Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers

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I. INTRODUCTION

The regulation of professional speech is one of the least developed areas of First Amendment doctrine. The few judicial decisions that have addressed limitations on professional speech have failed to provide a comprehensive analytical framework for defining the limits on such regulation. Moreover, there is little consensus in the academic literature regarding the proper approach to the issue.

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This Article examines First Amendment limitations on the regulation of professional speech in the context of recent "Circular 230" regulations, which govern the content and presentation of opinions and other written tax advice ("tax opinions") concerning transactions that have a significant or principal purpose of avoiding federal taxes or are otherwise deemed to be tax avoidance transactions.\(^3\) Although these regulations apply broadly to "practitioners" before the Internal Revenue Service (IRS),\(^4\) this Article focuses on the application of the regulations to lawyers.

The Circular 230 regulations require a tax opinion to meet a strict set of requirements. The opinion must identify and evaluate all facts relevant to the transaction.\(^5\) It must relate all applicable law to the facts.\(^6\) It generally must identify and evaluate each "significant Federal tax issue," meaning a federal tax issue that meets a materiality threshold and to which the IRS has a "reasonable basis" for a successful challenge.\(^7\) The opinion may not contain internally inconsistent legal analyses or conclusions,\(^8\) nor may it take into account the possibility that the IRS might not audit a tax return or raise an issue on audit, or might resolve the issue by settlement if raised.\(^9\) The opinion must conclude whether the overall tax treatment of the transaction is proper.\(^10\) If someone other than the practitioner will use or refer to the opinion to promote, market, or recommend (collectively, "to market") a transaction (a "marketed opinion"), the opinion must conclude that the taxpayer will prevail on each significant federal tax issue affecting the transaction, and that the overall tax treatment is proper, at a confidence level of at least "more likely than scholarship applying such principles to the regulation of speech in the capital markets. See Lillian R. Bevier, A Comment on Professor Wolfson's "The First Amendment and the SEC," 20 CONN. L. REV. 325 (1988); Allen D. Boyer, Free Speech, Free Markets, and Foolish Consistency, 92 COLUM. L. REV. 474 (1992) (reviewing NICHOLAS WOLFSON, CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC (1990)); Michael P. Dooley, The First Amendment and the SEC: A Comment, 20 CONN. L. REV. 335 (1988); Arthur R. Pinto, The Nature of the Capital Markets Allows a Greater Role for the Government, 55 BROOK. L. REV. 77 (1989); Michael E. Schoeman, The First Amendment and Restrictions on Advertising of Securities under the Securities Act of 1933, 41 BUS. LAW. 377 (1986); Nicholas Wolfson, The First Amendment and the SEC, 20 CONN. L. REV. 265 (1988).


4. Practitioners are defined for this purpose to include attorneys, certified public accountants, "enrolled agents," and "enrolled actuaries." 31 C.F.R. § 10.2 (2006).


6. Id. § 10.35(c)(2).

7. Id. § 10.35(c)(3), (b)(3).

8. Id. § 10.35(c)(2)(iii).

9. Id. § 10.35(c)(3)(ii).

10. Id. § 10.35(c)(4).
not.” Any non-marketed opinion that doesn’t express this level of confidence with respect to an issue must prominently disclose that the writer did not intend or write it to be used to avoid tax penalties, and that the taxpayer may not use it for this purpose (a “no reliance” legend). A marketed opinion must prominently disclose that the opinion was written to support the promotion or marketing of the transaction and that the taxpayer should seek advice, based on the taxpayer’s particular circumstances, from an independent tax advisor (a “consumer protection” legend). The tax opinion must disclose any compensation arrangement the practitioner has with a third party for marketing the transaction, and any referral agreement with a third party who markets such a transaction. The rules prohibit a practitioner from providing advice that is contrary to or inconsistent with a required disclosure.

The Circular 230 regulations allow tax opinions that meet certain conditions to avoid these requirements, generally or as to specific issues, by including a “no reliance” legend. Certain marketed opinions can avoid these requirements by including both a “no reliance” legend and a “consumer protection” legend. However, only limited categories of tax opinions can benefit from such exceptions. A practitioner cannot use the “no reliance” legend to avoid the Circular 230 requirements if an opinion addresses a so-called “listed transaction,” has as its principal purpose the avoidance or evasion of taxes, is a marketed opinion, or is subject to certain “conditions of confidentiality” or “contractual protection” for the taxpayer. Opinions that are excepted from these rules still must satisfy certain requirements regarding factual due diligence, and may not take into account the possibility that the IRS will not audit a tax return or raise an issue on audit, or will resolve the issue through settlement if it is raised.

The Circular 230 requirements are intended to address the significant policy and budgetary issue of practitioners’ involvement in the development, marketing and encouragement of abusive tax shelters. Professionals connected with these abusive shelters certainly have acted in-

11. Id. §§ 10.35(b)(5)(i), (c)(3)(ii), (c)(4)(ii).
12. Id. § 10.35(c)(4).
13. Id. § 10.35(e)(2).
14. Id. § 10.35(c)(1).
15. Id. § 10.35(c)(5).
16. Id. §§ 10.35(b)(4)(ii), (c)(3)(v).
17. Id. § 10.35(b)(5)(ii).
18. Listed transactions are discussed in more detail infra notes 49–55.
20. Id. § 10.37.
appropriately in some cases, but the Circular 230 requirements are in many respects an inappropriate response to these problems. The framework and prohibitions they impose prevent a lawyer from giving taxpayers a complete, informed assessment of their rights. In certain circumstances, the rules create significant ethical conflicts and deny the public legal advice. In general, they distort the lawyer’s role and erode the principles underlying legal ethics rules. The restriction of information and distortion of a lawyer’s role make the rules vulnerable to a First Amendment challenge under the doctrines of professional speech and, in the case of opinions used to market tax shelters to third parties, under a general “hearer-centered” First Amendment theory.

Part II of this Article discusses the background, scope, and requirements of the Circular 230 rules. Part III discusses the ethical rules applicable to tax opinions, compares these rules to the Circular 230 opinion standards, and concludes that the Circular 230 standards impose substantially greater requirements on practitioners than, and in certain respects conflict with, the ethical rules. Part IV discusses First Amendment case law and commentary regarding professional speech, and proposes that professional speech regulations be analyzed by a model that defines permissible regulation of professional speech by reference to the role of the profession in society and accepted professional norms. Part IV also discusses the professional speech doctrine in the context of a more general “hearer-centered” First Amendment theory, which is relevant in evaluating the restrictions on professional opinions used to market tax shelters to third parties. Part V applies the professional speech model and the “hearer-centered” theory to the Circular 230 tax opinion requirements, and concludes that the “viewpoint-neutral” standards imposed by Circular 230, while perhaps furthering the legitimate government purpose of ensuring that taxpayers not enter into tax-motivated transactions without a full understanding of the risks, are not narrowly tailored to their purpose and distort the normal functioning of the profession based on accepted usage. Part V also concludes that the “viewpoint-based” standards imposed by Circular 230 are even less justified in terms of furthering a legitimate government purpose, and more seriously distort the role of a lawyer and interfere with the exercise of professional judgment.

Finally, Part V considers what requirements the government could legitimately impose on tax opinions under the "professional speech" model and, in the case of opinions used to market tax shelters, under the "hearer-centered" theory.

II. CIRCULAR 230 OPINION RULES

A. History of the Circular 230 Opinion Standards

The Treasury Department (Treasury) has regulated lawyers and others practicing before the Department and its bureaus since before the modern income tax.23 Although Circular 230 regulated aspects of tax advice for many years, Treasury's authority to regulate the content of tax advice had been questioned.24 That question was addressed, however, by the American Jobs Creation Act of 2004,25 which amended the current authorizing statute, 31 U.S.C. Section 330, to specifically authorize Treasury to impose standards for written advice with respect to entities, plans or arrangements having a potential for tax avoidance or evasion.26

Treasury first adopted rules regulating the content and presentation of tax shelter opinions in 1984, in former Section 10.33 of Circular 230.27 Former Section 10.33 was directed primarily to the problem of heavily qualified, hypothetical, inconclusive or incorrect opinions which promoters used to market tax shelters.28 The preamble to the 1984 rules described the problem as follows:

The theory of the tax shelter promoter appears to be that the tax opinion, even if qualified or simply incorrect, may provided [sic] the investor with assurance that penalties will not be assessed . . .

Moreover, promoters also appear to hope that investors will view


26. 31 U.S.C. § 330(d) provides that "[n]othing in this section or in any other provision of law shall be construed to limit the authority of the Secretary of the Treasury to impose standards applicable to the rendering of written advice with respect to any entity, transaction plan or arrangement, or other plan or arrangement, which is of a type which the Secretary determines as having a potential for tax avoidance or evasion."


the practitioner’s willingness to provide an opinion, even when the opinion is frankly pessimistic . . . or simply does not purport to address key tax aspects, as an endorsement of the tax shelter.\textsuperscript{29}

The 1984 rules generally defined a “tax shelter” as an investment having specific federal income or excise tax savings attributes as a significant and intended feature.\textsuperscript{30} A “tax shelter opinion” was defined as “advice by a practitioner concerning the Federal tax aspects of a tax shelter either appearing or referred to in the offering materials, or used or referred to in connection with sales promotion efforts, and directed to persons other than the client who engaged the practitioner to give the advice.”\textsuperscript{31} Accordingly, a tax shelter opinion did not include “rendering advice solely to the offeror . . . so long as neither the name of the practitioner, nor the fact that a practitioner has rendered advice . . . is referred to in the offering materials or in connection with the sales promotion efforts.”\textsuperscript{32}

The 1984 rules required a practitioner who provided a tax shelter opinion to (1) identify, describe, and analyze relevant facts, (2) relate the law to the facts, (3) identify and assess material tax issues, and (4) provide an overall evaluation whether an investor will realize the material tax benefits.\textsuperscript{33}

In the preamble to the proposed former rules, Treasury emphasized that the rules would not “affect or regulate the practitioner’s relationship with individual clients,” and that it was “the use of a tax shelter opinion that the proposed rule would regulate, not the rendering of an opinion by a lawyer to his client.”\textsuperscript{34} The preamble also stated that the proposed rules were consistent with a 1982 American Bar Association opinion concerning tax shelter opinions, Formal Opinion 346.\textsuperscript{35} After final publication of Formal Opinion 346, the regulations were revised to conform more closely to the ABA opinion.\textsuperscript{36} “The legal profession,” as Treasury described the relationship, “has, by publication of ABA Opinion 346, recognized that attorneys have unique ethical responsibilities when they render tax shelter opinions to persons who are not their clients. This ac-

\textsuperscript{29} Id.
\textsuperscript{31} Id. § 10.33(c)(3).
\textsuperscript{32} Id.
\textsuperscript{33} Id. §§ 10.33(a)(1)–(3), (5).
\textsuperscript{34} Proposed Rules of the Department of the Treasury, Tax Shelters; Practice Before the Internal Revenue Service, 47 Fed. Reg. 56,144, 56,146 (Dec. 15, 1982).
\textsuperscript{35} ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 346 (1982) [hereinafter Formal Opinion 346]. Formal Opinion 346 was originally issued on June 1, 1981, but after criticism by tax practitioners, it was withdrawn and reissued in revised form on January 29, 1982.
tion by the ABA reinforces Treasury’s belief that tax practitioners must meet minimum standards of conduct with respect to tax shelter opinions.\textsuperscript{37}

On May 11, 2000, Treasury published an advance notice of proposed rulemaking that requested comments about the standards for providing tax advice and, in particular, whether the standards for tax shelter opinions should be extended to opinions not used to market tax shelters, including those used to establish a “reasonable cause and good faith” exception to accuracy-related penalties.\textsuperscript{38} The notice stated that practitioners and professional organizations had recommended a revision of Circular 230 to raise the standards for such advice.\textsuperscript{39} On January 12, 2001, after receiving public comments, Treasury proposed revisions to the rules for marketed tax shelters and new rules for all tax shelter opinions, including opinions rendered to clients, that conclude that an issue will be resolved in favor of a taxpayer at a level of confidence of “more likely than not” or higher.\textsuperscript{40} Many of the present Circular 230 opinion standards appeared in some form in the 2001 proposed rules and the proposed revisions that followed in 2003.

The 2001 proposed rules revised the definition of a “tax shelter” to incorporate the definition then found in Section 6662(d)(2)(C)(3) of the Internal Revenue Code (the Code):\textsuperscript{41}

For purposes of this subparagraph, the term “tax shelter” means—

(I) a partnership or other entity,

(II) any investment plan or arrangement, or

(III) any other plan or arrangement,

if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax.\textsuperscript{42}

As discussed in greater detail below, this technical definition of a “tax shelter” covers far more than what is typically thought of as a tax shelter.\textsuperscript{43}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{37} Id. at 6719–20.
\item \textsuperscript{38} Proposed Rules, Department of the Treasury, Regulations Governing Practice Before the Internal Revenue Service, 65 Fed. Reg. 30,375, 30,376 (May 11, 2000).
\item \textsuperscript{39} Id. at 30,375.
\item \textsuperscript{41} Currently, I.R.C. § 6662(d)(2)(C)(ii).
\item \textsuperscript{42} The 2003 proposed rules adopted a definition of “tax shelter” similar to the definition in I.R.C. § 6662(d)(2), but expanded the definition to cover all taxes imposed by the Internal Revenue Code, not just the Federal income tax.
\end{enumerate}
\end{footnotesize}
On December 20, 2004, Treasury published final rules that address, among other things, best practices for tax advisors, requirements for "covered opinions," requirements for other written advice, and procedures to ensure compliance. Treasury published corrections to the final rules on April 14, 2005, and further revisions on May 19, 2005. On December 20, 2004, Treasury published proposed rules applying the Circular 230 opinion standards to state and local bond opinions, which are excluded from the general requirements, and on June 7, 2005, the IRS issued interim guidance regarding the definition of a state or local bond opinion.

B. The Current Circular 230 Opinion Standards

There are four significant components to the current rules: (1) a definition of "covered opinions" that are subject to specific standards; (2) the specific standards, including due diligence, analysis and presentation requirements for different categories of covered opinions; (3) disclosures required to accompany covered opinions; and (4) due diligence and analysis standards for written advice other than covered opinions.

1. Covered Opinions

Opinions on certain types of transactions are per se covered opinions, with limited exceptions. These transactions include so-called "listed transactions" and transactions whose principal purpose is to avoid or evade tax ("principal purpose transactions"). In contrast, opinions on transactions in which avoiding or evading tax is merely a significant purpose ("significant purpose" transactions) are covered opinions only if they do not fit within an exception and (a) involve such conditions as confidentiality or contractual protection which suggest that the underlying transactions are tax shelters; (b) are marketed opinions; or (c) express a conclusion at a confidence level of "more likely than not" or higher (a

43. As pointed out by numerous commentators, the "significant purpose" definition covers almost any transaction that results in tax savings, including many common business transactions and well-accepted tax planning strategies. See, e.g., Michael L. Schler, Effects of Anti-Tax-Shelter Rules on Nonshelete Tax Practice, 109 TAX NOTES 915, 918 (2005).


Within these broad categories are numerous specific definitions and exceptions.

a. Opinions on Listed and Principal Purpose Transactions

i. Listed Transactions

Listed transaction opinions concern any federal tax issue arising from (1) a transaction that the IRS has identified in published guidance (i.e., listed) as a tax avoidance transaction, or (2) a transaction substantially similar to a listed transaction. A listed transaction is per se a “reportable transaction.” That is, participants in the transaction are subject to tax shelter reporting obligations, and “material advisors” to the transaction are subject to reporting and record-keeping (so-called “list maintenance”) obligations. The IRS views a “listed transaction” as a hard-core abusive tax shelter. At times, however, it can be difficult to identify a listed transaction. The definition of a listed transaction includes “substantially similar” transactions to those the IRS has listed. The tax shelter reporting rules add only that a transaction is “substantially similar” to an identified listed transaction if the two are factually similar or based on the same or similar tax strategies and are expected to have the same or similar tax consequences. There is no further guidance on the required degree of similarity; commentators have noted the difficulty of making this assessment.

ii. Principal Purpose Transactions

An opinion on a principal purpose transaction is written advice concerning any federal tax issue arising from an entity, plan, or arrangement, the principal purpose of which is the avoidance or evasion of any tax the Code imposes. In this context, a purpose is “principal” if it is more important than any other purpose. “Avoidance” and “evasion” are not defined. Treasury apparently intended that the terms be interpreted

50. Id. § 10.35(b)(2)(i)(C).
51. Id. § 10.35(b)(2)(A) (2006).
53. See id.
59. Id. § 10.35(b)(10).
consistently with their use in the “tax shelter” definition in Code Section 6662(d)(2)(C). However, neither Section 6662(d)(2)(C) nor the associated regulations define the terms. Federal tax rules generally define “evasion” as reduction of taxes through unlawful means and “avoidance” as reduction of taxes through lawful (or arguably lawful) means. Thus, the IRS may consider even lawful planning or activities to minimize taxes as “avoidance.”

The definition of a principal purpose transaction contains an exception for an entity, plan or arrangement whose principal purpose is to claim benefits “in a manner consistent with the statute and Congressional purpose.” However, there are no clear standards for determining when a claim of tax benefits is consistent with the statute and Congressional purpose, though the exception does not appear to apply where there is any meaningful uncertainty that the tax benefits in question are available. Finally, weighing the relative importance of the tax and non-tax purposes of a transaction to determine whether the principal purpose is avoidance of tax can be difficult, especially where the facts are not fully known.

iii. Covered Opinion Standards for Listed and Principal Purpose Transactions

The covered opinion standards of Section 10.35 apply with special rigor to opinions on listed and principal purpose transactions. The standards apply regardless of whether the opinion is used in marketing or the level of confidence it expresses. Section 10.35 provides no opportunity to exclude such an opinion from coverage by adding a “no reliance” legend (“legending out”).

The justification for this rigor cannot be to regulate opinions used for marketing purposes, as was the case with former Section 10.33, because the present Section 10.35 covers more than marketed opinions. Nor

60. See Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts ¶ 4.3.2 (1999).
61. But see Bernard Wolfman, James P. Holden & Kenneth L. Harris, Standards of Tax Practice § 208.2 (6th ed. 2004) (arguing, on the basis of the legislative history of Taxpayer Relief Act of 1997 and the purpose of the tax shelter definition under Code Section 6662, that not every corporate decision involving reduction of tax liability is avoidance).
64. In this regard, the covered opinion rules differ from the penalty and tax shelter reporting and document retention rules. For the latter purpose, the determination of whether a tax return position falls within the rules generally is made after the transaction has been completed.
65. As discussed below, there is an exception for “negative advice,” but it applies only where the opinion does not reach a conclusion favorable to the taxpayer at any confidence level.
can the justification be to regulate opinions used to avoid penalties. A "no reliance" legend could satisfy such needs, but the rule does not allow "legending out." Further, the rule covers opinions that could not be, or in fact are not, used for penalty protection purposes. Treasury apparently is of the view that listed and principal purpose transactions threaten the tax system, and therefore should be subject to strictures similar to those for marketed opinions.

