St. Mary's Law Journal

Volume 36 | Number 1 Article 1

1-1-2004

A National Tax Bar: An End to the Attorney-Accountant Tax Turf War.

Katherine D. Black

Stephen T. Black

ST. MARY'S LAW JOURNAL

VOLUME 36 2004 NUMBER 1

ARTICLES

A NATIONAL TAX BAR: AN END TO THE ATTORNEY-ACCOUNTANT TAX TURF WAR

KATHERINE D. BLACK*
STEPHEN T. BLACK**

* Associate Professor, Southern Utah University. J.D. 1984, University of California, Davis; LL.M. 1989, McGeorge School of Law.

** Professor of Law, Franklin Pierce Law Center. J.D. 1994, Brigham Young University; LL.M. 2000, University of Washington.

I. INTRODUCTION

It seems almost comical to even be analyzing the question, "Is tax the practice of law?" Tax practice is based on statutes and regulations and requires in-depth analysis to form an opinion on a tax issue. However, because of economic and political reasons, neither the courts, the legislatures, nor the practitioners seem to be able to answer this question.

Federal taxation in the United States is founded upon the very long and complicated Internal Revenue Code.[1] It is supported and explained by a mind-numbing number of regulations, both legislative and interpretive, and other administrative agency rulings and procedures that are only surpassed in their sheer volume by their complexity.[2] Tax professionals must read, interpret, research, write opinion letters on, and defend clients before an administrative agency and ultimately before courts of original jurisdiction and courts of appeals.[3] It is hard to imagine that anyone would flunk this question if given as a law school final essay. It seems to be a textbook definition of the practice of law.

There are not enough lawyers who want to or are competent to practice tax law, and yet tax law affects every American every year. While tax is arguably the practice of law, we have to let some nonlawyers practice or there simply will not be representation for everyone who needs it. However, state courts remain divided as to when practicing tax constitutes the practice of law.[4]

The Certified Public Accountants (CPAs) have long claimed that the Supreme Court in *Sperry v. Florida ex rel. Florida Bar*[5] gave the Secretary of the Treasury the right to say who practices before the IRS, and the Secretary of the Treasury has given CPAs that

1. 26 U.S.C. §§ 1-9833 (West 2004).
2. *See generally* 26 C.F.R. §§ 1-802 (2004) (providing for the various regulations).
3. *See generally id.* (discussing the various regulations of the tax code).
4. *See* Agran v. Shapiro, 273 P.2d 619, 627-31 (Cal. App. Dep't Super. Ct. 1954) (illustrating the problem for accountants as the court held nonlawyers could not perform acts before the IRS if those acts constituted the practice of law).
5. 373 U.S. 379 (1963).

right. That is not correct.[6] The Secretary of the Treasury stated that CPAs could come before the IRS to practice accounting (e.g. explain the financial statements they had prepared) but nothing contained in the Code of Federal Regulations was to be construed to allow a nonlawyer to practice law.[7] Either the CPAs did not read that part or chose to ignore it, which alone should be a statement about their ability to practice law.

Conflict between the two professions is not new. In the late 1940s, the American Bar Association (ABA) and the American Institute of Certified Public Accountants (AICPA) held a joint conference to decide what accountants and lawyers could do in the area of tax.[8] The tasks were nicely defined[9] and lines drawn between the professions were clear. However, now CPAs are practicing tax law with renewed vigor.[10]

Specifically, in the 1990s, the Texas Bar Association launched two investigations against Arthur Andersen and Deloitte and Touche alleging the unauthorized practice of law, and actually filed a formal complaint against Arthur Andersen.[11] The complaint against Andersen was eventually dropped, and since no report was issued, the reasons for the complaint may never be known.[12] However, the consequences of prevailing on such a claim would be staggering. If the state bar associations won they would be restraining

---

6. Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 403 (1963) (holding that the state of Florida could not enjoin a nonlawyer who was registered to practice before the United States Patent Office from preparing and prosecuting patent applications in Florida).

7. 31 C.F.R. § 10.32 (2004).

8. *See National Conference Adopts Code for Practice in Income Tax Field*, 37 A.B.A. J. 517, 517 (1951) (describing the efforts of the CPA-members and the lawyer-members of the American Institute of Accountants' 1951 National Conference Council).

9. *See id.* at 536-37 (discussing the "Statement of Principles Relating to Practice in the Field of Federal Income Taxation" approved by the Council of the American Institute of Accountants on May 8, 1951).

10. *See* John Goff, *The Big Five, By the Numbers (Update)-How Do the Top Professional Services Firms Stack Up in Revenues, Clients, and Service Lines?*, CFO.COM, *available at* http://www.cfo.com/article.cfm/3003928 (Mar. 22, 2002) (mapping out the various revenues of the largest accounting firms).

11. *See Texas Turf War Ends Peacefully – Lawyers and CPAs,* J. ACCOUNTANCY, Oct. 1998, at 13 (stating that Arthur Andersen was accused of engaging in the unauthorized practice of law, but the complaint was dismissed after an eleven month investigation by the Unauthorized Practice of Law Committee of the Texas Supreme Court).

12. *Id.*

hundreds of thousands of CPAs from practicing.[13] Although this would be appropriate because only lawyers should practice tax, to whom would all those tax clients go?

CPAs now engage in the most complex areas of tax planning, estate planning, and entity formation. They draft documents, and sometimes, just to pacify bar associations, hire attorneys to do the drafting.[14]

In response to the strong CPA lobby, Congress, in 1998, gave taxpayers a "privilege" that allows taxpayers to consult with qualified tax advisors in the same manner that they would consult with tax lawyers.[15] Suddenly, the federal courts found themselves deciding tax was the practice of law (if so the privilege would apply).[16] Even though the state courts had already ruled tax was the practice of law, federal courts were now called upon to interpret a federal statute.[17] It appeared to be a federal supremacy issue and the courts proceeded headlong to determine that generally, tax was not the practice of law and thus, CPAs had no privilege.[18]

The state supreme courts, for political or economic reasons of their own, issued some interesting law. Some states' legislatures had enacted statutes prohibiting the unauthorized practice of law, despite the fact that many of those states' highest courts had re-

---

13. *See generally* AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, 2002-2003 ANNUAL REPORT (2003), *available at http://www.aicpa.org/about/annrpt/2002-2003/index.html* (indicating the institute's current membership of certified public accountants was 335,111 during 2002 through 2003).

14. *See, e.g.*, Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1530 (2000) (describing multidisciplinary practices, or "MDPs," as overt attempts by accounting firms to expand into the legal services market); John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market, Lawyers may Find Themselves Not Only Blindsided by the Assault but also Limited by Professional Rules*, 84 A.B.A. J. 42, 43 (1998) (reporting that most observers agree the large accounting firms are "muscling into the legal market").

15. *See* I.R.C. § 7525 (1998) (discussing the tax advice privilege).

16. *See id.* (discussing the tax advice privilege).

17. *See* Theresa LeBlanc, *Accounting-Client Privilege: The Effect of the IRS Restructuring and Reform Act of 1998,* 67 UKMC L. REV. 583, 590-91 (1999) (discussing recent federal cases interpreting the accounting-client privilege); *see generally* United States v. Frederick, 182 F.3d 496 (7th Cir. 1999) (interpreting the privilege available in tax advice).

18. *See* United States v. KPMG L.L.P., 316 F. Supp. 2d 30, 36-37 (D.D.C. 2004) (determining identity of a client who had consulted with a tax shelter consultant was not protected); United States v. Arthur Andersen, L.L.P., 273 F. Supp. 2d 955, 957-58 (N.D. Ill. 2003) (interpreting the scope of the privilege narrowly).

served the right to regulate the practice of law.[19] This legislation led to problems, as some nonlawyers who were prosecuted under those statutes raised the issue of whether the statutes were unconstitutional.[20] These cases forced the courts between a rock and a hard place: Either invalidate the offending statute (but exonerate the guilty nonlawyer who may have harmed the public by his/her unlawful acts) or accept the statute as valid (either by delegation, waiver of their power, or by some other questionable logical gymnastics).[21]

Unfortunately, the piecemeal treatment of the unauthorized practice cases resulted in a double standard by sometimes allowing nonlawyers to handle some "nonlegal" areas of practice (e.g. real estate closings, third party adjusting, or tax) but, on the other hand, holding licensed lawyers to regulations under the courts' ethical rules.[22] Nonlawyers could solicit business, use questionable billing practices,[23] and generally were not required to obtain any degree of competency before representing the public.

Further, any impact on federal tax law also affects other non-tax areas of law. For example, the federal courts of appeal are deeply split now on whether attorney's contingency fees should be first taxed to the client and then again to the attorney.[24] This situation

---

19. *See* TEX. GOV'T CODE ANN. § 81.102 (Vernon 1998) (indicating in order to practice law in Texas one must be a member of the state bar and adhere to rules as promulgated); ARK. CODE ANN. § 16-22-208 (Michie 2002) (discussing Arkansas' statute regulating the practice of law); GA. CODE ANN. § 15-19-51 (2003) (discussing Georgia's statute regulating the practice of law).

20. *See* Moore v. Grillis, 39 So. 2d 505, 512 (Miss. 1949) (en banc) (finding a statute limiting who could prepare tax returns arbitrarily discriminatory).

21. *Compare* Rhode Island Bar Ass'n v. Libutti, 100 A.2d 406, 407-08 (R.I. 1953) (finding respondent guilty of the unauthorized practice of law based on pure statutory grounds), *with Moore*, 39 So. 2d at 512 (holding a statute that prevented person not qualified as Certified Public Accountants (CPAs) from charging fees for the preparation of tax returns unconstitutional).

22. *See generally* TEX. DISCIPLINARY R. PROF'L CONDUCT, *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G app. A-1 (Vernon Supp. 1998) (TEX. STATE BAR R. art. X, § 9) (discussing the various rules of professional conduct to which Texas lawyers are held accountable).

23. *See* Press Release, National Consumer Law Center Inc., Tax Loans Skim Hundreds of Millions from Working Poor (Jan 31, 2002), *at* http://www.consumerlaw.org/initiatives/refund_anticipation/content/release_content.html (last visited Sept. 4, 2004) (discussing the debacle on "refund anticipation loans" and over-billing).

24. *See generally* Cornelius Cowles, *To Include or Exclude? The Circuit Court Split on Double Taxation of Contingent Fees,* 28 VT. B.J. 25 (2002) (discussing the federal courts' split concerning the taxation of contingency fees).

could put many plaintiffs in the dire position of owing more in taxes than they recovered. In addition family lawyers cannot just rely on state family law statutes because many aspects of divorce carry serious tax consequences and could render an equitable or equal division anything but.[25] Despite this pressure on attorneys to learn and know tax, the ABA has chosen to practically ignore tax in the required courses for attorneys.[26]

Although current case law is divided regarding when an accountant is practicing law, this Article will explore different approaches to this problem. Specifically, Part II of this Article explores which entities control the regulation of the legal profession. Next, Part III examines the impact of the state courts on the issue of unauthorized legal practice. Part IV touches on the related issue of privilege and the treatment of the attorney-client privilege in the context of tax practice. Further, Part V considers whether tax practice should be considered the practice of law, and Part VI of this Article examines the legal profession's obligation to regulate the practice of law. Finally, Part VII proposes new educational requirements and the establishment of a tax bar to assure the public of some minimum standard of education and competency in the area of taxation.

II. WHO CONTROLS THE PRACTICE OF LAW

A. *Regulation of the Practice of Law - Separation of Powers*

The determination of legal rights (e.g. personal freedom, property rights, etc.) is so fundamental to the fiber of human existence, that the regulation by the state of the practice of law which determines these rights is deemed critical.[27] The state has a significant interest in regulating the practice of law and protecting its citizens from being misled.[28] The U.S. Supreme Court has held that states have "a substantial interest in regulating the practice of law within

25. *See* Wendy S. Goffee, *Estate Planning with Trusts for Divorcing Spouses*, 38 FAM. L.Q. 157, 159 (2004) (outlining the provisions of the Internal Revenue Code that are relevant to family law).

26. *See generally* American Bar Association, *Standards for Approval of Law Schools and Interpretations* (2004-2005), *available at* http://www.abanet.org/legaled/standards/standards.html (discussing accreditation requirements for law schools).

27. Bates v. State Bar of Ariz., 433 U.S. 350, 362-63 (1977) (citing Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975)).

28. *Id.* at 362.

the State."[29] However, because the practice of law not only determines legal rights, but also is involved with the administration of justice, it is the state courts, not the legislatures, that regulate the profession.[30] Thus, even though the legislatures may pass licensing laws, which presumably determine the rights of individuals to perform certain functions, these laws may not supersede or interfere with the power of the courts to regulate the practice of law.[31] "[T]he courts . . . ultimately decide whether certain undisputed activities constitute the unauthorized practice of law."[32]

Allowing the Legislature to pass laws regarding the practice of law is a violation of the separation of powers.[33] Outside of the checks and balances provided for in the Constitution, regulation and control of each branch's power is, and should be, left to that branch.[34] Allowing the Legislature to license and control attorneys would be like allowing the Chief Executive to have control over the hiring of legislative aides or committee staff. Both of these are an infringement into the balance of powers and should create grave concerns.

However, a comprehensive definition of just what qualifies as the practice of law is "impossible," and "each case must be decided upon its own particular facts."[35] The Utah Supreme Court stated:

> The practice of law is so affected with the public interest that the state has both a right and a duty to control and regulate it in order to promote the public welfare. . . . It is the attorney who first sits as

---

29. Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 383 (1963).

30. *In re* Fla. State Bar Ass'n, 40 So. 2d 902, 909 (Fla. 1949); Bassi v. Langloss, 174 N.E.2d 682, 684 (Ill. 1961); People *ex rel.* Courtney v. Ass'n of Real Estate Taxpayers, 187 N.E. 823, 826 (Ill. 1933); State *ex rel.* Johnson v. Childe, 295 N.W. 381, 382-83 (Neb. 1941); *In re* Integration of Neb. State Bar Ass'n, 275 N.W. 265, 267-68 (Neb. 1937). *See generally* Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525 (1983) (describing the path taken by state courts in asserting the courts' judicial power by regulating the legal profession).

31. Laughlin v. Clephane, 77 F. Supp. 103, 105 (D.D.C. 1947); Brydonajack v. State Bar of Cal., 281 P. 1018, 1020 (Cal. 1929).

32. Unauthorized Practice Comm., State Bar of Tex. v. Cortez, 692 S.W.2d 47, 51 (Tex. 1985).

33. *Id.* at 49.

34. *Cortez*, 692 S.W.2d at 50.

35. Palmer v. Unauthorized Practice of Law Comm. of Tex., 438 S.W.2d 374, 376 (Tex. Civ. App.—Houston 1969, no writ); *see also* State Bar of Mich. v. Cramer, 399 Mich. 116, 249 N.W.2d 1, 7 (1976) (citing Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 64 (1939) and stating that "[a]ny attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure").

> judge of the merits of every case, who decides whether or not suit should be commenced. The court and the public are interested in having that decision rendered by those qualified so to do. . . . The public is directly concerned with the functioning of the machinery set up for the purpose of handling judicial work.[36]

B. *Who Determines Who Practices in Federal Courts*

It should be noted, however, that state courts do not have authority to control who can practice in federal court.[37] "Where federal law authorizes an agent to practice before a federal tribunal, the federal law preempts a state's licensing requirements to the extent that they are contrary to federal law."[38] Generally, federal courts have undisputed authority to regulate those practicing before them, including decisions on admission and discipline.[39] Moreover, federal courts have the power to determine how its business is conducted provided that the rules adhere to rules of procedure and acts of Congress.[40]

Thus, state courts have the right to determine what is the unauthorized practice of law in state courts, but federal courts have that right when it comes to federal courts. In addition, according to the Supreme Court, the Legislature cannot pass legislation determining who can practice before the federal courts. This leaves open the question of whether Congress may dictate rules of conduct for the courts.

In *Ippolito v. Florida*,[41] plaintiffs were not licensed attorneys but wanted to practice law.[42] Plaintiffs sued the State of Florida, the Florida Supreme Court, the Florida Bar, the Second District Court of Appeals and its judges, various attorneys, and other defendants.[43] Plaintiffs were associated with several non-profit organizations, such as the Defenders of Life and Property Inc., and the Pro

---

36. Nelson v. Smith, 154 P.2d 634, 637 (Utah 1944).

37. State Unauthorized Practice of Law Comm. v. Paul Mason & Assocs., 159 B.R. 773, 776 (N.D. Tex. 1993), *aff'd*, 46 F.3d 469 (5th Cir. 1995).

38. *Id.* (citing Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 385 (1963)).

39. *In re* Landerman, 7 F. Supp. 2d 1202, 1204 (C.D. Utah 1998) (discussing the powers of the federal court).

40. *Id.*

41. 824 F. Supp. 1562 (M.D. Fla. 1993).

42. Ippolito v. Florida, 824 F. Supp. 1562, 1564 (M.D. Fla. 1993).

43. *Id.*

Se Litigants of America Inc., which represented clients who were unlicensed, non-members of the Florida Bar.[44]

Plaintiffs claimed the following: (1) the bar failed to implement formal checks and balances and consisted of "a government within a government"; (2) the state legislature assigned the Florida Supreme Court, one of the three branches of government, quasi-legislative authority contrary to the State Constitution of Florida; (3) allowing the judiciary to regulate the practice violated the doctrine of separation of powers by encroaching on the traditional role of the legislature; (4) the Florida Supreme Court failed to have the "inherent power" to both regulate its members and operate as a regulatory body; (5) the Florida Supreme Court did not have the power to enforce a regulatory scheme upon non-members because it was not able to regulate its own members; (6) non-members were denied their "constitutional right to practice law" without due process because the bar prohibited them from practicing law; and (7) in its action the Florida Supreme Court created an enterprise which allowed the Florida Bar to engage in racketeering activities with attorneys and judges that deprived plaintiffs of their constitutional rights.[45]

In addressing the issues, the court stated the following:

> In only a century, the world has changed remarkably and so has the law. Without a minimum level of expertise in the practice of law,

---

44. *Id.* at 1564-65.

45. *Id.* at 1565, 1575. Plaintiffs claimed the following constitutional rights were deprived:

(1) Access to the Courts
(2) Redress to Court
(3) Jury Trials
(4) Assistance of Counsel of Choice for all litigation
(5) Speedy trial
(6) Impartial/Public trial
(7) Intimidation and excessive force by bailiffs
(8) Harassment
(9) Coercion
(10) Removing documents from Court files
(11) Denying access to public files
(12) Taking private companies without court order
(13) Conflicts between judges and attorneys
(14) No checks and balances
(15) Self-discipline of attorneys
(16) Failure of judges to investigate wrongdoing

Id. at 1565 n.3.

> it is unlikely that an average person could effectively prepare a case for trial, appear in court, and make an effective argument before a judge or a jury. Unskilled laymen attempting to argue their own case, or on behalf of another, would be inordinately disadvantaged. For these reasons, the Bar has become an indispensable component of the modern legal system.
>
> . . . .
>
> An essential part of practicing law is knowledge of the substantive law—the law which creates and defines a party's cause of action. Like the procedural aspects of law, the substantive law has grown significantly over the years. The law's proliferation has caused several problems for laymen and attorneys alike. As the law expands, it becomes difficult for attorneys with skilled staffs to maintain their expertise and to stay abreast of changes in the law. As a result, managing the law's growth requires superior research skills. . . . For these reasons, the State of Florida requires law students to graduate from an accredited three-year graduate program of legal study, pass a detailed background examination, and complete a two day examination testing several areas of substantive law, procedural law, and ethics. These minimum entrance requirements are necessary to provide the public with capable and effective legal representation. For the reasons that follow, the State of Florida sets basic standards for and regulates applicants seeking admission to the legal profession because during the course of representing a client, an attorney may cause a client to relinquish his life, liberty or property.[46]

The separation of powers doctrine of the Constitution implicitly provides that for the judiciary to be truly independent and separate they must have the power to prescribe rules and enforce these rules for both members and nonmembers.[47] The court in *Ippolito* also noted:

> [T]he courts are the forum for resolving conflicts. In this forum, attorneys serve as advocates of the citizens. In many instances an attorney opposes adversaries who are agents of other co-equal branches. Thus, an independent judiciary is essential to protect individual citizens from abuse of power by governmental actors. In this

---

46. *Ippolito*, 824 F. Supp. at 1567-68 (citations omitted).

47. *Id.* at 1568; *see also* Strickland v. Washington, 466 U.S. 668, 711 (1984) (requiring reasonably effective legal representation in a criminal case). The Constitution of the State of Florida specifically assigns jurisdiction to its Supreme Court: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." FLA. CONST. art. V, § 15.

> respect alone, the practice of law is quite different from other professions. Also unlike accountants and other professionals, an attorney is an officer of the court, having duties that extend beyond loyalty to the client. As such, attorneys have a responsibility to the court and the public.[48]

The court further noted the judiciary should regulate the practice of law in order to maintain the integrity, independence, and autonomy of the judiciary.[49] Otherwise, if the legislature were to regulate, "ethical issues would become political issues."[50] Additionally, the stature of the judiciary as an independent branch of government would be lost.[51] The court argued, "the legal profession would become less of a profession and more of a business association which would serve only the self-interest of lawyers while ignoring the public interest."[52]

"There is no vested right in an individual to practice law."[53] As the Supreme Court noted, if there is a right, it is the Court's right "to protect itself, and hence society, as an instrument of justice."[54] Courts have traditionally asserted their inherent power over those persons that practice before them, and have punished the unauthorized practice of law as contempt of court.[55]

However, Utah, has taken a different interpretation.[56] In a 1985 amendment to Article VIII of the Utah Constitution, the exclusive authority for the regulation of the practice of law was vested in the Utah Supreme Court.[57] In 1997, the Utah Supreme Court heard a

---

48. *Ippolito*, 824 F. Supp. at 1571-72; *see also* Edenfield v. Fane, 507 U.S. 761, 775 (1993) (explaining the difference between accountants and attorneys). The Supreme Court noted that in the context of solicitation, "a CPA is not 'a professional trained in the art of persuasion.' A CPA's training emphasizes independence and objectivity, not advocacy." *Id.*

49. Ippolito v. Florida, 824 F. Supp. 1562, 1572 (M.D. Fla. 1993).

50. *Id.*

51. *Id.*

52. *Id.*

53. *In re* Isserman, 345 U.S. 286, 289 (1953).

54. *Id.*

55. *See* Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Powers*, 28 U. CHI. L. REV. 162, 165 (1960) (describing the traditional contempt power held by the courts); *see also* Note, *Remedies Available to Combat the Unauthorized Practice of Law*, 62 COLUM. L. REV. 501, 501 n.4 (1962) (describing American courts' assumption of inherent power to license and regulate attorneys).

56. Utah State Bar v. Petersen, 937 P.2d 1263, 1270 (Utah 1997).

57. *Petersen*, 937 P.2d at 1270.

case regarding the unauthorized practice of law.[58] Petersen was a paralegal who was meeting and counseling with clients, drafting documents and pleadings, and conducting legal research for clients for a fee.[59] He was convicted of violating Section 78-51-25 of the Utah Code which provides that only licensed attorneys can practice law.[60]

In an interesting twist, Petersen argued that the 1985 amendment of Article VIII of the Utah Constitution granted the Utah Supreme Court the exclusive authority to regulate the practice of law, and thus, the statute violated the separation of powers doctrine and was unconstitutional.[61]

Petersen's conduct was obviously and blatantly the unauthorized practice of law. However, because the action against him was brought under a statute,[62] rather than in response to a rule promulgated by the Utah Supreme Court governing the unauthorized practice of law, the Supreme Court found itself in the awkward position of having to reverse his conviction or to uphold the conviction and somehow fix the technicality and find the code section valid.[63]

In a surprising opinion, the Utah Supreme Court held that the authority granted to it by the Utah Constitution only allowed it to regulate the *authorized* practice of law, not the unauthorized practice of law.[64] Thus, it held, it could only regulate those people admitted to practice law.[65] Since it did not have the authority to regulate nonattorneys, that power was held by the legislature.[66] The Utah Supreme Court held that it did not have the authority to regulate nonattorneys practicing law.[67] Presumably, a nonattorney who showed up in court to represent a client could do so and the court could do nothing about it.

---

58. *Id.* at 1266.

59. *Id.*

60. *Id.* at 1265.

61. *Id.* at 1266.

62. *Petersen*, 937 P.2d at 1267-70.

63. *See generally id.* at 1267-69 (analyzing Petersen's argument in order to resolve the apparent friction between the Utah Code and precedent).

64. *Id.* at 1270.

65. *Id.* at 1270.

66. *Id.*

67. *Petersen*, 937 P.2d at 1270.

