the client and obligations to persons who will rely on an ensuing evaluation report.³⁹ For example, the client's entitlement to confidentiality may

35. MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft May 30, 1981).

36. *Id.*

Rule 2.3 Evaluation for Use by Third Persons

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client;

(2) The terms upon which the evaluation is to be made are stated in writing, particularly the terms relating to the lawyer's access to information, the contemplated disclosure of otherwise confidential information and the persons to whom report of the evaluation is to be made; and

(3) The implications to the client are disclosed and the client consents.

(b) In reporting the evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

(c) Except as disclosure is required in connection with a report of the evaluation, information relating to an independent evaluation is confidential under Rule 1.6.

37. Freeman, *Opinion Letter and Professionalism*, 6 SEC. L. REV. 101 (1974).

38. MODEL RULES OF PROFESSIONAL CONDUCT, at 118 (Proposed Final Draft May 30, 1981). The Model Rules define "adequate disclosure" as a communication of information sufficient to permit the person to whom the disclosure is made to appreciate the significance of the matter in question and to act in a reasonably prudent matter.

39. *Id.* note at 119.

conflict with a third person's entitlement to the disclosure of information that is neither misleading nor fraudulent.⁴⁰ Under this rule, an evaluation report must indicate any material limitations imposed on the scope of an investigation or the disclosure of information.⁴¹

Proper professional conduct should minimally require a reasonable and limited duty of inquiry as to the actual facts. This duty of inquiry has already been recognized by the Securities and Exchange Commission.⁴²

4. *A lawyer shall, in the preparation or issuance of a tax shelter opinion, make inquiries to ascertain that a good faith effort has been made to address legal issues other than those to be addressed in the tax shelter opinion.*

The lawyer should, within his tax opinion, address all relevant matters of law in good faith, regardless of whether he has been asked to address such issues.⁴³ The lawyer must comply with any other laws that are relevant to his tax opinion. Although tax counsel need not reexamine the conclusions of other counsel in specialized areas of the law, such as exemption of the transaction from securities registration, patent validity, and other similar matters, he should ascertain that competent professional advice has been obtained where relevant to the offering.⁴⁴ The tax shelter opinion should not be written in a vacuum; surrounding areas of the law must be taken into consideration.

5. *A lawyer shall, in the preparation or issuance of a tax shelter opinion, take reasonable steps to assure that all material federal income and excise tax issues have been considered. A lawyer shall take*

40. *Id.*

41. *Id.* at 120.

42. [I]f an attorney furnishes an opinion based solely upon hypothetical facts which he has made no effort to verify, and if he knows that his opinion will be relied upon as the basis for a substantial distribution of unregistered securities, a serious question arises as to the propriety of his professional conduct.

Distributions by Broker-Dealers of Unregistered Securities Release No. 6721 (Feb. 2, 1962), 2 FED. SEC. L. REP. (CCH) ¶ 22,757, reprinted in SEC Securities Act Release No. 9239 (July 1, 1971), 2 FED. SEC. L. REP. (CCH) ¶ 22,760.

43. Op. 346, *supra* note 1, at 6.

44. *Id.* at 6. Indeed, tax counsel may not be competent to reexamine the conclusions of other specialists. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6, DR 6-101 (1979). Competence has been defined:

Competence—A lawyer shall undertake representation only in matters in which the lawyer can act with adequate competence. Adequate competence includes the specific legal knowledge, skill, efficiency, thoroughness, and preparation employed in acceptable practice by lawyers undertaking similar matters.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1980).

reasonable steps to assure that all of those issues which involve the reasonable possibility of a challenge by the Internal Revenue Service have been fully and fairly addressed in the offering materials.

Formal Opinion 346 (Revised) mandates that, in writing a tax shelter opinion, the lawyer should relate the law to the facts, and each "material" tax issue should be fully addressed either by himself or another competent professional.⁴⁵ A good faith inquiry into all material matters of fact and law relevant to the tax shelter program, based on the information available at the time the offering materials are being circulated, requires some examination of material tax and legal issues including, as stated above, those issues about which no opinion was requested.⁴⁶ Additionally, the tax shelter opinion should fully and fairly address all issues for which there is a reasonable likelihood of an IRS challenge.⁴⁷ The attorney should confirm the objective facts and inquire into the reasonableness of subjective facts—especially those evidenced by a valuation, appraisal, projection, or estimate.⁴⁸ The purpose of this duty of inquiry and disclosure is to determine, based on current information, whether further inquiry is warranted in cases where full and fair disclosure has been made.⁴⁹ The accusation by the IRS Commissioner and the Treasury Department that the tax bar has failed to provide adequate ethical

45. Op. 346, *supra* note 1.

A "material" tax issue for purposes of this Opinion is any income or excise tax issue relating to the tax shelter that would have a significant effect in sheltering from federal taxes income from other sources by providing deductions in excess of the income from the tax shelter investment in any year or tax credits which will offset liabilities in excess of the tax attributable to the tax shelter investment in any year.

Id. at 6.