It is true that taxpayers have used many listed and principal purpose transactions to avoid taxes improperly or evade taxes. The propagation of such transactions undoubtedly threatens the tax system by creating false justifications for taxpayers that wish to misreport their tax liabilities. However, the mere fact that a transaction is a listed or principal purpose transaction does not necessarily mean that it reduces taxes improperly. Few court cases have adjudicated the merits of listed transactions, but the courts have upheld any number of transactions that would most likely qualify as principal purpose transactions. If courts rule that a transaction provides valid tax savings, it is hard to call it a threat to the tax system; if Congress and Treasury conclude otherwise, they have authority to change the applicable statutes and regulations.

Even if no court has ruled on the validity of a given listed or principal purpose transaction, all listed transactions, and many principal purpose transactions, are so-called "reportable transactions," which must be reported to the IRS. If the IRS successfully challenges a transaction, it can impose penalties under Code Section 6662A unless the taxpayer can show, under very stringent standards, reasonable cause for the position and good faith. While challenging such transactions places administrative burdens on the IRS and subjects the agency to litigation risks, such costs are inevitable in regulating a complex federal system subject to the ultimate interpretive authority of the courts.

Even assuming, arguendo, that listed and principal purpose transactions are an inherent threat to the tax system, it is not obvious that the threat justifies requiring a comprehensive opinion in every case. A practitioner normally will have a duty to alert a client that such transactions

70. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
have risks, including a fight with the IRS, but these risks can be identified without a comprehensive opinion.

Applying the covered opinion standards to every piece of written advice on a listed or principal purpose transaction will increase the cost of the practitioner’s advice. Also, some practitioners may be reluctant to give any written advice, for fear of inadvertently violating the requirements. Treasury may view such consequences as salutary means of discouraging listed and principal purpose transactions. However, discouraging lawyers’ advice is not an appropriate way to discourage such transactions, whose validity depends on the facts of each case.

b. Opinions on Significant Purpose Transactions

Opinions on significant purpose transactions are written advice concerning any federal tax issue arising from an entity, plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Code, if the written advice is (1) subject to “conditions of confidentiality” or “contractual protection”; (2) a “reliance opinion”; or (3) a “marketed opinion.” The rules do not provide standards for determining whether a significant purpose transaction exists. However, the history, drafting, and purpose of the rules clearly indicate that they incorporate the standards used in Code Section 6662(d)(2)(C) to define a tax shelter.

i. Opinions Subject to “Conditions of Confidentiality” or “Contractual Protection”

In general, an opinion is considered subject to conditions of confidentiality if the practitioner seeks to impose restrictions on the disclosure of the tax treatment or tax structure of the transaction for the purpose of maintaining the confidentiality of the practitioner’s tax strategies. An opinion is considered subject to contractual protection if the taxpayer is entitled to a refund of fees if all or part of the intended tax consequences addressed in the opinion are not sustained, or if the fees are contingent on the taxpayer’s realization of tax benefits from the transaction.

74. Id. § 10.35(b)(7). See also Treas. Reg. § 1.6011-4(b)(3)-(4) (substantially similar language).
Opinions on significant purpose transactions that are given under these circumstances are treated as per se tax shelter opinions and subject to the opinion standards in Section 10.35, regardless of whether they are used in marketing and regardless of their level of confidence. Presumably, the rationale for such rigorous application of the rule is that the tax practitioner should be viewed under these circumstances as promoting the significant purpose transaction, just as with a marketed opinion. However, these types of opinions do not receive fully parallel treatment. "Legending out" is allowed for marketed opinions, but not for "confidence" and "contractual protection" opinions; a limited scope opinion, as discussed below, is allowed for "confidence" and "contractual protection" opinions but not for marketed opinions. The reason for these differences is not obvious.

ii. Marketed Opinions

An opinion "is a marketed opinion if the practitioner knows or has reason to know that the written advice will be used or referred to by a person other than the practitioner (or a person associated with the practitioner's firm) in . . . marketing . . . an entity, investment plan or arrangement to one or more taxpayers." A practitioner is permitted to exclude an opinion (other than a listed transaction or principal purpose opinion) from this category by including a "no reliance" legend and a "consumer protection" legend. A marketed opinion that is not excluded nevertheless must include a "consumer protection" legend.

One problem with the rules lies in their lack of specific guidance on what constitutes the marketing of an entity, plan or arrangement. The 2001 proposed rules included the statement that it is irrelevant whether such activities are conducted publicly or privately. However, there has been no guidance as to whether a person may be viewed as a promoter even if not acting in the customary role of a shelter promoter. In many situations, a client engages one practitioner to provide advice regarding the tax treatment of a significant purpose transaction and another professional advisor for other aspects of the transaction. If the tax practitioner knows that the client is sharing the practitioner's opinion with the other advisor, and the other advisor refers to the tax opinion in recommending

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76. Id. § 10.35(b)(5).
77. Id. § 10.35(c)(3)(v)(A)(2).
78. Id. § 10.35(b)(5)(i).
79. Id. § 10.35(b)(5)(ii).
80. Id. § 10.35(e)(2).
that the client engage in the transaction, the tax opinion could be treated as a marketed opinion that must include the legend for marketed opinions. Yet, in this circumstance, the part of the legend stating that the opinion was written to support the marketing of the transaction will not be correct,82 the statement that the taxpayer should seek advice from an independent tax advisor makes no sense, and the statement that the client may not rely on the opinion to avoid penalties may not be correct, particularly if the opinion reaches conclusions at a "more likely than not" level of confidence.

These illogical results strongly suggest that the definition of a marketed opinion should be limited to opinions (or parts of opinions) that address the tax treatment of a person other than the practitioner's client. The absence of such a limitation may reflect a concern that the limitation would allow practitioners working with promoters to avoid the rules by rendering opinions to the promoter's clients and claiming that such persons are clients of the practitioner. However, even assuming that a valid attorney-client relationship exists,83 this concern could have been addressed more narrowly by defining a marketed opinion to include an opinion on a transaction rendered by a practitioner to a client for the purpose of facilitating the marketing of the transaction by a third party.

Another problem with the rules lies in their ambiguous definition of a marketed transaction. Consider the common situation in which a client is negotiating an acquisition and asks a practitioner for written advice regarding the tax treatment of the transaction to the client's counterparty. If the practitioner knows or has reason to know that the client will use or refer to the advice in connection with the negotiation, the opinion would appear to constitute a marketed opinion, unless there is an election to "legend out" the opinion.

One could avoid such situations by distinguishing opinions directed only to the client and not used in marketing materials from opinions directed to a third party or incorporated in marketing materials provided to the third party. It is difficult to see why the former should be treated as a marketed opinion.84

Presumably, Treasury had two reasons for not creating such an exception. First, there may have been a concern, even where advice is ad-

82. See Model Code of Prof'l Responsibility DR 5-104(A) (1980) (a "lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure"); Model Rules of Prof'l Conduct R. 1.8(a) (1983).
dressed to a client, that the client may show the practitioner’s written advice to a third party and encourage the third party to rely on it. However, this concern could have been addressed by requiring a prominent disclosure on the advice to the effect that it may not be relied upon by any third party. Second, there may have been a concern about situations where a practitioner’s advice is used to develop a marketed transaction even where the practitioner’s opinion was not shown or described to the third party, the practitioner was not directly involved in preparing the marketing materials, and the marketing materials actually furnished to potential purchasers describe the tax strategy and expected tax consequences only in very general terms and counsel the recipient to seek the advice of an independent tax advisor. In this case, the practitioner’s opinion is covered by the Circular 230 standards (absent a “legending out”) as a mechanism for regulating the development and marketing of tax shelters, and not because the opinion may be relied upon by any third party taxpayer; in effect, Treasury uses professional standards to create an obligation on the part of a practitioner not to participate in the development of tax shelters unless the practitioner can comply with the requirements for marketed opinions.

iii. Reliance Opinions

An opinion is a “reliance opinion” if it concludes at a confidence level of “more likely than not” (a greater-than-fifty-percent likelihood) that one or more significant federal tax issues would be resolved in the taxpayer’s favor. A practitioner can exclude such an opinion (on other than a listed or principal purpose transaction) by including a “no reliance” legend. A federal tax issue is “significant” if the IRS has a reasonable basis for a successful challenge and the resolution of the issue could have a significant impact, whether beneficial or adverse under any reasonably foreseeable circumstance, on the overall federal tax treatment of the transactions or matters addressed in the opinion.

The “more likely than not” standard of Section 10.35 is based on the standards in Code Section 6664 for opinions that may be relied upon to establish reasonable cause and good faith for avoiding the accuracy-related penalties with respect to corporate tax shelters. However, there are circumstances when a taxpayer cannot rely upon an opinion for that purpose, even if it reaches a level of confidence of more likely than not.

86. Id. § 10.35(b)(4)(ii).
87. Id. § 10.35(b)(3).
For example, a taxpayer cannot rely on it to avoid penalties for reportable transactions under Code Section 6662A if the practitioner rendering the opinion is a "disqualified tax advisor."89 Under such circumstances, the opinion should not have to meet the standards for a reliance opinion.

A practitioner may "legend out" a reliance opinion by including a "no reliance" legend.90 However, that legend is inaccurate in a number of ways. Treasury stated in the 2004 preamble to Section 10.35 that it would amend Treasury Regulations Section 1.6664-4 to clarify that taxpayers may not rely on opinions with such a legend to establish reasonable cause and good faith.91 However, no such amendment has been promulgated;92 no regulation prevents a client from relying on an opinion for this purpose, even if it contains a "no reliance" legend. Even if an opinion does not meet the standards for avoiding penalties under Code Section 6664, a taxpayer may be able to rely on it as a defense against other penalties, such as the penalty under Section 6662(b)(1) for negligence or disregard of rules or regulations93 or the penalty under Section 6663 for fraud.94

c. Excluded Opinions

Section 10.35 contains exceptions for opinions that otherwise would be defined as covered opinions under the foregoing rules. These exceptions include (1) preliminary advice if the practitioner is reasonably expected to later provide written advice satisfying the requirements of Section 10.35; (2) opinions on retirement plan qualification, state or local bond opinions, and opinions required to be filed with the Securities and

92. The absence of an amended regulation may reflect the fact that, because the Section 10.35 standards are much more detailed than those of Code Section 6664 and Treas. Reg. Section 1.6664-4(c), an opinion could meet the general standards of Section 6664 but not meet certain requirements of Section 10.35.
93. For this purpose, "negligence" includes any failure to make a reasonable attempt to comply with the tax rules, and "disregard" means disregard that is careless, reckless or intentional. See Treas. Reg. § 1.6662-3(b) (2003). See also WOLFMAN ET AL., supra note 61, at § 203.3.1.1 ("an incorrect decision regarding an unsettled question of law does not constitute negligence, provided the taxpayer's interpretation is not clearly untenable and is held in good faith"), citing United Title Ins. Co. v. Comm'r, 55 T.C.M. (CCH) 34, 53 (1988).
94. WOLFMAN ET AL., supra note 61, at § 202.3.2, citing Jemison v. Comm'r, 45 F.2d 4 (5th Cir. 1930); Whyte v. Comm'r, 52 T.C.M. (CCH) 677, aff'd, 852 F.2d 306 (7th Cir. 1988); Noël B. Cunningham & James R. Repetti, Textualism and Tax Shelters, 24 VA. TAX REV. 1, 30 (2004).
Exchange Commission, provided the opinion does not concern a listed or principal purpose transaction; (3) opinions given after a tax return is filed reflecting the tax benefits of a transaction; (4) so-called “negative advice” concluding that a taxpayer will not prevail on an issue, at any level of confidence; and (5) opinions rendered by a practitioner to his or her employer about the employer’s tax liabilities. The preliminary advice exception has little value to the practitioner providing initial planning advice, as this practitioner cannot predict whether the planned transaction will proceed, whether the client will continue to retain the practitioner, and what subsequent advice the client ultimately will request.

2. Standards for Covered Opinions

The current covered opinion standards, like the prior rules, impose requirements for factual due diligence and legal analysis. However, the covered opinion requirements for legal analysis differ from the prior rules in many respects, including the required scope of the opinion and exceptions to the required scope, required levels of confidence regarding conclusions, and limitations on the content of the analysis and advice.

a. Due Diligence Standards

Section 10.35 requires a practitioner to use reasonable efforts to determine relevant present and future facts and events, and prohibits reliance on unreasonable assumptions or representations. A factual representation is unreasonable if, among other things, the practitioner knows or should know that it is incorrect or incomplete. Section 10.37 applies similar standards to non-covered written advice. Section 10.35 also requires a practitioner to identify and consider all facts identified as relevant, and to identify in separate sections all factual assumptions and all factual representations, statements, or findings relied upon by the practitioner.

Section 10.35 specifically addresses assumptions and representations regarding the business purpose of a transaction: it is unreasonable for a practitioner to assume that a transaction has a business purpose or

95. Treasury has issued proposed regulations regarding State and local bond opinions, and the IRS has issued interim guidance regarding the definition of a State or local bond opinion for this purpose. See supra notes 47–48.
97. Id. § 10.35(c).
98. Id. § 10.35(c)(1).
99. Id. § 10.35(c)(1)(iii).
100. See id. § 10.37(a).
101. Id. § 10.35(c)(1)(i).
has the potential for nontax profits. \(^{102}\) The practitioner may not rely on a business purpose representation unless it specifically describes the purpose, or if the practitioner knows or should know that it is incorrect or incomplete. \(^{103}\) This requirement addresses strategies that fit within the literal terms of the Code and regulations but would not succeed without a valid business purpose.

**b. Standards of Legal Analysis**

Section 10.35 generally requires a covered opinion to (1) relate the applicable law (including judicial doctrines) to the relevant facts; (2) consider all significant federal tax issues; (3) provide a conclusion as to the likelihood that the taxpayer will prevail on each issue, and the facts and analysis supporting the conclusion; and (4) provide an overall conclusion as to the likelihood that the federal tax treatment of the transaction is proper, and the reasons for that conclusion. \(^{104}\) If the practitioner cannot reach an overall conclusion or a conclusion on one or more issues, the opinion must so state, and must include the reasons. \(^{105}\)

**i. Scope of Issues that Must be Addressed**

Unless a covered opinion qualifies under an exception for limited scope opinions or opinions that rely on the opinion of another practitioner, it must address all "significant Federal tax issues." \(^{106}\) It may not assume that a significant federal tax issue will be resolved in the taxpayer’s favor. \(^{107}\) A federal tax issue is significant for this purpose if it meets a materiality threshold, the IRS has a reasonable basis for a successful challenge, and the resolution could have a significant impact, whether beneficial or adverse, under any reasonably foreseeable circumstance on the overall federal tax treatment of the transaction. \(^{108}\)

The reasonable basis standard in Section 10.35 clearly is intended to reflect the standard in Code Section 6662(d)(2)(B)(ii), which permits a taxpayer to avoid a substantial underpayment penalty if the taxpayer has a reasonable basis for a position that is not associated with a tax shelter and discloses the position on its tax return. \(^{109}\) Under the applicable Treasury Regulations, "reasonable basis" is a relatively high standard of

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102. *Id.* § 10.35(e)(1)(ii).
103. *Id.*
104. *Id.* § 10.35(e)(2)–(4).
105. *Id.* § 10.35(e)(4)(i).
106. *Id.* § 10.35(e)(4)(ii).
107. *Id.* § 10.35(e)(3)(ii).
108. *Id.* § 10.35(b)(3).
tax reporting, significantly higher than "not frivolous" or "not patently improper."\textsuperscript{110} The reasonable basis standard is not satisfied by a merely arguable return position or a merely colorable claim.\textsuperscript{111} In contrast, former Section 10.33 required a practitioner to consider only material federal tax issues involving a "reasonable possibility of a challenge by the IRS."\textsuperscript{112} This standard allowed a practitioner to exercise professional judgment in distinguishing between those issues that raised a possibility of challenge, and thus required discussion, and those that did not.

In contrast, the reasonable basis standard of Section 10.35 does not allow for such judgment. The standard is reasonably workable for defining the minimum plausibility of a disclosed tax return position to avoid penalties. However, applying the standard to define the entire range of issues to be considered in an opinion requires the practitioner to identify not merely the positions that the IRS would most likely raise but rather all positions that the IRS might take that are more than merely arguable, colorable, frivolous or patently improper.\textsuperscript{113} The practitioner must do so even if the position has a low likelihood of success or the IRS is unlikely to raise the issue for policy or other reasons.\textsuperscript{114}

The preambles to the new rules do not discuss why "reasonable basis" replaced "reasonable possibility of challenge." Treasury may have thought that practitioners unduly discount the strength of IRS positions or rely too heavily on the chances that an issue will not be raised on audit or will be settled. However, it is hard to see why the goal of informing investors about important issues is furthered by requiring that they also be informed about unimportant ones. Alternatively, Treasury may have chosen the "reasonable basis" standard simply to discourage tax shelters, by requiring practitioners to present potential investors with a "parade of horribles" or increasing the cost of tax shelter opinions. Such an approach assumes that tax shelters are per se illegitimate and should be discouraged. However, the definition of a covered opinion for purposes of Section 10.35 depends not on the merits of the relevant transaction but on whether the transaction and the opinion fall within formal criteria indicating the existence of a tax shelter. Finally, Treasury may have feared that a practitioner would render a favorable conclusion on certain issues,

\textsuperscript{110} Treas. Reg. § 1.6662-3(b)(3) (2003).
\textsuperscript{111} Id. See also H.R. REP. NO. 103-213, at 669 (1993) (Conf. Rep.) ("The conferees intend that 'reasonable basis' be a relatively high standard of tax reporting, that is, significantly higher than 'not patently improper.' This standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim"); H.R. REP. NO. 103-111, at 754 (1993) (similar).
\textsuperscript{114} See Boston Bar Ass'n, COMMENTS ON PROPOSED AMENDMENTS TO CIRCULAR 230 4–6 (Mar. 25, 2005), reprinted in Tax Notes Today (Apr. 6, 2005).
leading investors to think they can rely on the opinion to avoid penalties, while failing altogether to address issues that the IRS might in fact raise. However, such a concern could have been addressed by requiring opinions to state that the taxpayer may not rely on them to avoid penalties in respect of issues that are not addressed.

ii. Exceptions for Reliance on Opinions of Others and Limited Scope Opinions

Section 10.35 contains two exceptions to the general rule that a covered opinion must address all significant federal tax issues. The first exception is for an opinion in which the practitioner relies on the opinion of another practitioner with respect to a significant federal tax issue.115 The relying practitioner’s opinion must identify the other opinion and set forth its conclusions, and must conclude that the combined analysis and overall conclusions of the opinions, taken as a whole, satisfy the requirements of Section 10.35.116 This exception merely allows different practitioners to split the responsibility for preparing opinions that together satisfy the requirements of Section 10.35. Although the exception may be useful in practice, it has little importance in analyzing the framework of the rules.