Taking its newfound power for a spin, the Utah Legislature decided in 2004 that the practice of law only includes practice before a court.[68] Utah now finds itself in the awkward position of having its supreme court and its bar association having to "negotiate" with the legislature to get back some of the practice of law.[69] Since the court refused to use the power granted to it pursuant to the constitutional amendment, the legislature took the initiative.[70]

Utah's professional licensing statute grants to CPAs the power to prepare tax returns and give tax advice.[71] Since the giving of tax advice is the practice of law, this statute should be unconstitutional because it violates the separation of powers doctrine. However, the Utah Supreme Court appears to have taken the position that the legislature can pass whatever laws it wants regarding the practice of law by nonattorneys.[72] Interestingly, Utah now has two conflicting laws: one giving CPAs the grant of authority to practice law in the area of tax, and another proscribing the practice of law by a nonattorney.[73] The supreme court has presumably backed out of the battle since CPAs are not attorneys.[74] Thus, unless the Utah Supreme Court decides to reverse itself and resume control, attorneys and the courts will always be at the mercy of the Utah Legislature as to what does and does not constitute the practice of law.[75]

The Florida Supreme Court in *Ippolito* stated:

---

68. *See* Act of May 5, 2003, ch. 339, 2003 Utah Laws 624 (enacting UTAH CODE ANN. § 78-9-102 (effective May 3, 2004), amending UTAH CODE ANN. § 63-55b-178 (2002) (effective May 5, 2003), and repealing UTAH CODE ANN. § 78-9-101 (Supp. 2003) (effective May 3, 2004)) (enacting the narrow definition of the practice of law).

69. *See* Paul Burghardt, *Recent Developments in Utah Law: Recent Legislative Developments: Practice of Law,* 2004 UTAH L. REV. 314, 314 (2004) (stating that in deciding possible solutions to the problem, the legislature consulted both the Utah Supreme Court and the Utah State Bar).

70. Nelson v. Smith, 154 P.2d 634, 637 (Utah 1944).

71. Certified Public Accountant Licensing Act, UTAH CODE ANN. § 58-26a-101 (2004).

72. *See Nelson*, 154 P.2d at 637 (holding that the legislature has the authority to regulate the practice of law).

73. *Compare* Utah State Bar v. Summerhayes & Hayden, Pub. Adjusters, 905 P.2d 867, 869 (Utah 1995) (defining the practice of law as counseling or giving advice on legal matters), *with* John A. Adams, *Substitute House Bill 349 and the Definition of the Practice of Law*, (2003), *at* http://www.utahbarhournal.com/html/may_2003_8.html (discussing the Utah Legislature's attempt to restrict the practice of law to matters held in court, thereby goading the judiciary into improving legal access to the middle class).

74. *Nelson*, 154 P.2d at 638.

75. *Id.* at 637-38.

> The reasons espoused for regulating accountants are similar to those advanced for regulating attorneys. Similar to the legal profession, modern business practices have changed and so has the accounting profession. For some business owners and families, professionals other than accountants can provide reliable and inexpensive bookkeeping, and, to some extent, tax planning. For services beyond that, an accountant or certified public accountant is required. As business has become more complex, many people, even those with modest incomes, require accounting services. Because nonaccountants can provide services at a lower cost, many customers prefer nonaccountants for needed services.
>
> By regulating accountants and establishing a minimum level of competence, the legislature protects the public welfare by providing a capable pool of accountants. Through licensing, accountants, in whom the public places its sacred trust, are required to adhere to rigid ethical standards, and when a licensed accountant violates those established standards, the state may impose sanctions. Regulation allows the public welfare to flourish because it requires professionals to remain accountable to the state.
>
> Without the State of Florida setting basic standards for admission, professionals—by their misconduct—would cause irreparable harm to clients and third parties. . . .[76]

It is noticeable, that the Florida Supreme Court apparently determined that tax is not necessarily the practice of law in allowing accountants to advise in this area.[77]

Arizona took a slightly different approach in *In re Creasy*.[78] Creasy was a disbarred attorney who began to work for his wife, a licensed insurance adjuster, representing clients.[79] The Arizona Supreme Court held that it had continuing jurisdiction over the authorized and unauthorized practice of law, at least with respect to former members of the bar.[80]

---

76. Ippolito v. Florida, 824 F. Supp. 1562, 1569-70 (M.D. Fla. 1993).

77. *Id.*

78. 12 P.3d 214 (Ariz. 2000).

79. *In re* Creasy, 12 P.3d 214, 215 (Ariz. 2000).

80. *Id.* at 216. "This constitutional power to regulate the practice of law extends to non-lawyers as well as attorneys admitted to bar membership. . . . The facts of this case do not require us to determine the extent of our power to regulate 'practitioners' who are not and have never been lawyers." *Id.* (citations omitted). The court specifically asserted that the legislature had no authority in this area, and any law purporting to give Creasy the right to practice was declared unconstitutional. *Id.* However, the court reserved the issue

Enforcement of existing prohibitions is undertaken by state bar organizations; unauthorized practice committees of a state, county, or local bar organizations.[81] California has taken the position that if one were ever a bar member, they must be active and pay dues or they cannot even do what other nonattorneys can do.[82] Presumably, California believes that activities such as title work and working for the court constitute the practice of law and are allowed to be done by nonattorneys, but not by inactive attorneys.[83] Interestingly, if you give up your bar license in California, as a former attorney, you are then allowed to perform these functions.[84]

Instead of providing a definition of what constitutes the unauthorized practice of law, the courts have chosen to shape a definition by their decisions on a case by case basis.[85] Therefore, to gain an understanding of the parameters of the unauthorized practice of law in the area of taxation, it is necessary to review these cases.

III. STATE COURTS ON THE UNAUTHORIZED PRACTICE OF LAW

Practice in the area of taxation creates an interesting anomaly. To the lay public, tax practice is within the purview of an accountant. Even attorneys and judges go to their accountant for tax advice and preparation. However, the courts have long held the field of taxation to be a field of law.[86] Thus, the practice of taxation by nonlawyers has been held is the unauthorized practice of law.[87]

---

of whether the legislature could empower one who had never been an attorney to practice law. *Id.*

81. *See* Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS. L.J. 577, 582-84 (1989) (emphasizing that bar associations play a significant role in enforcing prohibitions).

82. *See* Baron v. City of Los Angeles, 469 P.2d 353, 357-59 (Cal. 1970) (stating that the State Bar Act is mainly concerned with the licensing of attorneys and thus governs only acts that a licensed attorney can perform).

83. *See generally id.* at 357-59 (discussing what constitutes the practice of law, presumably indicating once non-licensed title work, and the like can no longer be performed).

84. *See id.* (stating that the State Bar Act is mainly concerned with the licensing of attorneys and thus governs only acts that a licensed attorney can perform).

85. *See* Bump v. Barnett, 16 N.W.2d 579, 583 (Iowa 1944) (stating that the court "refrain[s] from attempting to frame a complete, all-inclusive statement of what constitutes the practice of law, that might, in some future case, embarrass us").

86. *See* Rhode Island Bar Ass'n v. Libutti, 100 A.2d 406, 407 (R.I. 1953).

87. *Id.*; *see generally* State Bar Ass'n of Conn. v. Conn. Bank & Trust Co., 140 A.2d 863 (Conn. 1958); State of Nebraska *ex rel.* Nebraska State Bar Ass'n v. Frank, 363 N.W.2d 139 (Neb. 1985); Application of New Jersey Soc'y of Certified Pub. Accountants, 507 A.2d 711 (N.J. 1986); New York County Lawyers' Ass'n (*In re* Roel), 144 N.E.2d 24 (N.Y. 1957);

Despite the court's position, accountants and other non-legal professionals continue to practice in this field, and look for ways to expand and enlarge the scope of their practice.

"Tax practice," itself is a rather open-ended term. It covers four main areas of representation:

- tax return preparation;
- tax planning (including personal, business, international, and estate planning);
- tax controversies – representation of clients before the I.R.S.; and
- tax controversies – before the courts.[88]

The following review is intended to give the reader an overview of the court-established parameters of what constitutes the unauthorized practice of law in taxation.

A. *Preparation of Tax Returns*

The justification for allowing nonlawyers to prepare pre-printed forms for others may trace its roots to a 1950 A.L.R. entry, which argued:

> While a degree of familiarity with tax law is a requisite for making out self-assessing tax returns, these are generally regarded as primarily informative in character and not of the nature of strict legal instruments, which establish, limit, or terminate rights and liabilities. Consequently, the courts hold that their preparation, especially those of the simpler sort, is open to the laity.[89]

Whatever may have been the truth in 1950, these arguments seem ridiculous today. There are over 120 million taxpayers who file each year, and the IRS reports that over sixty-percent use a paid preparer.[90] Each year Congress changes the laws, and no layperson can hope to keep up with the complexity of changes.

New York County Lawyers' Ass'n (*In re* Bercu), 78 N.Y.S.2d 209 (N.Y. App. Div. 1948); New York County Lawyers' Ass'n (*In re* Standard Tax & Management Corp.), 43 N.Y.S.2d 479 (N.Y. Spec. Term 1943).

88. The authors' categorization is based on their extensive experience in taxation.

89. R. F. Martin, Annotation, *Services in Connection with Tax Matters As Practice of Law*, 9 A.L.R.2d 797, 801 (1950) (emphasis added).

90. *See Opportunities Exist to Transition Taxpayers From Submitting Computer-Prepared Tax Returns on Paper to E-Filing,* DEP'T OF TREASURY, Mar. 2004, *at* http://www.ustreas.gov/tigta/2004reports/200440076fr.pdf (stating that "[t]he IRS Advisory Council reports that paid preparers file nearly sixty percent of all individual tax returns").

Another court has adopted the idea that it is acceptable for non-attorneys to prepare documents for a client, but they have discarded the rationale that if judgment were involved, the preparer was engaged in the practice of law.[91] This holding is unsupportable because it tells us that nonlawyers can prepare complicated legal documents, regardless of the degree of skill or judgment necessary to adequately complete the forms.[92]

The IRS is a government police agency.[93] Preparing a 1040 actually means making disclosures to the government on behalf of a client, making elections as to how the law will treat a client, and testifying that those disclosures and decisions were the correct ones and were honestly reported, since the form is executed "under penalty of perjury."[94]

Preparation of tax returns is one big exception to the Fifth Amendment's guarantee of freedom from self-incrimination.[95] Disclosures and elections made on tax returns can result in either civil or criminal penalty, yet millions of Americans each year turn to nonlawyers to help them wade through the complexity of forms that, if nothing else, require huge amounts of skill and judgment in an arcane area of law.[96]

1. Statutory Restrictions

In *Rhode Island Bar Ass'n v. Libutti*,[97] the state bar association sought to enjoin a public accountant from preparing income tax returns.[98] A state statute limited return preparers to members of the bar, CPAs, or members of the American Institute of Account-

91. *See* United States v. Willis, 565 F. Supp. 1186, 1202-03 (S.D. Iowa 1983) (holding that the preparation of tax documents was not the practice of law).

92. *See id.* (recognizing the difficulty in not calling tax work the practice of law).

93. *See* IRS HISTORY AND STRUCTURE, *available at* http://www.irs.ustreas.gov/irs/article/0%2c%2Cid=98142%2C00.htm (discussing the history of the IRS and its powers); POLICE STRUCTURE OF THE UNITED STATES, *available at* http://faculty.ncwc.edu/toconor/polstruct.htm (referring to the IRS as a police structure).

94. *See* 2003 1040 Instructions – U.S. Individual Income Tax Return, *available at* http://www.irs.gov/pub/irs-pdf/i1040.pdf (indicating that the individual is signing under penalty of perjury the above information is true and correct).

95. *See* United States v. Wainwright, 413 F.2d 796, 803 (10th Cir. 1969) (discussing the issue of the Fifth Amendment right against self-incrimination and tax returns).

96. *See* 2003 1040 Instructions – U.S. Individual Income Tax Return, *available at* http://www.irs.gov/pub/irs-pdf/i1040.pdf (discussing the complexity involved in filing).

97. 100 A.2d 406 (R.I. 1953).

98. Rhode Island Bar Ass'n v. Libutti, 100 A.2d 406, 407-08 (R.I. 1953).

ants.[99] The bar association also contended that the accountant, in preparing returns for those taxpayers whose income is less than $5,000, was engaged in the unauthorized practice of law.[100] The court decided the case on the statutory grounds and did not reach the issue of whether preparation of these more complex returns was the practice of law.[101]

Comparatively, another court has held that certain statutory provisions, restricting the class of persons eligible to prepare income tax returns for compensation to CPAs and attorneys, violated the Fourteenth Amendment.[102] Presumably, at least one court would disagree.[103]

2. Simple Tax Returns

It is acknowledged that a degree of familiarity with the tax law is required for filling out tax returns.[104] However, despite this acknowledged "need to know," if a nonlawyer does tax work relying on his interpretation of this knowledge, it is the unauthorized practice of law.[105]

It is permissible for a layperson to prepare tax returns.[106] In *Blair v. Motor Carriers Serv. Bureau, Inc.*,[107] the court stated that the forms furnished by the State and Federal Revenue bureaus are "not definitive in character nor do they vest legal rights" and are also easily amendable and largely informative.[108] The court, the

---

99. *Id.* at 406-07.

100. *Id.* at 407.

101. *Id.* at 407-08.

102. *See* Moore v. Grillis, 39 So. 2d 505, 512 (Miss. 1949) (en banc) (discussing the application of constitutional law).

103. *See* Ippolito v. Florida, 824 F. Supp. 1562, 1573 (M.D. Fla. 1993) (citations omitted) (indicating that "[t]he right to practice law, however, is not a privilege or immunity within the meaning of the Fourteenth Amendment").

104. *See* Humphreys v. Comm'r, 88 F.2d 430, 432 (2d Cir. 1937) (stating "[h]ow any accountant doing income tax work could do his business at all without a knowledge of the statutes, decisions, and treasury rulings in income tax matters is hard to see, and we should hesitate to hold that the necessity of such knowledge would require every member of a firm of accountants to be a member of the bar").

105. *See* Blair v. Motor Carriers Serv. Bureau, Inc., 40 Pa. D. & C. 413, 430-31 (Pa. Com. Pl. 1939) (holding that when a person holds himself out as a "tax consultant[ ]" who is competent to counsel the public on avoiding tax liability, he is practicing law).

106. *Id.*

107. 40 Pa. D. & C. 413 (Pa. Com. Pl. 1939).

108. Blair v. Motor Carriers Serv. Bureau, Inc., 40 Pa. D. & C. 413, 429-31 (Pa. Com. Pl. 1939). The court stated that because a distinction between legal and business counsel

defendants are "little more than skilled amanuenses, doing what an intelligent man could do for himself and what would be given to another to do only by someone who has little acquaintance with business routine and accounting technique."[109] The court concluded that tax return preparations are acceptable but when a "doubtful question arises which requires the construction of a statute or the consideration of a decision, the problem calls for a lawyer's solution."[110]

In an interesting twist, although tax preparation is not necessarily the practice of law and may be done by a nonlawyer, at least one state has held that when it is done by a licensed lawyer it is the practice of law.[111] In *Commission on Professional Ethics & Conduct v. Mahoney,*[112] the Iowa Supreme Court indicated while tax preparation and labor negotiations do not always constitute the practice of law, when completed by a licensed attorney they are the practice of law.[113]

---

must be made and since the defendants' activity as "tax consultants" requires "familiarity with complicated statutes and with multitudinous court decisions" that therefore the defendants are "enjoined from advising, or holding themselves out as qualified to advice, their customers [on] how to avoid or reduce tax liability." *Id.* at 430-31. However, the court did opine that the "defendants may prepare and file tax returns, just as they may install bookkeeping and accounting systems or prepare record forms." *Id.* at 431. *See also* Merrick v. Am. Sec. & Trust Co., 107 F.2d 271, 276 (D.C. Cir. 1939) (supporting case law that accountants are engaging in unauthorized practice of law); *In re* New Jersey Soc'y of Certified Pub. Accountants, 507 A.2d 711, 711 (N.J. 1986) (concluding "that preparation of a [state] inheritance tax return by a non-lawyer accountant acting for another, constituted the unauthorized practice of law"); Waugh v. Kelley, 555 N.E.2d 857, 858-59 (Ind. Ct. App. 1990) (clarifying that an out of state lawyer's preparation and filing of federal and state income tax returns did not as a matter of law constitute legal services). *Contra In re* Graham, 30 Pa. D. & C. 531, 532 (Pa. Orph. 1937) (emphasizing that a "greater, more responsible, and delicate part of a lawyer's work is. . . . [d]rafting instruments creating trusts . . . all [which] require legal knowledge and power of adaptation of the highest order").

109. *Blair*, 40 Pa. D. & C. at 429.

110. *Id.* The court stated that because a distinction between legal and business counsel must be made and since the defendants' activity as "tax consultants" requires "familiarity with complicated statutes and with multitudinous court decisions" that therefore the defendants are "enjoined from advising, or holding themselves out as qualified to advise, their customers [on] how to avoid or reduce tax liability." *Id.* at 430-31. However, the court did opine that the "defendants may prepare and file tax returns, just as they may install bookkeeping and accounting systems or prepare record forms." *Id.* at 431.

111. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Mahoney, 402 N.W.2d 434, 436 (Iowa 1987).

112. 402 N.W.2d 434 (Iowa 1987).

113. Comm. on Prof'l Ethics & Conduct v. Mahoney, 402 N.W.2d 434, 436 (Iowa 1987).

Conversely in *United States v. Willis*,[114] despite evidence which clearly showed that preparation of tax returns was an integral part of a lawyer's practice, the trial judge felt constrained by the Eighth Circuit's scrivener dictum[115] in *Canaday v. United States*,[116] and held that preparation of tax returns by a lawyer was not the performance of a legal service.[117]

On July 7, 1985, the American Bar Association Committee on Ethics and Professional Responsibility issued Formal Opinion 85-352.[118] That opinion is clear recognition by the ABA that preparation of income tax returns is a part of the practice of law which, along with other aspects of the legal profession, requires adherence to the ethical standards of conduct applicable to all attorneys in civil matters.[119] Formal Opinion 85-352 makes it clear that the lawyer who prepares tax returns must make a legal evaluation and judgment that the position being taken in the return would stand a realistic possibility of success if the matter is litigated.[120]

One court reasoned that when an attorney performs a service, which can be done by a layman, he still has an obligation to perform the type of work the professional standards require of him in the practice of law.[121] If he identifies a legal problem while per-

---

114. 565 F. Supp. 1186 (S.D. Iowa 1983).

115. *See* Canaday v. United States, 354 F.2d 849, 857 n.7 (8th Cir. 1966) (agreeing with the District Courts' holding). The court noted:

> [I]t is patently clear that the function performed by C.O. Smith for the defendant in filling out defendant's tax returns was the function of a scrivener, and that the documents received by C.O. Smith from the defendant and the documents prepared by C.O. Smith for the defendant were not of such a nature as to be the subject of the attorney-client privilege. It is also clear that C.O. Smith voluntarily released the papers here complained of to the government agents without any coercion or duress being exercised by those agents.

Id.

116. 354 F.2d 849 (8th Cir. 1966).

117. *Compare* United States v. Willis, 565 F. Supp. 1186, 1202-03 (S.D. Iowa 1983) (stating that the court was constrained by the prior ruling in *Canaday*), *with* Canaday v. United States, 354 F.2d 849, 857 (8th Cir. 1966) (stating the attorney had not acted as an attorney by preparing income tax returns).

118. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 352 (1985).

119. *See id.* (stating a lawyer's duty in preparing tax returns requires adherence to ethical standards of the ABA).

120. *See id.* (stating advise in tax matters must be given as if it could be litigated).

121. *See* State v. Willensun, 123 N.W.2d 452, 454 (Wis. 1963) (stating a lawyer is bound to advise if he sees a legal problem while working in a professional capacity for a client).

forming such a service, he must address the problem, even though a layman in the same situation could not do so.[122] Therefore, because an attorney is licensed to practice law, professional services done by him are always done in the capacity of an attorney.[123] The court also reasoned that many people seek an attorney to do this type of professional service because they believe it will be done better by an attorney.[124]

Similarly, *Columbus Bar Ass'n v. Agee*[125] was a disciplinary proceeding against an Ohio attorney who split fees with a layman.[126] There the Ohio Supreme Court stated: "There are many areas in which personal services do not constitute the practice of law when done by a layman but which are the practice of law when performed by an attorney, e.g., work in the fields of income tax and trademarks."[127]

Alternatively in *Gardner v. Conway*,[128] the Minnesota Supreme Court found that the resolution of "difficult or doubtful legal questions" by an accountant hired to prepare tax returns constituted the unauthorized practice of the law.[129] The court, however, noted that the preparation of the tax returns, at least when done by an accountant, did not itself constitute the practice of law.[130]

Additionally, in *State ex rel. Nebraska State Bar Ass'n v. Butterfield*,[131] the Nebraska Supreme Court found that the preparation, by a suspended attorney, of "deeds, mortgages, releases, and income tax returns during the period of his suspension . . . is properly identified as the practice of law, whether or not it might under some circumstances be properly performed by others not admitted to the bar."[132]

---

122. *Id.* at 456.

123. *Id.* at 454.

124. *Id.*

125. 196 N.E.2d 98 (Ohio 1964).

126. Columbus Bar Ass'n v. Agee, 196 N.E.2d 98, 101 (Ohio 1964).

127. *Id.*

128. 48 N.W.2d 788 (Minn. 1951).

129. *See* Gardner v. Conway, 48 N.W.2d 788, 796 (Minn. 1951) (stating that whenever a layman resolves legal questions in the course of normal dealings that he is practicing law).

130. *Id.* at 797 (stating accountants' work is not law practice if it does not include questions of law).

131. 111 N.W.2d 543 (Neb. 1961).

132. Nebraska *ex rel.* Neb. Bar Ass'n v. Butterfield, 111 N.W.2d 543, 546 (Neb. 1961).

Moreover, in *Librarian v. State Bar*,[133] an attorney was suspended for violating the rules on solicitation because he placed signs on his home advertising income tax return and notary services.[134] The California Superior Court held if a person is licensed to practice law, any professional service he renders, whether some of those services may be performed by a professional licensed in another capacity, are considered to be performed in his capacity as an attorney.[135] A person may be licensed to practice law but must abide by the standards of professional conduct regardless of the capacity in which he is acting.[136]

Preparation of even the simplest tax return may, in fact, establish legal rights. Elections may be made simply by filing the return or failure to affirmatively make an election.[137] Admissions may be made through the filing of a return. Further, Congress has imposed penalties, both civil and criminal, for various violations and failures to comply in the preparation of the return.[138] Despite the fact that rights may be determined by simply filing a return, the nonlawyers may fill out tax returns as long as no "doubtful question arises which requires the construction of a statute or the consideration of a decision."[139] Presumably, as long as the tax preparer does not know that the question is doubtful or requires the construction of a statute or the consideration of a decision, he can prepare the return.

---

133. 136 P.2d 321 (Cal. 1943).

134. Librarian v. State Bar, 136 P.2d 321, 321 (Cal. 1943).

135. *Id.* at 323; *see also Oklahoma ex rel.* Okla. Bar Ass'n v. Samara, 725 P.2d 306, 308-09 (Okla. 1986) (indicating that suspended attorneys will be subject to standards); State v. Schumacher, 519 P.2d 1116, 1125 (Kan. 1974) (subjecting disbarred attorneys to higher standards).

136. *Librarian,* 136 P.2d at 321.

137. *See generally* 26 C.F.R. § 1.9002-8 (2004) (stating that "[g]enerally, the taxpayer to whom the Act applies will exercise the elections provided therein").

138. *See, e.g.*, 26 U.S.C.A. § 7201 (West 2004) (providing felony penalties of fines and/or imprisonment for an attempt to evade or defeat a tax); 26 U.S.C.A. § 7203 (West 2004) (providing misdemeanor penalties of fines and/or imprisonment for willful failure to file a return, supply information, or pay a tax); 26 U.S.C.A. § 6651 (West 2004) (asserting an addition to the tax or imposing a penalty on the net amount due for a failure to file the tax return or to pay the tax); 26 U.S.C.A. § 6652 (West 2004) (identifying the penalties for failing to file certain information returns, registration statements, etc.).

139. Blair v. Motor Carriers Serv. Bureau, Inc., 40 Pa. D. & C. 413, 435 (Pa. Com. Pl. 1939).

3. Tax Advice Unrelated to Preparing the Tax Return

Generally, the courts permit nonlawyers to prepare simple tax returns and to answer incidental questions of law in connection with the preparation of those returns.[140] However, nonlawyers are not allowed, as a separate service, to render opinions regarding questions or interpretation of tax laws based on an examination of authorities or give tax counsel regarding a course of action that will result in tax savings.[141]

In *Lowell Bar Ass'n v. Loeb,*[142] a local bar association brought a petition before the Supreme Court of Massachusetts to enjoin nonlawyers from giving legal advice regarding taxation and the preparation of income tax returns.[143] One of the respondents included an attorney who owned American Tax Services, an unincorporated business engaged in preparing individual income tax returns on a high volume basis.[144] He, however, spent little time in the business.[145] Other respondents included the wife of the owner, who devoted all of her time to the business, and a general manager.[146] The general manager was an accountant.[147] The court stated that the examination of statutes, judicial decisions, and departmental rulings, with the intent of advising upon an inquiry relative to taxation and followed by a rendering of an opinion on that issue, are part of the practice of law.[148] However, the preparation of tax returns on income derived principally from wages or salary is not the practice of law.[149] In contrast, the undertaking, without initial charge, to negotiate with tax officials over any controversy that might arise in a given return did constitute the practice of law.[150] Further, the court stated that the commencement of legal proceedings in court in cases related to taxes is exclusively reserved to lawyers.[151]

---

140. Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27, 34 (Mass. 1943).
141. *Id.* at 33.
142. 52 N.E.2d 27 (Mass. 1943).
143. Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27, 29 (Mass. 1943).
144. *Id.* at 30.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Loeb*, 52 N.E.2d. at 33.
149. *Id.* at 34.
150. *Id.* at 35.
151. *Id.* at 32-33.