46. Sax, *supra* note 9, at 34.

47. Op. 346, *supra* note 1, at 7.

48. The Opinion states that:

Where some material tax issues are being considered by other competent professionals, the lawyer should review their written advice and make inquiries of the client and the other professionals to assure that the division of responsibility is clear and reasonable to assure that all material tax issues will be considered, either by the lawyer or by the other tax professional, in accordance with the standards developed in this opinion. If, as a result of review of the written advice of another professional or otherwise, the lawyer believes that there is a reasonable possibility that the Internal Revenue Service will challenge the proposed tax effect respecting any material tax issue considered by the other professional, and the issue is not fully addressed in the offering materials, the lawyer has ethical responsibilities to advise the client and the other professional and to refuse to provide an opinion unless the matter is addressed adequately in the offering materials. The lawyer also should assure that his own opinion identifies clearly its limited nature, if the lawyer is not retained to consider all of the material tax issues.

Id.

49. *Id.*

guidelines in the area of tax opinions, which ignore actual facts and are based upon unprofessional conduct, has been remedied by Formal Opinion 346 (Revised).⁵⁰

6. *A lawyer shall, in the preparation and issuance of a tax shelter opinion, provide, where possible, an opinion as to the likely outcome of potential litigation, on the merits, of each material tax issue addressed in the offering materials.*

A tax opinion is commonly understood to be an expression of counsel's prediction of a court's decision in the event that the IRS takes a contrary position and litigates the issue. In rendering such an opinion the lawyer is serving as an adviser, not as an advocate. Formal Opinion 346 (Revised) states that wherever possible the lawyer should state his opinion of the probable outcome, on the merits, of each material tax issue. However, recognizing the complexity of the issues and the lack of authority relating to tax shelters, this is often not possible. In such a case, the lawyer should state that it is not possible to make a judgment and give the reasons for his conclusions.⁵¹ The opinion may question the validity of revenue rulings or the reasonings of lower court opinions that the lawyer feels are wrong provided a complete explanation is given, including what position the IRS is likely to take on the particular issue and a summary of why the position is thought to be wrong.⁵² The risks of an adversarial proceeding should also be set forth. It is emphasized that the lawyer who issues a tax shelter opinion occupies an advisory, not adversarial, role upon which third parties rely.

7. *A lawyer shall, where possible, provide an overall evaluation of the extent to which the aggregate tax benefits are likely to be realized.*

The touchstone for determining proper professional conduct lies in the concept of good faith,⁵³ and both the Disciplinary Rules and the Ethical Considerations condone a good faith test of adversative positions.⁵⁴ Formal Opinion 346 (Revised) clearly advises that:

[t]he clear disclosure of the tax risks in the offering materials should include an opinion by the lawyer or by another pro-

50. Tax Shelters; Practice Before the Internal Revenue Service, 45 Fed. Reg. 58,594 (1980) (Proposed Rule but never adopted).

51. Op. 346, *supra* note 1, at 7.

52. *Id.* at 7.

53. Sax, *supra* note 9, at 37.

54. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (A) (2), EC 7-22, EC 7-25 (1979).

professional providing an overall evaluation of the extent to which the tax benefits, in the aggregate, which are a significant feature of the investment to the typical investor are likely to be realized as contemplated by the offering materials.⁵⁵

The lawyer has a duty to state whether the significant tax benefits will or will not be realized, or whether the probabilities are evenly divided.⁵⁶

In certain rare instances the lawyer may conclude, in good faith, that it is impossible to judge the extent to which significant tax benefits are likely to be realized.⁵⁷ The Opinion allows attorneys to render negative opinions which indicate that the significant tax benefits, in the aggregate, will not be realized. The attorney must clearly and prominently state this negative conclusion in the offering materials.⁵⁸

The lawyer should satisfy himself that the evaluation meets the above standards even if another professional is providing the overall evaluation.⁵⁹

8. *A lawyer shall, prior to the issuance of any offering materials, assure that they correctly represent the nature or extent of the tax shelter opinion.*

A tax shelter opinion, especially one which does not contain a prediction of a favorable outcome, should always be reviewed by the lawyer to assure that offerees will not be misled, the tax risks are clearly disclosed, and the offering materials, taken as a whole, clearly express the tax lawyer's opinion.⁶⁰ The lawyer may even go so far as to withdraw from employment if he disagrees with a course of conduct upon which the client insists.⁶¹

55. Op. 346, *supra* note 1, at 8.

56. *Id.* at 8.

57. Such an impossibility is exemplified within the Opinion where: the most significant tax benefits are predicated upon a newly enacted Code provision when there are no regulations and the legislative history is obscure. In these circumstances, the lawyer should fully explain why the judgment cannot be made and assure full disclosure in the offering materials of the assumptions and risks which the investors must evaluate.

Id. at 8.

58. This was the most significant change made in the revised Opinion. *Id.* at 8.

59. *Id.*

60. "The risks and uncertainties of the tax issues should be referred to in a summary statement at the very outset of the opinion on the tax aspects or tax risks section of the offering materials." *Id.* at 8.

61. *Id.* at 9; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1979).

IV. CONCLUSION

With Formal Opinion 346 (Revised), the American Bar Association has correctly undertaken primary responsibility for the promulgation and enforcement of a set of ethical guidelines relating to the lawyer's role in tax shelter opinions. It is now incumbent upon ethics committees of local bar associations to focus on the issues involved in tax shelter opinions. These local committees should request the highest courts of their respective states to promulgate ethical considerations and disciplinary rules, such as those listed above, which pertain to this area of the law. These rules, like Formal Opinion 346 (Revised), should go further than merely articulating "black letter" rules which embody minimum standards, violation of which would be grounds for disciplinary action. They should define the higher standards to which all lawyers should aspire in keeping with the high traditions of their profession.

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