The second exception, for limited scope opinions that address less than all significant federal tax issues in transactions,117 has greater significance. Such opinions are permitted provided that (1) the practitioner and the taxpayer agree that the scope of the opinion, and the taxpayer’s reliance on it for penalty purposes, are limited to the issues addressed in the opinion; (2) the opinion does not relate to a listed or principal purpose transaction and is not a marketed opinion; and (3) the opinion discloses that it (A) is limited to the federal tax issues addressed, (B) expresses no opinion on other issues that could affect the tax treatment of the transaction, and (C) may not be used by the taxpayer to avoid penalties with respect to such other issues.118 The practitioner is not required to identify the federal tax issues that the opinion does not address.

Former Section 10.33 addressed only opinions used to market tax shelters to third parties.119 It was thus reasonable to require disclosure and analysis of all important federal tax issues associated with the transaction. Accordingly, the former rule contained no provision for limited scope opinions. In contrast, present Section 10.35 also applies to advice

116. Id. § 10.35(d)(1).
117. Id. § 10.35(c)(3)(v).
118. Id. § 10.35(c)(3)(v)(A), (c)(4).
that is addressed to a client concerning the client’s tax treatment. There is no obvious reason under this circumstance to prohibit a limited scope opinion, yet Section 10.35 will not allow such an opinion if it concerns a listed or principal purpose transaction, even if the opinion is not used for marketing to third parties and even with a “no reliance” legend. Furthermore, even if addressed only to the practitioner’s client concerning the client’s tax treatment, Section 10.35 will not allow an opinion if it is referred to by a third party in marketing, promoting or recommending the transaction because this kind of opinion falls within the technical definition of a marketed opinion. There is no clear reason why any of these limitations should apply.

The limited scope opinion also raises issues stemming from the fact that the practitioner and the taxpayer must agree to limits on the taxpayer’s reliance on the opinion for penalty purposes. It is not clear that such an agreement is binding on the taxpayer in its dealings with the IRS. If it is, the practitioner is placed in the position of negotiating directly with the client over the scope of the client’s rights.

iii. Required Level of Confidence Regarding Conclusions

If a covered opinion is not a marketed opinion, Section 10.35 does not require conclusions on specific issues or the overall treatment of the transaction at a minimum level of confidence. However, if an opinion fails to reach a favorable conclusion on one or more significant federal tax issues at a “more likely than not” level, it must include a “no reliance” legend with respect to those issues. Even if the opinion is not subject to the foregoing requirements, it may remain subject to other requirements of Circular 230, including those of Section 10.34, which imposes standards for advice on tax return positions. Under Section 10.34, a practitioner may not advise a client to take a position on a tax return unless (1) the practitioner determines that the position has a realistic possibility of being sustained on the merits, or (2) the position is not frivolous and the practitioner advises the client of any opportunity to avoid penalties through disclosure. A position is considered to have a realis-

122. If the reason for requiring such an agreement was to ensure that the taxpayer has given “informed consent” to the limited availability of the opinion for penalty purposes, that could have been achieved more directly.
124. Id. § 10.35(e)(4).
125. Id. § 10.34(a). A position is frivolous if it is “patently improper.” Id. § 10.34(d)(2).
tic possibility of being sustained on its merits if the position has approximately a one-in-three, or greater, likelihood of being sustained.\(^{126}\)

In contrast, if a covered opinion is a marketed opinion, it must conclude that the taxpayer will prevail on each significant federal tax issue, and that the federal tax treatment of the transaction is proper, at a confidence level of at least "more likely than not."\(^{127}\) A practitioner who is unable to reach such conclusions may not provide the marketed opinion. However, the practitioner may provide written advice under the "legending out" exception by including a "no reliance" legend and a "consumer protection" legend.\(^{128}\) The "legending out" exception does not apply to written advice regarding listed or principal purpose transactions.

The requirement that a marketed opinion reach "more likely than not" conclusions reflects Treasury's view that the "reasonable basis" tax shelter opinions permitted under former Section 10.33 were of questionable legitimacy.\(^{129}\) However, the requirement does not merely prohibit favorable opinions where the practitioner in fact believes that tax benefits are unlikely to be available. A practitioner may be unable to provide a "more likely than not" opinion concerning a position because of the absence of published guidance; even if the position is as likely as any other to succeed, Section 10.35 would prevent the practitioner from rendering a marketed opinion.

Alternatively, a practitioner may be able to reach a "more likely than not" conclusion regarding the primary tax benefits of a transaction but not regarding some lesser benefit. If the secondary benefit would have a "significant" impact on the overall tax treatment of the transaction, the practitioner may not render a marketed opinion unless he concludes that the benefit would not be allowable at any confidence level (even at a "not frivolous" level). If the practitioner concludes that the secondary benefit probably is not allowable but that the taxpayer would have a more than frivolous case for claiming it, the practitioner would not qualify for the "negative advice" exception.

In the case of a significant purpose transaction, the opinion may qualify for the "legending out" exception.\(^{130}\) However, the "legending out" exception is not available for a listed or principal purpose transaction. If the purpose of the "more likely than not" rules is to prevent practitioners from encouraging positions that they believe unlikely to be al-

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126. *Id.* § 10.34(d)(1).
127. *Id.* § 10.35(c)(3)(iv).
128. *Id.* § 10.35(b)(5)(ii).
lowable, there is little reason to treat listed and principal purpose transactions differently from significant purpose transactions. The absence of a "legending out" exception for listed and principal purpose transactions may reflect a view that such transactions simply should not be marketed if there is substantial uncertainty about the tax benefits. Prohibiting practitioners from rendering marketed opinions about such transactions will certainly make it difficult, if not impossible, to market them. However, this motivation raises the question of the purpose of the Circular 230 opinion requirements: are they meant to be professional standards, or are they being used as a tool for the regulation of otherwise permissible tax shelter activity?

iv. Limitations on Content of Analysis and Advice

A covered opinion must not contain internally inconsistent legal analyses or conclusions. Further, the practitioner may not provide advice to any person that is contrary to or inconsistent with a disclosure required under Section 10.35. The rules do not define "internally inconsistent" analyses or conclusions. Presumably, the term describes taking an analytical position to reach a favorable conclusion on one issue and a contrary analytical position to reach a favorable conclusion on another issue. In many circumstances, however, there is a question whether different provisions of the Code and regulations embody the same concept. For example, the practitioner may conclude that the same term should be defined differently for purposes of different provisions. If it ultimately is determined that the same definition is used in provisions, does the opinion violate the requirements of Section 10.35?

An opinion will often adopt alternative analyses, usually because a particular point cannot be resolved with a sufficient level of certainty. If the outcome of one alternative analysis as opposed to another could have a significant impact on the overall tax treatment of the transaction, the issue will be a significant federal tax issue. If pursuing the alternative analyses leads the opinion to differing conclusions, are those analyses and conclusions "internally inconsistent?"134

131. Id. § 10.35(c)(2)(iii).
132. Id. § 10.35(e)(5).
133. See, e.g., Black & Decker Corp. v. United States, 436 F.3d 431, 438–39 (4th Cir. 2006) (concluding that the term "money received" has a different meaning in Code Section 358(a)(1) from its meaning in Code Section 357(b)(1)).
134. Alternative analyses also present problems for the requirement that a marketed opinion reach a favorable conclusion at a confidence level of at least "more likely than not." At most, the opinion can conclude that only one of the alternative analyses and resulting positions will "more likely than not" be the correct resolution. Is analysis of the other alternatives prohibited in a mar-
Prohibiting a practitioner from providing any advice inconsistent with a required disclosure raises similar issues. Consider the "no reliance" legend: a practitioner would appear to be prohibited from advising the client that this legend is not relevant to the penalty for negligence or fraud, even if, in fact, it is. In the case of a marketed opinion addressed to a client, what is the practitioner to say if the client expresses puzzlement about the disclosures that the opinion was written to support the promotion or marketing of the relevant transaction, and that the client should seek advice based on the client's particular circumstances from an independent tax advisor?

One of the most serious limitations on the content of a covered opinion or other written advice is that the practitioner must not take into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised. The first two parts of the requirement were intended to prevent practitioners from relying on the "audit lottery" in reaching conclusions about the tax treatment of transactions. Such a prohibition is clearly sound and congruent with the duties of the practitioner to the client and the tax system. However, once an issue is identified in an audit, a practitioner should be permitted to analyze the likelihood that the IRS will pursue the issue, or that the issue will be settled if raised. An essential role of a tax advisor is to identify those issues that are most likely to be raised and to assess the various ways that such issues may be resolved. This is especially true in complex transactions: the IRS might hypothetically raise a large number of tax issues, whereas in practice, only the strongest challenges would emerge in any IRS audit or court proceeding.

The IRS frequently issues revenue procedures stating that it will not challenge positions taken by taxpayers under specific circumstances. There are many other cases in which the IRS reaches conclusions in unsettled areas. In some such areas there may be no authority other than published, private, or internal rulings or other IRS pronouncements. In other areas, there are applicable court decisions, but the IRS has stated that it will not follow such decisions. Under the Circular 230 rules, a practitioner may not rely solely on such statements in assessing the mer-

keted opinion? Must a covered opinion that is not a marketed opinion contain a "no reliance" disclosure if it analyses other alternatives?


137. See, e.g., Rev. Proc. 2000-37, 2000-40 I.R.B. 308 (qualifying certain property for like-kind exchange treatment if it is held under arrangements meeting certain requirements).
its of a position. The practitioner would instead be required to assume that the IRS will challenge the position and assess whether a court would uphold the revenue procedure or other administrative pronouncement as a correct statement of the tax law or find the pronouncement binding on the IRS. Although such analysis may on occasion be appropriate, requiring it in all circumstances eliminates the certainty and simplicity that such revenue procedures and other IRS guidance are intended to create.

In conclusion, the current Circular 230 opinion standards represent a substantial extension of the regulation of tax advice. The standards define covered opinions broadly and provide limited exceptions, including exceptions based on legends that may be inaccurate or inappropriate. Covered opinions are subject to rigid standards generally requiring a comprehensive review and analysis of the applicable facts and legal issues, and the overall treatment of the transaction. The standards also impose limitations on the methods of analysis that may be used in the opinion, required levels of confidence for certain types of advice, and required disclosures that the lawyer may not contradict. As discussed in Part III, these requirements diverge significantly from the rules of legal ethics and pronouncements regarding tax opinions.

III. Ethical Rules Regarding Tax Shelter Opinions

One of the most striking features of the Circular 230 covered opinion standards is the standards' divergence from, and in certain respects their conflict with, the rules of legal ethics and pronouncements regarding tax opinions. There is a broad body of legal ethics pronouncements and rules affecting tax opinions, including (A) ABA Formal Opinion 346, which provides standards for marketed tax shelter opinions; (B) ABA Formal Opinion 85-352, which provides standards for advice regarding uncertain tax return positions; (C) draft opinion standards proposed by the Committee on Standards of Tax Practice of the ABA Section of Taxation; and (D) general principles of legal ethics set forth in the Model Code, the Model Rules and related commentary.

139. The following discussion is based largely on the Model Code, the Model Rules and formal opinions of the ABA Standing Committee on Ethics and Professional Responsibility. Though nearly all States have adopted some version of the Model Code or the Model Rules, neither codification sets forth binding ethical standards. The ethical standards of the relevant jurisdiction must also be consulted. See WOLFMAN ET AL., supra note 61, § 103. Likewise, ethics opinions represent a source of interpretive guidance but are generally not binding on the courts. Id. § 103.1.2.
A. Ethical Guidance Regarding Marketed Tax Shelter Opinions

ABA Formal Opinion 346 provides guidance regarding tax opinions used to market tax shelters to third parties, setting forth “disciplinary standards” and “ethical considerations.”\textsuperscript{140} The “disciplinary standards” prohibit, among other things, the rendering of a false opinion, including one that is intentionally or recklessly misleading or that is based on facts that the lawyer knows are untrue.\textsuperscript{141}

The “ethical considerations” in Formal Opinion 346 reflect a “body of principles,” but do not “constitut[e] absolute requirements, the violation of which may result in sanctions.”\textsuperscript{142} The ethical considerations require a lawyer, among other things, to (a) obtain access to relevant information, inquire as to the relevant facts and be satisfied that the promoter’s representations regarding the venture are clearly identified, reasonable and complete; (b) relate the law to the facts and identify facts that are assumed; (c) consider all material tax issues and ensure that all issues having a reasonable possibility of challenge by the IRS are addressed in the offering materials; (d) provide, where possible, an opinion on the likely outcome of such issues; (e) provide, where possible, an overall evaluation whether the tax benefits in the aggregate are likely to be realized; and (f) ensure that the offering materials correctly describe the tax shelter opinion.\textsuperscript{143}

Formal Opinion 346 contains a narrow definition of a “tax shelter,” but reasonably should apply to any marketed investment, plan or arrangement designed to reduce federal taxes.\textsuperscript{144} The Opinion limits the definition of “tax shelter opinion” to broadly marketed opinions and tax

\textsuperscript{140} Formal Opinion 346, \emph{supra} note 35.
\textsuperscript{141} \emph{Id.}
\textsuperscript{142} \emph{Id.}
\textsuperscript{143} \emph{Id.}
\textsuperscript{144} Formal Opinion 346 defines a tax shelter as follows:

[A]n investment which has as a significant feature for federal income or excise tax purposes either or both of the following attributes: (1) deductions in excess of income from the investment being available in any year to reduce income from other sources in that year, and (2) credits in excess of the tax attributable to the income from the investment being available in any year to offset taxes on income from other sources in that year. Excluded from the term are investments such as, but not limited to, the following: municipal bonds; annuities; family trusts; qualified retirement plans; individual retirement accounts; stock option plans; securities issued in a corporate reorganization; mineral development ventures, if the only tax benefit would be percentage depletion; and real estate where it is anticipated that deductions are unlikely to exceed gross income from the investment in any year, and that any tax credits are unlikely to exceed the tax on the income from that source in any year.

\emph{Id.} at n.1.
in marketing materials. Accordingly, it excludes the following types of advice:

- Advice rendered solely to the offeror, so long as neither the name of the lawyer nor the fact that a lawyer has rendered tax advice is referenced in the offering materials or in sales promotion efforts;

- Cases in which a small group of investors negotiates the transaction directly with the offeror of securities and depends solely on other advisors for tax advice.

Apart from the differences in the definitions of tax shelter and tax shelter opinion, the principal differences between Formal Opinion 346 and Section 10.35 concern the scope of the issues that a tax shelter opinion must address and the level of confidence that the opinion must reach.

Under Formal Opinion 346, a lawyer should consider all "material tax issues" or ensure that they are considered by another competent professional. The opinion should address each material tax issue having a reasonable possibility of an IRS challenge. For this purpose, a "material" tax issue is an issue having a significant effect in sheltering from taxes. The "reasonable possibility of an IRS challenge" standard in Formal Opinion 346 permits the lawyer to exercise substantially greater judgment than the "reasonable basis" standard in Section 10.35.

Formal Opinion 346 requires a tax shelter opinion to state the probable outcome of each material tax issue, where possible. Also, the tax disclosure in the offering materials should include an overall evaluation as to whether the aggregate tax benefits are likely to be realized. The lawyer should state whether the benefits probably will or probably will not be realized or whether the probabilities are evenly divided. If such a judgment is impossible, the lawyer should explain why and assure full disclosure in the offering materials of the assumptions and risks.

145. Formal Opinion 346 generally defines a tax shelter opinion as follows:
[Advice by a lawyer concerning the federal tax law applicable to a tax shelter if the advice is referred to either in offering materials or in connection with sales promotion efforts directed to persons other than the client that engages the lawyer to give the advice. The definition includes the tax aspects ... portion of the offering materials prepared by the lawyer whether or not a separate opinion letter is issued.

Formal Opinion 346, supra note 35.

146. Id.
147. Id.
148. Id.
149. Id.
150. Id.
151. Id.
152. Id.
153. Id.
mal Opinion 346 does not set forth a minimum level of confidence for a tax shelter opinion. However, if it reaches a negative conclusion, that conclusion must be clearly and prominently noted in the offering materials. Thus, Formal Opinion 346 stands in contrast to the requirement in Section 10.35 that a marketed covered opinion provide "more likely than not" conclusions on each significant federal tax issue and the overall tax treatment of the transaction.

B. Ethical Guidance Regarding Opinions on Tax Return Positions

ABA Formal Opinion 85-352 sets forth standards for advice regarding uncertain tax return positions. It provides that a lawyer may recommend positions favorable to a client if the lawyer has a good faith belief that the positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law. Good faith requires some realistic possibility of success if the position is litigated, but may exist even if the lawyer believes that the client's position probably will not prevail. Formal Opinion 85-352 also states the following duties of a lawyer in rendering tax advice:

- The lawyer should counsel the client as to whether a court is likely to sustain the position.
- The lawyer should counsel the client regarding the potential penalties and other legal consequences, including a judgment as to whether the position has sufficient merit to avoid penalties with or without disclosure.
- A lawyer must not mislead the IRS deliberately, either by misstatements, silence, or permitting the client to mislead.

A Special Task Force established by the ABA Tax Section issued a report (the "Special Task Force Report") concluding that Formal Opinion 85-352 applies both to advice rendered in the preparation of a tax return and to other advice involving tax return positions, including tax advice

154. See id. See also WOLFMAN ET AL., supra note 61, § 503.4.2.6 (stating that "it would be difficult to conclude that a practitioner who provides an adequately disclosed negative opinion violated a professional standard").

155. Formal Opinion 346, supra note 35. Formal Opinion 346 also notes that a tax shelter opinion may question the validity of a revenue ruling or the reasoning of a lower court opinion. Id. However, there must be a complete explanation of such questioning, including an assessment of what position the IRS is likely to take on the issue and, if applicable, a summary of why this position is wrong, and a statement of the risks of an adversarial proceeding. Id.


157. Id.

158. Id.

159. Id.
rendered while structuring transactions or preparing transaction documents.\textsuperscript{160} According to the Special Task Force Report, a position has a realistic possibility of success if the likelihood of success before a court closely approaches one-third, or if the position is supported by "substantial authority."\textsuperscript{161} A position with a realistic possibility of success may be asserted to obtain a concession in settlement negotiations.\textsuperscript{162}

Formal Opinion 85-352 differs from the covered opinion requirements of Section 10.35 in a number of ways. The standards of Formal Opinion 85-352 apply only when advice relates to tax return positions. Accordingly, it appears that preliminary or hypothetical planning advice is not covered by Formal Opinion 85-352. Formal Opinion 85-352 requires a lawyer to counsel the client regarding potential penalties, but does not require every tax opinion to state the permissible extent of reliance on the opinion itself as a defense against penalties. Advice that is subject to Formal Opinion 85-352 need not consider all tax issues related to the transaction, nor does Formal Opinion 85-352 prohibit internally consistent legal analysis or conclusions. While a lawyer may only recommend a position that has a reasonable possibility of success if the position is litigated, the Special Task Force Report appears to permit a lawyer to recommend such positions with the expectation that they will be resolved through settlement. Finally, the "realistic possibility of success" standard of Formal Opinion 85-352 is lower than the "more likely than not" standard imposed on marketed opinions by Section 10.35.

\textit{C. Proposed ABA Tax Opinion Standards}

The Committee on Standards of Tax Practice of the ABA Section of Taxation prepared a draft Statement of Standards of Tax Practice 2000-2 setting forth standards for written federal tax opinions (the Draft Statement).\textsuperscript{163} Although the Draft Statement has not been finalized or reviewed, it addresses many of the same topics addressed in the covered opinion standards of Section 10.35.