Ultimately, the court found that respondents did not engage in the practice of law.[152] The court decided the case based on the simplicity of the returns prepared by the respondents, explaining that the respondents filled out simple income tax returns that "can readily be filled out by any intelligent taxpayer . . . who has the patience to study the instructions."[153]

Comparatively, in the landmark *Bercu* case,[154] a New York appellate court found an accountant guilty of the unauthorized practice of law while giving tax advice.[155] The taxpayer company had not paid city sales and use taxes during a period in which its business was unprofitable.[156] In a later year in which it had made a large profit, the company wanted to settle a tax obligation, providing it could take the deduction on its federal income tax return for the profitable year.[157]

The company's regular accountant, who was also an attorney, had rendered an opinion based upon a decision of the U.S. Supreme Court, that the payments would have to be accrued back to the years they were incurred.[158] The taxpayer then consulted Bercu.[159]

Bercu, an accountant, conducted his own research and gave an opinion that the payments could be deducted in the profitable year.[160] He was not employed as an auditor or accountant for the client, nor for work on its books or tax returns.[161]

The court held Bercu in contempt for providing legal services apart from his normal accounting work.[162] However, the court intimated that when an accountant deals with a question of law which is only incidental to preparing a tax return, he is not engaged in the

---

152. *Id.* at 34.

153. *Loeb*, 52 N.E.2d at 34.

154. 78 N.Y.S.2d 209 (N.Y. App. Div. 1948).

155. New York County Lawyers' Ass'n (*In re* Bercu), 78 N.Y.S.2d 209, 220 (N.Y. App. Div. 1948).

156. *Id.* at 213.

157. *Id.*

158. *Id.*

159. *Id.*

160. *In re Bercu*, 78 N.Y.S.2d at 213-14.

161. *Id.* at 216.

162. *Id.* at 221.

unauthorized practice of law.[163] This practice became known as the incidental test.[164]

It is interesting to note that in *Bercu*, the initial proceeding arose when Bercu had sued for fees.[165] The unauthorized practice of law issue was raised as a defense to having to pay the fees.[166]

4. Tax Advice Incidental to Preparing the Tax Return

In *Agran v. Shapiro*,[167] the California Superior Court rejected the incidental activity test of *Bercu* and ruled that an accountant may not give legal advice or do legal work even in connection with his regular work as an accountant in tax matters.[168] The court stated:

> It appears to be generally conceded that it is within the proper function of a public accountant, although not a member of the bar, to prepare federal income tax returns, except perhaps in those instances where substantial questions of law arise which may competently be determined only by a lawyer. . . . [The IRS took the position that the] loss did not constitute a "net operating loss" within the meaning of the "carry back" provision of the statute. At this stage no question of accounting was involved. Neither the fact that the loss had been sustained nor the manner in which it arose was questioned. The only question was whether, under the admitted facts, the loss was one which could be "carried back," the answer to which depended upon whether or not it was a loss attributable to the operation of a trade or business regularly carried on by the taxpayer" within the meaning of that phrase as used in the Internal Revenue Code, section 122(d)

---

163. *See id.* at 216-17 (suggesting an accountant is not practicing law when they merely address a question of law that is incidental to preparing a tax return).

164. New York County Lawyers' Ass'n (*In re* Bercu), 78 N.Y.S.2d 209, 213 (N.Y. App. Div. 1948).

165. *Id.* at 211.

166. *Id.* at 221. Interesting no action was brought against the IRS agent, who, in all probability, was not an attorney either. *Id.* In fact, our research did not uncover any cases in which nonlawyers representing the IRS have been sued for the unauthorized practice of law!

167. 273 P.2d 619 (Cal. App. Dep't Super. Ct. 1954).

168. Agran v. Shapiro, 273 P.2d 619, 625-26 (Cal. App. Dep't Super. Ct. 1954) (finding that an accountant admitted to practice by the IRS was not entitled to recover fees for handling complex legal dispute in agency proceedings, because that work constituted unauthorized practice, even if it was incidental to accounting services); *see also* Gardner v. Conway, 48 N.W.2d 788, 795 (Minn. 1951) (holding an accountant is considered to be practicing law when he resolves incidental legal questions).

(5), 26 U.S.C.A. § 122(d) (5). We see no escape from the conclusion that under the circumstances this question was purely one of law.[169]

In *Agran* the plaintiff was an accountant who sued his client for fees.[170] He had filed a tax return for his client in which he claimed a deduction for a loss.[171] He then prepared a tentative carry-back of the loss to two preceding tax years.[172] Subsequently, the plaintiff met with an IRS agent who disallowed the loss.[173] Finally, the plaintiff researched the case law and presented his position to the IRS agent.[174]

Questions of fact are seldom brought to the accountant.[175] When the taxpayer comes to the accountant, it is not in an adversarial context. All facts are generally admitted or at least assumed. Clients consult accountants to apply the law to the facts. Even the simplest 1040 is a series of legal conclusions.[176] Marital status, dependent status, whether earnings are really wages and whether items on a W-2 are includible or not are all legal conclusions.[177] In fact, preparation of the Form W-2 itself calls for conclusions of law, which are not simple determinations.[178]

Thus, under the *Agran* analysis, preparation of even a simple tax return might constitute the practice of law.[179] Further, from the

---

169. *Agran*, 273 P.2d at 623 (emphasis added); *see also Gardner*, 48 N.W.2d at 795 (holding that "[a]ny rule which holds that a layman who prepares legal papers or furnishes other services of a legal nature is not practicing law when such services are incidental to another business or profession completely ignores the public welfare").

170. *Agran*, 273 P.2d at 620.

171. *Id.* at 621.

172. *Id.*

173. *Id.* at 622.

174. *Id.*

175. Both authors have an extensive background in accounting and the law. In addition, prior to teaching law Professor Stephen Black was a principal shareholder in a tax boutique, where he was involved in domestic and international tax planning and represented individuals and businesses before the Internal Revenue Service and state tax agencies.

176. Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27, 32 (Mass. 1943).

177. *See* Gardner v. Conway, 48 N.W.2d 789, 795 (Minn. 1951) (noting that although incidental to another occupation a particular practice "may entail a difficult question of law which requires a determination by a trained legal mind").

178. *See* IRS 2003 Form W-2, *available at* http://www.irs.gov/app/vita/content/basic/lesson10/images/0110_09_125.pdf (showing a sample W-2 form and the sections for marital and dependent status). For example, one must determine whether an employee is an "employee" or "independent contractor" for federal tax status. *Id.*

179. *Cf.* Agran v. Shapiro, 273 P.2d 619, 627-31 (Cal. App. Dep't Super. Ct. 1954) (providing that whenever a controversial legal issue is involved, meaning any matter the

cases which concern the giving of tax advice, it would appear that tax planning is definitely the practice of law and should not be done by nonlawyers.[180] In addition, any tax work before the IRS by nonlawyers that consists of researching and rendering opinions on the law constitutes the unauthorized practice of law.[181]

In *Agran* the court indicated an accountant is required to conform his accounting skills to the law, and consequently must be knowledgeable about the law of accounting.[182] Similarly, a lawyer must have a fair understanding of accounting.[183] The court further noted: "If taxation is a hybrid of law and accounting, it does not follow that it is so wholly without the law that its legal activities may be pursued without proper qualifications and without court supervision."[184]

Agran further noted that the Treasury Regulations allowing accountants to practice before the IRS do not allow non-members of the bar to perform acts constituting the practice of law.[185] Since the regulations specifically state that nothing contained in them shall be construed to allow a nonlawyer to practice law, accountants may practice before the IRS, but only if the work they perform is strictly within the scope of accounting and not law.[186] The work of the accountant is exempt only if it is "dissociated from legal advice."[187]

However, conversely, in *Gardner v. Conway*,[188] the Minnesota Supreme Court held that "[a]ny rule which holds that a layman

---

Treasury Department might take issue with or where the matter could become a basis for litigation, the services of a lawyer should be retained).

180. *See* Manddbaum v. Gilbert & Barker Mfg. Co., 290 N.Y.S. 462, 464 (N.Y. City Ct. 1936) (supporting the proposition that giving tax advice may constitute the practice of law).

181. *Agran*, 273 P.2d at 627.

182. *Id.* at 626.

183. *Id.*

184. *Id.*

185. *Agran*, 273 P.2d. at 627-31; *see also In re* Lyon, 16 N.E.2d 74-75 (Mass. 1938) (holding that only those who have been accepted as members of the bar are authorized to practice law); De Pass v. B. Harris Wool Co., 144 S.W.2d 146, 147 (Mo. 1940) (indicating that the statute that provides that only those licensed to practice law, may practice law). *Cf.* Chicago Bar Ass'n v. United Taxpayers of Am., 38 N.E.2d 349, 351 (Ill. App. Ct. 1941) (asserting that courts with the support of statutes define the authorized practice of law).

186. *Agran*, 273 P.2d at 628.

187. *In re* Opinion of the Justices, 194 N.E. 313, 318 (Mass. 1935).

188. 48 N.W.2d 788 (Minn. 1951).

who prepares legal papers or furnishes other services of a legal nature is not practicing law when such services are incidental to another business or profession completely ignores the public welfare."[189]

Nonetheless, the court in *Mandelbaum v. Gilbert & Barker Mfg. Co.*,[190] denied an accountant the recovery of a fee for advice given.[191] It stated:

> If plaintiff is allowed to recover, then an accountant may practice law without a license. Any one who renders an opinion as to the proper interpretation of a statute, or gives information as to what judicial or quasi judicial tribunals are deciding, and receives pay for it, is, to that extent, practicing law.[192]

5. Legal Advice by Accountants

In 1943, a corporation offered to provide an interpretation and analysis of tax laws and statutes, recommendations regarding contract modifications, recommendations of clauses to be used in forms and in corporate resolutions, and review of clients' tax and legal status all with a view of achieving large tax savings.[193] This action was held to be clearly the unauthorized practice of law and was not made any less so by the fact that the corporation suggested to its clients that they consult an attorney.[194]

In a 1986 New Jersey case, the court held that CPAs are permitted to prepare and file estate inheritance tax returns without being considered as engaging in the unauthorized practice of law, provided that they notify their clients in writing before commencing work and inform them review of the return by an attorney might be advisable because of legal principles that might be involved in the preparation of the return.[195] Thus, the court acknowledged

---

189. Gardner v. Conway, 48 N.W.2d 789, 795 (Minn. 1951).

190. 290 N.Y.S. 462 (N.Y. City Ct. 1936).

191. Mandelbaum v. Gilbert & Barker Mfg. Co., 290 N.Y.S. 462, 464 (N.Y. City Ct. 1936).

192. *Id.*; *see also* State *ex rel.* Hunter v. Daugherty, 286 N.W. 783, 784 (Neb. 1939) (asserting unauthorized practice of law may be punished as contempt).

193. *In re* New York County Lawyers Ass'n, 43 N.Y.S.2d 479, 480 (N.Y. Sup. Ct. 1943).

194. *Id.* at 480-81.

195. *In re* New Jersey Soc'y of Certified Pub. Accountants, 507 A.2d 711, 717 (N.J. 1986).

that the preparation of the return dealt with legal issues, but allowed the client to assume the risk of having a nonlawyer do the work.[196]

6. Permissible Actions by Accountants

There are a few cases holding that giving tax advice, even though not incidental to another service, does not constitute the unauthorized practice of law.

In *Groninger v. Fletcher Trust Co.*,[197] a corporate fiduciary furnished pamphlets to its customers which gave tax information and illustrations of ways to reduce tax liability and to prepare tax returns.[198] This was found not to constitute the unauthorized practice of law.[199] Generally, the sale of printed material, even when purporting to explain legal practices to the public, has not been held to be the practice of law.[200] The courts are divided, however, on the question of whether the sale of "how to" kits constitutes the practice of law.[201]

Additionally, in *Elfenbein v. Luckenbach Terminals, Inc.*,[202] the court held that developing a plan of changing par value stock into nonpar stock and reducing the number of outstanding shares to

---

196. *See id.* (holding that New Jersey CPAs may file inheritance tax returns as long as they notify their client in writing of the benefit of legal review). In a joint statement issued by the ABA and the AICPA, the two organizations adopted a Statement on Estate Planning. *Report, Lawyers and Certified Public Accountants: A Study of Interprofessional Relations*, 36 TAX LAW. 26, 35-36 (1982). The statement contemplates that in estate planning, certain areas are better handled by lawyers due to the legal problems that may underlie the transaction, whereas other areas of estate planning are better handled by accountants who are better equipped to handle the planning process. *Id.* at 36.

197. 41 N.E.2d 140 (Ind. 1942).

198. Groninger v. Fletcher Trust Co., 41 N.E.2d 140, 142 (Ind. 1942).

199. *Id.*

200. *See id.* (listing other cases where furnishing pamphlets is not the unauthorized practice of law).

201. *See* Frazee v. Citizens Fid. Bank & Trust Co., 393 S.W.2d 778, 784-86 (Ky. 1965) (enumerating services that may not be performed by a bank or trust company); Cape May County Bar Ass'n v. Ludlam, 211 A.2d 780, 781-83 (N.J. 1965) (holding that drafting deeds, mortgages, and other legal instruments was the unauthorized practice of law); New York County Lawyers' Ass'n (*In re* Roel), 144 N.E.2d 24, 24 (N.Y. 1957) (holding practicing foreign law as it relates to New York law is unauthorized); *see also* New York County Lawyers' Ass'n v. Dacey, 21 N.Y.S.2d 694, 695 (N.Y. 1967) (mem.) (holding that a "how to" book did not violate New York law prohibiting the unauthorized practice of law); 7 AM. JUR. 2d *Attorneys at Law* § 119 (2004) (outlining the jurisdictional differences on when the sale of books or forms constitutes the unauthorized practice of law).

202. 166 A. 91 (N.J. 1933).

affect a tax savings did not constitute the unauthorized practice of law.[203]

Further, a nonlawyer who offered to point out a loop hole in the Internal Revenue Code in exchange for a percentage of the savings was held, in *High v. Trade Union Courier Publishing Corp.*,[204] not to be unlawfully practicing law.[205]

Comparatively, in *Zelkin v. Caruso Discount Corp.*,[206] the plaintiff, a CPA, represented taxpayers in contesting deficiency assessments by the IRS.[207] The plaintiff testified that he had performed research at two law libraries and reviewed the original reserve agreement.[208] The plaintiff contended, however, that his research was directed toward a determination of proper accounting methods employed by taxpayers in similar factual settings.[209] The defendant, citing *Agran*, asserted that the plaintiff's services constituted the unauthorized practice of law.[210] The *Zelkin* court negated this argument by emphasizing that in *Agran* the accountant testified that he not only "cited numerous cases to the Internal Revenue agent" but also spent days reading and reviewing applicable law.[211] However, in the case at hand, the plaintiff neither read the law nor cited any cases to the Internal Revenue agent.[212] Consequently, the panel found the defendant's argument to be unfounded.[213]

In addition, the Supreme Court of South Carolina refused to adopt rules proposed by the South Carolina Bar which would have

---

203. *See* Elfenbein v. Luckenback Terminals, Inc. 166 A. 91, 94 (N.J. 1933) (holding that the actions were an effort to disclose rather than advice of a legal nature).

204. 69 N.Y.S.2d 526 (N.Y. Spec. Term 1946), *aff'd*, 89 N.Y.S.2d 527 (N.Y. App. Div. 1949).

205. High v. Trade Union Courier Publ'g Corp., 69 N.Y.S.2d 526, 528-29 (N.Y. Spec. Term 1946), *aff'd*, 89 N.Y.S.2d 527 (N.Y. App. Div. 1949).

206. 9 Cal. Rptr. 220 (Cal. Dist. Ct. App. 1960).

207. Zelkin v. Caruso Disc. Corp., 9 Cal. Rptr. 220, 222-23 (Cal. Dist. Ct. App. 1960). The relevant tax issue concerned whether Commercial Credit Corp. held reserves in excess of those that it was entitled to hold. *Id.* at 223. Any such excess would be available to the defendant upon demand and, accordingly, taxable as if the defendant had received it. *Id. See also* 26 C.F.R. § 1.451-2(a) (2004) (explaining that a taxpayer is in constructive receipt of funds that are made available to her to draw upon if notice of intention to withdraw is given).

208. *Zelkin*, 9 Cal. Rptr. at 222.

209. *Id.* at 223.

210. *Id.* at 224.

211. *Id.* at 223-24.

212. *Id.*

213. *Zelkin*, 9 Cal. Rptr. at 223-24.

restricted the ability of laypersons, including CPAs, to practice before state agencies and the probate court.[214] The rules would have also restricted CPAs in the practice of tax.[215] The court stated:

> [O]ur respect for the rigorous professional training, certification and licensing procedures, continuing education requirements, and ethical code required of Certified Public Accountants (CPAs) convinces us that they are entitled to recognition of their unique status. . . . We are confident that allowing CPAs to practice in their areas of expertise, subject to their own professional regulation, will best serve to both protect and promote the public interest.[216]

Notably, even the U.S. Supreme Court has presumed that nonlawyers could provide tax advice.[217] The Court heard a case in which an executor relied upon an attorney to file an estate tax return.[218] Because of a clerical error, the attorney failed to file the return on time.[219] Consequently, the executor filed a lawsuit premised on the attorney's error to recover penalties assessed for the untimely filing.[220] The Court held that a taxpayer's reliance on an attorney to prepare and file a tax return does not constitute "reasonable cause" for the late filing.[221] The Court went on to stress that "[i]t requires no special training or effort to ascertain a deadline and make sure that it is met."[222] In an effort to explain their holding and probably without much consideration for the impact of their words on the issue of whether tax is the practice of law, the Court stated: "When an accountant or attorney *advises* a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are

---

214. *In re* Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E.2d 123, 124 (S.C. 1992).

215. *Id.* at 124.

216. *Id.* at 124-25.

217. *Cf.* United States v. Boyle, 469 U.S. 241, 252 (1985) (presuming that accountant who is not a lawyer can give tax advice, in holding that reliance on an agent is not an excuse for failing to timely file one's tax return).

218. *Id.* at 242.

219. *Id.* at 243.

220. *Id.* at 244.

221. *See id.* at 243 n.1 (explaining that the IRS has enumerated eight reasons which provide a reasonable cause that will excuse an untimely filing, otherwise the court determines whether the reasonably prudent person would consider it a reasonable cause for delay).

222. *Boyle*, 469 U.S. at 252.

not competent to discern error in the substantive advice of an accountant or attorney."[223]

7. Sarbanes-Oxley

On October 16, 2001, Enron Inc. announced a $638 million loss for the third quarter, and Wall Street reduced the value of stockholders' equity by $1.2 billion.[224] Later that year, Enron announced that earnings over the past four years had been overstated by $586 million and that it had up to $3 billion in debt obligations to various partnerships.[225] A $23 billion merger deal fell through, and Enron's debt was downgraded to junk-bond status.[226]

The Sarbanes-Oxley Act of 2002[227] is probably the most important legislation affecting accounting, auditing, financial reporting, and professional services firms since the securities and exchange laws of the early 1930s. Section 201(a) of the Sarbanes-Oxley Act adds a new section, 10A(g), to the Securities Exchange Act of 1934.[228] Basically, it is unlawful for a registered public accounting firm that performs an audit of an issuer's financial statements (and any person associated with such a firm) to provide to that issuer, contemporaneously with the audit, any non-audit services, including the following nine categories:[229]

(1) bookkeeping or other services related to the accounting records or financial statements of the audit client;
(2) financial information systems design and implementation;
(3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports;
(4) actuarial services;
(5) internal audit outsourcing services;
(6) management functions or human resources;

---

223. *Id.* at 251.

224. Chris Ayers, *SEC Inquiry Into Enron*, THE TIMES (London), Oct. 23, 2001, at B29.

225. Steven Pearlslein & Peter Behr, *At Enron, the Fall Came Quickly; Complexity, Partnerships Kept Problems from Public View*, WASH. POST, Dec. 2, 2001, at A1.

226. Ben White, *Do Rating Agencies Make the Grade?: Enron Case Revives Sole Old Issues*, WASH. POST, Jan. 30, 2202, at E1.

227. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (2002) (codified at 15 U.S.C. § 7245).

228. *See id.* at § 201(a) (providing a new section on prohibited activities).

229. *See id.* (listing services a public accounting firm is prohibited from providing to an issuer while doing an audit for that issuer).

(7) broker or dealer, investment adviser, or investment banking services;
(8) legal services and expert services unrelated to the audit; and
(9) any other service that the Board[230] determines, by regulation, is impermissible.[231]

Any non-audit service for an audit client, including tax services, that is not one of the prohibited nine may be rendered only if the activity is approved in advance by the audit committee of the issuer.[232] That is, unless tax is considered a legal service.

A big question then, is, are tax services prohibited as legal services? The SEC indicated in a Release with respect to auditors the following:

> The Commission's principles of independence with respect to services provided by auditors are largely predicated on three basic principles, violations of which would impair the auditor's independence: (1) an auditor cannot function in the role of management, (2) an auditor cannot audit his or her own work, and (3) an auditor cannot serve in an advocacy role for his or her client.[233]

The Release, in addressing legal services, indicated the professional duty at its prime is to advance the clients' interests.[234] This means, as defined in the Rules of Professional Conduct, a lawyer while staying within the law must be zealous and diligent in their representation.[235] Further, a lawyer must perform whatever legal and ethical duties he or she can do to advance the client's cause.[236] Consequently, it is not possible for an individual to be both a legal advocate and an auditor for one company.[237] This position has

---

230. The Public Company Accounting Oversight Board was established pursuant to section 101 of the Public Company Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

231. Sarbanes-Oxley Act of 2002, § 201(a) (providing that a registered public accounting firm can provide non-audit services that are not expressly prohibited).

232. *See id.* (indicating approval is needed to stray from list by the audit committee).

233. Strengthening the Commission's Requirements Regarding Auditor Independence, Exchange Act Release No. 33-8183; 34-47265; 35-27642; IC-25915; IA-2103, FR-68, File No. S7-49-02 (Mar. 27, 2003), *available at* http://www.sec.gov/rules/final/33-813.htm (citing United States v. Arthur Young & Co., 465 U.S. 805, 819 n.15 (1984)).

234. *Id.*

235. *See id.* (discussing the Rules of Professional Conduct).

236. *Id.*

237. *Id.*

been upheld by the Supreme Court, who has previously recognized the conflict that inherently exists for an individual attempting to be an auditor and an attorney for the same corporation.[238] The Release further indicated:

> The rules we are adopting are consistent with our proposal. Accordingly, an accountant is prohibited from providing to an audit client any service that, under circumstances in which the service is provided, could be provided only by someone licensed, admitted, or otherwise qualified to practice law in the jurisdiction in which the service is provided.
>
> We recognize that there may be implications for some foreign registrants from this rule. . . . As a general matter, our rules are not intended to prohibit foreign accounting firms from providing services that an accounting firm in the United States may provide. In determining whether or not a service would impair the accountant's independence solely because the service is labeled a legal service in a foreign jurisdiction, the Commission will consider whether the provision of the service would be prohibited in the United States as well as in the foreign jurisdiction.[239]

Arguably, the Release appears to sanction the provision of tax services, however, the SEC does not indicate by whose standard that service would be prohibited.[240] Thus, the issue is still not settled.

B. *Tax and Estate Planning*

In *New York County Lawyers' Ass'n v. Dacey*,[241] respondents wrote, published, distributed and sold a book on avoiding probate.[242] The New York Court of Appeals ultimately held that selling such a book was not the unauthorized practice of law.[243]

---

238. Strengthening the Commission's Requirements Regarding Auditor Independence, Exchange Act Release No. 33-8183; 34-47265; 35-27642; IC-25915; IA-2103, FR-68, File No. S7-49-02 (Mar. 27, 2003), *available at* http://www.sec.gov/rules/final/33-8183.htm (citing United States v. Arthur Young & Co., 465 U.S. 805, 819 n.15 (1984)).

239. *Id.*

240. *Id.*

241. 21 N.Y.2d 694 (N.Y. 1967) (mem.).