\textsuperscript{160} Paul J. Sax, James P. Holden, Theodore Tannenwald, Jr., David E. Watts & Bernard Wolfman, \textit{Report of the Special Task Force on Formal Opinion 85-352}, 39 \textit{TAX LAW.} 635 (1986). The Special Task Force Report was approved by the Council of the Section of Taxation of the ABA but not reviewed or approved by the ABA Standing Committee on Ethics and Professional Responsibility, which had originally issued Formal Opinion 85-352. \textit{Id.} at 635. Accordingly, the authoritative effect of the Special Task Force Report is not clear. \textit{Wolfman et al.}, \textit{supra} note 61, \$ 204.1.

\textsuperscript{161} Sax et al., \textit{supra} note 160, at 638–39.

\textsuperscript{162} \textit{Id.} at 639.

\textsuperscript{163} \textit{STANDARDS OF TAX PRACTICE COMMITTEE, AMERICAN BAR ASSOCIATION, DRAFT STATEMENT OF STANDARDS OF TAX PRACTICE 2000-2} (Sept. 13, 2000), \textit{reprinted in TAX NOTES TODAY} (Oct. 23, 2000) [hereinafter DRAFT STATEMENT].
The Draft Statement is limited to tax opinions addressing specific factual circumstances and providing a legal conclusion. Accordingly, it does not apply to advice that is abstract, tentative or preliminary. The standards include the following:

- A tax opinion should state the purposes for which it was prepared and how it may be relied upon, where appropriate, to avoid a risk of misunderstanding.
- A tax opinion should clearly identify the material factual circumstances. An attorney need not audit such facts, but must make further inquiry if they are materially incomplete, inconsistent, or otherwise implausible, and may not issue an opinion on the basis of representations known to be false. An opinion addressed to a third party should describe the relevant due diligence and assumptions and may not ignore relevant facts.
- A tax opinion should relate the applicable legal authorities to the facts.
- A tax opinion should identify all material tax issues for which no opinion is being rendered, if reasonably necessary to avoid a misunderstanding.
- A tax opinion should express the author’s degree of confidence and, if appropriate, discuss whether the position has sufficient merit to avoid penalties. An opinion may be given for the stated purpose of penalty protection only if the author concludes that the required level of probability exists as of the relevant date.
- A lawyer should advise a client regarding penalties that may be imposed because of a tax return position recommended by the lawyer.\footnote{164. Id.}

The Draft Statement (1) does not define material tax issues; (2) permits limited scope opinions; and (3) does not impose a minimum level of confidence.

The greater flexibility of the Draft Statement reflects a view that the duties of a lawyer rendering a tax opinion should be defined by reference to the purpose of the opinion and the legal and ethical standards that apply to the lawyer and the recipient of the opinion. Implicit in the Draft Statement is a lawyer’s obligation to ascertain those standards and to conform the opinion to them.
D. General Ethical Principles Applicable to Tax Shelter Opinions

The legal ethics rules, pronouncements, and commentary provide guidance on a range of issues that are relevant to tax shelter opinions. Those issues include (1) the general duties of a lawyer to clients and to the tax system; (2) standards for factual due diligence; (3) the scope of legal issues that must be addressed in the opinion; (4) required levels of confidence regarding conclusions; (5) limitations on the content of the analysis and advice in an opinion; and (6) required disclosures. In contrast to the rigid Circular 230 opinion standards, the legal ethics rules, pronouncements and commentary provide general standards that must be applied on the basis of the relevant circumstances.

1. General Duties of a Lawyer to Clients and to the Tax System

Canons 7 and 8 of the Model Code contain the ethical rules governing a lawyer’s duties to the client and to the tax system.\textsuperscript{165} Canon 7 provides that a lawyer should represent a client zealously within the bounds of the law.\textsuperscript{166} Canon 8 provides that a lawyer should assist in improving the legal system.\textsuperscript{167} The Model Code does not view these duties as conflicting; to the extent that a conflict arises, it generally should be resolved in favor of the client.\textsuperscript{168} For a lawyer serving as advocate, Ethical Consideration 7-19 states more directly that “[t]he duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.”\textsuperscript{169} By contrast, the obligations of lawyers to assist in improving the legal system largely arise outside the context of a specific client representation.\textsuperscript{170}

Notwithstanding the client-centered position of the Model Code, most commentators express the view that, when providing tax advice to a client, the lawyer’s duty to promote the interests of the client is limited by a duty to the tax system as a whole.\textsuperscript{171} Such duty generally is justified

\textsuperscript{165} \textit{Model Code of Prof’l Responsibility} Canon 7, 8 (1983).
\textsuperscript{166} \textit{Id.} at Canon 7.
\textsuperscript{167} \textit{Id.} at Canon 8.
\textsuperscript{168} See, e.g., \textit{Model Code of Prof’l Responsibility} EC 7-1 (1983) (“[t]he 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, which includes Disciplinary Rules and enforceable professional regulations”); \textit{Id.} at EC 8-4 (a lawyer may advocate legislative or administrative changes on behalf of a client even though he does not agree with them).
\textsuperscript{169} \textit{Id.} at EC 7-19 (1983).
\textsuperscript{170} See, e.g., \textit{Id.} at EC 8-1 (1983) (“[lawyers] should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients”).
\textsuperscript{171} See, e.g., \textit{Wolfman et al., supra} note 61, § 101.2 (The “practitioner’s obligation to the client, however, is not unrestricted. The practitioner also owes a duty, albeit less well-defined, to the tax system as a whole.”); Michael C. Durst, \textit{The Tax Lawyer’s Professional Responsibility}, 39 U.
by the self-assessment nature of the federal income tax system and the inability of the IRS to audit a meaningful percentage of returns filed.\textsuperscript{172} A number of commentators argue, on various theories, that a lawyer has a duty to the tax system regardless of whether a particular transaction is likely to be audited.\textsuperscript{173} The basis and scope of this duty to the system are not clear; beyond basic principles, the views regarding the fundamental sources of a lawyer’s duties to the tax system are all over the map.\textsuperscript{174}

This lack of consensus extends to the question of what a lawyer should do when a client does not accept the lawyer’s duty to the system. Under the Model Code, a lawyer “may continue the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous

\begin{footnotes}
\textsuperscript{172} See, e.g., WOLFMAN ET AL., supra note 61, § 201.2; Galler, supra note 171, at 694–95.

\textsuperscript{173} The theories include the notion that tax returns are a collective obligation of citizenship (see WOLFMAN ET AL., supra note 61, § 201.2; Falk, supra note 171, at 648), that the duties of tax lawyers should be aligned with the client’s obligations (see WOLFMAN ET AL., supra note 61, § 101.2; Durst, supra note 171, at 1047–48), that taxpayers should duly assert positions having legitimate authoritative support (see Handelman, Counseling, supra note 171, at 786), and that the flexibility taxpayers and advisers have to structure affairs to minimize taxes creates obligations to the tax system (see WOLFMAN ET AL., supra note 61, § 503.1).

\textsuperscript{174} See, e.g., Durst, supra note 171, at 1059–64 (distinguishing between rules imposing normative obligations and those meant to discourage specific activity); Falk, supra note 171, at 663 (“[t]ax shelters raise distinctive problems that justify unique ethical rules for tax shelter advice”); Grauer, supra note 171, at 358 (duty of lawyer derives from taxpayer’s duty to file true and correct tax return); Handelman, Counseling, supra note 171, at 781–86 (lawyer’s reporting position duties derive from the client’s duties to comply with Code as can be best determined); Holden, Practitioners’ Standard, supra note 171, at 327 (source of professional standards is “generally not the tax law itself [, but the] authority that has the power to regulate professional practice within the tax field”).
\end{footnotes}
legal position."  

Likewise, under Formal Opinion 85-352, a lawyer has no duty to withdraw merely because a client refuses to disclose a position on a tax return that could subject the client to penalties. By contrast, the Special Task Force Report concludes that a lawyer must withdraw from representing a client that insists on asserting a tax return position that does not have a realistic possibility of success if litigated.

2. Due Diligence Standards

Neither the Model Code nor the Model Rules impose specific standards of factual inquiry. However, a lawyer's duty to make appropriate inquiry can be derived from more general requirements, especially as related to competent and zealously representing within the bounds of the law, and communication with third parties. When advising a client, a lawyer's duty of inquiry is circumstantial and subject to reasonable agreement between the lawyer and the client. The Model Rules permit a client to limit the scope of a lawyer's investigation when preparing an evaluation for use by a third party. However, the limitation must be disclosed to the third party, and the lawyer must not knowingly make a false statement of material law or fact. Under some circumstances, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of the search may be limited by time constraints or the non-cooperation of persons having

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175. **Model Code of Prof'l Responsibility EC 7-5** (1983); see also **Model Rules of Prof'l Conduct R. 1.16(a)(1) (2004)** (noting that "a lawyer shall not represent a client [where] the representation will result in a violation of the Rules of Professional Conduct or other law").

176. Formal Opinion 85-352, supra note 156 states the following: [Where a lawyer has a good faith belief in the validity of a position in accordance with the [realistic possibility of success standard] 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.

*Id.*

177. See, e.g., WOLFMAN ET AL., supra note 61, § 204.2.4.1.


179. **Model Code of Prof'l Responsibility Canon 7** (1983); **Model Rules of Prof'l Conduct R. 1.3, 2.1, 3.1** (2003).

180. **Model Rules of Prof'l Conduct R. 2.3(a), 4.1** (2003).

181. *Id.* at R. 1.1, 1.2(c).

182. *Id.* at R. 2.3 cmt.

183. *Id.* As noted above, ABA Formal Opinion 85-352 likewise provides that a lawyer is under a duty not to mislead the IRS deliberately, either by misstatements or by silence or by permitting the client to mislead.
relevant information. Under the Model Rules, "[a]ny such limitations that are material to the evaluation should be described."\(^{185}\)

In contrast, Formal Opinion 346 and the Draft Statement impose more explicit duties to inquire into the relevant facts.\(^{186}\) Formal Opinion 346 ignores a client’s right to limit the scope of a lawyer’s investigation. Other relevant authorities, including the regulations regarding return preparer penalties and Section 10.34 of Circular 230, governing advice with respect to tax return positions, adopt similar standards.\(^{187}\)

3. Scope of Issues That Must Be Addressed

The Model Code and Model Rules provide only general guidelines regarding the issues that a lawyer must address when advising a client. Both codifications recognize the tension between the lawyer’s duty of competence and the client’s right to limit the scope of the lawyer’s work, and both seek to resolve the tension through a process of informed consent.\(^{188}\) Though Canon 6 and Disciplinary Rule 6-101(A)(2) of the Model Code and Model Rule 1.1 state that competent representation requires certain levels of knowledge and preparation, the comment to Model Rule 1.1 recognizes that "[a]n agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible."\(^{189}\)

Formal Opinion 346 is the most detailed ethical guideline regarding the required scope of issues that must be addressed in a tax shelter opinion. It requires a lawyer rendering a marketed opinion to address each material issue raising the reasonable possibility of an IRS challenge.\(^{190}\) However, Formal Opinion 346, like the other guidance, relies on the lawyer’s judgment to identify the material issues the IRS is likely to raise and to assess the level of analysis required for each issue.\(^{191}\) The Draft Statement also takes the lawyer’s judgment as its point of reference, rely-

\(^{185}\) Id.  
\(^{186}\) Formal Opinion 346, supra note 35 (summarizing the duty of a lawyer to verify the facts underlying a tax shelter opinion); Draft Statement, supra note 163 (summarizing the duty of a lawyer to make factual inquiry when rendering tax opinions).  
\(^{188}\) See Symposium, When Worlds Collide: Ethics v. Economics, 20 CAP. U. L. REV. 365 (1991). See also WOLFMAN ET AL., supra note 61, § 502.1.2 (discussing ABA Section of Taxation draft informal opinion addressing the question of whether a lawyer may reduce research on behalf of a client if the client so requests).  
\(^{189}\) Model Rules of Prof’l Conduct R. 1.1 cmt. (2003). See also Id. at R. 1.2(a), (c)-(d), 1.4(a)-(b) (2003); Model Code of Prof’l Responsibility EC 7-8 (1983).  
\(^{190}\) Formal Opinion 346, supra note 35.  
\(^{191}\) Id.
ing on the lawyer’s assessment of the potential for misunderstanding if an issue is not addressed in an opinion. 192

4. Required Level of Confidence Regarding Conclusions

The views on the level of confidence required before a lawyer can recommend a tax position to a client are as diverse as the views regarding the nature of the lawyer’s duties to the system. At one pole is Model Rule 1.2(d), which provides that a lawyer shall not counsel a client to engage in conduct the lawyer knows is criminal or fraudulent, but allows that a lawyer may discuss the legal consequences of any proposed course of conduct and counsel a client in a good faith effort to determine the validity, scope, meaning or application of the law. 193 The comment to Model Rule 1.2(d) notes that determining such validity “may require a course of action involving disobedience.” 194 Formal Opinion 85-352 uses the standard of the lawyer’s good faith belief in “some realistic possibility of success if the matter is litigated.” 195 The Special Task Force Report states that this standard should be met if the likelihood of success approaches one-third or the position is based on “substantial authority.” 196 The “realistic possibility of success” standard has been adopted in the context of return preparer penalties and in Section 10.34. 197

Commentators differ regarding the proper interpretation of these standards. A principal difference concerns the extent to which the standard should be subjective or objectively verifiable. Many commentators view a percentage-based standard as unacceptably subjective and unadministrable. 198 However, little consensus exists on how to frame a more objective standard, including questions of whether the standard should be based on the reasonableness of the position 199 or specifically tied to available tax authorities. 200 Another principal difference concerns the

192. DRAFT STATEMENT, supra note 163.
194. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) cmt. (2003).
199. See, e.g., Sax et al., supra note 160; Durst, supra note 171, at 1074; Holden, Practitioners’ Standard, supra note 171, at 333–34.
approach that a lawyer should take to uncertain issues, including positions that have some realistic possibility of success but probably will not succeed. Several commentators advocate a minimal standard for litigating a position in Tax Court on the ground that a taxpayer’s right to pursue a position in Tax Court would be meaningless without the right to take such a position on the tax return. Some would impose a higher standard, at least for undisclosed positions, on the ground that the self-assessment system presumes that tax returns are correct without the need for an audit. However, commentators generally have not proposed a standard requiring that the position be “more likely than not” to succeed, because such a standard would unduly limit taxpayers’ access to the Tax Court on uncertain positions.

5. Limitations on Content of Analysis and Advice

The ethical rules do not expressly limit the method of analyzing a legal problem beyond requiring competence, action within the bounds of law, and the application of generally accepted methods of legal analysis. Commentators generally agree with such standards while noting the dif-

*Basis Standard in Assessing Practitioner Conduct Under Circular 230, 8 VA. TAX REV. 743, 758 (1989).*

201. Such right was well articulated by Franklin Green:

Under our system, a taxpayer is permitted to take a position with a substantially less than 50 percent likelihood of success if that position nevertheless has a sufficient degree of merit. It is then incumbent on the government to raise questions on audit and to seek deficiencies in tax from the taxpayer who has the right not to pay the disputed amount until the matter has been litigated . . . . [I]t has been a fundamental role of tax practitioners to identify for taxpayers those tax return positions that may be attempted and those that are beyond the pale . . . . In a real sense, the tax adviser is a gatekeeper who regulates the flow of issues into the system.


202. See, e.g., Handelman, *Constraining*, supra note 171, at 91. The notion of setting a higher standard for professionals than for taxpayers has been criticized because of the tension such discrepancy would create in the lawyer-client relationship. See, e.g., Durst, supra note 171, at 1043; Holden, *Practitioners’ Standard*, supra note 171, at 341. Cf. Grauer, supra note 171, at 357 n.21.

The return preparer penalties and Section 10.34 require that an undisclosed position have a realistic possibility of success. Both the preparer penalty regulations and Section 10.34 incorporate the standards for determining whether "substantial authority" exists for a tax return position for purposes of the substantial understatement penalties. However, those standards do not prescribe a comprehensive method of legal analysis; instead, they simply identify the types of authorities that may support a position and the weight to be given to those authorities.

Once it is assumed that a position will be raised on audit, the Model Code and the Model Rules clearly permit a lawyer to consider the likelihood that the IRS would challenge the position or agree to a settlement. Formal Opinion 85-352 appears to permit a lawyer to consider the likelihood that the IRS will agree to a settlement. The Special Task Force Report states that the determination whether the position has a realistic possibility of success "assumes that the issue is in court and to be decided," but also states that a position may be asserted in a return as a bargaining position if the position has a realistic possibility of success if litigated.

As discussed above, requiring a lawyer to ignore the discretion exercised by the IRS prevents a lawyer from performing one of the essential functions of tax advice. Additionally, requiring a lawyer to assume that a matter will come before a court ignores the role of the IRS as an interpreter of the tax law. The degree to which IRS positions affect court decisions is beyond the scope of this Article. However, in broad terms,

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204. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. (2003); Symposium, Law and Order, supra note 203, at 639–642; Handelman, Constraining, supra note 171, at 96–98; Philipps et al., supra note 201, at 1173–74; Caplin, supra note 203, at 976–79. There is debate concerning issues such as the extent to which a well-reasoned construction of a statute will suffice. See, e.g., Symposium, Law and Order, supra note 203, at 639–642.
208. Sax et al., supra note 160, at 638.
209. Id. at 639.
a court may treat the position of the IRS as (1) binding on the IRS or both the IRS and the taxpayer; (2) meriting deference; (3) meriting no stronger weight than the position of the taxpayer; or (4) meriting no weight, for example, because it intentionally conflicts with the Code. Even when a court accords the IRS position no deference, the agency acts in an interpretive role, if for no other reason than the position will be publicly articulated and consequently taken into account by taxpayers.

Because of the important substantive role of the IRS and its de facto role as a wielder of administrative discretion, a lawyer should be permitted to take into account the likely position of the IRS, whether in published guidance or otherwise, in reaching a conclusion about the substantive merits of a taxpayer’s position. A contrary rule would compromise the lawyer’s duty to a client. Consider, for example, a revenue procedure that expressly permits a taxpayer’s position but is inconsistent with the tax law and would not be binding on the IRS in litigation. A taxpayer would have a right to file a tax return based on the revenue procedure, subject to the risk that the IRS might later seek to take a contrary position, but the lawyer would be prevented from advising a client to do so. If a taxpayer would have the right to file a tax return on that basis, it cannot be unethical for a lawyer to advise a client on the same basis.

Under the regulations specifying the “permissible authorities” that may be taken into account when determining whether “substantial authority” exists for a tax return position, administrative pronouncements of the IRS, including pronouncements such as private letter rulings that do not have precedential value and would be given little or no deference by a court, are treated as “authority.” The weight given to an authority

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211. See WOLFMAN ET AL., supra note 61, § 202.3.1.2 (arguing adviser who ignored nonbinding IRS pronouncements “likely breached his duty of competence to the client”).

212. The extent to which a court would hold the IRS to a position expressed in a revenue procedure that is contrary to the tax law is not entirely clear. See Capitol Fed. Sav. & Loan Ass’n v. Comm’r, 96 T.C. 204 (1991) (holding revenue procedures generally not binding on the IRS unless failure to follow would constitute abuse of discretion).

213. See, e.g., Lee A. Sheppard, News Analysis, Wall Street Rules: Feline Prides get IRS Imprimatur, TAX NOTES (Aug. 1, 2003) (Revenue procedures are “declarations of how the IRS will administer the law, even if the result contravenes it.”). Cf. Terence Floyd Cuff, Real Estate and the Deferred Exchange Regulations, in 562 PRACTICING LAW INSTITUTE, TAX LAW AND PRACTICE 457, 856 (2003) (If “[Rev. Proc. 2000-37] is inconsistent with the law, then it is not a legitimate approach to law enforcement.”).


215. I.R.C. § 6110(k)(3) (2005). In general, a court gives weight to a private letter ruling only as evidence that the IRS has taken the positions stated therein. See, e.g., Rowan Cos., Inc. v. United States, 452 U.S. 247, 261 n.17 (1981); True Oil Co. v. Comm’r, 170 F.3d. 1294, 1302 (10th Cir. 1999); Snap-On Tools, Inc. v. United States, 26 Cl. Ct. 1045, 1060 (1992); Vons Cos., Inc. v. United States, 51 Fed. Cl. 1, 8–11 (2001).
depends not only on its persuasiveness but also on the type of the administrative pronouncement, the level of formal agency review, and the extent to which the pronouncement is intended as a general statement of the position of the IRS.216 Thus, a revenue ruling will be given greater weight than a private letter ruling, and certain older authorities will be given less weight than more recent ones.217 A lawyer should not be deemed unethical for applying the same principles.

6. Required Disclosures

The ethical rules do not contain any specific disclosure requirement corresponding to the “no reliance” and “consumer protection” legends of Circular 230. Formal Opinion 85-352 and the Draft Statement require a lawyer to counsel the client regarding penalties,218 but neither document requires every tax opinion to state the permissible extent of reliance on the opinion itself as a defense against penalties. The Draft Statement provides merely that, if an opinion has been prepared for the specific purpose of penalty protection, the author must comply in good faith with the standards for penalty protection opinions and include a specific representation to that effect in the opinion.219

In contrast, the general effect of Section 10.35 is to require that all tax opinions include a “no reliance” legend unless the advice complies with the covered opinion rules and expresses conclusions at a confidence level of at least “more likely than not.” As discussed above, the legend is inaccurate in a number of respects. Requiring a lawyer to include a “no reliance” legend where the advice could in fact be relied upon by the taxpayer conflicts with a lawyer’s ethical duties to provide competent advice and to exercise independent judgment.220 The prohibition in Section 10.35 against a lawyer’s providing advice inconsistent with such a disclosure prevents the lawyer from correcting the misstatement.221 There

217. Id. A revenue ruling is more likely to be given binding effect or deference by a court. However, the “substantial authority” standards do not require a determination whether a court would give weight to a particular pronouncement because it represents the position of the IRS. Instead they give weight to the pronouncement because it is the outcome of a deliberative process by the IRS.
219. DRAFT STATEMENT, supra note 163.
221. See Burgess J.W. Raby & William L. Raby, Practitioner Advice as a Defense Against Penalties, TAX NOTES TODAY (Oct. 13, 2005) ("[I]t doesn’t seem professionally responsible to tell the client in any and all written-advice situations that advice cannot be relied on for penalty protec-
are circumstances in which a lawyer faced with this situation may feel required to withdraw from a representation, and the same ethical issues that forced the lawyer’s withdrawal could keep the client from procuring alternative legal advice regarding the tax treatment of the transaction.

Finally, the “consumer protection” requirement in Section 10.35 for both marketed opinions and opinions that are not marketed opinions because they are “legended out” raises issues of professional ethics similar to those raised by the “no reliance” legend. Where an opinion is rendered by a lawyer to a client in a true lawyer-client relationship concerning the client’s tax treatment, the required disclosure that the opinion was written to support the promotion or marketing of the relevant transaction, and that the taxpayer should seek advice based on the taxpayer’s particular circumstances from an independent tax advisor, are patently incorrect and undermine the confidence that a client is entitled to place in a lawyer. Under the ethical rules, the lawyer is required to exercise independent professional judgment on behalf of the client free of the interests of third parties. Where a lawyer is acting in a manner consistent with his or her ethical obligations, there is no reason to require the lawyer to make statements suggesting otherwise.

In conclusion, the Circular 230 opinion standards extend substantially beyond the standards in the legal ethics rules and guidance. Except for marketed tax shelter opinions, the legal ethics rules and guidance permit advice to be crafted to the specific needs of the client, and do not impose specific requirements regarding factual due diligence, the scope of the legal issues that must be addressed, methods of analysis, or required disclosures. Moreover, various requirements in Section 10.35 may conflict with a lawyer’s duties under the ethics rules and guidance, particularly: (1) the requirement that a covered opinion address all material tax issues; (2) the requirement that certain covered opinions reach conclusions at a confidence level of at least “more likely than not”; (3) the prohibitions against certain methods of analysis; and (4) certain required disclosures.

222. See Model Rules of Prof’l Conduct R. 1.7(b) (2003). Cf. ABA Section of Taxation, Committee on Standards of Tax Practice, Report, Statement of Standards of Tax Practice 2000-1, in 54 Tax Law. 185 (2000) (addressing conflicts between the penalty rules for taxpayers and professional rules for lawyers providing advice on tax return positions); Green, supra note 201, at 1703, 1709 (arguing disparity between rules applicable to taxpayers and rules applicable to practitioners advising tax return positions creates conflicts of interest).

IV. FIRST AMENDMENT LIMITS ON THE REGULATION OF PROFESSIONAL SPEECH

First Amendment case law has infrequently addressed attempts by the government to regulate the content and presentation of advice and other non-solicitation type speech by professionals. The limited case law and commentary in this area suggests a model that defines permissible regulation of professional speech largely by reference to the role of the profession in society and accepted professional norms. However, the model may not be appropriate in cases where professional advice is rendered for the purpose of marketing a product to third parties. In those cases, a more general "hearer centered" theory, akin to the commercial speech doctrine, may be appropriate.

A. Caselaw Concerning Professional Speech

1. Lowe v. Securities and Exchange Commission

The U.S. Supreme Court addressed the tension between freedom of speech and the government's authority to regulate professions in the 1985 case Lowe v. Securities and Exchange Commission.\(^\text{224}\) The case arose from an attempt by the SEC under the Investment Advisors Act of 1940 to enjoin a former investment advisor, whose registration had been revoked because of criminal activity, from publishing investment newsletters and a chart service.\(^\text{225}\) The Court held that the publishing activity could not be enjoined because it fell within the Act's exemption for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation."\(^\text{226}\) In so holding, the Court distinguished between the provision of personalized advice, based on a fiduciary relationship to a specific client, and the publication of generic and impersonal advice or information:

[T]he petitioners' publications do not fit within the central purpose of the Act because they do not offer individualized advice attuned to any specific portfolio or to any client's particular needs. On the contrary, they circulate for sale to the public at large in a free, open market—a public forum in which typically anyone may express his views.\(^\text{227}\)

\(^{225}\) Id. at 183–86. The newsletters included commentary about the markets, reviews of market indicators and investment strategies, and specific recommendations for buying, selling, or holding specific investments, and advertised a hotline for current information.
\(^{227}\) Lowe, 472 U.S. at 208 (footnote omitted).
Justice White's concurrence concluded that the statute permitted regulation of the activity and considered whether the regulation violated the First Amendment.228 The concurrence took a broad view of government's power to regulate professions, opining that such power "is not lost whenever the practice of a profession entails speech."229 However, the concurrence stated, the government's authority to restrict entry into professions through licensing "has never been extended to encompass the licensing of speech per se or of the press . . . . At some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment."230 The concurrence, like the majority opinion, based the limits of permissible regulation on the distinction between whether a professional offers personal advice and purports to exercise judgment on the client's behalf in light of the client's individual circumstances.231

Applying this distinction, the concurrence concluded that "[t]he application of the Act's enforcement provisions to prevent unregistered persons from engaging in the business of publishing investment advice for the benefit of any who would purchase their publications . . . is a direct restraint on freedom of speech and of the press subject to the searching scrutiny called for by the First Amendment."232

2. Joslin v. Secretary of the Department of the Treasury

Though both the majority opinion and the concurrence in Lowe based the standard for permissible governmental regulation of professional speech on whether the communication was personalized and given within a fiduciary-like relationship,233 neither opinion sought to define this standard further. One of the first cases to attempt a further definition, Joslin v. Secretary of the Department of the Treasury, 234 arose in connection with former Section 10.33. The plaintiff tax lawyer in Joslin challenged former Section 10.33 on the grounds that it limited his ability to give legal advice and opinions regarding taxation and his ability to

228. Id. at 226–27 (White, J., concurring).
229. Id. at 228.
230. Id. at 229–30.
231. Id.
232. Id. at 233. The concurrence concluded that, even if the newsletters were treated as having only the lesser protection of commercial speech, the injunction would be found overbroad; thus, it was not necessary to determine whether the newsletters had full First Amendment protection or only commercial speech protection. Id. at 234–35.
communicate advice to the public. The taxpayer argued that, because the rules applied to opinions directed to third parties, they could not be justified as professional regulation under the standard articulated in Lowe.

The Joslin court observed that former Section 10.33 followed the professional guidelines of Formal Opinion 346 and noted the general power of the state to impose restrictions on professions even if the incidental effect is to abridge freedom of speech. The court followed Justice White's concurrence, finding that the relevant distinction is whether there was a "personal nexus between professional and client." The court then concluded that, although former Section 10.33 applied only to tax shelter opinions addressed to third parties, there was nevertheless a personal nexus between the attorney and the promoter for whom the opinion was prepared:

The attorney is charged with making factual determinations about a tax scheme. In order to do so the attorney must develop a personal relationship with his client. The tax shelter opinion purports to be the judgment of a practitioner exercised on behalf of a particular individual or corporation with whom he is directly acquainted.

The Joslin court further held that, even if the rendering of tax shelter opinions constituted speech, it was commercial speech; thus, the regulations were required to satisfy only the Constitutional guidelines for the restriction of false and misleading commercial speech. Applying these standards, the court concluded that "the regulations contained in Sections 10.33 . . . are not abridgements of constitutionally protected speech but are regulations governing the standard of practice of professionals." The court implied that, if the regulation of professional speech satisfies the minimum Constitutional standards for the state's exercise of its police powers, any such regulation is permissible. Joslin thereby went substantially beyond the Supreme Court's decision in Lowe. Because the District Court's decision was vacated on appeal for lack of jurisdiction, Joslin has no precedential value; nevertheless, the analysis in Joslin...
lin reflects one pole in the debate over First Amendment restrictions on
the regulation of professional speech.


The Supreme Court has returned to the issue of regulation of pro-
fessional speech a number of times since Lowe. In Gentile v. State Bar of
Nevada,243 the plaintiff criminal defense attorney had given a press con-
ference shortly after his client’s indictment for alleged theft where he
asserted, among other things, that his client was innocent and that a po-
lace detective expected to be a prosecution witness had in fact committed
the theft.244 The state bar subsequently disciplined the lawyer under a
professional rule prohibiting a lawyer from making a public statement
about a pending case where the lawyer knows or reasonably should know
that the statement will have a substantial likelihood of materially preju-
dicing the court proceeding.245 The lawyer challenged the discipline on
First Amendment grounds. In a fragmented decision, the Court held that,
though the particular rule under which the lawyer was disciplined was
unconstitutionally vague, the First Amendment generally permits courts
to impose such restrictions on lawyers’ statements concerning pending
cases.246 The Court declined to subject such restrictions to the more de-
manding standards for restrictions on media statements, which may not
be restricted by a court absent a clear and present danger of causing a
malfunction in the criminal justice system.247

In so holding, the Court emphasized that the lawyer’s role is an es-
sential part of the justice system, even outside the courtroom.248 Because
of this role, a range of restrictions had been permitted on lawyers’
speech, including limitations on advertising and solicitation.249 In each
case, the Court had “engaged in a balancing process, weighing the
State’s interest in the regulation of a specialized profession against a
lawyer’s First Amendment interest in the kind of speech that was at is-
sue.”250 The “substantial likelihood of material prejudice” standard was
constitutional for attorneys because “it is designed to protect the integrity

244. Id. at 1041–47.
245. Id. at 1033. The rule was based on MODEL RULES OF PROF’L CONDUCT R. 3.6 (2003).
247. Id. at 1069–71.
248. Id. at 1071.
249. Id. at 1073 (citing Peel v. Attorney Registration and Disciplinary Comm’n of Ill., 496 U.S.
U.S. 350 (1977)).
and fairness of a State’s judicial system, and it imposes only narrow and necessary limitations on lawyers’ speech.\textsuperscript{251}

\textit{Gentile} may be viewed narrowly as establishing guidelines for the regulation by courts of lawyers appearing before them in pending cases. However, the decision may also be viewed as a template for the regulation of speech by professionals that participate in crucial public functions. Under the Court’s analysis, the mere fact that a professional participates in an important public function is not sufficient to permit limitations on the professional’s speech. Rather, the speech must present a clearly defined and realistic threat to the functioning of the system. Moreover, any restriction on the speech must be designed to address the threat and be narrowly tailored to limit only threatening speech.

4. \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}

In \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\textsuperscript{252} the Court considered state restrictions on the provision of abortions, including a requirement that, at least 24 hours before performing a non-emergency abortion, a physician inform a patient of the nature of the procedure, the health risks of abortion and childbirth, and the probable gestational age of the unborn child.\textsuperscript{253} The restrictions also required the physician or a qualified non-physician to inform the woman of the availability of printed materials published by the state that described the fetus and provided information about medical assistance for childbirth, obtaining child support from the father, and agencies which provide adoption and other services as alternatives to abortion.\textsuperscript{254} No abortion could be performed unless the woman certified in writing that she had been informed of the availability of the printed materials and had been provided with them if she so chose.\textsuperscript{255}

In a fragmented decision, the Court upheld the information requirements, though none of the opinions was supported by a majority of the Justices and only the opinion of Justice O’Connor, joined by Justices Kennedy and Souter, considered the First Amendment. Justice O’Connor’s opinion, contradicting certain prior decisions,\textsuperscript{256} concluded that the information requirements did not unduly burden the right to obtain an abortion, in light of the state’s substantial and legitimate interests

\textsuperscript{251} \textit{Id.} at 1075.
\textsuperscript{252} 505 U.S. 833 (1992).
\textsuperscript{253} \textit{Id.} at 881.
\textsuperscript{254} \textit{Id.}
\textsuperscript{255} \textit{Id.}
in protecting the physical and psychological health of the mother and the life of the unborn child: the information to be provided was truthful and designed to further the state’s interests by allowing a patient to make a fully informed decision. The opinion noted that compliance was not required if the physician could demonstrate by a preponderance of the evidence that he reasonably believed furnishing the information would have had a severely adverse effect on the patient’s physical or mental health. Accordingly, the opinion held that the “statute does not prevent the physician from exercising his or her medical judgment.”

Justice O’Connor’s opinion treated the question of professional speech as secondary to the question of state burdens on abortion, but nevertheless included a consideration of whether a physician has a First Amendment right not to provide information in the manner required by the statute. According to the opinion, while “the physician’s First Amendment rights not to speak [were] implicated,” such rights were implicated “only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” Accordingly, the information requirements were found constitutional. It should be noted, however, that Casey involved a requirement to provide information, not a prohibition on speech. Further, Justice O’Connor’s conclusion was dependent on a finding that the state’s requirements did not prohibit a physician from exercising professional judgment.

5. Legal Services Corp. v. Velazquez

The most recent Supreme Court consideration of First Amendment limitations on the regulation of professional speech occurred in Legal Services Corp. v. Velazquez, which arose from a challenge to a Federal statute prohibiting lawyers receiving funding from the Legal Services Corporation from undertaking any representation that involved an effort to amend or otherwise challenge existing welfare laws. In Rust v. Sullivan, the Court upheld legislation prohibiting federal funds for family planning clinics if clinic doctors discussed abortion with their patients.

257. Casey, 505 U.S. at 883.
258. Id. at 883–84.
259. Id. at 884. The opinion also held that the requirements did not violate the doctor-patient relationship. Id.
260. Id.
261. Id. at 881–87.
262. Id. at 884.
264. Id. at 538–39. If the presence of constitutional or statutory challenges became apparent while a lawyer was engaged in a representation, regulations under the statute required the lawyer to withdraw. Id. at 539.
The Velazquez Court distinguished Rust, explaining that the federal program in Rust had been intended to further a specific government message and that viewpoint-based restrictions were therefore permitted.\(^{266}\) In contrast, the Legal Services program was designed to facilitate private speech, not to promote a governmental message.\(^{267}\) In this circumstance, restricting lawyers' speech "distorts the legal system by altering the traditional role of attorneys."\(^{268}\) Accordingly, the government "may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary."\(^{269}\) By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the statute "prohibit[ed] speech and expression upon which courts must depend for the proper exercise of the judicial power."\(^{270}\)

The chief contribution of Velazquez was to emphasize that a restriction on lawyers' speech may distort the legal system by altering the "traditional role of attorneys."\(^{271}\) A finding of such distortion of the lawyer's advocacy role was one of the main bases for the Court's holding that the Legal Services restriction was unconstitutional.\(^{272}\)

6. Conant v. Walters

In Conant v. Walters,\(^{273}\) the Court of Appeals for the Ninth Circuit upheld, on First Amendment grounds, an injunction against the federal government's law enforcement actions against California physicians.\(^{274}\) The controversy arose from California's enactment of legislation that decriminalized the use of marijuana for limited medical purposes and immunized physicians from prosecution under state law for recommend-

\(^{266}\) Velazquez, 531 U.S. at 541–43.

\(^{267}\) "Congress funded LSC grantees to provide attorneys to represent the indigent clients ... . The attorney defending the decision to deny [welfare] benefits will deliver the government's message in the litigation. The LSC lawyer, however, speaks on the behalf of his or her private, indigent client." Id. at 542.

\(^{268}\) Id. at 544. The Court compared such distortion to restrictions on editorial content and decisions by broadcast networks, citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984), and restrictions on editorial content in student newspapers, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).

\(^{269}\) Velazquez, 531 U.S. at 544.

\(^{270}\) Id. at 545. The Court was particularly concerned with the fact that the prohibition "sifts out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry." Id. at 546. The Court did not view the ability of a funded lawyer to withdraw from representation as avoiding an unconstitutional restriction on speech, particularly because the indigent client was unlikely to find other counsel. Id. at 547.

\(^{271}\) Id. at 544.

\(^{272}\) Id. at 543–47.

\(^{273}\) 309 F.3d 629 (9th Cir. 2002).