242. New York County Lawyers' Ass'n v. Dacey, 21 N.Y.2d 694, 695 (N.Y. 1967) (mem.).

243. *Id.* at 695. *But see* Cape May County Bar Ass'n v. Ludlam, 211 A.2d 780, 780 (N.J. 1965) (holding that important legal rights are affected by the judgment of the individual selecting and drafting legal instruments). In order to protect these rights, as well as the

In *Stark County Bar Ass'n v. Beaman*,[244] the court held that it was the unauthorized practice of law for a nonlawyer to give advice regarding the laws of probate of decedents' estates and the tax laws of Ohio and the United States, and to advise and counsel regarding the specific type of trust agreement that would be suitable in a given situation.[245]

C. *Tax Controversies - Representation of Clients Before the Internal Revenue Service*

Currently, attorneys, accountants, enrolled agents, and others are allowed to practice before the IRS, according to Treasury Department Regulations.[246] Oddly enough, Section 10.32 of those rules provides that "nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law."[247]

The California court in *Agran* pointed out that this statute allows accountants to practice only accounting before the IRS.[248] Even the U.S. Supreme Court in *Sperry* pointed out that this language would be strictly construed as not allowing nonlawyers to practice law.[249]

In *Sperry*, the U.S. Supreme Court heard a case in which it determined whether practice before the Patent Office by nonlawyers constitutes the unauthorized practice of law.[250] The Court found

---

property in question, it is required that these services be provided by "licensed members of the legal profession." *Id.; see also In re* Roel, 3 N.Y.2d 224, 231 (N.Y. 1957) (emphasizing that a nonattorney is not entitled to offer legal advice on the sole basis of specialized knowledge about the particular subject); Oregon State Bar v. John H. Miller & Co., 385 P.2d 181, 181 (Or. 1963) (enjoining defendants engaged in the insurance business from preparing estate plans that embodied legal analysis); Frazee v. Citizens Fid. Bank & Trust Co., 393 S.W.2d 778, 784-86 (Ky. Ct. App. 1965) (concluding that the drafting of estate plans involving legal analysis is the practice of law).

244. 574 N.E.2d 599 (Ohio 1990).

245. Stark County Bar Ass'n v. Beaman, 574 N.E.2d 599, 600-01 (Ohio 1990).

246. *See* Agran v. Shapiro, 273 P.2d 619, 627 (Cal. App. Dep't Super. Ct. 1954) (indicating that under Treasury Department regulations, certain professionals are authorized to represent clients before the Treasury Department).

247. *See id.* at 628 (pointing out that the Treasury Regulations specifically prohibit persons not members of the bar from practicing the law).

248. *See id.* at 623, 631 (failing to accept that an accountant may perform services such as advising his client on legal questions).

249. Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 385 (1963).

250. *Id.*

that Congress recognized that the Commissioner of Patents had the following:

> [The authority to] practice before the Patent Office by non-lawyers. . . . If the authorization is unqualified, then, by virtue of the Supremacy Clause, Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority. . . . [R]egistration in the Patent Office confers a right to practice before the Office without regard to whether the State within which the practice is conducted would otherwise prohibit such conduct.[251]

The Court, however, emphasized that the regulations used the wording that registration "shall only entitle the persons registered to practice before the Patent Office."[252] This wording was opposed to the predecessor provision which provided that registration "shall not be construed as authorizing persons not members of the bar to practice law."[253] Thus, the Court left to the commissioner of an agency the discretion to supersede state law.[254]

The Supreme Court further noted in *Sperry* that state law must yield to federal law when the two are incompatible.[255] The Code of Federal Regulations further provides that "[n]othing in this part shall be construed to preempt the authority of each State to regulate the practice of law, except to the extent necessary for the Patent and Trademark Office to accomplish its federal objectives."[256]

---

251. *Id.* at 385, 388.

252. *Id.* at 386 (discussing language in 37 C.F.R. § 1.341). Section 1.341 appears to be repealed, however, Section 1.34 still requires only authorized persons to represent before the United States Patent and Trademark Office. 37 C.F.R. § 1.34 (2004).

253. Amendments to the Rules of Practice of the United States Patent Office, 3 Fed. Reg. 2429 (Oct. 8, 1938).

254. *See* Florida Bar *re*: Advisory Opinion, 571 So. 2d 430, 433 (Fla. 1990) (refusing to approve a proposed opinion which would have made the designing and preparing of pension plans and advising clients concerning such plans the unauthorized practice of law). Relying heavily upon the Employee Retirement Income Security Act of 1974, which allows nonlawyers to prepare and present such plans for IRS approval, and the statutes and regulations which provide that a number of major functions in the operation of pension plans can be carried out by nonlawyers, the court stated that while it could render such an opinion, the record did not justify a definitive opinion on the subject. *Id.* at 432 (discussing 29 U.S.C. §§ 1001-1461 (1988)).

255. Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 384 (1963) .

256. 37 C.F.R. § 10.1 (2004).

Thus, the Supreme Court left the door open in *Sperry* for nonlawyers to practice before the Patent and Trademark Office.[257]

Two important things should be noted about this decision: (1) Under the current Code of Federal Regulations, enacted in 1985, only licensed attorneys and those agents who were admitted prior to 1957, are allowed to practice before the Patent and Trademark Office;[258] and (2) this case has been misquoted and misused as a grant of greater powers than actually provided.[259]

Treasury Regulation Section 10.32 states that "[n]othing in the regulations [shall] be construed as authorizing persons not members of the bar to practice law."[260] This is the specific language the Supreme Court stated would bar a nonlawyer from providing "legal" services.[261]

Specifically, the California Superior Court in *Agran* came to the same conclusion when it held that nonlawyers could not perform acts before the IRS if those acts constituted the practice of law.[262] What acts constitute the practice of law is determined by case law in the various states, which has drawn very narrow lines as to what an accountant may do.

---

257. *See Sperry,* 373 U.S. at 386 (indicating the language of the regulation applying to the *Sperry* court provided "that registration in the Patent Office does not authorize the general practice of law, but sanctions only the performance of those services which are reasonably necessary and incident to the preparation and prosecution of patent applications.").

258. 37 C.F.R. § 10.1 (2004).

259. *See* Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1534 (2000) (applying *Sperry,* and indicating that "[f]ederal regulations, which preempt the state unauthorized practice of law statutes, permit accountants to provide tax advice."); Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption from State Unauthorized Practice of Law Rules*, 11 AKRON TAX J. 47, 55 (1995) (interpreting *Sperry* as meaning "[i]t is beyond dispute that the definition of 'practice before the Internal Revenue Service' includes activities that have traditionally been considered the practice of law"); John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-first Century*, 69 FORDHAM L. REV. 83, 109 (2000) (indicating there is specific authorization from the statutes for "lawyers, accountants, and enrolled agents to provide clients with tax advice."). This advice may include current and future tax problems and the interpretation of case law, statutes and regulations. *Id.* It may also include comparing the "different structures that a taxpayer could use to conduct a business or investment activity." *Id.* Preparation of tax opinions may also be included. *Id.*

260. 31 C.F.R. § 10.32 (2002).

261. Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 385-87 (1963).

262. Agran v. Shapiro, 273 P.2d 619, 627-31 (Cal. App. Dep't Super. Ct. 1954).

Further, giving advice to individuals under indictment for willful evasion of federal income tax was held to be the unauthorized practice of law where the individual advised the person of the nature of the charges and whether he should plead guilty.[263] "[P]reparation of charters, by-laws, resolutions, and other documents incidental to the contractual rights of the corporation, its incorporators, and stockholders . . ." was found to constitute the practice of law.[264] However, the cases are split on whether an accountant could recover for the fees for tax related work when other services performed constituted the unauthorized practice of law.[265]

Generally, the unauthorized practice of law generally arises in the context of contempt, injunction, disciplinary action, or contractual conflicts. However, in *Goldenberg v. Comm'r*,[266] the issue was whether a licensed attorney and CPA could deduct the cost of a law degree in taxation as a trade or business expense.[267] The petitioner worked for the IRS prior to entering law school.[268] The court held that prior employment as an IRS revenue agent, appeals officer, or as a CPA did not constitute the practice of law.[269] However, in *Bancroft v. Indemnity Insurance Co.*,[270] the court held that an accountant's malpractice insurance policy covered liability for negligently rendered tax opinions despite the insurer's assertion that the insured was engaged in the unauthorized practice of law.[271]

D. *Tax Controversies - Representation of Clients Before the Courts*

Even though this type of representation would seem to be the quintessential definition of the "practice of law," the U.S. Tax Court, pursuant to its Rule 200(a), allows nonlawyers to appear

263. Lowe v. Presley, 71 S.E.2d 730, 733 (Ga. Ct. App. 1952).

264. Florida Bar v. Town, 174 So. 2d 395, 397 (Fla. 1965).

265. *See* Florida Bar v. Town, 174 So. 2d 395, 397 (Fla. 1965) (holding that the creation of a corporate charter was the unauthorized practice of law); DeLeon v. Saldana, 745 S.W.2d 55, 58 (Tex. App.—San Antonio 1987, writ denied) (holding that a nonlawyer could not recover the value of his non-legal services because they were combined with legal services that he was not authorized to provide).

266. 65 T.C.M. (CCH) 2338 (T.C. 1993).

267. Goldenberg v. Comm'r, 65 T.C.M. (CCH) 2338, 2338 (T.C. 1993).

268. *Id.*

269. *Id.* at 2340.

270. 203 F. Supp. 49 (W.D. La. 1962).

271. Bancroft v. Indem. Ins. Co., 203 F. Supp. 49, 57 (W.D. La. 1962).

and represent clients before it.[272] The other two trial courts which hear federal tax cases do not.[273]

E. *Attorney Discipline*

Notably, attorneys who assist nonattorneys to practice law may be disciplined. In *Cincinnati Bar Ass'n v. Kathman*,[274] attorney disciplinary proceedings were instituted for this reason.[275] The Ohio Supreme Court held that a licensed attorney aids in the unauthorized practice of law when he or she assists nonlawyers to market or sell living trusts warranting a six month suspension.[276] Thus, presumably, attorneys working in multi-disciplinary practices may be subject to disciplinary procedures for aiding in the unauthorized practice of law.

IV. The Federal Courts and Privilege

The law regarding tax practice is further blurred by decisions involving the attorney-client privilege issue. Cases involving the unauthorized practice of law predominately arise in state courts. Unauthorized practice cases seldom arise in the federal court system since, generally, it is a state issue. Similarly, tax cases seldom arise in state courts since taxation is a federal issue. Issues of privilege in the federal tax arena generally arise in the federal court system. Thus, although the state courts may have ruled that tax is the practice of law for state law unauthorized practice issues, the federal courts have been deciding that tax is not the practice of law for privilege issues.[277] There is a large body of federal case law involving the attorney-client privilege which discusses the nature of

---

272. Tax Ct. R. 200(a).

273. *See* R.C.F.C. 83.1 (indicating the Court of Federal Claims requires the individual practicing before them to be an attorney); *see generally* 28 U.S.C.A. § 1654 (West 1994) (providing for the general rule that either the party or their "counsel" appear before a federal court).

274. 748 N.E.2d 1091 (Ohio 2001).

275. Cincinnati Bar Ass'n v. Kathman, 748 N.E.2d 1091, 1092 (Ohio 2001).

276. *Id.* at 1097.

277. *See generally* R.F. Martin, Annotation, *Services in Connection with Tax Matters As Practice of Law*, 9 A.L.R.2d 797 (1950) (delineating the differences between treatment of tax as the practice of law within state and federal courts).

legal services, and which has developed its own definition of the practice of law as it relates to tax.[278]

Despite state case law holding that the rendering of legal advice is lawyer's work, several federal courts deciding the privilege issue have held that tax services or tax return preparation are accounting services, and hence not covered by attorney-client privilege.[279] This is an easy way out of difficult privilege issues for the federal courts, but muddies the water for tax practitioners.

---

278. *See* Nguyen v. Excel Corp., 197 F.3d 200, 206 (5th Cir. 1999) (asserting that questions pertaining to a more general nature of legal services do not trigger the attorney-client privilege); United States v. Liebman, 742 F.2d 807, 809 (3d Cir. 1984) (concluding that the attorney-client privilege applied to a summons from the Internal Revenue Service which requested client information that specifically identified the subject matter and the substance of the communication between attorney and client); Colton v. United States, 306 F.2d 633, 636 (2d Cir. 1962) (finding that attorney-client discussions regarding the general nature of legal services did not qualify as confidential communications and were an acceptable subject for questioning of the attorney in the course of a federal income tax investigation of one of his clients); Diversified Group, Inc. v. Daugerdas, 304 F. Supp. 2d 507, 513-14 (S.D.N.Y. 2003) (holding that an attorney's invoices were not privileged because no details were given regarding the legal nature of the services provided). *See generally* Annotation, *What Matters Are Protected by Attorney-Client Privilege or Are Proper Subject of Inquiry by Internal Revenue Service Where Attorney Is Summoned in Connection with Taxpayer-Client Under Federal Tax Examination*, 15 A.L.R. FED. 771 (1973) (providing a more detailed discussion of federal courts' examination of the nature of legal services and the practice of law in relation to taxation issues).

279. *See In re* Grand Jury Proceedings, 220 F.3d 568, 571 (7th Cir. 2000) (explaining that information transmitted to an attorney or his agent for use on a tax return does not invoke the attorney-client privilege, because "the preparation of tax returns is an accounting service, not the provision of legal advice"); United States v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999) (opining that the attorney-client privilege is not applicable to tax services because "a taxpayer must not be allowed, by hiring a lawyer to do the work that an accountant, or other tax preparer, or taxpayer himself or herself, normally would do, to obtain greater protection from government investigators than a taxpayer who did not use a lawyer as his tax preparer would be entitled to"); United States v. Bornstein, 977 F.2d 112, 116 (4th Cir. 1992) (concluding that the attorney-client privilege does not attach to tax preparation services unless the accountant, at the attorney's request, is explaining difficult tax concepts for the attorney's benefit); *In re* Grand Jury Investigation, 842 F.2d 1223, 1224-25 (11th Cir. 1987) (finding that the preparation of a tax return by an attorney should not be privileged because the same tax return, when prepared by a professional accountant, would not be entitled to any privilege); United States v. Davis, 636 F.2d 1028, 1043 (5th Cir. 1981) (stating that the preparation of a tax return, while requiring certain understanding of the law, is an accounting service and is not entitled to attorney-client privilege, even when performed by an attorney).

A. *Background*

The attorney-client privilege is the client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and his or her attorney.[280] The privilege is intended to ensure "full and frank communication between attorneys and their clients."[281] Originally, the privilege was viewed as belonging to the attorney, but today the privilege is recognized as the client's.[282] By promoting greater disclosure of relevant facts by the client, this privilege allows the attorney to provide legal advice that is more informed and, therefore, more effective.[283]

Because the attorney-client privilege is "in derogation of the search for truth,"[284] some courts have frequently given the privilege a narrow construction.[285] After all, exercising the privilege means that the information sought cannot be obtained and thus, it acts as a shield and a cloak.

The privilege is governed by substantive law, rather than procedural law.[286] Thus, in federal cases based on diversity jurisdiction, privilege is generally determined in accordance with state law,[287] but in cases determining deficiencies in federal taxes, the federal common law applies.[288] The privilege is not guaranteed by the Constitution, but comes instead from statute or common law.[289]

---

280. *See* BLACK'S LAW DICTIONARY 501 (6th ed. 1990) (defining the attorney-client privilege).

281. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The Court stated that the privilege promotes public interest in the observance of law and the administration of justice by encouraging full and frank communication between attorneys and their client. *Id.*

282. Tillotson v. Boughner, 350 F.2d 663, 665 (7th Cir. 1965); Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956); Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D. Cal. 1978).

283. *See Upjohn Co.*, 449 U.S. at 389 (stating that the privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client").

284. United States v. Nixon, 418 U.S. 683, 710 (1974).

285. *See* Fisher v. United States, 425 U.S. 391, 403 (1976) (noting, "since the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose").

286. *See* FED R. EVID. 501 (indicating that federal privilege law is based upon the common law).

287. FED. R. EVID. 501 advisory committee's note.

288. Johnston v. Comm'r, 119 T.C. 27, 34 (2002).

289. *See* Clutchette v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985) (stating that the attorney-client privilege is not a constitutional right).

Where information is revealed to the attorney for the purpose of disclosure to the government, waiver of the privilege is presumed.[290] Courts have held that tax returns and records in the hands of a taxpayer are not privileged from discovery.[291] However, the courts have also held that great caution should be exercised in ordering the disclosure of tax returns.[292] There is a judicially developed "'qualified' privilege . . . that disfavors the disclosure of income tax returns as a matter of general federal policy."[293] A court must determine whether (1) the tax return is relevant to the subject matter in dispute; and (2) a compelling need exists for the return, because the information sought is not obtainable from other sources.[294] While the party seeking discovery of the tax returns bears the burden of establishing its relevance, the resisting party has the task of identifying an alternative source for the information.[295]

"[T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[296] Common law has defined the attorney-client privilege as protecting only communications relating to an opinion of law, legal service, or aid in a legal proceeding.[297] The privilege is held by and must be

290. *See* St. Regis Paper Co. v. United States, 368 U.S. 208, 218-19 (1961) (supporting the proposition a waiver of privilege is presumed).

291. *Id.* at 218-19; Poulos v. Naas Foods, Inc., 959 F.2d 69, 74 (7th Cir. 1992); Credit Life Ins. Co. v. Uniworld Ins. Co., 94 F.R.D. 113, 119 (S.D. Ohio 1982).

292. *See* Natural Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397, 1411 (5th Cir. 1993) (warning that disclosure of tax returns is a threat to privacy and effective administration of the income tax system); Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975) (stating that a public policy against unnecessary disclosure encourages the filing of complete and accurate tax returns).

293. Eastern Auto Distribs., Inc. v. Peugeot Motors of Am., Inc., 96 F.R.D. 147, 148-49 (E.D. Va. 1982).

294. *Eastern Auto Distribs., Inc.*, 96 F.R.D. at 148. *See also* Hawkins v. South Plains Int'l Trucks, Inc., 139 F.R.D. 679, 681-82 (D. Colo. 1991) (recognizing two part test); United States v. Bonanno Organized Crime Family of La Cosa, 119 F.R.D. 625, 627 (E.D.N.Y. 1988) (recognizing test); S.E.C. v. Cymaticolor Corp., 106 F.R.D. 545, 547 (S.D.N.Y. 1985) (recognizing test).

295. *Eastern Auto Distribs., Inc.*, 96 F.R.D. at 149 (citing Biliske v. Am. Live Stock Ins. Co., 73 F.R.D. 124 (W.D. Okla. 1977)); *see also* Kelling v. Bridgestone/Firestone, Inc., 157 F.R.D. 496, 498 (D. Kan. 1994) (recognizing the same burden on the party seeking the tax returns).

296. FED. R. EVID. 501.

297. Am. Standard, Inc. v. Pfizer, Inc., 828 F.2d 734, 745 (Fed. Cir. 1987).

claimed by a client, and limits the person receiving the privilege to a member of the bar of the court.[298] There are several ways a client can waive his privilege.[299]

Since the adoption of the Federal Rules of Evidence in 1975,[300] the federal courts have struggled to define the "federal common law" on this subject.[301] Rule 501 of the Federal Rules of Evidence, as well as the Supreme Court's decisions in *United States v. Euge*[302] and *Upjohn Co. v. United States*,[303] make it clear that privileges in the federal courts are to be determined pursuant to federal common law.[304] Rule 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.[305]

Rule 501 governs issues of privilege in the federal courts.[306] Thus, federal common law governs in federal question cases and state law governs in diversity suits.[307] IRS summons are issued

---

298. Fisher v. United States, 425 U.S. 391, 403 (1976).

299. *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5506, at 562-63 (1986 & Supp. 1998) (noting that if a client places material at issue during a trial, the client waives any communications privilege related to the particular material).

300. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

301. *See* FED R. EVID. 501 (indicating federal privilege law is based upon the common law).

302. 444 U.S. 707 (1980).

303. 449 U.S. 383 (1981).

304. *See* Upjohn Co. v. United States, 449 U.S. 383, 398 (1981) (implying that because Congress failed to legislatively narrow the work-product privilege, its applicability is determined under Federal Rules of Civil Procedure 26(b)(3), the codification of the common law); United States v. Euge, 444 U.S. 707, 714 (1980) (explaining that the duty to provide evidence has not only been considered to exist in the common law, but in statute as well).

305. FED. R. EVID. 501.

306. *Id.*

307. *See id.* advisory committee's note (indicating that "federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason").

under federal law, and the applicability of the attorney-client privilege is a federal question.[308]

Common law did not extend the privilege of confidential communications to accountants.[309] There are various reasons for courts' reluctance in allowing an accountant-client privilege.[310] In general, privileges are disfavored under evidentiary principles because their effect is to prevent the use of relevant evidence.[311] Thus, privileges should exist only within the narrowest possible limits and only when good reasons can be shown for their existence.[312]

Another reason for the denial of the accountant-client privilege is the differing responsibilities of an attorney and an accountant.[313] An attorney owes a duty of undivided loyalty to the client, an accountant, on the other hand, owes a duty not only to the client, but also to governmental agencies regulating the client's industry, and to the client's creditors and investors.[314] Some courts have held that handing over records to an accountant comes with little expectation of privacy, but instead with the knowledge that the informa-

---

308. *See In re* Pebsworth, 705 F.2d 261, 262 (7th Cir. 1983) (explaining that such privileges are "a matter of federal common law; state-created principles of privilege do not control"); Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100, 104 (3d Cir. 1982) (explaining that when a case presents both federal and state law claims, "the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule"); United States v. Hankins, 581 F.2d 431, 438 n.13 (5th Cir. 1978) (enunciating that when a federal law applies, the applicability of privilege is determined by federal common law).

309. *See* United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984) (upholding that an accountant-client privilege does not exist); Couch v. United States, 409 U.S. 322, 335 (1973) (stating that an accountant-client privilege does not exist under federal law); United States v. Bein, 728 F.2d 107, 112 (2d Cir. 1984) (indicating that there is not a privilege between an accountant and a client); United States v. El Paso Co., 682 F.2d 530, 541 (5th Cir. 1982) (refusing to recognize an accountant-client privilege).

310. *See* Emily Jones, *Keeping Client Confidences: Attorney-Client Privilege and Work-Product Doctrine in Light of* United States v. Adlman, 18 PACE L. REV. 419, 429-30 (1998) (summarizing reasons that exist for historically disallowing an accountant-client privilege).

311. *See* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, 70-4 (McNaughton rev. 1961) (indicating a disfavor towards expanding the recognized privileges).

312. *See id.* (rejecting the expansion of the recognized privileges).

313. *See Arthur Young & Co.*, 465 U.S. at 817-18 (arguing that an accountant must maintain independence from the client whereas an attorney owes the client a duty of utmost loyalty).

314. *Id.*

tion will be disclosed on the tax return.[315] Only attorneys act as confidential advisers to their clients.[316]

The concept of an accountant-client privilege is not foreign at the state level.[317] In fact, more than half of the states have a privilege addressing the need for confidentiality between an accountant and a client.[318] Only fourteen of the states have a privilege shielding advice an accountant gives a client in discovery.[319] "Additionally, state statutes which grant a more expansive accountant-client privilege have consistently been interpreted by courts in a narrow manner."[320] While states may be more receptive than federal government to the privilege, as the privilege provides for candid communication between the accountant and the client; however, it should not be thought that the privilege has been fully embraced.[321]

Ultimately, the Internal Revenue Service Restructuring and Reform Act of 1998 created a privilege for CPAs, enrolled agents and enrolled actuaries, similar to the privilege of confidentiality which attorneys currently enjoy.[322] Consequently, Section 7525 was enacted to allow taxpayers to consult with qualified tax advisors in the same manner that they consult with tax lawyers.[323] Section 7525 provides the protections of confidentiality for "communication[s] between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an at-

---

315. Couch v. United States, 409 U.S. 322, 335 (1973).

316. *See* Bryan C. Skarlatos, *The Attorney-Client Privilege and Work Product Doctrine: Concerns of Tax Practitioners*, 2001 A.B.A. Annual Meeting, SEC. TAX., *available at* http://www.abanet.org/tax/home.html (discussing the various issues of asserting privilege in communications with attorneys and accountants).

317. Therese LeBlanc, *Accountant-Client Privilege: The Effect of the IRS Restructuring and Reform Act of 1998*, 67 UMKC L. REV. 583, 587 (1999).

318. *Id.*

319. *Id.*

320. *Id.* at 588.

321. *Id.*

322. *See* Therese LeBlanc, *Accountant-Client Privilege: The Effect of the IRS Restructuring and Reform Act of 1998*, 67 UMKC L. REV. 583, 586 (1999) (discussing the Restructuring and Reform Act).

323. *Id.*

torney."[324] The "privilege" however, has met with mixed emotions.

B. *The Debate over Privilege*

The accountant privilege has been criticized as an attempt to modify the Federal Rules of Evidence, which provide that privilege in federal courts should be determined in accordance with the common law as interpreted by judicial decisions, not by legislative action.[325] Opponents argue that the common law has established that no privilege for accountants exists, and any attempt to legislate the privilege is actually an attempt to circumvent common law.[326] However, in light of a Utah District Court's ruling that "[a] federal court has the power to prescribe rules for the conduct of its business as long as the rules are consistent with the Acts of Congress and the rules of practice and procedure," presumably the legislature has that right.[327]

> It is also an issue whether accountants are equipped to handle the responsibility which comes with privilege. . . . For example, the decision of whether to assert privilege is highly strategic, and may affect such things as whether a taxpayer has the burden of proof at trial (as the cooperation of the taxpayer, or lack thereof, could shift the burden). This is a consequence an accountant may fail to consider, but that an attorney would likely take into consideration.[328]

Accountants are not bound to the same duty of confidentiality as attorneys. The AICPA's Code of Professional Conduct imposes a duty of confidentiality upon CPAs who are members.[329] Members who breach these rules can lose their membership in the AICPA (not their license).[330] However, most states have also adopted a

---

324. I.R.C. § 7525(a)(1) (1998). This privilege may not be asserted in criminal tax matters. *Id.* § 7525(a).

325. *Id.* at 591.