\(^{274}\) Id. at 632.
ing or approving of the use of marijuana for such purposes. In response, the federal government promulgated a policy stating that a doctor’s recommending or prescribing marijuana was not consistent with the public interest within the meaning of the Controlled Substances Act and that such actions would lead to revocation of the physician’s authority to prescribe controlled substances. Various parties challenged the policy on First Amendment grounds and obtained a permanent injunction that prohibited the federal government from revoking the controlled substances registration of a doctor or from conducting an investigation that might lead to such revocation, solely on the basis of the physician’s recommendation, based on sincere medical judgment, that a patient use medical marijuana.

The Ninth Circuit noted that where a physician actually prescribed marijuana or made a recommendation intended to facilitate access to marijuana, the injunction did not bar the federal government from prosecuting the physician for aiding and abetting a violation of or a conspiracy to violate federal law. However, a doctor could not be viewed as aiding and abetting or participating in a conspiracy merely because the doctor anticipated that the patient would respond to the doctor’s recommendation by obtaining marijuana in violation of federal law.

The court rejected a series of government arguments. The government had argued that restrictions on physicians’ First Amendment rights are permissible because medicine is a regulated profession; the court, rejecting the argument, responded that professional speech “may be entitled to ‘the strongest protection our Constitution has to offer.’” The court also rejected the government’s argument that a doctor-patient discussion about marijuana might lead the patient to make a bad decision, noting that the First Amendment does not permit restrictions on the communication of truthful information because of decisions such information may lead a recipient to make. Finally, the court rejected the

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275. Id.
276. Id. at 632–33.
277. Id. at 633–34.
278. Id. at 635–36.
279. Id. at 636.
280. Id. at 637 (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 634 (1995)).
281. Id. at 637 (citing Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002), in which the Supreme Court, in holding unconstitutional rules that prohibited physicians and pharmacists from advertising compounded drugs, rejected the government’s argument that “people would make bad decisions if given truthful information about compounded drugs”).
argument that a doctor's recommending marijuana may encourage illegal conduct.\textsuperscript{282}

The court in Conant concluded that the federal policy restricted a particular viewpoint—the view that medical marijuana would likely help a specific patient—and that such content-based restrictions on speech are ""presumptively invalid."\textsuperscript{283} Following Velazquez, the court further concluded that the federal policy ""alter[s] the traditional role' of medical professionals by 'prohibit[ing] speech necessary to the proper function-ing of those systems.'"\textsuperscript{284}

Conant addresses both the relatively narrow issue of viewpoint-based speech as well as broader principles. The decision sets a basic threshold by affirming the First Amendment protection of speech that does not in itself constitute illegal conduct.\textsuperscript{285} The decision also recognizes that communications between a professional and a client are entitled to strong First Amendment protections, notwithstanding that the professions are subject to regulation, and follows Velazquez in stating that the scope of the First Amendment protection of professional speech is related to the traditional role and purpose of the profession.\textsuperscript{286} Finally, the decision refuses to accept restrictions on truthful professional speech based on the possibility that the recipient may use the information to make bad decisions or engage in illegal conduct.\textsuperscript{287}

\section*{B. The Professional Speech Model}

Though a comprehensive analysis of the philosophical underpin-nings of the First Amendment and the function and meaning of professional speech is beyond the scope of this Article, the court opinions discussed above suggest a model, supported by commentators, for analyzing

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\item 282. Id. at 638. The court noted that a similar justification had been rejected in Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (finding that the First Amendment prohibited application of the Child Pornography Prosecution Act of 1996 to virtual child pornography).
\item 284. Id. at 638 (quoting Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 544 (2001)). The court also found the Federal policy impermissible because it was a restriction on speech whose meaning depends upon the meaning attributed to it by the hearer. Id. at 639 (citing Thomas v. Collins, 323 U.S. 516, 535 (1945)).
\item 285. See N.Y. State Bar Ass'n v. Reno, 999 F. Supp. 710 (N.D.N.Y. 1998) (A preliminary injunction was issued against enforcement of Section 4734 of Balanced Budget Act of 1997, which made it illegal to counsel or assist an individual to dispose of certain assets to qualify for Medicaid benefits; Federal government did not defend the constitutionality of the provision.). See also Magee v. United States, 93 F. Supp. 2d 161, 162 (D.R.I. 2000) (The ""United States does not dispute that Section 4734 is 'plainly unconstitutional.'").
\item 286. Conant, 309 F.3d at 638.
\item 287. Id. at 637–38.
\end{itemize}
the regulation of professional speech. 288 This model identifies professional speech as a personalized communication given in the context of a fiduciary-like relationship between a person who adheres to a shared body of professional knowledge and values and that person’s client. 289 Such speech is entitled to First Amendment protection. 290 This protection differs from the protection given to the press and “street corner” speech on the one hand and the protection given to commercial speech on the other. 291

The model defines permissible regulation of professional speech largely by reference to the role of the profession in society and accepted professional norms. 292 Professional speech may be prohibited where it involves illegal conduct, presents a clear and realistic threat to the proper functioning of the profession or the institutions with which the profession interacts, or deviates from accepted professional norms. 293 However, any such prohibition must be narrowly tailored to address only the illegal conduct, the specific threat to the system, or the deviation from professional norms. 294 In addition, professional speech may be regulated for the purpose of furthering a legitimate State policy, provided that the regulation does not distort the usual functioning of the profession based on ac-

288. See Halberstam, supra note 2, at 792–828 (analyzing professional speech under theories of economics, culture, democracy, and liberty, and arguing that professional speech should be evaluated by reference to the social context in which it is expressed); Kry, supra note 2, at 957–63 (analyzing professional speech under the “marketplace of ideas” theory and the “self governance” theory); Wendel, supra note 2, at 404–23 (analyzing lawyers’ speech by reference to the values of discovery of truth, democracy, dissent, and self-fulfillment).

289. See Halberstam, supra note 2, at 839–44; Kry, supra note 2, at 907–11.

290. See Halberstam, supra note 2, at 838 (“Justice White’s rationality review, as adopted by four members of the Court in Casey, fails to give professional speech its due. At a minimum, professional speech should be accorded no less protection than commercial speech”); Wendel, supra note 2, at 359 (“Gentile does not revive the long-discredited right/privilege distinction . . . . It merely makes the less controversial constitutional point that in some kinds of state-established forums, speakers’ rights may be limited by reasonable government interests.”); Berg, supra note 2, at 170 stating that

Casey’s conclusion that physician speech should be deprived of full First Amendment protection because ‘it is subject to reasonable licensing and regulation by the State’ turns traditional First Amendment methodology on its head. Rather than focusing on the necessity of limiting speech under certain circumstances, the traditional method for determining whether speech is protected in the first instance is to assess whether the expression facilitates First Amendment values. It is the function of the constitutional standard of review to protect the speech when it facilitates those values, and to permit government regulation in those exceptional instances when those values are outweighed by the expression’s negative impact.

291. See Halberstam, supra note 2, at 773–76; Wendel, supra note 2, at 381–82.

292. See Halberstam, supra note 2, at 834–35; Wendel, supra note 2, at 385–86.

293. See Halberstam, supra note 2, at 844–49, 867–68.

Professional speech may not be prohibited merely because the client may use the information to make a bad choice or to engage in illegal conduct, provided that the professional does not participate in or further the illegal conduct. Likewise, a professional may not be required to make statements that are false or misleading.

An obvious question regarding the professional speech model is whether it should apply to professional speech used to market a product to a third party, such as a tax opinion used to market a tax shelter. In addressing this question, it is useful to consider whether a lawyer’s opinion constitutes “commercial speech” and, if so, how the professional speech model interacts with the commercial speech doctrine. Both courts and commentators have noted that the boundaries of commercial speech are unclear. However, even in the broadest formulations, “commercial speech” would apply only to communications made by or on behalf of a seller to a potential purchaser and having some connection to the proposed sale. Thus, in the case of a marketed tax shelter, the commercial speech doctrine would not apply to an opinion given by a lawyer to a client that is a potential purchaser that addresses the client’s tax treatment, because the lawyer is not the seller of the shelter or the seller’s agent. Likewise, the commercial speech doctrine will not apply where the client is the tax shelter promoter and the lawyer provides advice to the promoter regarding the tax treatment of a potential purchaser, if the lawyer’s advice is not addressed to the potential purchaser and not intended by the lawyer to be shown to the potential purchaser or incorporated in marketing materials.

296. Conant v. Walters, 309 F.3d 629, 637–38 (9th Cir. 2002).
297. Casey, 505 U.S. at 882.
299. See, e.g., Bolger v. Youns Drug Prods. Corp., 463 U.S. 60, 66–68 (1983) (commercial speech generally characterized by advertising format, product reference and commercial motivation); Kasky v. Nike, Inc., 45 P.3d 243, 256–57 (Cal. 2002) (speech considered to be in advertising format if message is directed to an audience that will be influenced, or likely influenced, to engage in a commercial transaction).
300. See Post, supra note 2, at 23 (The “doctrine stops short of commercial communications between persons deemed to be involved in relationships of dependence or reliance.”).
Where the client is the tax shelter promoter and asks the lawyer to prepare advice for a third party investor in the shelter, there is a facial appeal to viewing the shelter as the product and the lawyer's advice as a form of advertising; in this view, the commercial speech doctrine would apply. However, even in this case, the lawyer's obligation to exercise independent professional judgment, speak truthfully, and disclose relevant facts distinguishes the lawyer's advice from typical advertising, which has no such internally imposed obligations.

C. "Hearer-Centered" First Amendment Theory

The objective of the commercial speech doctrine is to ensure the free flow of truthful rather than misleading commercial information and to permit reasonable consumer protection and similar regulations. If professional speech is directed to third parties, it may be more appropriate to apply a "hearer-centered" First Amendment theory similar to that developed by Burt Neuborne in The First Amendment and Government Regulation of Capital Markets. The purpose of such a theory is to ensure that the recipient, in this case the recipient of the lawyer's advice, receives information that enhances his ability to make an informed and autonomous choice. Under such a theory, the government would be free to prohibit false or misleading speech or speech that promotes an unlawful choice. Moreover, the government would be free to require the inclusion in communications of information that helps the recipient make an informed choice. However, absent a compelling governmental need and narrowly tailored measures that address such need, the government could not prohibit the communication of truthful, non-misleading information, regardless of the risk that the recipient would use the information to make an undesirable choice, nor could it impose inaccurate prophylactic rules branding certain categories of speech as inherently false or misleading.


Untruthful speech, commercial or otherwise, has never been protected for its own sake...

302. See Neuborne, supra note 2, at 28-40.

303. Id.

304. The Supreme Court's professional solicitation cases have considered in detail the application of overbroad and prophylactic rules to commercial speech by lawyers. In the non-commercial context, a person generally may challenge a speech regulation on the grounds that it prohibits protected speech, even though the person's speech itself is not protected. See generally RONALD D.
The “hearer-centered” theory has several elements in common with the professional speech model described above. Both theories aim principally to protect the recipient’s interest in receiving the advice for the purpose of making an informed and autonomous choice within the scope of the recipient’s rights. Both theories permit the censoring of speech that promotes an illegal objective or is deemed actually or professionally false or misleading, and both permit reasonable compelled disclosures provided that the disclosures are not themselves false or misleading. Under both theories, the possibility that the recipient may use the information to make a bad choice is not a legitimate basis for restricting speech.

However, the professional speech model focuses on the specific societal role of the lawyer, the relevant professional norms, and the exercise of professional judgment. In contrast, the “hearer-centered” theory, while regarding the professional and societal context as relevant because it helps define the interests of the recipient of advice, does not protect the professional role, professional institutions, or the exercise of professional judgment as values in themselves.

V. APPLICATION OF FIRST AMENDMENT PRINCIPLES TO THE CIRCULAR 230 OPINION REQUIREMENTS

The obligations imposed by Circular 230 on lawyers rendering tax shelter opinions consist of (1) obligations regarding the general structure of the advice and the issues that must be addressed, which generally are neutral as to the viewpoint expressed by the advice (“viewpoint-neutral” requirements); and (2) obligations regarding the method of analysis, the

ROTUNDA & JOHN E. NOVAK, TREATISE ON CONSTITUTIONAL LAW § 20.8 (3d ed. 1999) (discussing the overbreadth doctrine); Richard H. Fallon, Making Sense of Overbreadth, 100 YALE L.J. 853 (1991); Wendel, supra note 2, at 382–91 (discussing the application of the overbreadth doctrine to limits on lawyer speech); Miller, supra note 217, at 198–201. The Court has held that the justification for the application of overbreadth analysis “applies weakly, if at all, in the ordinary commercial context.” Bates v. State Bar of Ariz., 433 U.S. 350, 380 (1977). The Court also has permitted the application of overbreadth rules to otherwise protected commercial speech based on the prophylactic effect of the rule. See, e.g., Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 463–64 (1978) (prohibition against in-person solicitation by lawyers); Fla. Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995) (prohibition against targeted direct-mail solicitations to victims and their relatives for thirty days following an accident or disaster). However, the Court has only permitted such prophylactic rules in circumstances in which the rule is narrowly tailored to achieving a substantial governmental interest. Id. at 632–34. The Court consistently has rejected justifications for prophylactic rules based on the potential effects of providing information to the public regarding potential legal rights. See, e.g., Bates, 433 U.S. at 375–77 (rejecting justification of ban on lawyer advertising on the ground that it would stir up litigation); accord, Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 642–46 (1985). Conversely, in cases where the Court has upheld prophylactic rules, it has emphasized the fact that such rules do not materially interfere with lawyers’ communications with potential clients regarding their legal rights. Ohralik, 436 U.S. at 458; Went For It, 515 U.S. at 632–34.
conclusions reached in certain advice, and disclosures that must accompany the advice and that require the expression of specific viewpoints or facts ("viewpoint-based" requirements). Application of the professional speech model and the "hearer-centered" theory described above to these rules raises a number of serious First Amendment concerns. Those concerns could be addressed by a number of specific changes to the Circular 230 opinion standards for non-marketed and marketed opinions.

A. Viewpoint-Neutral Requirements

As discussed above, both Section 10.35 and Section 10.37 impose due diligence standards. Section 10.35 also requires a practitioner to relate the applicable law to the relevant facts, to consider all "significant federal tax issues," to provide a conclusion as to the likelihood that the taxpayer will prevail with respect to each issue, and to provide an overall conclusion as to the tax treatment of the transaction. The significant First Amendment questions are (1) whether the government may prohibit the rendering of written advice that does not reflect one or more of those analyses; and (2) to what extent the government may impose standards for conducting the analyses themselves.

The requirements in Section 10.35 are intended to prevent hypothetical, inaccurate or incomplete advice. However, in certain circumstances the advice rendered by a tax lawyer perforce will be objectively inaccurate, hypothetical, or incomplete. Bad advice may be a result of inaccurate assumptions or hypothetical or limited client questions. Under the legal ethics rules, the ability of a lawyer to give limited advice depends on the context of the request. Lawyers and clients are given broad latitude to define the scope of the lawyer's advice, subject to standards of reasonableness.

In certain circumstances the rules require more extensive advice. A lawyer advising on a tax return position may not recommend a position without determining relevant facts, placing them in a legal framework, identifying relevant issues, and reaching conclusions on the issues and an overall conclusion that the position has a reasonable possibility of success if litigated. A tax opinion reaching a conclusion on a specific set of facts must identify relevant facts, relate them to applicable law, identify and consider the relevant issues, and reach conclusions appropriate to the purpose and expected use of the opinion. A lawyer preparing a

305. See supra notes 99–103 and accompanying text.
307. See supra note 30.
308. Formal Opinion 85-352, supra note 156.
309. DRAFT STATEMENT, supra note 163.
tax opinion that is used to market tax shelters must conduct reasonable factual due diligence, relate the law to the facts, consider all material federal tax issues and, where possible, provide specific and general conclusions about separate issues and the overall tax treatment of the transaction.\footnote{310}{Formal Opinion 346, \textit{supra} note 35.}

However, Section 10.35 has a broader scope than the ethical rules. Formal Opinion 346 applies only to "tax shelter opinions," which are limited to broadly marketed opinions or tax disclosure in offering or marketing materials.\footnote{311}{\textit{Id.}} It does not apply where advice is rendered solely to the offeror, the involvement of the lawyer is not publicized, or a tax shelter transaction is directly negotiated by a small group of investors having their own tax counsel. Formal Opinion 85-352 applies to advice regarding a tax return reporting position.\footnote{312}{Formal Opinion 85-352, \textit{supra} note 156.} It is true, as noted in the Special Task Force Report, that the opinion would also apply to advice regarding tax return positions prior to the actual preparation of the return, including advice in structuring transactions.\footnote{313}{Sax et al., \textit{supra} note 160, at 638. \textit{See also} WOLFMAN \textit{et al.}, \textit{supra} note 61, § 502 ("Since advising on return positions is inherent in most tax planning, the application of Opinion 85-352 would appear to apply to tax planning by logical extension.").} However, Formal Opinion 85-352 does not clearly require a lawyer to approach every planning question, no matter how preliminary or hypothetical, based on the assumption that the lawyer's advice will be reflected in a tax return.

Even where advice is related to a return position, a foreshortened analysis may be permissible. For example, a client may request advice concerning a specific rule that is only one of a number of elements in determining a return reporting position. In these circumstances, the lawyer will have an obligation to identify all the relevant facts regarding the application of the rule within the context of all known facts. However, the lawyer will not be required by Formal Opinion 85-352 to engage in a full analysis leading to an overall conclusion regarding the tax treatment of the position.

Section 10.35 requires a full-fledged analysis in many situations where the ethical rules do not. In these cases, the First Amendment professional speech model described above requires consideration of a number of questions. Does the absence of a full-fledged analysis constitute participation in illegal conduct, present a clear and realistic threat to the tax system, or deviate from accepted professional norms? If so, are the requirements of Section 10.35 narrowly tailored to address the illegality, the threat to the tax system, or the deviation from professional norms?
Finally, do the requirements of Section 10.35 further a legitimate government policy in a manner that does not distort the usual functioning of the profession based on accepted usage, or prevent the exercise of professional judgment?

1. Harmful Effects of Tax Advice

There is no reason to think that rendering written advice without a full-fledged analysis will in itself constitute participation in illegal conduct. Likewise, based on the ethical rules and practices discussed above, there is little reason to think that the absence of a full-fledged analysis represents a deviation from accepted professional norms.\textsuperscript{314} Arguably, limited-scope written tax advice represents a clear and meaningful threat to the system because it facilitates transactions motivated by tax avoidance, which themselves are threats. It could also be argued that the covered opinion requirements for a full-fledged opinion are directly related to the goal of discouraging inappropriate tax avoidance by ensuring that the recipient of the advice receives a full analysis of the likelihood that the transaction will or will not achieve the desired tax objectives.\textsuperscript{315}

\textsuperscript{314} It might be argued that the covered opinion standards of Section 10.35 reflect accepted professional norms because they reflect recommendations of the ABA Section of Taxation. \textit{See} ABA \textit{Section of Taxation, Report to Amend 31 C.F.R. Part 10, Treasury Department Circular 230, To Deal with "More Likely Than Not" Opinions Relating to Tax Shelter Items of Corporations (Nov. 1, 1999), reprinted in Tax Notes Today (Nov. 2, 1999); ABA Section of Taxation, Comments Regarding "Pre-Opinion Opinions" Relating to Corporate Tax Shelter Items (Sept. 15, 2000), reprinted in Tax Notes Today (Sept. 21, 2000); ABA Section of Taxation, Administrative Recommendation Regarding Regulations Governing Practice Before the IRS (Aug. 13, 2001), reprinted in Tax Notes Today (Aug. 15, 2001); ABA Section of Taxation, Proposed Revisions to Circular 230 ABA Section of Taxation Recommendations (Apr. 24, 2002), reprinted in Tax Notes Today (May 6, 2002). However, the ABA Section of Taxation recognized that many of the concepts in its recommendations "are novel and untried." ABA Section of Taxation, Proposed Revisions to Circular 230 ABA Section of Taxation Recommendations (Apr. 24, 2002), reprinted in Tax Notes Today (May 6, 2002).