326. *Id.*

327. *In re* Richard Landerman, 7 F. Supp. 2d 1202, 1204 (C.D. Utah 1998).

328. Therese LeBlanc, *Accountant-Client Privilege: The Effect of the IRS Restructuring and Reform Act of 1998*, 67 UMKC L. REV. 583, 591-92 (1999) (citing Steve Johnson, *Tax Advisor-Client Privilege: An Idea Whose Time Should Never Come*, 98 TAX NOTES TODAY 35-89 (Feb. 23, 1998)).

329. *See id.* at 592-93 (discussing the AICPA CODE OF PROF'L CONDUCT R. 301, *available at* http://www.aicpa.org/about/code/et301/htm).

330. *Id.*

version of the AICPA's Code of Professional Conduct.[331] Breach under the licensing statute can result in loss of a CPA's license.[332] However, "[u]nlike the oath attorneys take when sworn in as officers of the court, an accountant's duty of confidentiality is more limited, namely because of their role as an independent, objective party."[333]

The accountant privilege, unlike the attorney-client privilege, "only applies during a trial or judicial proceeding."[334] Since the work of the accountant is intended to be disseminated to third parties, usually there is a waiver of the accountant's duty of confidentiality.[335] Generally, courts have stated that disclosing "tax information in a tax return . . . renders the privilege with respect to the tax preparation invalid because of waiver."[336] A further limitation on the accountant privilege is that it only applies in regards to tax advice.[337] Tax advice is when an individual gives advice regarding a matter that is within the individual's scope authority.[338] Since the Treasury Regulations do not give nonattorneys the right to practice law, and since the courts have held the giving of tax advice to be the practice of law, accountants cannot give tax advice, and this should render the privilege moot.

C. *Prior Law*

Prior to enactment of Section 7525,[339] an accountant might have been protected by the accountant-client privilege if he was engaged to assist the attorney in advising and representing the attorney's client.[340] This seems to be valid today as well. If the accountant is

---

331. *Id.*

332. *Id.*

333. Therese LeBlanc, *Accountant-Client Privilege: The Effect of the IRS Restructuring and Reform Act of 1998*, 67 UMKC L. REV. 583, 591-92 (1999).

334. *Id.*

335. *Id.* at 595.

336. *See id.* at 595 (discussing the limitations of the privilege as it pertains to the tax return).

337. *See id.* (discussing the Restructuring and Reform Act) (discussing the Internal Revenue Service Restructuring and Reform Act of 1998, I.R.C. § 7525(a)(1) (1998)).

338. Therese LeBlanc, *Accountant-Client Privilege: The Effect of the IRS Restructuring and Reform Act of 1998*, 67 UMKC L. REV. 583, 591-92 (1999) (citing I.R.C. § 7525(a)(3)(B) (1998)).

339. I.R.C. § 7525 (1998).

340. *See* United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (indicating that the presence of an accountant does not destroy the attorney-client privilege).

not retained to assist the attorney in providing legal advice, the rendering of legal advice is still the unauthorized practice of law if performed by an accountant. If the accountant is retained to do tax return preparation, the privilege does not apply. Thus, despite the passage of Section 7525, prior case law should continue to be good law.

An "accountant can be retained by [an] attorney to clarify communications between [the] attorney and [the] client in order to assist [the] attorney in rendering legal advice."[341] The privilege then attaches because the client's relationship is with the attorney, not the accountant.[342]

D. *Supreme Court Cases*

Prior to the passage of the new legislation, the Supreme Court in *Couch v. United States*,[343] indicated that there was no accountant-client privilege for confidential communications with a client.[344] The client attempted to assert an accountant-client privilege to prevent her accountant from producing business records which she had supplied to him for the preparation of her tax returns.[345] The Court stated that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases. . . ."[346]

In *United States v. Arthur Young & Co.*[347] the Court held that accountants did not possess a work-product privilege.[348] The work-product privilege relates to materials and documents created by the attorney whereas, the attorney-client privilege relates to the admission of confidential communications between an attorney and the client in a trial or proceeding.[349] The work-product privilege pro-

---

341. Bryan C. Skarlatos, Speech Before the Annual Meeting of the American Bar Association's Tax Law Section (Aug. 4, 2001), *available at* http://www.abanet.org/tax/home.html (on file with the *St. Mary's Law Journal*).

342. *Id.*

343. 409 U.S. 322 (1973).

344. Couch v. United States, 409 U.S. 332, 335 (1973).

345. *See id.* (arguing that there is an expectation of privacy due to the confidential nature of accountant-client privilege).

346. *Id.*

347. 465 U.S. 805 (1984).

348. United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984).

349. *See* FED. R. CIV. P. 26(b)(3) (setting forth the work product privilege). *Compare* FED. R. EVID. 501 (incorporating the common law privileges into the federal rules), *with*

vides that documents prepared in anticipation of litigation or trial are not discoverable without a showing of substantial need and undue hardship otherwise existing to obtain equivalent material.[350] "[M]ental impressions, conclusions, opinions, or legal theories" included in documents are absolutely immune from disclosure, even if there is a showing of substantial need and undue hardship.[351]

The Supreme Court held that the accountants from Arthur Young & Co. possessed no work-product privilege from disclosure in response to an IRS summons issued with respect to the tax accrual work papers prepared by the CPA in the course of regular financial audits.[352] The Court focused on the potential conflict of interest which results when a CPA is granted a privilege.[353] This conflict occurs when a CPA, who is supposed to be acting as an independent "public watchdog," takes on the role of an advocate (e.g., through tax consulting).[354] The role of advocate requires a work-product, and communication privilege between an accountant and client.[355] But, if those privileges are present, a CPA, who is supposed to issue a qualified or adverse opinion when he becomes aware of material matters which influence the opinion adversely, may fail to disclose the material issue because of privilege. The Court stated that "[t]he independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public."[356] To successfully carry out its duties, "[t]his 'public watchdog' function demands that the accountant maintain total independence from the client. . . ."[357] Thus, the privilege was denied.[358]

In *Upjohn*, a drug manufacturer's general counsel was engaged in soliciting information from various employees for purposes of an internal investigation of possible illegal payments made to foreign

---

Upjohn Co. v. United States, 449 U.S. 383, 387 (1981) (stating that the attorney-client privilege is the oldest known to common law).

350. FED. R. CIV. P. 26(b)(3).

351. *Id.*

352. *Arthur Young*, 465 U.S. at 817.

353. *Id.* at 818.

354. *Id.* at 817.

355. *Id.*

356. *See id.* at 817-18 (highlighting the different roles between an attorney as an advocate and an accountant with a duty to the public).

357. *Id.*

358. *Id.*

governments.[359] The IRS was conducting a criminal tax investigation and attempted to compel the Upjohn attorneys to produce the questionnaires and interview notes from the internal investigation.[360] Ultimately the Supreme Court held that communications with an attorney acting in a dual capacity as an attorney and as a business advisor could be privileged.[361] According to the Court, the communications between the corporation's employees and the general counsel, which were evidenced both by the responses to questionnaires and by notes taken by the general counsel reflecting employee responses during interviews, were protected by the attorney-client privilege.[362] Accordingly, the IRS could not compel disclosure of such communications.[363] The Court endorsed the application of the attorney-client privilege to corporations, but limited its application to only those communications related to the purpose of obtaining legal advice for the corporation.[364] Following *Upjohn*, communications made in reference to pure business matters do not enjoy the protection of the attorney-client privilege.[365]

Attorneys who prepare clients' tax returns might assume that their notes, memoranda, work papers, and communications with clients are beyond the reach of a summons or subpoena by virtue of the attorney-client privilege. This assumption finds some support from *United States v. Euge*,[366] in which the Supreme Court stated that the obligation to provide relevant and material evidence

359. Upjohn Co. v. United States, 449 U.S. 383, 386-87 (1981).

360. *Id.* at 387-88.

361. *See id.* at 386 (holding that communications between the company's general counsel, also acting as the vice-president and secretary, and the company's employees were privileged).

362. *Id.* at 397.

363. *Id.*

364. *See Upjohn Co.*, 449 U.S. at 394-96 (stating that the communication must be for the purpose of securing legal advice for the corporation).

365. *Id.* The proposition that an attorney must be acting in the capacity of legal counsel during communications with the client in order for the privilege to attach is supported by the *Upjohn* Court's assertion that the communications were protected because they were made "to secure legal advice from counsel." *See* Sedco Int'l, S.A. v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982) (stating that the attorney-client privilege does not protect ordinary business advice).

366. 444 U.S. 707 (1980).

to a tax investigation was "subject to the traditional privileges and limitations," including the attorney-client privilege.[367]

The Supreme Court cases, however, have not specifically addressed the issue of whether an accountant is practicing law when practicing tax. In *Couch*, for example, the client tried to assert an accountant-client privilege to prevent her accountant from producing business records she supplied to the accountant for the preparation of her tax returns.[368] The Court simply stated that there was no accountant-client privilege under federal law, and "no state-created privilege ha[d] been recognized in federal cases."[369] Thus the Court did not address whether the accountant had been engaged in the unauthorized practice of law.[370] Similarly, in *Arthur Young* the Court said there was no work-product privilege for tax accrual papers and launched into the accountant's dual obligations to the client and the public.[371] In *Upjohn*, the Court applied the privilege to corporations and noted that matters purely business in nature have no privilege.[372] Comparatively, the *Euge* Court simply held that the obligation to provide relevant evidence in a tax investigation is still subject to the attorney-client privilege.[373]

Accordingly, the distinction between attorney-client communications for legal advice and communications for business advice may be difficult to make, especially in the corporate context. According to the Court in *Upjohn*, such decisions must be made on a case-by-case basis.[374] Corporate communications are not entitled to privileged status merely because an attorney was involved.[375] When an

---

367. United States v. Euge, 444 U.S. 707, 712-13 (1980) (reflecting on Congress's intent to provide a broad testimonial obligation).

368. Couch v. United States, 409 U.S. 322, 335 (1973).

369. *Id.* at 335-36.

370. *See Couch*, 409 U.S. at 323-36 (addressing only the issue of privilege).

371. *See* United States v. Arthur Young & Co., 465 U.S. 805, 817-19 (1984) (noting that an independent auditor has a responsibility to the public above his relationship with the client).

372. *See* Upjohn Co. v. United States, 449 U.S. at 383, 395-402 (1981) (applying the attorney-client privilege to all communications with employees, but not to the underlying facts about which the communications were made).

373. *See Euge*, 444 U.S. at 714 (1980) (explaining that evidence production is "subject to the traditional privileges and limitations").

374. *See Upjohn Co.*, 449 U.S. at 396 (citing Rule 501 of the Federal Rules of Evidence).

375. *See* Avianca, Inc. v. Corriea, 705 F. Supp. 666, 676 (D.D.C. 1989) (stating that corporations may not "shield[ ] their business transactions from discovery simply by fun-

attorney acts in a dual capacity—e.g., as both general counsel and as an executive of the corporation—the analysis focuses on whether the communication at issue was legal in nature.[376] Communications between an attorney and a client may contain both legal and nonlegal aspects, and such "mixed communications" can make the determination of privilege a difficult task.[377] Attorneys engaged in tax return preparation, like their corporate counterparts, may find themselves acting in such a dual capacity by rendering both legal and non-legal tax advice.

The federal courts have the right to determine who practices before them and what rules apply.[378] The Supreme Court in *Sperry v. Florida ex rel. Florida Bar* recognized a federal agency's right to determine which practitioners could appear before the agency and what those practitioners could or could not do.[379] Furthermore, the Treasury Department Circular 230, which governs practice before the IRS, specifically denies to nonattorneys the right to do anything that would constitute the practice of law.[380] Section 7525 of the Internal Revenue Code, however, grants a privilege to "tax practitioners" authorized under Circular 230 when those practitioners are giving tax advice.[381]

Presumably, a determination of whether or not a communication is legal in nature will turn on state or federal case law addressing what constitutes the practice of law. Instead of focusing on the states' legal determinations of whether an activity constitutes the

---

neling their communications through a licensed attorney"), *aff'd sub nom.* Avianca, Inc. v. Harrison, 70 F.3d 637 (D.C. Cir. 1995).

376. *See* Scott R. Flucke, *The Attorney-Client Privilege in the Corporate Setting: Counsel's Dual Role As Attorney and Executive,* 62 UMKC L. REV. 549, 558 (1994) (summarizing the case-by-case analysis performed by contemporary courts to evaluate the protection of each communication).

377. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE 3.02[2][b][ii], at 3-34 to 3-35 (2d ed. 1990) (calling the determination of whether mixed attorney client communications are privileged "imprecise").

378. *See* NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 33 (3d ed. 2004) (noting, however, that the federal courts normally rely on the state court admission processes when determining who will be admitted to practice before them).

379. *See* Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 385-86 (1963) (noting that a state may not obstruct the use of a license granted under an act of Congress).

380. 31 C.F.R. § 10.32 (2004).

381. *See* I.R.C. § 7525 (1998) (granting "the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney . . . to a communication between a taxpayer and any federally authorized tax practitioner").

practice of law, the federal courts have ignored the states' laws and have made their own determinations based on federal case law.

Moreover, the federal courts have not established any bright line tests despite the numerous cases that have been decided.[382] In order to be privileged, a requirement may be that the communication in question be "predominantly concerned"[383] with the rendering of legal advice, while some courts use the similar "primarily concerned" language.[384] Another court has held that the attorney-client privilege will attach to communications made for the purpose of obtaining (1) a legal opinion, (2) legal services, or (3) assistance in a legal proceeding.[385]

E. *Decisions from the Courts of Appeal*

At the circuit court level, there have been numerous cases decided on the distinction between documents that represent the provision of a legal service and documents that are primarily related to accounting services. Generally, the circuit courts have classified the documents related to tax preparation work as primarily accounting-related, and thus unprivileged.[386] Six circuits have held that there is no attorney-client privilege for work related to the preparation of tax returns by a lawyer.[387] Some have reached this

---

382. *See* Scott R. Flucke, *The Attorney-Client Privilege in the Corporate Setting: Counsel's Dual Role As Attorney and Executive*, 62 UMKC L. REV. 549, 556 (1994) (remarking that *Upjohn*'s case-by-case approach left considerable confusion among the circuits because there is no restriction on the federal courts' discretion to choose among the already existing alternative tests).

383. *See* Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 204 (E.D.N.Y. 1988) (stating that the communication must be "designed to meet problems which can fairly be characterized as predominantly legal").

384. *See* Barr Marine Prods., Inc. v. Borg-Warner Corp., 84 F.R.D. 631, 634 (E.D. Pa. 1979) (stating that the communication must be "primarily legal").

385. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (qualifying the application of the privilege).

386. *See, e.g.*, *In re* Grand Jury Investigation, 842 F.2d 1223, 1224 (11th Cir. 1987) (noting that generally preparation of tax advice is not legal advice); United States v. Davis, 636 F.2d 1028, 1043 (5th Cir. 1981) (characterizing preparation of tax returns as primarily an accounting service).

387. *See* United States v. Borstein, 977 F.2d 112, 116 (4th Cir. 1992) (citing *United States v. Davis*, and determining that information contained in tax returns is "ordinarily not privileged" because the preparation of tax returns "is primarily an accounting service," rather than a legal service); *In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987) (agreeing with the majority rule that the preparation of tax returns does not fall within the attorney-client privilege); United States v. Lawless, 709 F.2d 485, 487 (7th Cir.

result by holding that the preparation of tax returns by an attorney is not the performance of legal services, but is instead accounting service or "scrivener" work.[388] Other courts reached their decisions by holding that the client waived the privilege of confidentiality because the client intended that all of the information communicated to the attorney be disclosed to the government in the tax return.[389] Hence, in these circuits, the

---

1983) (finding that the transmission of information on a tax return is not protected by the attorney-client privilege); United States v. Davis, 636 F.2d 1028, 1043 (5th Cir. 1981) (citing Olender v. United States, and Canady v. United States); United States v. Gurtner, 474 F.2d 297, 299 (9th Cir. 1973) (holding that consultations with an attorney for the purpose of preparing tax returns are not privileged); Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962) (explaining that information included in a tax return is not subject to the attorney-client privilege because the information in the tax return is not intended to be confidential).

388. *See* Canaday v. United States, 354 F.2d 849, 857 (8th Cir. 1966) (noting that the lower court correctly found that an attorney did not render legal services, but merely acted as the defendant's scrivener); *see also In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987) (holding that preparing tax returns does not equate to giving legal advice for attorney-client privilege purposes because a client could not claim any privilege if an accountant prepares his tax return); United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983) (explaining that several courts have held that preparing a tax return is "primarily an accounting service," and then noting that even if the client's attorney was giving legal advice in addition to preparing a tax return, no such evidence was introduced at trial); United States v. Davis, 636 F.2d 1028, 1043 (5th Cir. 1981) (holding that, while it "may require some knowledge of the law, [preparing tax returns] is primarily an accounting service."); *In re* Grand Jury Empanelled May 7, 1987, Misc. No. 87-165, 1989 Dist. LEXIS 7416, at *15, *20-21 (D.N.J. June 29, 1989) (noting the majority rule is that the preparation of tax returns is not the same as giving legal advice and then holding that the IRS has a right to access the accounting details behind figures reported on tax returns).

389. *See In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987) (holding that information a client transmits to his attorney for the purpose of preparing tax returns is not privileged); United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983) (stating that when a client transmits information with the intent that the information would be used on a tax return, the "transmission destroys any expectation of confidentiality"); Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962) (explaining that information given to an attorney by a client is often intended for transmittal by the attorney to others, and is not privileged); *In re* Witness Before Grand Jury, 631 F. Supp. 32, 33 (E.D. Wis. 1985) (holding that information is not privileged because it was transmitted for use in preparation of a tax return); United States v. Baucus, 377 F. Supp. 468, 471 (D. Mont. 1974) (stressing that information in work papers that was to be disclosed in tax returns was not intended to remain confidential and is therefore not privileged); Brittingham v. Comm'r, 57 T.C. 91, 96 (1971) (finding that communications made by the client to his attorney were "for the sole purpose" of transmitting them to state taxing authorities); *cf.* United States v. El Paso Co., 682 F.2d 530, 540 (5th Cir. 1982) (finding that The El Paso Company waived the attorney-client privilege by disclosing information to independent auditors used by the company to determine whether it had enough funds appropriated for contingent taxes).

attorney-client privilege will not attach to communications of this nature.[390]

Most courts do not address the question of whether tax is the unauthorized practice of law. Instead, they assume that accountants can practice tax and therefore look to see if there is a privilege. The Fifth Circuit, however, did address the issue and found the practice of tax to be the practice of accounting.[391] But when reconsidering the issue, the court indicated its reluctance to hold that tax practice by attorneys was not the practice of law[392] and opted instead to fall back on the waiver theory.[393]

The Seventh Circuit tried to create a rule in *Frederick* that when attorneys are practicing tax, an accounting service, no privilege attaches.[394] Similarly, the documents created in connection with the preparation of the tax return are not communications subject to the attorney-client privilege.[395] However, tax planning advice can constitute legal advice.[396]

Six circuits have decided eight major cases on the issue of whether a client may rely on the attorney-client privilege when he has an attorney prepare his income tax returns. The Fifth Circuit in *United States v. Davis*[397] and the Eleventh Circuit in *In re Grand*

---

390. *In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987); United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983); Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962); *In re* Witness Before Grand Jury, 631 F. Supp. 32, 33 (E.D. Wis. 1985); United States v. Baucus, 377 F. Supp. 468, 471 (D. Mont. 1974); Brittingham v. Comm'r, 57 T.C. 91, 96 (1971); *cf.* United States v. El Paso Co., 682 F.2d 530, 540 (5th Cir. 1982) (finding that The El Paso Company waived the attorney-client privilege by disclosing information to independent auditors used by the company to determine whether it had enough funds appropriated for contingent taxes).

391. *El Paso Co.*, 682 F.2d at 539.

392. *See id.* (stating also that the court did not need to decide the issue).

393. *Id.* at 541.

394. *See* United States v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999) (stating that "a taxpayer must not be allowed, by hiring a lawyer to do the work that an accountant, or other tax preparer, or the taxpayer . . . normally would do, to obtain greater protection from government investigators than a taxpayer who did not use a lawyer as his tax preparer would be entitled to").

395. *See id.* (explaining that accountants and other tax preparers create documents while in the process of preparing tax returns that are not privileged because such a privilege would allow taxpayers who hire lawyers greater protection than taxpayers who hire accountants to do the same work).

396. *See* United States v. Willis, 565 F. Supp. 1186, 1190 (S.D. Iowa 1983) (holding that when advice on tax planning is sought from an attorney, such advice constitutes legal advice for attorney-client privilege purposes).

397. 636 F.2d 1028 (5th Cir. 1981).

Jury Investigation[398] held that preparation of tax returns by an attorney is an accounting service, not a legal service.[399] Similarly the Ninth Circuit reached the same result in *United States v. Gurtner*,[400] as did the Seventh Circuit in *United States v. Lawless*.[401] On the other hand, in *Canaday*, the Eighth Circuit stated that tax return preparation does not rise to the level of an accounting service, but instead is merely scrivener work.[402]

In addition, some courts have held that disclosure of general information on a tax return may waive the privilege with respect to details underlying the information.[403] The waiver theory avoids the question of whether tax is the practice of law.

In *United States v. Cote*,[404] for example, the Eighth Circuit adopted the waiver theory,[405] which subsequently became the basis for the decisions by the Seventh Circuit in *Lawless*,[406] the Fifth Circuit in *United States v. El Paso Co.*,[407] and the Tenth Circuit in *Dorokee Co.* v. *United States*.[408] Other courts, however, have held

---

398. 842 F.2d 1223 (11th Cir. 1987).

399. *In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987); United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981).

400. 474 F.2d 297 (9th Cir. 1973).

401. 709 F.2d 485 (7th Cir. 1983). *See also* United States v. Lawless, 709 F.2d 485, 487-88 (7th Cir. 1983) (agreeing with other courts that the preparation of tax returns "is primarily an accounting service" and holding that even if the client's attorney was giving legal advice in addition to preparing a tax return, no such evidence was introduced at trial); United States v. Gurtner, 474 F.2d 297, 298 (9th Cir. 1973) (explaining that, although a client's accountant had a working relationship with the client's attorney, the communications between the accountant and the client were not privileged because the consultations were for the purpose of preparing the client's tax returns and therefore provided an accounting service rather than a legal service).

402. Canaday v. United States, 354 F.2d 849, 857 (8th Cir. 1966).

403. *Lawless*, 709 F.2d at 488; United States v. Cote, 456 F.2d 142, 195 (8th Cir. 1972).

404. 456 F.2d 142 (8th Cir. 1972).

405. *See* United States v. Cote, 456 F.2d 142, 145 (8th Cir. 1972) (stating that the "disclosure effectively waived the privilege not only to the transmitted data but also as to the details underlying that information").

406. *See Lawless*, 709 F.2d at 488 (citing *Cote*, to reach its ultimate decision).

407. *See* 682 F.2d 530, 541 (5th Cir. 1982) (refusing to create what would effectively be an accountant-client communications privilege).

408. 697 F.2d 277 (10th Cir. 1983); *Cote*, 456 F.2d at 145; *see In re* Grand Jury Subpoena Duces Tecum June 9, 1982, 697 F.2d 277, 280 (10th Cir. 1983) (noting that even courts that recognize an attorney-client privilege arising from an attorney's tax work do not apply it to documents to be included in the client's tax return because the information is obviously not intended to be confidential).

that information the client does not intend to disclose remains privileged.[409]

1. Second Circuit

The court in *United States v. Bohonnon*[410] found that the names of clients for whom the attorney had prepared tax returns and copies of the returns were not protected by the attorney-client privilege.[411] In addition, information transmitted to the attorney and intended by the client to be included in the tax return was not covered by the privilege.[412] Only the underlying legal advice or documentation could have been protected by the privilege.[413]

Documents and tangible things that reflect the mental impressions, conclusions, opinions, and legal theories of the attorney or other representative concerning litigation cannot be disclosed under any circumstances.[414] A document is prepared "in anticipation of litigation" if the document is prepared because of the prospect of litigation.[415] The Second Circuit specifically held that a document could be prepared "because of" possible litigation even though the litigation had not yet commenced and even though the transactions addressed by the document had not yet occurred.[416] Thus, an analysis of the tax consequences of a proposed transaction may be protected by the work product doctrine if the taxpayer can prove that the analysis was prepared because of the threat of litigation.[417]

---

409. *See, e.g.*, United States v. Schenectady Sav. Bank, 525 F. Supp. 647, 654 (N.D.N.Y. 1981) (noting that the information was not the type normally disclosed to third parties); United States v. Schlegel, 313 F. Supp. 177, 179 (D. Neb. 1970) (citing *Colton v. United States* to decide that the client-prepared papers are protected by privilege).

410. 628 F. Supp. 1026 (D. Conn. 1985).

411. United States v. Bohonnon, 628 F. Supp 1026, 1029 (D. Conn. 1985).

412. *Id.*

413. *Id.*

414. *See* United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998) (holding that these types of documents do not lose their work-product protection simply because they are meant to assist in making a business decision based on any anticipated litigation).

415. *See id.* at 1202 (citing 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024, at 343 (1994), and noting that this is the rule used also in the Third, Fourth, Seventh, Eighth, and D.C. circuits).

416. *See id.* at 1200 (applying the "because of" standard to a hypothetical situation involving a contemplated business transaction).

417. *Id.*

Communications seeking advice or information from a third party in order to better advise the client do not constitute legal advice.[418] Communications regarding accounting or tax services do not constitute legal advice.[419] What if the taxpayer is taking a position that is reasonable, but to which the IRS has not acquiesced? Is that tax service? Are the related papers associated with it "in anticipation of litigation"? Would they therefore be privileged?

It is essential to document the relationship between the attorney, the accountant, and the client at the outset of the relationship.[420] In the Second Circuit, representation of a taxpayer during an audit is accounting work as opposed to legal work.[421]

2. Third Circuit

In *In re Grand Jury Proceedings*,[422] the court held that the test is "whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."[423] After the accounting scandals related to Enron, Xerox, WorldCom, and other corporate giants,[424] and the new legislation regarding penalties for corporate fraud,[425] is it safe to say under this test that all audits, tax returns, and the underlying documents would qualify?

---

418. *See* United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999) (refusing to shield communication between an attorney and a third party simply because it becomes important to the client's case).

419. *See* United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (dismissing the privilege when the client seeks accounting services, but not legal advice).

420. *See* United States v. Adlman, 68 F.3d 1495, 1500 (2d Cir. 1995) (discussing that the taxpayer did not establish a relationship between himself, his lawyer, and the accountant).

421. *Id.*

422. 604 F.2d 798 (3d Cir. 1979).

423. *In re* Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979) (quoting from 8 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024, at 198 (1970)).

424. *See generally* Vicky Stamas, *Xerox Case Isn't Over, SEC Chairman Says*, L.A. TIMES, July 1, 2002, at B2 (noting that Xerox was under investigation for inflating revenues in order to meet earnings forecasts, WorldCom was charged with hiding costs of $3.9 billion, and Enron overstated income by $1 billion over four years).

425. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 166 Stat. 745 (characterized as "[a]n Act [t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws").

In *Lustman v. Commissioner*,[426] the court reviewed a tax court decision that found a taxpayer had failed to report his tax liability correctly.[427] The court refused to recognize any privilege in the taxpayer's confidential communications with his accountant, declaring that when records concerning tax liability were the subject matter of inquiry, Section 7602 of the Internal Revenue Code negated any privilege that might exist.[428] The court said that confidential communications between a client and an accountant are not generally considered privileged at common law, and that there was no state or federal statute applicable that would confer such a privilege.[429] Presumably, this would be exactly the kind of case to which the new Section 7525 privilege would apply.

In *United States v. Jaskiewicz*,[430] the court concluded that "a State-created accountant-client privilege [was] not applicable in a Federal criminal trial."[431] A taxpayer who was being prosecuted for tax evasion attempted to rely on a privilege created by a Pennsylvania statute in order to suppress his accountant's testimony and work papers.[432] The court explained that, without a statute providing otherwise, there was no accountant-client privilege.[433] Because the privilege deviated from the common law and was an exception to the general rule that anyone with knowledge of the facts is required to testify, a statute creating the privilege should be strictly construed.[434] Thus, because the Pennsylvania statute, by its own provisions, was not to be applied in federal criminal trials, the court refused to uphold the privilege.[435]

---

426. 322 F.2d 253 (3d Cir. 1963).

427. Lustman v. Comm'r, 322 F.2d 253, 254 (3d Cir. 1963).

428. *Id.* at 259.

429. *Id.*

430. 278 F. Supp. 525 (E.D. Pa. 1968).

431. United States v. Jaskiewicz, 278 F. Supp. 525, 531 (E.D. Pa. 1968).

432. *Id.* at 529-30.

433. *Id.* at 530.

434. *Id.*

435. *See id.* at 532 (denying the taxpayer's motion to suppress his accountant's papers and testimony); *see also* United States v. Stoehr, 100 F. Supp. 143, 162 n.49 (M.D. Pa. 1951) (noting the absence of privilege for communications between a client and his accountant), *aff'd*, 196 F.2d 276 (3d Cir. 1952).

3. Fourth Circuit

Whether an attorney is acting in a legal or a non-legal capacity depends on the purpose and nature of the communication.[436] In *United States v. Mancuso*,[437] the IRS was prosecuting the taxpayer for tax evasion.[438] The IRS sent for and extensively interviewed the accountant who had prepared the taxpayer's returns.[439] The government obtained access to the accountant's entire file on the taxpayer, including net worth schedules prepared at the request of the taxpayer's defense counsel as well as letters from the defense counsel.[440] The trial court suppressed the net worth statements and all related papers prepared by the accountant for use in the taxpayer's defense.[441]

In response to the taxpayer's claim of a Fourth Amendment violation, the court noted that the Supreme Court had never allowed protection of a wrongdoer's misplaced belief that someone to whom the wrongdoer voluntarily confided wrongdoing would not reveal it, even though the taxpayer had entrusted the accountant only with tax records.[442] There was no surreptitious invasion by a government agent into the legal camp of the defense, and the government did not engage in electronic surveillance, wiretapping, or deception.[443] Thus, there was no government intrusion upon the confidential relationship between the taxpayer and his counsel.[444] The court added that the government's deficiencies in the proper conduct of the prosecution were not erased by later notices to

436. *See* United States v. Bornstein, 977 F.2d 112, 116-17 (4th Cir. 1992) (noting that to determine whether the privilege applies, the lower court must determine whether accounting papers had been prepared for the purpose of rendering legal advice); United States v. Schenectady Sav. Bank, 525 F. Supp. 647, 652-53 (N.D.N.Y. 1981) (agreeing with the Second Circuit's analysis and stating that only papers made for the purpose of providing confidential communications to the attorney, or those prepared by the attorney, are protected).

437. 378 F.2d 612 (4th Cir. 1967).

438. United States v. Mancuso, 378 F.2d 612, 613 (4th Cir. 1967), *amended*, 387 F.2d 376 (4th Cir. 1967).

439. *Id.* at 617.

440. *Id.*

441. *Id.* at 618.

442. *Id.*

443. United States v. Mancuso, 378 F.2d 612, 618 (4th Cir. 1967) (citing *Hoffa v. United States*, 385 U.S. 293, 302 (1966)), *amended*, 387 F.2d 376 (4th Cir. 1967).

444. *Id.*

counsel of what was done, but it was persuaded that wrongful intent was absent.[445]

4. Fifth Circuit

The court in *United States v. Davis*[446] recognized that materials were not privileged when they related to matters other than the giving of legal advice.[447] *Davis* involved a suspected narcotics smuggler whose income tax returns, which showed little or no income, had been prepared for many years by Davis, an attorney who was also a CPA.[448] The IRS issued summonses to Davis and his law partner, directing them to produce documents consisting mainly of the attorneys' records of financial transactions of the client.[449]

The court noted that the attorney-client privilege was not available because preparation of tax returns by an attorney was not a legal service.[450] Although the preparation of tax returns may require some knowledge of the law, such preparation must be classified as primarily accounting, rather than legal, service.[451] According to the court, a taxpayer should not benefit by hiring a lawyer to perform the same task that can be performed by an accountant but without the benefit of a federal privilege.[452]

In *United States v. El Paso Co.*,[453] the Fifth Circuit, after noting its holding in *Davis*, observed that "we would be reluctant to hold that a lawyer's analysis of the soft spots in a tax return and his judgments on the outcome of litigation on it are not legal advice."[454] *El Paso* involved an audit of a major corporation, during which the IRS issued a summons requiring production of the com-

445. United States v. Mancuso, 387 F.2d 376, 377 (4th Cir. 1967) (amending United States v. Mancuso, 378 F.2d 612 (4th Cir. 1967)).

446. 636 F.2d 1028 (5th Cir. 1981).

447. *See* United States v. Davis, 636 F.2d 1028, 1043-44 (5th Cir. 1982) (stating that the privilege "extends only to *legal* advice given by a lawyer").

448. *Id.* at 1032.

449. *Id.* at 1032-34.

450. *See id.* at 1043 (stating that the services underlying the asserted privilege are typically performed by accountants).

451. *Id.*

452. *See Davis,* 636 F.2d at 1043.

453. 682 F.2d 530 (5th Cir. 1982).

454. United States v. El Paso Co., 682 F.2d 530, 539 (5th Cir. 1982).

pany's tax accrual work papers.[455] Those work papers showed all the company's contingent tax liabilities.[456] El Paso, however, claimed an attorney-client privilege over the documents.[457]

After indicating its reluctance to rule that the lawyer's analysis in the case was not legal advice, the Fifth Circuit expressly declined to rule on that issue.[458] Instead, the court found that the company had waived any privilege by disclosing the work papers and the potential tax liability issues to the independent auditors who certified the corporation's financial statements.[459]

Work product protection applies as long as the primary motivation behind the creation of the document was to aid in possible future litigation,[460] though the preparation of a tax return does not automatically give rise to an anticipation of litigation.[461] There must be a concrete or identifiable reason to justify the anticipation of litigation.[462]

When faced with specific fact patterns, the court keeps coming back to the conclusion that tax practice is the practice of law, and any blanket refusal of the privilege or statement that tax practice is the practice of accounting simply does not work. However, the court is resistant to grant a privilege to accountants. But instead of

---

455. *Id.* at 533.

456. *Id.*

457. *Id.*

458. *Id.* at 539. Two years earlier, the Fifth Circuit concluded that the attorney-client privilege applied when an attorney had been consulted regarding returns he did not prepare. United States v. Hankins, 631 F.2d 360, 361, 365 (5th Cir. 1980). In *Hankins*, the Fifth Circuit reversed criminal and civil contempt citations of the attorney for refusal to produce documents and testify. *Id.* at 365.

459. *See El Paso Co.*, 682 F.2d at 540 (stating that "El Paso's disclosure of the tax pool analysis to the auditors destroys confidentiality with respect to it"). The court noted that "[w]ith the destruction of confidentiality goes as well the right to claim the attorney-client privilege." *Id.*

460. *Id.* at 542 (stating that the "doctrine focuses only on materials assembled and brought into being in anticipation of litigation"); *see also* United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1982) (concluding that litigation need not be imminent as long as aiding in possible future litigation is the primary purpose behind the document's creation).

461. *See Davis*, 636 F.2d at 1040 (commenting that "papers generated by an attorney who prepares a tax return are not within the work product privilege simply because there is always a possibility that the IRS might challenge a given return"); *see also* Colton v. United States, 306 F.2d 633, 640 (2d Cir. 1962) (rejecting the work product privilege claim when the taxpayer failed to even suggest that the papers were prepared in anticipation of litigation).

462. *See Davis*, 636 F.2d at 1040 (requiring that the primary motivating purpose behind the document's creation be to aid in possible future litigation).

holding that tax is the practice of law and therefore, accountants should not be practicing law, let alone be granted a privilege, the court resorts to other rationales.

In *Falsone v. United States*,[463] for example, the court concluded that an accountant-client privilege created by statute did not apply to a tax investigation hearing before the IRS because an administrative proceeding rather than a civil action was involved.[464] In *Hayes v. United States*,[465] the court stated that the accountant-client privilege under a state statute was not applicable to a federal criminal proceeding against a taxpayer for attempting to evade federal income taxes.[466] At the trial, the court admitted into evidence statements of the taxpayer's accountant concerning the taxpayer's net worth.[467] The Fifth Circuit said that because the taxpayer's accountant was acting within the scope of his employment and authority when he indicated his estimate of the extent of the taxpayer's cash reserves to the government agent, the accountant's statement was admissible against the taxpayer as an admission by an authorized agent.[468]

In *United States v. Lemlich*,[469] the court summarily affirmed the judgment on a taxpayer's conviction for failing to file employer's quarterly tax returns.[470] The court found no merit to the contention that the attorney-client privilege had been violated by asking the defendant whether his attorney, who held a power of attorney to represent him before the IRS, had asserted the defense that the defendant lacked the knowledge that he could file a return without a remittance.[471]

---

463. 205 F.2d 734 (5th Cir. 1953).

464. Falsone v. United States, 205 F.2d 734, 742 (5th Cir. 1953) (concluding ultimately that the state statute "was not intended to make so radical a change in administrative procedure as to require that . . . agencies be restricted by the rigid rules of evidence").

465. 407 F.2d 189 (5th Cir. 1969).

466. *See* Hayes v. United States, 407 F.2d 189 (5th Cir. 1969) (citing Falsone v. United States, 205 F.2d 734 (5th Cir. 1953)).

467. *Id.* at 192.

468. *Id.*

469. 418 F.2d 212 (5th Cir. 1969).

470. United States v. Lemlich, 418 F.2d 212, 214 (5th Cir. 1969).

471. *Id.*

5. Sixth Circuit

In *Brown v. United States*,[472] the Sixth Circuit held that computation of a taxpayer's net worth based upon information provided by the taxpayer and made by the taxpayer's "auditor" was not privileged.[473] Thus, the computational evidence was admissible in a prosecution against the taxpayer for attempting to evade income taxes.[474]

The court in *Gariepy v. United States*[475] denied the existence of any privilege between an accountant and his client when the taxpayer, whose net worth had increased dramatically, claimed that he had received a gift of $50,000 but refused to reveal the donor.[476] The taxpayer's accountant, who prepared his returns, assisted the IRS agents in their investigation and gave them the name of the alleged donor, thus making it possible for the government to "completely shatter" the taxpayer's gift defense.[477] The evidence provided by the accountant was not privileged;[478] the court said that even if the accountant was in the employ of the taxpayer's counsel at the time he received and relayed the information to the investigators, there was respectable authority supporting denial of the accountant privilege.[479]

6. Seventh Circuit

In *United States v. Frederick*,[480] the court stated that "[w]hen a revenue agent is merely verifying the accuracy of a return, often with the assistance of the taxpayer's accountant, this is accountants' work and it remains such even if the person rendering the assistance is a lawyer rather than an accountant."[481] The court also stated that an audit is unique as a possible predecessor to litigation as well as a stage in determining a taxpayer's liability.[482] Taxpay-

472. 224 F.2d 845 (6th Cir. 1955).
473. Brown v. United States, 224 F.2d 845, 848 (6th Cir. 1955).
474. *Id.*
475. 189 F.2d 459 (6th Cir. 1951).
476. Gariepy v. United States, 189 F.2d 459, 463-64 (6th Cir. 1951).
477. *Id.* at 463.
478. *Id.*
479. *Id.* at 463-64.
480. 182 F.3d 496 (7th Cir. 1999).
481. United States v. Frederick, 182 F.3d 496, 502 (7th Cir. 1999).
482. *Id.*

ers, however, are usually represented by accountants in audits, and thus this work must be classified as accounting work, even when rendered by a lawyer.[483] Only if a lawyer is assisting the taxpayer in the audit by dealing with issues of case law or statutory interpretation should privilege protect the documents.[484] Thus, because Frederick's work with regard to the audits did not fall within this latter category, the court found the audit-related documents to be unprivileged as well.[485] The court also stated, however, that if the attorney is there "to deal with issues of statutory interpretation or case law that the revenue agent may have raised[,] . . . the lawyer is doing lawyer's work."[486]

The court classified communication furnished by a person for the purpose of enabling the preparation of a tax return as communication that neither reflects the lawyer's thinking nor elicits his legal advice,[487] but it refused to assume that the client presented all of the information to Frederick in his role as a conduit to the IRS and not in his capacity as counsel.[488] Additionally, the court rejected the argument that numerical information never falls within the attorney-client or work-product privileges.[489] The court posited, for example, that a numerical figure, such as an estimate of damages, could reflect an attorney's thinking.[490]

The court also considered the impact of Section 7525 on the issue.[491] This provision extends the attorney-client privilege to nonlawyers or "federally authorized tax practitioners" that practice in front of the IRS.[492] This statute, according to the court, was intended to protect communications between the client and the fed-

---

483. *See id.* (stating that verifying the accuracy of returns is accountants' work).

484. *Id.*

485. *Id.*

486. *Frederick*, 182 F.3d at 500.

487. *See id.* at 500 (stating that when information is given to the tax preparer for the purposes of preparing a tax return instead of a brief or opinion letter, the information is not privileged).

488. *See id.* at 501 (explaining that "everything transmitted to [Frederick] by the taxpayer was intended to assist him in his tax-preparation function and thus might be conveyed to the IRS, rather than in his legal-representation function.").

489. *Id.*; *cf.* United States v. Schwimmer, 892 F.2d 237, 245 (2d Cir. 1989), *aff'd*, 502 U.S. 810 (1991) (remanding for a determination of what use was made of the derivative information and whether rights of the appellant were affected).

490. *Frederick*, 182 F.3d at 501.

491. United States v. Frederick, 182 F.3d 496, 501 (7th Cir. 1999).

492. 26 U.S.C.S. § 7525(a)(3)(A) (Law. Co-op. 2003); *Frederick*, 182 F.3d at 502.

erally authorized tax preparer only to the extent that the same communication would be protected between a taxpayer and an attorney.[493] After indicating that nothing in the statute suggests an extension of the privilege to federally authorized tax practitioners when they are performing non-legal work, the Seventh Circuit concluded that the statute had no effect on the analysis already presented in the opinion.[494] Thus, the court attempted to create a definition of when tax is the practice of law and what the role of the section 7525 "privilege" really is.[495]

In *United States v. Lawless*,[496] the court found that information transmitted for the purpose of preparation of a tax return is not privileged information just because the recipient is an attorney rather than an accountant or tax preparer.[497] The court based its decision on the general principles of the attorney-client privilege that it had adopted in previous cases, including the requirement that the communication must come from a professional legal advisor acting in that capacity.[498] Further, the court stated that claims of privilege are to be made and sustained on a question-by-question or document-by-document basis, and these clients will be strictly confined within narrow limits.[499] The court explained that because the two documents at issue in this case were given to the attorney for the purpose of tax preparation and no other purpose, they were not related to the giving of legal advice, even assuming

493. *Frederick*, 182 F.3d at 502.

494. *Id.*

495. *See id.* (explaining that the statute "protects communications between a taxpayer and a federally authorized tax practitioner 'to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney'").

496. 709 F.2d 485 (7th Cir. 1983).

497. *See* United States v. Lawless, 709 F.2d 485, 488 (7th Cir. 1983) (finding that "information transmitted for the purpose of preparation of a tax return, though transmitted to an attorney, is not privileged information.").

498. *See id.* at 487 (citing Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 319 (7th Cir. 1963), and United States v. Tratner, 511 F.2d 248 (7th Cir. 1975)); *see also* United States v. Tratner, 511 F.2d 248 (7th Cir. 1975) (supporting the rule that the attorney-client privilege applies when a professional gives a client advice in confidence); Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, (7th Cir. 1963) (adopting the general principle of an attorney-client privilege that says legal advice given by a professional advisor in confidence to his client makes the communication privileged).

499. *See Lawless*, 709 F.2d at 487 (explaining that "a blanket claim of privilege is unacceptable").

that the attorney gave legal advice to the client.[500] Therefore, the documents, although transmitted through an attorney, were not privileged communications.[501]

The court, however, stopped short of holding that preparation of tax returns by an attorney was not a legal service. Instead, it ruled in favor of the government because the two documents at issue contained information submitted in connection with the preparation of the estate tax return and that disclosure of tax information on the return "effectively waives the privilege 'not only to the transmitted data but also as to the details underlying that information.'"[502] *Lawless*, therefore, may properly be classified as a "waiver" case.[503]

In *United States v. Balistrieri*,[504] the court held that a state statute creating an accountant-client privilege did not apply in a prosecution of a taxpayer for evading his income taxes.[505] The court reasoned that the statute did not apply because (1) only federal law applies in a federal criminal tax prosecution, and (2) there is no accountant-client privilege in the federal system.[506]

7. Eighth Circuit

In *Canaday*, the Eighth Circuit held that an attorney, by completing a client's tax returns, did not act as a lawyer, but merely as a scrivener.[507] Under these circumstances the attorney-client relationship was not established.[508] Thus, any communications to the

---

500. *See id.* (stating that no evidence was introduced to establish that the documents were for any other purpose).

501. *Id.* at 488.

502. *Id.* (citing United States v. Cote, 456 F.2d 142, 145 (8th Cir. 1972)).

503. *See also* United States v. Windfelder, 790 F.2d 576, 580 (7th Cir. 1986) (denying attorney-client privilege to information transmitted to a party with the intent that the party use the information to explain to the IRS the disparity between estate tax and income tax returns); Webster v. United States, No. 85-3109, 1986 WL 8784, at *3 (C.D. Ill. 1986) (noting that the privilege was waived because the party asserting the privilege allowed an IRS investigator to inspect the records in question).

504. 403 F.2d 472 (7th Cir. 1968), *vacated on other grounds,* 395 U.S. 710 (1969).

505. United States v. Balistrieri, 403 F.2d 472, 481 (7th Cir. 1968), *vacated on other grounds,* 395 U.S. 710 (1969).

506. *Id.* In addition, the court stated the statutory accountant-client privilege did not apply because the privilege could only be invoked by the accountant—not the client. *Id.*

507. Canaday v. United States, 354 F.2d 849, 857 (8th Cir. 1966).

508. *Id.*

attorney or documents in his custody concerning the tax return were not subject to the attorney-client privilege.[509]

Canaday involved a taxpayer who was convicted on two counts of income tax evasion.[510] On appeal, the taxpayer-defendant raised as error the trial court's refusal to suppress evidence because of the attorney-client privilege.[511] The attorney who prepared the defendant's income tax returns testified as a government witness at the trial, despite the defendant's pretrial motion to suppress his testimony.[512] After a hearing, the trial court found that the attorney had acted not as a lawyer, but "merely as a scrivener" for the defendant.[513] Without much discussion or analysis, the Eighth Circuit simply adopted the reasoning of the trial court that the documents "were not of such a nature as to be the subject of the attorney-client privilege."[514]

In *United States v. Cote*,[515] the taxpayers had employed a certified public accountant to prepare their tax returns for several years.[516] After the taxpayers received notification from the IRS that their returns were to be examined, the CPA referred them to an attorney.[517] The attorney employed the CPA to conduct an audit of taxpayers' books, which was carried out in the attorney's office.[518] After receiving the results of the audit, the attorney advised the taxpayers to file amended returns for the years under examination.[519] The amended returns showed a greater amount of income than the previously-filed returns, but provided no explanation for the increase.[520] The IRS issued summonses to both the

509. *Id.*; *see also* United States v. Willis, 565 F. Supp. 1186, 1189 (S.D. Iowa 1983) (finding that, as a general rule, a client's communications to a lawyer related to preparation of an income tax return are not made for the purpose of seeking "legal advice" within meaning of attorney-client privilege).

510. *Canaday*, 354 F.2d at 857.

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.* at 857 n.7 (articulating the findings of the trial court).

515. 456 F.2d 142 (8th Cir. 1972).

516. United States v. Cote, 456 F.2d 142, 143 (8th Cir. 1972) (holding that the taxpayer waived attorney-client privilege regarding working papers when the tax return was filed with the IRS).

517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.*

CPA and the attorney directing them to testify and to produce all work papers used in preparing both the original and amended returns.[521]

The Eighth Circuit acknowledged that the services performed by the attorney constituted legal advice, not accounting services.[522] But the Eighth Circuit then held that the taxpayers waived the attorney-client privilege because "by filing the amended returns the taxpayers communicated, at least in part, the substance of that information to the government, and they must . . . disclose the detail underlying the reported data."[523]

The court in *Banks v. United States*[524] held that no lawyer-client privilege existed when a taxpayer's attorney received a list of IRS questions for the taxpayer, after which the attorney provided those answers to the IRS.[525] The attorney then served as a witness to identify the sheets containing the questions and answers, enabling the IRS to introduce those sheets into evidence in a prosecution of the taxpayer on charges of attempted tax evasion.[526]

The court stated that the lawyer was not acting as a mere attorney, but was the taxpayer's agent.[527] In that capacity, the attorney secured the taxpayer's answers to the previously submitted questions and returned them to the IRS representative.[528] The court observed that the information requested was furnished by the taxpayer to his lawyer for the sole purpose of giving it to the IRS in response to their questions, and that the lawyer was therefore acting within the scope of his authority as the taxpayer's agent.[529]

In *United States v. Schlegel*,[530] the court held that aside from the information incorporated into the return, and except for a plan on

---

521. *Cote*, 456 F.2d at 143-44.

522. *Id.* at 144.

523. *Id.* The accountant testified that the data from the work papers was transcribed onto the amended returns that were filed with the government. *Id.* at 145. This disclosure, according to the court, waived the privilege to the transmitted data as well as the underlying details. *Id.*

524. 204 F.2d 666 (8th Cir. 1953), *vacated on other grounds*, 348 U.S. 905 (1955).

525. Banks v. United States, 204 F.2d 666, 670 (8th Cir. 1953), *vacated on other grounds*, 348 U.S. 905 (1955).

526. *Id.*

527. *Id.*

528. *Id.* (recognizing that "whatever an agent does or says . . . within the scope of his authority, is done or said by the principal").