The ABA Section of Taxation has since concluded that "the regulations are producing undesirable consequences at a level that is disproportionate to the associated benefits to the tax system." Letter from Dennis B. Drapkin to Mark W. Everson, Donald L. Korb, Eric Solomon, Cono R. Namorato (Dec. 5, 2005), in Tax Notes Today (Dec. 6, 2005).

\textsuperscript{315} \textit{See} ABA Section of Taxation, Proposed Revisions to Circular 230 ABA Section of Taxation Recommendations (Apr. 24, 2002), reprinted in Tax Notes Today (May 6, 2002). Arguably, the goals of Circular 230 concerning [penalty-protection opinions] could be achieved by making Circular 230 applicable to, and only to, opinions offered for purposes of penalty protection. Notwithstanding this, however, the Recommendation makes Circular 230 applicable to any opinion covering a section 10.35 transaction, as defined, regardless of whether the opinion is intended to create penalty protection. This is because ... [w]e believe that the attractiveness of abusive transactions will be reduced if practitioners are required to disclose all relevant issues and risks to taxpayers. This is appropriate in our current environment despite the fact that some transactions that meet the heightened due diligence procedures contained in section 10.35 are substantively sound under today's rules.
As discussed above, however, a tax-avoidance motivation does not necessarily prevent a transaction from lawfully achieving the desired tax benefits. Therefore, the government must argue either that tax-avoidance transactions are frequently invalid, or that the threat to the system comes from the combination of the transaction's tax-avoidance purpose with the uncertainty over its tax results. Under the First Amendment, it is difficult to justify regulating speech regarding a class of transactions because of the frequency with which invalid transactions occur within that class; if a meaningful amount of legitimate speech exists within the class, the regulation must fall. It is true that, where the rules are not clear, some taxpayers will interpret the uncertainty in their favor and seek to structure transactions to fall within these uncertain rules; tax advice regarding such transactions will facilitate this behavior. However, the potential for such manipulation has not been held sufficient grounds for regulating a class of speech that includes legitimate speech.

It might be argued, based on Gentile, that the test for regulating professional speech does not require certainty that the speech will harm the system. However, the ethical rule considered in Gentile specifically targeted statements that "have a substantial likelihood of materially prejudicing an adjudicative proceeding," and the Court emphasized the specific connection between the lawyer's speech and a threat to the integrity and fairness of the judicial system. In contrast, Section 10.35 applies indiscriminately to speech regarding valid and invalid transactions. It is doubtful that a court would uphold a regulation of professional speech based on the nonspecific threat that, as a result of such speech, taxpayers and their lawyers may structure transactions to exploit ambiguities in the tax rules.

Id.

316. See supra note 67. Likewise, the fact that a transaction has been designated by the IRS as a listed transaction does not in itself mean that the transaction is invalid.

317. See supra note 304.

318. See Caplin, supra note 203, at 976 (quoting Charles Grassley, R-Iowa, as observing that "At the heart of every abusive tax shelter is a tax lawyer or accountant").


320. "While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding." Id. at 1076.

321. The mere fact that such transactions are likely to give rise to litigation is not a threat that would justify the speech regulation. As the Supreme Court noted in the context of attorney advertising:

That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights. Accordingly, it is not sufficient justification for the discipline imposed on
This justification for regulating speech may not be appropriate even where written tax advice concerns an issue that ultimately is determined in favor of the IRS. Consider, for example, advice that correctly concludes that (1) an issue is uncertain, (2) there is a realistic possibility that the taxpayer will prevail, but (3) "more likely than not" the IRS will prevail, and (4) if the IRS prevails, the taxpayer will incur a substantial understatement penalty. There is little in such advice that could be seen to facilitate the improper tax avoidance. It is true that, by concluding that the taxpayer has a realistic possibility of success, the advice enables the taxpayer to assert the position on a tax return without risk of penalties for fraud, negligence, or disregard of rules or regulations. However, until the issue has been resolved, the taxpayer has the right to assert the position. It is difficult to see how the tax system is threatened by advice that correctly assesses the taxpayer's rights.322

Even if advice threatens the system by improperly concluding that a structure will provide tax benefits, are the requirements in Section 10.35 for a full-fledged opinion narrowly tailored to address the specific threat? There are two ways in which such a full-fledged opinion might help avoid structured transactions that improperly claim tax benefits: (1) by giving a full description of the factual and legal context of a transaction and identifying its strengths and weaknesses, an opinion could, if seen by the IRS, assist the IRS in challenging an improper transaction; (2) by identifying risks and penalties, the recipient might be less likely to claim improper benefits.

The requirements cannot be justified based on the possibility that an opinion will be seen by the IRS. While opinions sometimes will be disclosed to the IRS, many remain privileged and undisclosed. Accordingly, such requirements would not be narrowly tailored to a specific threat. Even if the requirements were limited to opinions that are discoverable by the IRS, this justification would be doubtful. Requiring a lawyer to prepare an opinion in ways designed to assist the IRS in a future challenge would entail a serious distortion of the lawyer's professional role; and, as a practical matter, taxpayers and lawyers would, absent some specific purpose such as penalty protection, avoid such advice whenever possible.

The requirements also cannot be justified on the grounds that they will discourage taxpayers from taking improper positions. The "ground up" analysis required by Section 10.35—identification of facts, relation

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appellant that his truthful and nondeceptive advertising had a tendency to or did in fact encourage others to file lawsuits.


322. See Trucksess, supra note 203, at 755.
of law to the facts, a reasoned conclusion regarding each significant federal tax issue, and an overall reasoned conclusion, with separate statements of assumptions relied upon and representations by the taxpayer—will lead to the preparation of comprehensive opinions. However, such comprehensiveness is not necessary or even desirable if the purpose is to prevent taxpayers from taking improper positions. The objective could be better achieved by requiring practitioners to properly address those issues that are relevant to the purpose and expected use of the opinion, including requirements that the practitioner consider all facts relevant to such issues and all relevant legal aspects of each issue, reach correct conclusions regarding the likelihood that each such issue will be resolved in the taxpayer’s favor, and address the likelihood that the client will incur penalties if the client’s position is not sustained.

2. Legitimate Government Policies

Another possible justification of the requirements is that they further legitimate government policies and impose only minor burdens on the lawyer-client relationship. Possible government policies include ensuring that taxpayers not enter into tax-motivated transactions without a full understanding of the risks and maintaining the public confidence in the honesty and integrity of tax professionals.\(^ {23}\)

These purposes are undoubtedly legitimate. The concern is whether the requirements achieve these ends and whether they improperly distort the role of an attorney based on accepted practices. In one sense, taxpayers will be better informed of the relevant risks by opinions that provide a comprehensive analysis of every potential issue. However, such analysis may not give taxpayers a meaningfully better understanding of the risks.\(^ {24}\) In particular, the low threshold for defining a significant federal tax issue may require a lawyer to address relatively unimportant issues in ways that dilute the lawyer’s message regarding more important issues.\(^ {25}\)

The requirement that covered opinions address all significant federal tax issues and include comprehensive analyses of the strengths and

\(^{23}\) The preamble to Section 10.35 specifically refers to the goal of restoring, promoting and maintaining the public’s confidence in tax practitioners as a purpose for the “best practices” contained in Section 10.33.

\(^{24}\) A similar issue arises in securities offering disclosures containing extensive discussions of potential risks. Without guidance regarding the relative importance of various risks, the reader may tend to discount the entire discussion.

\(^{25}\) One response is that Section 10.35 does not prevent the lawyer from highlighting the most important issues. However, the argument that the covered opinion requirements ensure better-informed taxpayers is not supported by a suggestion that the taxpayer need not read the entire opinion.
weaknesses of the taxpayer’s position also significantly alters the role of a lawyer providing advice to a client. Lawyers and clients may agree to limit the scope of written advice for any number of reasons. The client may want the benefit of the lawyer’s judgment as to which issues are most important. The client may have an independent knowledge of the tax law and wish advice only on a specialized point. The client may not want all the advice in writing because of a concern that the written advice may lose the protection of the attorney-client privilege. The client may have a limited budget. A transaction may not be sufficiently developed to merit an in-depth analysis. There may be insufficient time to prepare a comprehensive analysis. None of these reasons should deny the client the right to receive advice regarding his legal rights and exposures. For that reason, the ethical rules generally permit lawyers and clients to agree on the scope of legal advice, provided that the client is informed and the limitation does not prevent competent representation. 

Even where the lawyer’s advice is provided to a third party, the requirements substantially expand the obligations of a lawyer in ways that may prevent such advice from being rendered. This is particularly a concern for advice rendered in connection with commercial negotiations between the client and a third party having its own tax counsel. There, the lawyer’s role is akin to that of an advocate, since the third party’s tax counsel normally will evaluate the lawyer’s advice and make a recommendation to the third party whether or not to accept such advice. There are many legitimate reasons why the parties may not wish the lawyer to provide a comprehensive analysis of the third party’s tax position. Nor is a comprehensive analysis required under the ethical rules, which merely require that the lawyer disclose to the third party any limitation on the scope of the lawyer’s investigation and that the lawyer not knowingly make a false statement of material law or fact.

While much of the distortion to a lawyer’s typical role can be avoided through the various “legending out” exclusions to the covered opinion rules and the possibility, within the covered opinion rules, of

326. See supra notes 181–85, 188–89, and accompanying text.

327. The client typically will not wish to undertake this responsibility because of cost and liability concerns, and because the client’s relationship with the third party is principally commercial. Even if the client were prepared to have its lawyer provide a comprehensive analysis, the lawyer may not have sufficient information about the third party to permit such an analysis. The third party may request that the lawyer provide advice only regarding the tax treatment of facts that are better known to the client and the lawyer than to the third party. Also, the third party may be reluctant to disclose commercially sensitive or private information to the lawyer, who generally would have an ethical obligation to disclose those facts to the client. Finally, the third party may be reluctant to have the lawyer prepare a comprehensive analysis because such analysis would not be covered by attorney-client privilege.

328. See supra notes 182–85 and accompanying text.
providing a limited scope opinion, that is at best an incomplete response. First, the "legending out" and limited scope exceptions are not available in all circumstances: no "legending out" exclusion is available for written advice regarding listed or principal purpose transactions, or opinions regarding significant purpose transactions that are subject to conditions of confidentiality or contractual protection. Likewise, a limited scope opinion may not be provided in the case of a listed or principal purpose transaction or a marketed opinion. The distortion of a lawyer's role is just as likely in these cases as where a "legending out" exception is available.

Moreover, there are problems with the legends themselves. As discussed above, the legends may be false, overbroad, or inappropriate for the circumstances; practitioners should not be required to make such statements as a condition of avoiding the covered opinion requirements. A lawyer's role is also distorted by the conditions for providing a limited scope opinion, which, as discussed above, appear to place the lawyer in the position of negotiating directly with the client over the scope of the client's rights.

Finally, it is not clear that the covered opinion requirements have any meaningful connection to the level of public confidence in tax professionals. It could just as well be argued that the covered opinion requirements erode confidence among the informed public in their ability to obtain legal advice at a reasonable cost and in a manner suited to their legitimate needs.

B. Viewpoint-Based Requirements

Circular 230's viewpoint-based requirements include obligations regarding the method of analysis, conclusions that must be reached, and disclosures that must be made. As a general proposition, the First Amendment subjects viewpoint-based restrictions to a heightened level of scrutiny. However, such restrictions are not per se invalid under the

329. Arguably, lawyers who offer confidential tax strategies or charge fees contingent on tax benefits have a greater duty to analyze the entire transaction. Assuming that is the case, a better approach would be to limit practitioners' ability to impose confidentiality restrictions or charge contingent fees. Proposed revisions to Circular 230 would do that for contingent fees. 71 Fed. Reg. 6421 (Feb. 8, 2006).
330. See supra notes 82, 92–94.
331. See supra note 122.
332. See, e.g., Green, supra note 201, at 1702 ("Respect for the system is jeopardized if rules of practice ban advising about positions that in other contexts may be legitimately advocated and that in some cases ... may be attempted by taxpayers without exposure of penalty to them.").
professional speech model described above.\textsuperscript{335} Instead, under the professional speech model, each viewpoint-based requirement must be evaluated based on the policy goal that the requirement is intended to serve; whether the requirement is narrowly tailored to its objective; and whether it distorts the usual functioning of the profession, prevents the exercise of professional judgment, or requires a professional to make false or misleading statements.\textsuperscript{336}

1. Requirements Regarding Method of Analysis

Section 10.35 imposes two principal restrictions on the analysis in a covered opinion. The first is that the opinion may not contain internally inconsistent legal analyses or conclusions.\textsuperscript{337} As discussed above,\textsuperscript{338} the principle difficulty with this requirement is the uncertainty regarding its scope,\textsuperscript{339} since it is frequently not clear whether two analyses or conclusions are inconsistent. It is difficult to identify the policy goals served by preventing a lawyer from seeking to distinguish the meanings given to the same term in different provisions of the Code or addressing alternative analyses, and prohibiting this analysis would interfere with the practitioner’s obligation to provide a client with a complete assessment of the possible outcomes and with a lawyer’s fundamental role in interpreting the law.\textsuperscript{340}

The second principal restriction is that, in evaluating a tax issue, a practitioner may not take into account the possibilities that the IRS may not audit a tax return or raise an issue, or that the issue will be resolved by settlement if raised.\textsuperscript{341} Section 10.37 imposes this second restriction on written advice that is not a covered opinion.\textsuperscript{342} As discussed above, prohibiting a lawyer from taking the audit lottery into account is a non-controversial restatement of existing ethics rules.\textsuperscript{343} On the other hand,


\textsuperscript{336} See supra notes 292–97 and accompanying text.


\textsuperscript{338} See supra notes 131–34 and accompanying text.

\textsuperscript{339} If an opinion contains literally opposite analyses, one is plainly wrong; accordingly, the practitioner is not competent. Section 10.51(l) defines incompetent and disreputable conduct for which a practitioner may be sanctioned as including the giving of a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading.

\textsuperscript{340} See generally Bruce A. Green, The Criminal Regulation of Lawyers, 67 FORDHAM L. REV. 327 (1998) (discussing conflicts between criminal law and the professional role of protecting public’s legal rights).


\textsuperscript{342} Id. § 10.37(a).

\textsuperscript{343} See supra notes 207–09 and accompanying text. But see Blattmachr et al., supra note 84, at 75 n.76 (arguing that a rule prohibiting a practitioner from referring to the possibility that return
prohibiting a lawyer from analyzing the likely responses of the IRS to a position identified on audit interferes with a lawyer’s role.

The vast majority of tax disputes are resolved at the administrative level, where the identification, evaluation and resolution of issues is generally faster and less costly, and Congress has expressed a general policy favoring resolution of tax disputes outside the courts.\textsuperscript{344} The IRS, through revenue procedures and other pronouncements, regularly provides channels for resolving specific issues outside the courts. In those cases, advice that fails to take into account the expected position of the IRS would be incomplete.\textsuperscript{345} Even if there is no specific administrative channel for resolving an issue, administrative pronouncements are treated as authority for purposes of defining acceptable tax return positions, not merely because of the persuasiveness of pronouncement or the likelihood that a court may give deference to the positions, but precisely because they represent the view of the IRS and are thought to predict the position that the IRS will take in similar cases. Because predictions of IRS positions can be an important element in identifying a taxpayer’s rights, a rule that prohibits predictions can significantly distort a lawyer’s role and prevent the exercise of professional judgment.

2. Required Level of Confidence Regarding Conclusions

Unless an opinion is a marketed opinion, Section 10.35 does not impose minimum levels of confidence. However, an opinion that fails to express a favorable conclusion on a significant federal tax issue at a confidence level of at least “more likely than not” must include a “no reliance” legend.\textsuperscript{346} A marketed opinion must express a favorable conclusion on each significant federal tax issue, and regarding the overall tax treatment of the transaction, at a confidence level of at least “more likely than not.”\textsuperscript{347}

Requiring “more likely than not” conclusions in marketed opinions is meant to prevent a practitioner from providing advice used by third parties to encourage taxpayers to take improper positions.\textsuperscript{348} However, as

\textsuperscript{344} See, e.g., I.R.C. § 7123 (2005), which provides for non-binding mediation at the request of a taxpayer or the IRS Office of Appeals on any issue unresolved at the conclusion of appeals procedures or unsuccessful attempts to enter into a closing agreement.

\textsuperscript{345} A corporate tax shelter opinion that takes into account the possibility of settlement in reaching a “more likely than not” confidence level may not be relied upon as a defense against the penalties of Treas. Reg. § 1.6664-4(f)(2)(B). However, there is no ethical prohibition against a lawyer’s rendering such an opinion.

\textsuperscript{346} Circular 230, 31 C.F.R. § 10.35(c)(4) (2006).

\textsuperscript{347} Id. § 10.35(c)(3)(iv).

\textsuperscript{348} See supra note 129.
discussed above, the rule prohibits a practitioner from providing an opinion in circumstances where there is little reason to think that taxpayers are being encouraged to take improper positions—for example, where the rules are uncertain or in situations involving only secondary issues. The problem of secondary issues does not arise if the practitioner renders "negative advice" that the position will not succeed and does not indicate a favorable view at any level of confidence. However, other professional standards may treat such advice as incomplete or misleading if it does not appropriately identify the taxpayer’s rights. Also, the broad definition of a marketed tax shelter results in the rule applying in situations where there is no improper inducement; for example, where the advice is provided to a client regarding the client’s tax treatment.

Finally, whether the “more likely than not” standard is appropriate is a fundamental question. The ethical rules generally apply a “realistic possibility of success” standard, which can be satisfied if there is a one-in-three possibility of success. Likewise, the tax return preparer under-statement penalty applies a “realistic possibility of success” standard. In the ethics context, most commentators have rejected a “more likely than not” standard because of the inherent subjectivity of a percentage-based standard and because such a standard unduly restricts the positions that a taxpayer may assert on a return.

The minimum-level-of-confidence standards interfere in significant ways with a lawyer’s role in providing tax advice and the legitimate exercise of a lawyer’s judgment. Consider three situations where a lawyer renders tax advice: (1) advice addressed to a client and discussing the tax treatment of the client; (2) advice addressed to a client and discussing the tax treatment of a third party (such as a business counterparty of the client); and (3) advice addressed to a third party and discussing the tax treatment of the third party.