529. *Id.*

530. 313 F. Supp. 177 (D. Neb. 1970).

the taxpayer's part to commit a crime or fraud, all of the information given to an attorney by a taxpayer for the purpose of having the attorney prepare the taxpayer's income tax returns was protected by the attorney-client privilege.[531] The taxpayer's attorney informed an IRS agent that after he had prepared the taxpayer's return from summaries provided by the taxpayer, the taxpayer amended the summaries to show less income.[532] The court stated that realistically a client intends that an attorney will conclude what amount of information should be conveyed to the government, and that the client intends the remainder of what he conveys to the attorney to be held in confidence.[533] According to the court, "[a] different rule would not really support the purpose of the privilege, which is to encourage free disclosure of information by the client to the attorney."[534] Thus, the court directed that the communications before the court were not to be admitted into evidence unless other evidence showed that, at the time of the communications with his attorney, the taxpayer knew or reasonably should have known that using the lower set of income figures would further a fraud or crime.[535]

8. Ninth Circuit

In *Olender v. United States*,[536] the Ninth Circuit stated that communications regarding business issues do not constitute legal advice.[537] The court found no evidence that an attorney was employed as anything other than an accountant.[538] Accordingly, no attorney-client privilege applied.[539] Unfortunately, the court considered the net worth statement, which involves the application of accounting principles, and the tax return, which involves application of the tax law, in the same vain.[540]

---

531. United States v. Schlegel, 313 F. Supp. 177, 179-80 (D. Neb. 1970).
532. *Id.* at 178.
533. *Id.* at 179.
534. *Id.*
535. *Id.* at 181.
536. 210 F.2d 795 (9th Cir. 1954).
537. Olender v. United States, 210 F.2d 795, 806 (9th Cir. 1954).
538. *Olender*, 210 F.2d at 806.
539. *Id.* at 806.
540. *Id.*

United States v. Gurtner[541] involved an appeal from a conviction for income tax evasion.[542] The Ninth Circuit's opinion indicated that the defendant was advised by his attorney to consult with an accountant, and that the accountant and the attorney had a "working relationship."[543] Gurtner's accountant testified at trial to Gurtner's detriment.[544] Although Gurtner did not object to the accountant's testimony either before trial or while the accountant was on the stand, he later argued at trial and on appeal that his conversations with the accountant were privileged attorney-client communications.[545] The Ninth Circuit held that a taxpayer's consultations with an accountant or tax attorney for the purpose of preparing tax returns were not privileged attorney-client communications.[546]

The court explained that what was vital to the privilege was "that the communication be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer*,"[547] and that if the client sought only accounting service, or if the client sought the accountant's advice rather than the lawyer's, no privilege existed.[548]

Even if the accountant was an agent of the attorney, not all consultations with such agents are privileged.[549] A taxpayer's consultations, even with an attorney who is preparing tax returns, are not privileged.[550]

The court, however, held differently in *United States v. Judson*.[551] In *Judson*, the taxpayer, who was under investigation for tax evasion, was directed by his attorney to prepare a net worth statement.[552] Accordingly, the taxpayer hired two accountants to prepare the statement.[553] Thus, the net worth statement was pre-

---

541. 474 F.2d 297 (9th Cir. 1973).

542. United States v. Gurtner, 474 F.2d 297, 298 (9th Cir. 1973).

543. *Id.*

544. *See id.* (recognizing Gurtner's assertion that the attorney's testimony should be stricken from the record).

545. *Id.* at 298-99.

546. *Gurtner*, 474 F.2d at 299 (citing Olender v. United States, 210 F.2d 795, 806 (9th Cir. 1954), and Canaday v. United States, 354 F.2d 849, 857 (8th Cir. 1966)).

547. *Id.* at 298.

548. *Id.* at 299.

549. *Id.*

550. *Id.*

551. 322 F.2d 460 (9th Cir. 1963).

552. United States v. Judson, 322 F.2d 460, 462 (9th Cir. 1963).

553. *Id.*

pared at the direction of the attorney and delivered to him to enable him to render legal advice to his client relating to the pending tax investigation.[554] The court affirmed the lower court's determination that the net worth statement and related work papers of the accountants were covered by the attorney-client privilege.[555]

In *Baldwin v. Commissioner*,[556] the court held that the advice of an attorney to a client concerning the transfer of realty to the client's son to save probate expenses was privileged and inadmissible.[557]

According to the court in *Himmelfarb v. United States*,[558] information gained by a tax accountant in a conference between an attorney and the clients when the accountant's presence was not indispensable is not privileged, even though the attorney hired the accountant.[559] The court implied that information obtained by the accountant was not privileged regardless of whether the information was obtained by the accountant from the taxpayer, from discussions during meetings between the clients and their attorney at which the accountant was present, or from the attorney who had received the information from either or both of the clients.[560]

In *United States v. Hickok*,[561] a taxpayer's records given to an accountant to allow the accountant to prepare tax returns were deemed unprivileged communications.[562] The taxpayer knew that information in the records would be disclosed during the accountant's preparation of the returns; thus, the privilege did not apply.[563] Further, a party may not disclose privileged attorney communications about a matter that is relevant and material to issues in a case

554. *Compare* United States v. Judson, 322 F.2d 460, 462 (9th Cir. 1963) (noting that the accountant's role when preparing the statement was to facilitate an accurate consultation between the client and attorney about the client's financial status), *with* United States v. Gurtner, 474 F.2d 297, 299 (9th Cir. 1973) (indicating that consultations between the client and an accountant for purposes of preparing returns are not privileged).

555. United States v. Judson, 322 F.2d 460, 462 (9th Cir. 1963).

556. 125 F.2d 812 (9th Cir. 1942).

557. Baldwin v. Comm'r, 125 F.2d 812, 816 (9th Cir. 1942).

558. 175 F.2d 924 (9th Cir. 1949).

559. Himmelfarb v. United States, 175 F.2d 924, 939 (9th Cir. 1949) (concluding that the accountant's presence was a convenience).

560. *See id.* at 939 (considering it unnecessary to determine the factual basis behind preparation of the documents in question).

561. 481 F.2d 377 (9th Cir. 1973).

562. United States v. Hickok, 481 F.2d 377, 379 (9th Cir. 1973).

563. *Id.*

and then invoke a privilege to prevent discovery of other communications about the same matter.[564]

9. Tenth Circuit

In *Dorokee Co. v. United States*,[565] a grand jury subpoena *duces tecum* was directed to the taxpayers' attorney requiring the production of all "work papers, financial statements, and correspondence" relating to the preparation of the taxpayers' returns.[566] Noting the Fifth Circuit's holding that preparation of tax returns by an attorney constituted an accounting service rather than a legal service, the Tenth Circuit declined to follow that lead, stating instead:

> We need not resolve this issue here because the [taxpayers] have failed to establish their entitlement to the privilege. Even those courts holding that the attorney-client privilege can arise from the preparation of income tax returns do not apply the privilege to documents given by a client to an attorney for inclusion in the client's income tax return, because such information is obviously not intended to remain confidential.[567]

When a party asserts the attorney-client privilege because the documents to be produced could be incriminating to the client, courts measure the availability of the privilege by the degree to which the client would be protected by the Fifth Amendment from personally producing documents.[568] In order to raise a Fifth Amendment privilege, the taxpayer must comply with the summons and then, at an appropriate time, claim the privilege applies to specific documents and the answers to individual questions.[569] This objection must be based upon a reasonable belief that compulsory response to those matters would "pose a substantial and real hazard of subjecting [the taxpayer] to criminal liability."[570]

---

564. *See* Weil v. Investment/Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981) (finding the privilege waived when a party disclosed the content of a privileged communication that was relevant and material to an issue before the court).

565. 697 F.2d 277 (10th Cir. 1983).

566. Dorokee Co. v. United States, 697 F.2d 277, 278 (10th Cir. 1983).

567. *Id.* at 280.

568. *See* United States v. Clark, 847 F.2d 1467, 1470 (10th Cir. 1988) (citing Fisher v. United States, 425 U.S. 391, 404-05 (1975)).

569. *Id.* at 1474; United States v. Schmidt, 816 F.2d 1477, 1482 (10th Cir. 1987).

570. *Clark*, 847 F.2d at 1474 (emphasis omitted) (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).

10. Eleventh Circuit

In *In re Grand Jury Investigation*,[571] the court stated that information used in the preparation of a tax return should not be viewed as legal advice.[572] Glen Schroeder was the target of a grand jury investigation into charges of tax evasion.[573] His tax return showed only a moderate income, but the government submitted evidence that showed he had purchased a house with a value of ten times his reported income for the year, and that he had paid for the house with a cashier's check purchased with cash.[574] His attorney, who was also an accountant, had prepared Schroeder's income tax returns for many years, and had also performed other legal services for him, such as assisting him in setting up several offshore companies.[575] When the grand jury subpoenaed that attorney to testify and produce documents relating to the preparation of the returns, Schroeder asserted the attorney-client privilege.[576]

The Eleventh Circuit held that the attorney-client privilege was inapplicable because preparation of tax returns was not a legal service.[577] Any information that a taxpayer gives to an attorney for the purpose of tax return preparation, including sources of income, does not constitute protected communication.[578]

While the government acknowledged on appeal that an attorney-client relationship had in fact existed between the attorney and Schroeder with respect to matters other than tax return preparation,[579] the Eleventh Circuit determined that the "crime-fraud exception" to the attorney-client privilege vitiated the privilege.[580] Because the government had shown a prima facie case of tax evasion, and because the attorney's advice had been in the broad sense

---

571. 842 F.2d 1223 (11th Cir. 1987).

572. *In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987).

573. *Id.* at 1224.

574. *Id.* at 1227.

575. *Id.* at 1224, 1227 n.5.

576. *Id.* at 1224.

577. *In re* Grand Jury Investigation, 842 F.2d at 1225.

578. *See id.* (expounding that "[a] taxpayer should not be able to invoke a privilege simply because he hires an attorney to prepare his tax returns").

579. *Id.* at 1225.

580. *See id.* at 1226, 1229 (reiterating that "[t]he attorney-client privilege does not protect communications made in furtherance of a crime or fraud"; ordering that the attorney must testify about sources of income his client disclosed that are related to the client's alleged tax evasion).

related to that tax evasion, the crime-fraud exception came into play to override the attorney-client privilege.[581]

F. *Summary*

Regulation of the practice of law by the state is deemed critical.[582] There is, however, a growing body of federal law dealing with privilege that has tried to define the bounds of legal practice. The federal courts have generally assumed that accountants can practice tax, and thus, when an attorney is practicing tax, the courts are not sure how to characterize it. The Fifth Circuit started by saying that if an attorney is practicing tax he must be practicing accounting,[583] but when the facts changed and the attorney was representing someone in a tax fraud case, it became obvious that aspects of tax must be the practice of law.[584]

The courts, however, have generally not analyzed whether accountants should be practicing tax in the first place. Because the federal courts have tried to limit the applicability of the accountant-client privilege, tax attorneys have seen a significant weakening of the attorney-client privilege. Many of the decisions express concern that a taxpayer should not be able to gain greater protection from government information gathering by hiring an attorney.[585] This is a tacit recognition that taxpayers use nonattorneys, and yet

---

581. *See In re* Grand Jury Investigation, 842 F.2d at 1229 (ordering the attorney to testify about sources of income disclosed by Schroeder during the course of representation that related to tax evasion). Courts apply a two-part test to determine whether the crime-fraud exception overcomes privilege. *Id.* at 226. First, the government must establish a prima facie case that the client was engaged in crime or fraud when the client sought the lawyer's advice. *Id.* Second, the government must show that the client obtained the lawyer's assistance in furtherance of the activity. *Id.*

582. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 361-62 (1977) (calling the states' interest in regulating attorneys "especially great" and at the heart of the states' power to protect the public).

583. *See* United States v. El Paso Co., 682 F.2d 530, 539 (5th Cir. 1982) (stating that "[t]he line between accounting work and legal work in the giving of tax advice is extremely difficult to draw.").

584. *See, e.g.,* United States v. Cote, 456 F.2d 142, 143 (8th Cir. 1972) (recognizing that an attorney rendered legal services when advising his clients to file amended returns); United States v. Judson, 322 F.2d 460, 462 (9th Cir. 1963) (recognizing the privilege when the attorney requested preparation of accounting documents).

585. *See, e.g., In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987) (expounding that "[a] taxpayer should not be able to invoke a privilege simply because he hires an attorney to prepare his tax returns"); United States v. Davis, 636 F.2d 1028, 1043 (5th Cir. 1981) (stating that a taxpayer should not benefit by hiring a lawyer to perform the

none of the federal courts have taken notice of the fact that in many states this practice is the unauthorized practice of law.

Federal courts retain the power to admit and to discipline members of their bar separately from admission and disciplinary procedures of state courts.[586] Furthermore, a federal court has the power to prescribe rules for the conduct of those who practice before it as long as the rules are consistent with the federal law and procedural and practice rules.[587]

The Supreme Court has recognized that the commissioner of a federal agency has the authority to determine who can practice before the agency.[588] Despite permitting CPAs, enrolled agents, enrolled actuaries, and selected others to practice before the office, Circular 230 includes language that "[n]othing in the regulations . . . may be construed as authorizing persons not members of the bar to practice law."[589]

The question then is: Where do we look to find what constitutes the practice of law? Because taxation is predominantly federal law, the federal courts should make this determination with respect to tax practice. Unfortunately, unauthorized practice cases are seldom brought before federal courts because prosecution for the unauthorized practice of law is generally brought by a state or state bar association and is prosecuted under state law. If it is the practice of law, the courts get to regulate it.[590] If it is not the practice of law, the legislature gets to regulate it under its police power.[591]

---

same task that can be performed by an accountant but without the benefit of a federal privilege).

586. *In re* Abrams, 521 F.2d 1094, 1101 (3d Cir. 1975).

587. *In re* Landerman, 7 F. Supp. 2d 1202, 1204 (C.D. Utah 1998).

588. *See* Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S. 379, 385 (1963) (recognizing that a statute gives the Commissioner of the Patent Office the authority to allow nonlawyers to practice before the office); *see also* NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 34 (3d ed. 2004) (explaining that under the Constitution's Supremacy Clause, "states may not prohibit nonlaywers admitted by federal agencies from practicing before those agencies pursuant to agency rules").

589. 31 C.F.R. § 10.32 (2004).

590. *See* NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 32-33 (3d ed. 2004) (noting that the courts ultimately have authority over both admission to practice and the disciplinary system to which a lawyer is subject after admission, although the legal profession has exercised a substantial amount of control over both of these methods of regulation).

591. *See* 16A AM. JUR. 2D *Constitutional Law* § 361 (2004) (characterizing the scope of police power as "quite extensive"). "In general, [the police power] extends to the enactment of all such wholesome and reasonable laws not in conflict with the constitution of the

The federal courts, in trying to establish the boundaries of "privilege" in federal tax cases, have fashioned rules that also impact on whether tax practice is or is not the practice of law in federal courts. They have, however, fashioned a confusing and uncertain definition based on other criteria. Unfortunately, this leaves taxpayers and tax practitioners in a perilous position.

V. SHOULD TAX PRACTICE BE THE PRACTICE OF LAW?

Taxation deals so intimately with realization, interpretation, and integration of a huge body of law that practice in this area, of necessity, involves the practice of tax law. Realistically, the courts could not hold otherwise.

However, tax is an area in which the "practice of law" perhaps should not be reserved for attorneys alone, nor should all attorneys be allowed to practice in this area. Thus, the field of taxation is unusual and should be viewed from its unique perspective.

A. *Tax Practice by Attorneys—Law School Training*

Tax law is extremely complicated, pervasive, and intertwined. Most litigation involves dollars and tax consequences and attorneys in any field where money is at issue need knowledge of tax laws or their advice and representation may result in malpractice.[592]

For example, the courts of appeals are split on whether attorneys' contingency fees should be first taxed to the client and then

---

state or the United States as may be deemed conducive to the public good." *Id. But see, e.g.,* Eckles v. Atlanta Tech. Group, Inc., 485 S.E.2d 22, 25-26 (Ga. 1997) (trumping a statutory provision that allowed a layman to represent a corporation and holding that only the state supreme court has authority to admit someone to practice law before a court of record); Wash. State Bar Ass'n v. State, 890 P.2d 1047, 1052 (Wash. 1995) (holding that a state legislative enactment unconstitutionally encroached upon the court's powers, violated the separation of powers doctrine, and thus was void).

592. *See* Naqvi v. Rossiello, 746 N.E.2d 873, 880 (Ill. App. Ct. 2001) (finding that the trial court erred when it determined there was not a factual question presented about whether the defendant attorney was negligent when he advised the plaintiff that the proceeds of a settlement were non-taxable). In *Naqvi*, a client brought suit against his former attorney and firm, alleging that they negligently failed to structure his settlement to achieve favorable tax consequences. *Id.* at 875. *See also* Matthew Garretson, *A Fine Line We Walk: Counseling Clients About the Form of Settlement*, PROF'L LAWYER, Summer 2002, at 1 (positing that the proper scope of client counseling includes structured settlements and the tax and non-tax implications thereof).

again to the attorney.[593] The tax courts' and the circuit courts' rulings that contingency fees can first be taxed to the client in their entirety and then the attorneys' fees portion will be taxed to the attorney may have a substantial impact on litigation.[594] For example, if the client pays 35% on the recovery for federal tax and 9% for state tax, and the attorney gets 70% of the recovery when it goes to appeal, the client will pay out 114% of the recovery.[595] Thus, the attorney will probably have to apprise the client that winning could be the worst case scenario because it could result in the client going in the hole by 14% of every dollar recovered.[596] This could put many plaintiffs in the dire position of owing more in taxes than they recover. Thus, the tax consequences may not just impact contingency fee litigation, it could kill it! Further, if the attorney then pays out 35% and 9% of the 70% portion that is his recovery, 88% of the recovery will be paid out as tax. So why would anyone go through the agony of litigation?

Attorneys practicing in family law cannot just rely on state family law statutes because every aspect of divorce carries serious tax consequences and could render an "equitable division" anything but equitable. This is true of most aspects of litigation. The tax consequences of all aspects of litigation and compliance work are significant and should be considered. Despite this pressure on attorneys to learn and know tax, the ABA has chosen to practically ignore tax in the required courses for attorneys.

For a practitioner in tax, the requisite core of knowledge consists of approximately twelve areas: (1) individual income tax with tax accounting and timing issues; (2) corporate tax; (3) corporate reor-

---

593. *See* Raymond v. United States, 355 F.3d 107, 109 (2d 2004) (noting that "[w]hether contingent fees are includable in the gross income of a client recovering on a judgment is the subject of much debate among the circuit courts"). The majority of the circuits hold that contingency fees *are* includable in gross income. *Id.* In *Raymond*, the court held the contingency fee was not excludable. *See id.* at 118 (remanding with instructions to grant the government summary judgment). *But see* Banks v. Comm'r, 345 F.3d 373, 382 (6th Cir. 2003), *cert. granted*, 124 S. Ct. 1712 (2004) (recognizing the court split and holding that the contingency fees were excludable).

594. *See generally* Gregg D. Polsky, Essay, *The Contingent Attorney's Fee Tax Trap: Ethical, Fiduciary Duty, and Malpractice Implications*, 23 VA. TAX REV. 615 (2004) (discussing the implications of the alternative minimum tax, or "AMT").

595. *See id.* at 618-20 (explaining the mechanics of the AMT trap and noting the "preposterous" result).

596. *See id.* at 626 (noting that the client should be kept informed of the risk of the AMT trap).

ganizations/consolidations; (4) S corporation tax; (5) partnership tax; (6) estate and gift tax; (7) estate planning (including generation skipping tax); (8) pensions and profit sharing; (9) property transaction tax; (10) fiduciary income tax; (11) procedure before the IRS and tax litigation; and (12) international tax.[597] These twelve areas of law are considered, by the authors, as necessary for a solid tax practitioner.

Tax research may be included in the legal research course or may be offered as a separate offering. Generally, tax classes are not required for a Juris Doctorate. Except in law schools offering a LL.M. in tax, many "tax lawyers" are graduating from law school with one or two tax classes, all of which are electives. It is hard to imagine how ethical rules requiring competency could be met under the current educational standards. Furthermore, tax is not an intuitive subject, nor one that can be easily learned independently. A lawyer practicing in tax who has not been introduced to the broad range of laws may not even be aware of the issues to be researched.

Fortunately, this is not the case, in schools offering an LL.M. in taxation. Those graduates generally have at least an introduction to the core of tax.[598] However, compliance and the requisite knowledge of arithmetic and accounting are often dismissed with the comment, "That's what accountants are for." As a result, tax attorneys are often limited and timid about their ability to practice in the area of taxation.

---

597. *See* St. Mary's University School of Law Required Course Checklist, *available at* http://www.stmarytx.edulaw/docs/RequiredCourses.pdf (last visited Sept. 21, 2004) (requiring students to fulfill basic courses in persons and property, business and commercial transactions, public and international law, civil and criminal litigation, practice skills, and philosophy of law and lawyers; while federal income tax and estate and gift tax are two of the eight course that may complete the public and international course requirement).

598. *See, e.g.,* Georgetown Law, Taxation Master of Laws (LL.M.), *at* http://www.law.georgetown.edu/graduate/taxation.cfm (last visited Sept. 26, 2004) (requiring that twenty of twenty-four LL.M. credits be selected from the Taxation section of the law school's curriculum); New York University School of Law, Taxation Graduate Program, *at* http://www.law.nyu.edu/depts/admissions/info/graduate/tax.html (strongly recommending Taxation of Property Transactions and Timing Issues and the Income Tax as two classes every student should take).

B. *Early Controversy*

The 1940s saw a public conflict between attorneys and accountants over who should practice tax.[599] Law schools were just starting to offer courses in the area, and as a general rule, attorneys were not trained in taxation.[600] Despite the lack of training on the part of attorneys, however, the question of who should be allowed to practice in the area of taxation became a hotly contested issue. In resolving the controversy, members of the bar generally acknowledged that accountants played a significant role in tax work.[601] In Maurice Austin's 1951 treatise entitled *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice*,[602] the author noted the opinions of two prominent attorneys:

> Tax work, as has often been pointed out, has been neglected by lawyers and the average lawyer does not know anything about it. In most law firms of any size there are one or two men who are doing it, but the others don't know anything about it.
>
> The public will always consult the man who is supposed to know about taxes. That is one reason why *it is the settled practice of the community to go to the accountant.*[603]
>
> If any lawyer needs proof of the importance and necessity of a certified public accountant, let him attempt to prepare an income-tax return for any corporation or partnership of any size. The income-tax law, itself, bristles with legal questions, but the lawyer is rare who

---

599. *See generally* Maurice Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice*, 36 IOWA L. REV. 227, 227 (1950) (noting that the public conflict during the previous ten years has been fruitless, injurious, and unedifying).

600. *See id. at* 230 (stating that, at the time the article was written, law schools had only recently been offering income tax courses).

601. *See id.* at 232 (noting that the business world had long recognized the distinct importance of the two professions, explaining that in large metropolitan centers, law firms engaged accountants as employees to work on income tax matters).

602. *Id.* Austin was a certified public accountant, a member of the New York bar, an accounting member of the National Conference of Lawyers and Certified Public Accountants, a former Vice President of the American Institute of Accountants, and a professor of law at Brooklyn Law School. *Id.* at 227.

603. Maurice Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice*, 36 IOWA L. REV. 227, 232 n.11 (1950) (quoting Robert G. Dodge of the Massachusetts Bar Association).

can complete intricate returns without the help of an accountant of ability.[604]

Austin further remarked, that until larger numbers of lawyers were trained in tax work, clients would continue to entrust their tax work to persons most familiar with the field.[605] "In looking to the future," Austin advised, "it is well for lawyers to bear in mind that this condition is of their own creation, and that its correction requires changes in deeply ingrained habits of thought and practice for which they are in large part responsible."[606] Austin's solution was two-fold: More tax training for attorneys and more joint effort between attorneys and accountants.[607]

In an attempt to lessen the tension between the two professions, the National Conference of Lawyers and Certified Public Accountants adopted the *Statement of Principles Relating to Practice in the Field of Federal Income Taxation Statement*.[608] The *Statement*'s purpose was to try to reach agreement between the two professions on the general principles.[609] In addition, the drafters of the *Statement* wanted to remove the feud from the arena of public debate, and instead return it to the conference table.[610]

The *Statement* provided that either accountants or lawyers could prepare federal income tax returns provided they consult the other when questions of accounting or law arise.[611] In addition, if uncertainties arise as to the interpretation of tax law or general law,

---

604. *Id.* (quoting Augustus Studer, *The Lawyer and the Accountant*, 77 J. ACCT. 368, 369-70 (1944)). Augustus Studer was President of the New Jersey Bar Association. *Id.*

605. *See id.* at 240-41 (stating that as long as there continued to be an insufficient number of attorneys who are trained and competent in tax law, CPAs would handle these matters out of habit and necessity).

606. Maurice Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice*, 36 IOWA L. REV. 227, 240-41 (1950).

607. *Id.* at 242.

608. *See National Conference Adopts Code for Practice in Income Tax Field*, 37 A.B.A. J. 517, 517 (1951) (describing that the adoption of the *Statement of Principles* by the American Institute of Accountants concluded a seven year consideration of whether the *Statement* was necessary); *see also* Maurice Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Procedure*, 36 IOWA L. REV. 227, 241 (1950) (noting that the ABA took exception to some of the content of the *Statement*).