In the first situation, assume that the lawyer is rendering tax advice to a client regarding the client’s treatment in a tax shelter transaction and that the lawyer knows the advice will be used by a promoter in marketing the transaction to the client—for example, because the client asks the

349. See supra notes 129–30.
350. Formal Opinion 346, supra note 35, specifically requires a lawyer to “fully and fairly address” each relevant material tax issue.
351. See supra note 161.
352. See supra notes 197, 205.
353. See supra notes 198–203 and accompanying text. Cf. WOLFMAN ET AL., supra note 61, § 202.3.1.2 (A "substantial authority standard is more stringent than the professional standard currently governing practitioners in recommending positions that may be taken on the taxpayer’s return."); Green, supra note 201, at 1698 (a "more stringent return position standard will result in more meritorious positions being placed beyond the pale of ethical tax advice.").
lawyer to send a draft of the advice to the promoter for comments. In this situation, the limits on the lawyer’s ability to provide advice should be no greater than the client’s right to act on such advice.\textsuperscript{354} If the client has the right to file a tax return (subject to any required disclosure) claiming tax benefits from the transaction, it should not be deprived of the lawyer’s advice regarding the strength of the position, even if the lawyer does not reach a conclusion at a confidence level of at least “more likely than not.”\textsuperscript{355} True, the lawyer’s inability to reach that level of confidence normally will prevent the client from using it to establish a reasonable cause and good faith defense against penalties. However, the client has a right to assert the position on a tax return pending resolution of the relevant issues and the penalties will apply only if the client’s position ultimately is determined to be incorrect.\textsuperscript{356}

The fact that the lawyer’s advice is used by the tax shelter promoter should not affect the foregoing analysis. It might be argued that either the promoter or the client may press the lawyer to reach a favorable conclusion on an improper transaction. However, a fundamental tenet of legal ethics is the lawyer’s duty to exercise independent professional judgment in the face of pressure.\textsuperscript{357} A rule based on the assumption that a lawyer will not exercise such judgment fundamentally distorts the role of a lawyer by preventing both good and bad lawyering. Another concern may be that the promoter will use the lawyer’s advice to encourage the client to take a risky position—that the client will make bad choices based on the lawyer’s advice. However, this argument suffers from two flaws. First, the lawyer generally has a duty to explain the risks.\textsuperscript{358} Second, any problem that exists is one of bad choices, not of truthful information: “It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”\textsuperscript{359}

\textsuperscript{354} Cf. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (“Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman’s position.”).

\textsuperscript{355} Cf. Truckess, supra note 203, at 762–63.

\textsuperscript{356} See supra notes 201–03 and accompanying text.

\textsuperscript{357} See, e.g., MODEL RULES OF PROF’L CONDUCT R. 2.1 (2003); MODEL CODE OF PROF’L RESPONSIBILITY Canon 5 (1983).

\textsuperscript{358} See MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (2003) (stating that a “lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-8 (1980) (stating that a “lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations”).

Now consider the second situation, in which the lawyer advises a client about the tax treatment of a third party. Assume that the client is the tax shelter promoter and seeks advice about the treatment of a third party investor in the shelter, and that the lawyer knows the client will use the advice to market the tax shelter to the third party. Further assume, however, that the lawyer’s advice is not addressed to the third party and that the client’s marketing efforts will not refer to the lawyer’s advice. Here again, the limits on the lawyer’s ability to provide advice should be no greater than the client’s right to act on such advice. The lawyer will have a duty not to knowingly participate in the development of a tax shelter that lacks a realistic possibility of success and to advise the client of its legal obligations in marketing the tax shelter, such as any duty to report the tax shelter and to maintain documentation regarding the tax shelter and the marketing efforts. However, if the client is permitted to market the tax shelter, it cannot be deprived of legal advice regarding the tax shelter it is marketing.

Finally, consider the third situation, in which the lawyer gives advice to a third party about the tax treatment of the third party. Assume that the client, the tax shelter promoter, asks the lawyer to prepare advice for a third party investor in the tax shelter regarding the investor’s tax treatment. In this case, the restrictions on the lawyer’s advice operate to restrict the client’s marketing activities. Even if other marketing activities are not prohibited, regulating the lawyer’s advice may be considered important because of the perceived authority of a lawyer’s advice.

This situation is more complex than the others, because it involves First Amendment limits on the regulation of both professional speech and commercial-type speech. The initial question is whether providing legal advice as part of a marketing effort is an accepted part of a lawyer’s role. Lawyers representing sellers frequently will be called upon to provide advice to potential purchasers. For example, a lawyer representing a seller of property may be called upon to provide a good-title opinion to the purchaser, or a lawyer for an issuer of securities may be called upon

are generally referred to in First Amendment theory as “paternalism,” and a First Amendment doctrine has developed around the rejection of such justifications. See Carpenter, supra note 2. See also Volokh, supra note 2, at 1304 (The “premise of modern First Amendment law is that the government generally may not (with a few narrow exceptions) punish speech because of a fear, even a justified fear, that the people will make the wrong decisions based on that speech.”). Nevertheless, the boundary between speech that falls outside professional norms and speech that merely reflects a professionally controversial position is often unclear. Attempts to prohibit marginal professional views raise important First Amendment issues. See, e.g., 2002 Op. Iowa Att’y Gen. 02-12-1 (2002) (analyzing Dental Board rule prohibiting dentists from recommending removal of restorations from nonallergic patients for alleged purpose of removing toxic substances from body, and concluding that Dental Board had responsibility to monitor scientific support for its position).
to provide a tax disclosure in a prospectus. Such role is specifically addressed by the ethical rules and other guidance.\textsuperscript{360}

The ethical rules nevertheless highlight the tension that arises when a lawyer renders an opinion at the client’s request to a third party. In those circumstances, the lawyer assumes responsibilities to the third party as well as to the client. As stated in Formal Opinion 346, “[t]hese third persons have an interest in the integrity of the evaluation.”\textsuperscript{361} Under Model Rule 2.3(a), a lawyer may provide such advice if the lawyer reasonably believes that providing the opinion “is compatible with other aspects of the lawyer’s relationship with the client.”\textsuperscript{362} Where providing the opinion is likely to have a material adverse effect on the client’s interests, the lawyer must obtain the client’s informed consent before providing the opinion.\textsuperscript{363}

Under the ethical rules, the lawyer rendering an opinion to a third party has a duty of candor and must exercise independent professional judgment.\textsuperscript{364} Thus, the lawyer must disclose to the third party any limitation on the scope of the opinion or limitation imposed by the client.\textsuperscript{365} The lawyer must not knowingly make a false statement of material fact or law in providing the opinion.\textsuperscript{366} However, assuming that the client and the third party are otherwise acting within the bounds of the law, the lawyer has no duty to evaluate whether what is being sold by the client is appropriate for the third party’s needs.

A similar analysis should apply for purposes of the First Amendment. If the third party would have the right to file a tax return claiming tax benefits based on the relative strength of the position, the lawyer should not be prevented from providing an otherwise accurate and complete opinion merely because the transaction is uncertain or risky. A rule prohibiting the lawyer from providing the opinion could be justified only on the ground that the third party might be persuaded to take an undue tax risk. However, as discussed above, the “bad choices” rationale for restricting truthful speech has been emphatically rejected by the Supreme Court.\textsuperscript{367}

\textsuperscript{360} See, e.g., \textit{Model Rules of Prof’l Conduct} R. 2.3 cmt. (2003); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 335 (1981); Formal Opinion 346, \textit{supra} note 35.

\textsuperscript{361} Formal Opinion 346, \textit{supra} note 35.

\textsuperscript{362} \textit{Model Rules of Prof’l Conduct} R. 2.3(a) (2003).

\textsuperscript{363} \textit{Id.} at R. 2.3(b).


\textsuperscript{365} \textit{Model Rules of Prof’l Conduct} R. 2.3 cmt. (2003).

\textsuperscript{366} \textit{Id.}

\textsuperscript{367} See \textit{supra} notes 281, 359. Dale Carpenter has noted that the antipaternalism principle is not limited to the rejection of justifications based on the harm that may be caused to the direct recipient of the speech. Rather, the principle “is hostile to attempts by the government to restrict
3. Required Disclosures and Prohibition Against Contrary Advice

Section 10.35 provides for various disclosures on written advice, either as conditions for qualifying under a specific exception from the covered opinion rules or as absolute requirements for covered opinions with certain characteristics. In the first category are the "legending out" disclosures for reliance opinions or marketed opinions and the disclosures for limited scope opinions. In the second category are the required disclosures for covered opinions that are marketed opinions and opinions (other than marketed opinions) that fail to reach a "more likely than not" conclusion. If a disclosure is required under Section 10.35, a practitioner may not provide advice that is contrary to or inconsistent with the required disclosure.

As discussed above, the "no reliance" legend is inaccurate in a number of respects: (1) there currently is no rule prohibiting a taxpayer from relying on a "no reliance" opinion; (2) in the case of tax shelters that are not reportable transactions, a non-corporate taxpayer may assert reliance on an opinion reaching a lower level of confidence; and (3) the "no reliance" legend is inconsistent with a taxpayer's ability to rely on an opinion to avoid the penalties for negligence, disregard of rules or regulations, and fraud. By requiring a lawyer to include a "no reliance" legend in circumstances in which the written advice could in fact be relied upon by the taxpayer, and by prohibiting a lawyer from providing advice contrary to or inconsistent with the "no reliance" legend, Section 10.35 creates a significant conflict with a lawyer's ethical duties to provide competent advice and exercise independent judgment, and interferes in significant ways with a lawyer's role. Likewise, the "consumer protection" legend is inaccurate in cases where the opinion is rendered by the lawyer to a client and addresses the client's tax treatment.

From a First Amendment perspective, there is no sufficiently compelling justification to require a lawyer to make false or misleading statements. Rather, First Amendment case law has permitted required disclosures by professionals only where such disclosures were "truthful

speech on the grounds that, after receiving speech, citizens will make decisions based on the speech which in the aggregate harm the collective welfare." Carpenter, supra note 2, at 618.


369. Id. § 10.35(b)(5)(ii).

370. Id. § 10.35(c)(3)(v)(a).

371. Id. § 10.35(e)(2).

372. Id. § 10.35(e)(4).

373. See supra notes 91–94 and accompanying text.

374. See Blattmachr et al., supra note 63, at 1534; Blattmachr et al., supra note 84, at 74–75 (First Amendment implications of requiring a "no reliance" legend that is inconsistent with the applicable penalty rules).
and nonmisleading. Moreover, First Amendment case law has specifically condemned restrictions on legal advocacy that effectively deny a client access to legal advice.

C. Covered Opinion Requirements Permitted Under the Professional Speech Model

Many of the covered opinion standards appear to be derived from the requirements for opinions used to establish a reasonable cause and good faith defense against corporate tax shelter penalties, and an apparent purpose of the standards is to make clear to a taxpayer the extent to which the taxpayer may rely on the advice for penalty defense. However, as discussed above, the standards for penalty-defense opinions are not appropriate over the whole range of clients' needs for tax advice, and imposing those standards across the board significantly distorts a lawyer's role in many circumstances.

The policy objectives could be achieved far more directly by requiring an opinion to state whether it is intended to be relied upon to establish a reasonable cause and good faith defense to penalties. If so, it would be appropriate to require that the opinion comply with the standards for penalty-defense opinions. Other advice would be subject to the general due diligence and competency standards of Section 10.22 and Section 10.51 of Circular 230. Consistent with those general standards, where a practitioner's advice purports to reach a definitive conclusion about the tax treatment of specific facts, the practitioner could be required to (1) identify the scope of the opinion; (2) state the purposes for which it has been prepared; and (3) identify the persons who may rely on the opinion. Likewise, the rules could prohibit opinions that are based on unreasonable factual or legal assumptions, that unreasonably rely upon representations, statements, findings or agreements, or that fail to consider all relevant facts that the practitioner knows or should know. The rules could require such opinions to (1) relate the applicable law to the facts, (2) identify and address the relevant legal issues, (3) reach conclusions re-

377. See Treas. Reg. §§ 1.6664-4(c)(1) (factual due diligence obligations), 1.6664-4(f)(2)(B)(2) (relation of the law to the facts, and conclusion at a greater than 50% confidence level), and 1.6664-4(f)(2)(B) (opinion does not take into account the possibility that a return will not be audited, that an issue will not be raised on audit, or that an issue will be settled).
378. See WOLFMAN ET AL., supra note 61, § 208.5.3 (discussing the 2003 proposed covered opinion rules).
379. See supra notes 323–28 and accompanying text.
Regarding such issues, and (4) where relevant to the purpose of the opinion, state the extent to which such conclusions affect the recipient’s right to report a position on its tax return and the potential penalties if the position is not sustained. Finally, the rules could prohibit a practitioner from taking into account the possibility that a tax return will not be audited, or that a position will not be discovered in an audit. However, the practitioner could take into account the possibilities that an issue would not be raised once detected by the IRS, or would be resolved at the administrative level.

Special standards would continue to apply to marketed tax shelter opinions, defined as opinions addressed to third parties and used by a tax shelter promoter for marketing purposes (including tax disclosures and materials that will be referred to in marketing efforts). Consistent with Formal Opinion 346 and the consumer protection concerns associated with marketed tax shelter opinions, the rules could require a full-fledged opinion along the lines of the covered opinion requirements of Section 10.35. The principal differences between present Section 10.35 and the suggested revisions relate to the scope of the issues that the opinion must consider, the permissible analytical methods, the required level of confidence for conclusions, and the content of the required disclosures. The rules would require such a marketed opinion to address all federal tax issues (1) that could have a significant impact on the overall tax treatment of the transaction, and (2) for which there is a reasonable possibility of challenge by the IRS. The opinion would not have to address every tax issue for which the IRS has a reasonable basis for a successful challenge. The opinion would have to conclude that all the tax benefits being promoted have a realistic possibility of being sustained if challenged by the IRS. However, to the extent that a taxpayer would have a right to assert the benefits on a tax return and the promoter would have a right to market the transaction, the opinion would not have to conclude that the taxpayer is “more likely than not” to succeed if such benefits are challenged. Finally, the opinion would have to (1) address the potential penalties if the benefits are successfully challenged; (2) address the extent to which a taxpayer may rely upon the opinion as a defense against such penalties; (3) state that it was written to support the marketing of the transaction, and that the taxpayer should seek independent tax advice; and (4) disclose the existence of any compensation or referral arrangement between the promoter and the practitioner.
D. Covered Opinion Requirements for Marketed Tax Shelter Opinions Permitted Under the "Hearer-Centered" Theory

In certain respects the Circular 230 requirements for tax opinions used to market tax shelters can be compared to the requirements for securities offering materials. Securities offering materials can be seen as a form of commercial speech, and it may be appropriate to consider tax shelter opinions used for marketing purposes in a similar light.381

As discussed above, the purpose of the "hearer-centered" First Amendment theory is to ensure that the recipient of commercial-type speech receives information that enhances his or her ability to make an informed and autonomous choice.382 Under such a theory, the government can prohibit false or misleading speech, or speech that promotes an unlawful choice, and can require inclusion of information that helps the recipient make an informed choice. However, absent a compelling need and narrowly tailored measures, the government cannot prohibit the communication of truthful, non-misleading information, regardless of the risk that the recipient will use the information to make an undesirable choice. Further, the government cannot impose inaccurate prophylactic rules.

Application of the "hearer-centered" theory to the Circular 230 restrictions on marketed tax shelter opinions results in a somewhat different analysis than under the professional speech model. However, the ultimate conclusions are largely the same. Consider first the requirement that a lawyer address each significant issue for which the IRS has a "reasonable basis" for a successful challenge. Under a "hearer-centered" theory, such a requirement will be evaluated principally on whether it promotes an informed and autonomous choice by the recipient. That, in turn, depends on whether the use of a "reasonable basis" standard, rather than the "reasonable possibility of challenge" standard under the professional rules, furthers or hinders the recipient's informed choice. Because the "reasonable basis" standard is more comprehensive and objective than the "reasonable possibility of challenge" standard, a court is likely to conclude that the "reasonable basis" standard furthers, or at least does not materially hinder, the recipient's informed decision making.383 The burden would be on the challenger to establish that the "reasonable ba-

381. See, generally, Bevier, supra note 2; Boyer, supra note 2; Dooley, supra note 2; Neuborne, supra note 2; Pinto, supra note 2; Schoeman, supra note 2; Wolfson, supra note 2.
382. See supra note 303.
383. See, e.g., Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 650–53 (1985) (upholding requirement that advertisement of contingent legal fee arrangement disclose the possibility that clients will have to pay costs in unsuccessful lawsuits).
sis" requirement prevents an informed choice; for example, by submerging important risks in speculative ones, deterring lawyers from providing important advice out of a fear of the consequences of failing to identify an issue, or making legal advice prohibitively expensive.\textsuperscript{384}

Second, consider the prohibition against a lawyer’s taking into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised.\textsuperscript{385} A professional speech model would allow rules prohibiting a lawyer from taking into account the likelihood of detection, but would strike down rules prohibiting a lawyer from taking into account the likely responses of the IRS after the issue has been identified in an audit. A “hearer-centered” theory would reach the same result for different reasons. Advice that takes into account the possibility of non-detection strongly implies that the conclusions cannot sustain close examination and therefore are false or misleading. On the other hand, analysis of the likely responses of the IRS after the issue has been identified in an audit is clearly relevant to an informed choice by the recipient whether to take the risk that the matter will be challenged by the IRS and will not be resolved at the administrative level.

Third, consider the requirement that the opinion reach a favorable conclusion on each significant tax issue at a confidence level of at least “more likely than not.”\textsuperscript{386} As discussed above, such a requirement prohibits advice reaching a favorable conclusion at a lower level of confidence, regardless of whether the taxpayer has a right to claim the uncertain position on a tax return.\textsuperscript{387} The prohibition against advice at a lower level of confidence is a prophylactic rule that treats the lower-confidence-level conclusions as inherently invalid, or as encouraging bad choices. The professional speech theory would find problems with this rule based on a lawyer’s duties to a client; a “hearer-centered” theory would not allow the prohibition against lower-confidence-level conclusions, both because the advice may well be correct, and because of the paternalistic effect of the prohibition.

VI. CONCLUSION

The recent surge in illegitimate tax shelters is undeniably a problem for the tax system. Moreover, the behavior of certain professionals in developing, promoting and executing highly abusive tax shelters is deplorable. However, the Circular 230 requirements for covered opinions

\textsuperscript{384} See Pinto, \textit{supra} note 2, at 94.
\textsuperscript{386} Id. § 10.35(c)(3)(ii).
\textsuperscript{387} See \textit{supra} notes 201–03, 351–56, and accompanying text.
are in many respects an inappropriate response to these problems. The requirements effectively impose a framework and prohibitions on advice in ways that prevent a lawyer from giving taxpayers a complete, informed assessment of their rights. In certain circumstances the rules create significant ethical conflicts and deny the public legal advice. More generally, they distort the lawyer’s role and erode the principles underlying legal ethics rules. This restriction of information and distortion of a lawyer’s role make the rules vulnerable to a First Amendment challenge under the doctrines of professional speech and, in the case of tax opinions used to market tax shelters to third parties, under a general “hearer-centered” First Amendment theory.