609. Maurice Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Procedure*, 36 IOWA L. REV. 227, 241 (1950).

610. *Id.*

611. *National Conference Adopts Code for Practice in Income Tax Field*, 37 A.B.A. J. 517, 537 (1951).

these must be referred to an attorney; if the questions involved classifying and summarizing in terms of money, or interpreting the financial results, the taxpayer, or his lawyer, should retain an accountant.[612]

According to the *Statement*, only attorneys may prepare or give advice about the sufficiency of legal documents.[613] If questions arise involving the application of legal principles while representing taxpayers before the Treasury Department, the matter should be left to a lawyer.[614] If, however, the questions involve accounting, summarization, classification, or interpretation of financial statements, the matter should be handled by an accountant.[615] The *Statement* also discussed when an attorney or an accountant should be used before a tax court.[616] Thus, the *Statement* closely followed the court decisions by stating that an accountant can fill out a tax return, but if a question of law arises, it must be resolved by an attorney.[617]

C. *Tax Practice by the Accounting Profession*

Despite what appeared to be an established state of the law on what constituted the unauthorized practice of law in the tax area, accountants had other ideas. Generally, accountants already provide legal services with tax advice,[618] and the level of tax practice in which accountants engage often far exceeds the parameters set down by the courts.[619] Further, recent events surrounding the accounting scandals of Enron, Xerox, and WorldCom have shown

---

612. *Id.*

613. *Id.*

614. *Id.*

615. *Id.*

616. *National Conference Adopts Code for Practice in Income Tax Field*, 37 A.B.A. J. 517, 537 (1951).

617. *Compare id.* (finding that questions of law should be determined by an attorney), *with* Canaday v. United States, 354 F.2d 849, 857 (8th Cir. 1966) (noting that the lower court correctly found that an attorney did not render legal services, but merely acted as the defendant's scrivener), *and In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987) (holding that preparing tax returns does not equate to giving legal advice for attorney-client privilege purposes because a client could not claim any privilege if an accountant prepares his tax return).

618. Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1534 (2000).

619. *See id.* at 1534-36 (describing the "MDP phenomenon" in depth). Some firms continue to stretch the limits of acceptability under current rules. *Id.* at 1535. For exam-

that without adequate supervision and controls, the practice of law in the areas of accounting and tax have the potential of doing great harm.[620]

Although the law has been established by the courts, it would appear that no one truly believes it is the law; consequently, the law is not enforced. The accounting profession does not believe it is the law, so accountants continue to not only practice in this area, but to expand their practices into other areas of "law" as well.[621] The public does not believe it is the law either, as can be seen by the large numbers of taxpayers who seek the assistance of an accountant, rather than an attorney, to get tax advice and have their taxes done.[622] The tacit approval of the bar has led accountants to believe that the practice of tax falls within the purview of the accounting profession, and the failure to enforce the law has led accountants to believe they are a law unto themselves.

Since the early 1990s the largest accounting firms have been practicing law in Europe.[623] It is also the consensus of many that these same firms are also horning into the legal market here in the United States.[624] This has created a stage for an upcoming battle between lawyers and accountants.[625] Further, the "fight promises

---

ple, one Washington, D.C., firm is not only financed by one of the major accounting firms, but also bears that firm's name. *Id.*

620. *See* Vicky Stamas, *Xerox Case Isn't Over, SEC Chairman Says*, L.A. TIMES, July 1, 2002, at B2 (noting that Xerox was under investigation for inflating revenues in order to meet earnings forecasts, WorldCom was charged with hiding costs of $3.9 billion, and Enron overstated income by $1 billion over four years).

621. *See* John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market, Lawyers May Find Themselves Not Only Blindsided by the Assault but also Limited by Professional Rules*, 84 A.B.A. J. 42, 43 (1998) (reporting that most agree the large accounting firms are "muscling into the legal market"). Even smaller accounting firms are beginning to expand their "traditional lines of business," which in turn are blurring the distinctions between the two professions. *Id.*

622. *See id.* (noting that when the tax practice picks up, the large accounting firms begin to hire lawyers).

623. John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market, Lawyers May Find Themselves Not Only Blindsided by the Assault but also Limited by Professional Rules*, 84 A.B.A. J. 42, 42 (1998).

624. *Id.* at 43.

625. *Id.*

to be divisive" as many of the large accounting firms have begun to recruit lawyers from firms and law schools.[626]

CPAs are regulated by state boards of accountancy.[627] These boards are charged with enforcing and interpreting the rules governing the licensing and regulation of CPAs.[628] The minimum licensing requirements generally include passing the Uniform CPA Examination (which has very little to do with tax knowledge), educational requirements (which require very little tax), experience (which may have nothing to do with tax), continuing professional education, and peer review (not applicable in the tax area).[629] AICPA, has promulgated a Code of Professional Conduct and Statements on Responsibility in Tax Practice.[630] The Statements establish standards for tax practice and define the responsibility of CPAs, but they only apply to members of the AICPA.[631] These standards are not mandatory and carry no sanction for their breach.[632]

Additionally Circular 230 is a codification of the laws imposed upon those practicing tax before the IRS.[633] Circular 230 imposes a number of duties and restrictions.[634] The Treasury Department has the authority to suspend or disbar a person from practicing before it for incompetence, disreputable conduct, or violation of statutes

---

626. John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market, Lawyers May Find Themselves Not Only Blindsided by the Assault but also Limited by Professional Rules*, 84 A.B.A. J. 42, 44 (1998).

627. *See generally* Texas State Board of Public Accounting, *available at* http://www.tsbpa.state.tx.us/ (last visited Sept. 21, 2004) (detailing, among other things, the board rules for public accounting in Texas).

628. *See generally* Texas State Board of Public Accounting, *available at* http://www.tsbpa.state.tx.us/rulemain.htm (last visited Sept. 21, 2004) (stating the rules for the accounting profession).

629. *See generally* Texas State Board of Public Accounting, *available at* http://www.tsbpa.state.tx.us/eqmain.htm (last visited Sept. 21, 2004) (discussing the Uniform CPA examination).

630. *See generally* AICPA Code of Prof'l Conduct, *available at* http://www.aicpa.org/about/code/index.htm (last visited Sept. 21, 2004) (reprinting all of the sections of the Code of Professional Conduct).

631. *See* AICPA Code of Prof'l Conduct – Composition, Applicability and Compliance, *available at* http://www.aicpa.org/about/code/comp.htm (last visited Sept. 27, 2004) (providing for compliance standards with the Code).

632. *See id.* (indicating compliance is voluntary).

633. Regulations Governing the Practice of Attorneys, Certified Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers before the Internal Revenue Service, *available at* http://www.irs/gov/pub/irs-pdf/pcir230.pdf (last visited Sept. 21, 2004).

634. *See id.* (listing out the duties and restrictions).

or regulations.[635] The Internal Revenue Code also provides penalties for tax return preparers who breach the rules or break the law.[636]

Probably the most disturbing aspect of practice by accountants is that they have done nothing to dispel the public's misconception that the designation, "CPA," means tax.[637] In fact, not only have they done nothing to explain that the CPA designation does not mean tax expertise, they have continued to perpetrate the misconception. With all the scandals currently surrounding the accounting firms, their lack of full disclosure about their actual preparation in tax is disturbing.[638]

VI. THE LEGAL PROFESSION'S OBLIGATION TO REGULATE THE PRACTICE OF LAW

Despite the obligation of the legal profession to regulate the practice of law, it has taken relatively few steps to restrain the unauthorized practice of law in the area of taxation. Many of the cases have arisen sporadically when an accountant sued for fees, or when an attorney became disgruntled with an accountant. Whether an accountant is restrained from practicing tax, may be determined by whether he alienates an attorney. Thus, a tax accountant's right to practice tax may be capriciously determined by his social skills rather than his competency in the tax area.

As competition for clients and business has increased, accountants and attorneys have begun working together to help promote business. Thus, unless an attorney is representing a client in defending a suit for fees, attorneys do not want to alienate a potential source of work!

---

635. *See id.* (indicating that Section 10.50 deals with sanctions).

636. *See id.* (laying out the procedure to appeal a decision by the IRS, including an audit).

637. *See* John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market, Lawyers May Find Themselves Not Only Blinded by the Assault but also Limited by Professional Rules*, 84 A.B.A. J. 42, 43 (1998) (indicating that the "Big Six" in the United States are engaging in legal activities when dealing with tax).

638. *See id.* at 42 (stating that a state supreme court committee is investigating whether or not Arthur Andersen was engaging in the unauthorized practice of law).

A. *Participation in Fraud on the Accountant*

By not taking a stand on the unauthorized practice of law in the tax area, however, the legal profession has opened up the possibility of participating in an unwitting fraud on accountants. If an accountant sues for fees earned from giving tax advice, the client can get out of paying the fees by simply asserting that the advice constitutes the unauthorized practice of law. The recalcitrant client might very well be an attorney or judge.

Further, if a client is suing for malpractice, the fact that the accountant is guilty of the unauthorized practice of law will weigh heavily against him. The situation is so egregious that many malpractice carriers use clauses that void coverage if the accountant sues for fees.

B. *Ethical Obligations of the Legal Profession*

In spite of their reluctance to take a stand against accountants on the unauthorized practice of law issue, attorneys are under an ethical obligation to do so. The older ABA Model Code of Professional Responsibility established ethical standards which are to govern the actions of attorneys engaged in the practice of law.[639] Canon 3 is entitled "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law."[640] Model Rule 5.5 of the Model

---

639. MODEL CODE OF PROF'L RESPONSIBILITY CANNON 3 (1980).

640. *Id.* Relevant Ethical Considerations include:

> EC 3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

MODEL CODE OF PROF'L RESPONSIBILITY EC 3-1 (1980). Furthermore, EC 3-2 provides that the difficulties inherent in the legal profession mandate that only trained professionals should practice law. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-2 (1980). The consideration states that:

> The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

Rules of Professional Conduct states that a lawyer shall not assist another in the unauthorized practice of law.[641]

By failing to firmly establish that tax is the unauthorized practice of law, the legal profession has also created a trap for accountants. More than two-thirds of the states make the unauthorized practice of law a misdemeanor by statute.[642] Others consider it contempt of court.[643] However, accountants cannot provide competent tax services without dealing with legal matters,[644] and thus, practicing law under the current standards. As Judge Pennington Straus, the former Chair of the ABA Standing Committee on National Conference Groups, stated, "all kinds of other professional people are practicing the law almost out of necessity."[645]

The ABA Commission on Professionalism stated, "It can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients on any matter concerning the law."[646] However, under the current standards, nonlawyers do so at their peril.

Id. The ABA Model Code of Professional Responsibility not only affords the above discussion of the ethical considerations, but it provides disciplinary rules that, if violated, can result in disbarment. Those disciplinary rules are as follows: "Aiding Unauthorized Practice of Law. (A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law." MODEL CODE OF PROF'L RESPONSIBILITY DR 3-101 (1980). In addition, the disciplinary code places several barriers designed to further separate lawyers from nonlawyers. "Dividing Legal Fees with a Non-Lawyer. (A) A lawyer or law firm shall not share legal fees with a non-lawyer. . . ." MODEL CODE OF PROF'L RESPONSIBILITY DR 3-102 (1980). Directive 3-103 provides the final disincentive for lawyers who want to work directly with nonlawyers. "Forming a Partnership with a Non-Lawyer. (A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." MODEL CODE OF PROF'L RESPONSIBILITY DR 3-103 (1980).

641. *See* John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market, Lawyers may Find Themselves Not Only Blindsided by the Assault but Also Limited by Professional Rules,* 84 A.B.A. J. 42, 44 (1998) (noting that accounting firms claim not to offer legal services but advice). This raises the question of how attorneys employed by the Big 4 accounting firms reconcile their employment with this rule?

642. *See* Deborah L. Rhode, Symposium, *The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 726 (1994) (stating that traditionally the legal profession has had the authority to define what the practice of law entails).

643. *Id.* at 727.

644. *See* James Podgers, *Statements of Principles: Are They On the Way Out?*, 66 A.B.A. J. 129, 129 (1980).

645. *Id.* at 131.

646. AM. BAR ASS'N COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, REPORT OF THE COMMISSION ON PROFESSIONALISM TO THE BOARD OF GOVERNORS AND THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION (1986), *reprinted in* 112

Even if accountants and attorneys work together in the area of tax or estate planning, the potential is great for the ethical standard of the legal profession to become severely strained. Since many attorneys are not competent to "crunch" the numbers, it is important for attorneys to have a good working relationship with an accountant. This relationship may be destroyed if the attorney refuses to participate in the estate planning business of the accountant or takes the position that the accountant should not be practicing tax.

Unless the legal profession as a whole takes a stand against practice by accountants and its continued encroachment into the most complex areas of taxation and estate planning, either the ethics of the profession, or the service provided to the client will suffer. On the other hand, if the legal profession and the public determine that it is best to allow accountants to practice in the areas of taxation and estate planning, this needs to be clearly set out so that accountants can practice within the parameters of the law.

From a practical perspective, not enough trained lawyers (in tax or otherwise) exist to do the tax work now performed by accountants.[647] Thus, if the legal profession suddenly began to enforce the unauthorized practice of law in tax, it would create chaos. This was the same situation that existed in the 1940s.[648] Despite the call for better training for attorneys in the field of taxation, the situation has not dramatically changed since the earlier controversy.[649] Therefore, although the state courts have adamantly declared tax practice to be the practice of law, the legal profession simply cannot enforce the courts' stand.

VII. PROPOSAL FOR CHANGE

Rule 1.1 of the Model Rules of Professional Conduct deals with a lawyer's obligation to assist in the integrity and competence of

---

F.R.D. 243, 301 (1986). The ABA recently formed a taskforce on the model definition of the practice of law charged with consideration, among other things, of minimum qualifications, competence and accountability. *Id.*

647. Maurice Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice*, 36 IOWA L. REV. 227, 240 (1950).

648. *See id.* at 240-41 (addressing the shortage in lawyers as being one of attorney's own creation).

649. *Id.*

the legal profession.[650] Perhaps it is time for the courts and the legal profession to take a new look at their obligation in the area of tax practice.

In 1985, after a struggle regarding the preparation of real estate documents by nonlawyers, the Washington Supreme Court held that licensed real estate brokers or sales agents could prepare lawyer-approved forms as long as those individuals were held to the same standard of care as attorneys.[651] The court, after considering the interests of consumers in reduced costs and increased convenience, and the interest of other licensed vocations in using the broker's expertise, stated: "We no longer believe that the supposed benefits to the public from the lawyers' monopoly on performing legal services justifies limiting the public's freedom of choice."[652] Other trends have encouraged nonlawyers to respond to this unmet demand. An increasing specialization in legal work, coupled with a growing reliance on paralegals and routinized case-processing systems, undercuts some of the traditional competence-related justifications for banning lay competitors. Law school and bar exam requirements provide no guarantee of expertise in tax preparation, areas where the need for low-cost services is greatest.[653]

An ABA survey of clients reported that 82% of respondents agreed that "many things that lawyers handle—for example, tax matters or estate planning . . . can be done as well and less expensively by nonlawyers."[654]

With the legal community beginning to recognize the practical realities of nonlawyers practicing law, various steps are being taken to deal with this situation.[655] The most common approaches exempt lay legal practice that is widespread in the community, inci-

---

650. MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

651. Cultum v. Heritage House Realtors, Inc., 694 P.2d 630, 635 (Wash. 1985) (en banc).

652. *Id.* at 634.

653. Deborah L. Rhode, Symposium, *The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 727 (1994).

654. *Id.* at 726 n.225 (quoting BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 231 (1977)).

655. AM. BAR ASS'N STANDING COMM. ON PROFESSIONALISM, TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT TO THE HOUSE OF DELEGATES 3 (1986), *available at* http://www.abanet.org/cpr/model-def/taskforce_rpt_429.pdf.

dental to another established business, or only routine tasks requiring knowledge of an average citizen.[656]

By focusing on the nature of the task rather than the skills of the provider, this approach fails to adequately acknowledge consumer concerns. Typically, courts determine what tasks are beyond an average individual's grasp without reference to any evidence that offending practitioners have only average knowledge or have harmed the public by their activities.

Following the new trends, it would be possible for the courts to establish a new standard for the practice of tax. The courts could consider making an exception to the unauthorized practice of law for tax practitioners who demonstrate exceptional knowledge and agree under the supervision of the courts.

A. *Qualifications to Practice "Law" in the Tax Area*

1. Education

The first criterion for allowing nonlawyers to practice tax would be the demonstration of exceptional knowledge, and it should be defined in terms of current standards required by the courts. However, in establishing this standard, it should apply to attorneys practicing tax as well.

The body of knowledge required to competently practice tax is enormous. It takes proficiency in twelve areas of knowledge to cover the basic core of the subject matter.[657] In addition, there are numerous specialty areas.[658] Further, the complexity of the administrative procedures is overwhelming.

---

656. *See* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 46-48 nn.140-46 (1981) (citing state statutes that provide different approaches addressing the unauthorized practice of law).

657. The areas include: Individual income tax; Advanced topics in individual income tax; tax research; corporate tax I – formation; corporate tax II – dissolution; corporate reorganization & consolidated returns; partnership taxation; estate and gift taxation; income taxation of estates and trusts; state and multi-state taxation; taxation of deferred compensation; tax procedure; and international. Although some of the topics appear to be continuations of others, each contains enough material to be separately considered.

658. Some of the topics include: Estate planning; taxation of property transactions; foreign taxation; taxation of S corporations; income tax planning strategies; tax planning for small businesses; taxation of not-for-profit corporations and deferred giving; employee benefits; taxation of divorce; and taxation of intellectual property transactions.

Generally, neither attorneys nor accountants has had adequate educational preparation to practice tax.[659] The accountant frequently has had only one business law course as part of his accounting program. He will probably not be well versed in the laws of business organizations, trusts, wills and estates, contracts, or other business topics, nor will he have had exposure to constitutional law or criminal procedure. However, after years of experience under the tutelage of an experienced tax accountant, the accountant probably will acquire the required knowledge and expertise to function competently in taxation.

On the other hand, a student in a J.D. program may not be required to take any tax courses.[660] The attorney starting a tax practice may have had only the same two tax classes as the accountant. In addition, since the tax law student is seldom required to know how to do any of the computations relating to tax issues, he may be incapable of actually computing the tax consequences of an intended tax plan.[661]

An attorney with nothing more than the ABA required courses is not qualified to practice tax. Tax is such a complicated and interrelated area, it is not enough to simply research a tax question. First, it is necessary to know that there is an issue. Although an attorney may be able to find a definitive answer with respect to the question posed, his answer may impact numerous other tax issues of which he and the client are unaware, and which will not be apparent from the attorney's research. Thus, competency requires much more than research skills or a broad background in peripheral legal issues.

The ABA Model Rules of Professional Responsibility define competent professional judgment as "the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment."[662] In

---

659. *See* Maurice Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice*, 36 IOWA L. REV. 227, 230-31 (1950) (noting that taxation includes areas within the exclusive control of lawyers and accountants).

660. *See generally* St. Mary's University School of Law Required Course Checklist, *available at* http://www.stmarytx.edu/law/docs/RequiredCourses.pdf (last visited Sept. 21, 2004) (listing all of the required courses, and Federal Income Taxation is not one of them).

661. In one author's LL.M. program at McGeorge School of Law, the typical comment was, "You don't need to know how to compute it, that's what accountants are for."

662. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-2 (2004).

tax practice competent professional judgment requires trained familiarity with the tax law and tax procedures, a disciplined, analytical approach to tax problems and their numerous ramifications, and a firm ethical commitment. The required training simply is not part of a regular program in law leading to the juris doctorate degree.[663] However, after years of tutelage under a competent tax attorney and/or after an LL.M. program in tax, an attorney may possess the required abilities.

Recently, the ABA formed the Taskforce on the Model Definition of the Practice of Law.[664] The taskforce recognized that:

> [A] lawyer serves the complex role as a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. The lawyer's complex role includes special obligations such as client confidentiality, conflicts avoidance, competent performance and professional independence that underscore the need for a comprehensive system of minimum qualifications for admission to the practice of law. The principal objective of the qualification system is to ensure that education, training, examination and fitness criteria are satisfied prior to admission and licensing. Thereafter, the jurisdiction's regulatory system monitors the ethical conduct and competency of lawyers through an extensive system of professional continuing education, periodic registration, professional conduct rules and professional liability standards, and disciplinary enforcement.[665]

Unfortunately, the taskforce did not address a situation in which the attorney is not competent to practice in the first place, or the definitions of who can practice that apply evenly to large firms and local solo practitioners.[666]

So exactly who is qualified to do tax or estate planning or give tax advice? The average attorney with a J.D. has a general knowledge of the law, and the legal ramifications of corporations, partnerships, estates, trusts, wills, and contracts. He may also have a

---

663. *See generally* St. Mary's University School of Law Required Course Checklist, *available at* http://www.stmarytx.edu/law/docs/RequiredCourses.pdf (last visited Sept. 21, 2004) (indicating that since Federal Income Taxation is not a required course).

664. ABA Task Force on the Model Definition of the Practice of Law Standing Committee on Client Protection (2003), *available at* http://www.abanet.org/cpr/model-def/taskforce_rpt_429.pdf.

665. *Id.* at 6-7 (citations omitted).

666. *See generally id.* (discussing the task force).

basic understanding of individual taxation, business entities or estate and gift taxation, but when faced with other tax issues, the expertise of the attorney may fall short of the level demanded by the ABA Model Rules.[667]

On the other hand, a CPA is qualified in areas of auditing and advising management, with some experience with taxation. However, even if the CPA is knowledgeable in taxation, he will probably lack the knowledge of the legal issues relating to estate, business, or tax planning.

It is possible that under the existing standards and educational programs, neither accountants nor attorneys should be allowed to practice tax unless some additional standard is imposed. The concept of additional entrance requirements to practice in a field of law is not new.[668] For example, patent attorneys are required to pass an examination before they are allowed to practice as "patent" attorneys.[669]

In 1983, the American Taxation Association proposed making a certification for tax specialists.[670] This certification would have given the client a tool to help determine which practitioners had achieved a certain level of competency in the area of taxation. The proposal was opposed by accounting tax practitioners and the accounting academicians.[671]

Steps have been taken in several of the states to allow attorneys who have met test and experience requirements to hold themselves out as "specialists" in various areas.[672] Attorneys who have not

---

667. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

668. 37 C.F.R. § 1.34 (2003) (requiring registration of authorization of attorneys who practice before the U.S. Patent and Trademark Office).

669. *See* Dale L. Carlson et al., *"Are We Certifiable?" Redux – A Strategic Plan for Maintaining Patent Practice Competence*, 85 J. PAT. & TRADEMARK OFF. SOC'Y 287, 290 (2003) (discussing the various requirements for practicing before the Patent and Trademark Office).

670. *See* C. Douglas Izard & John D. McKinney, *The Certification of Tax Specialists: Some Empirical Results*, 5 J. AM. TAX ASS'N 1, 1 (1983), *available at* http://www.atasection.org/jata/83fall.html#izard (discussing a study conducted to determine whether to have certification of tax specialists).

671. *Id.*

672. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 7.04 (2003) (discussing state requirements to hold yourself out as a specialist); *see also* MODEL RULES OF PROF'L CONDUCT R. 7.4 (2003) (recognizing the professional requirements to hold yourself as out as a specialist).

met the requirements can still practice in the specialty areas, but they cannot hold themselves out as "specialists."[673]

Since the courts have the ultimate authority to regulate the practice of law, any standard imposed upon practitioners before they can practice tax must be imposed by the courts. Until the courts impose a standard of education, the public will not be guaranteed a pool of qualified practitioners in the area of tax practice.

2. Regulation by the Courts

Perhaps it is time for the legal profession to reevaluate its responsibility regarding the practice of law in the area of tax. The legal profession alone does not have the qualified manpower to meet the public demand for tax advice.[674] On the other hand, the profession has the responsibility for making sure that the public is served by competent, ethical practitioners. Its reluctance to take a firm and definitive stand on the practice of tax has subjected the public to essentially unregulated tax practitioners.

In *Gardner v. Conway,*[675] the court said:

> Any criterion for distinguishing law practice from that which belongs to other fields can be properly geared to the public welfare only if we keep in mind the manner in which the licensing of lawyers serves its purpose. The law practice franchise or privilege is based upon the threefold requirements of *ability*, *character*, and *responsible supervision*. The public welfare is safeguarded not merely by limiting law practice to individuals who are possessed of the requisite ability and character, but also by the further requirement that such practitioners shall thenceforth be officers of the court and subject to its supervision.[676]

The courts could make the practice of tax by either accountants or attorneys subject to its supervision. By so doing, the courts would have the disciplinary power that is deemed to be important to the public welfare.

---

673. TEX. DISCIPLINARY R. PROF'L CONDUCT 7.04 (2003).

674. *See* John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market, Lawyers may Find Themselves Not Only Blindsided by the Assault but also Limited by Professional Rules*, 84 A.B.A. J. 42, 44 (1998) (indicating that the Big Six accounting firms have thousands of individuals working for them to aid all of the individuals with tax).

675. 48 N.W.2d 788 (Minn. 1951).

676. Gardner v. Conway, 48 N.W.2d 788, 795 (Minn. 1951).

B. *Recommendation*

Reform and change accompany any recommendation for the future. First, enjoining nonlawyers from tax practice would require a vast increase in the number of practicing tax attorneys. It would also require a complete change in the education provided in law schools so that upon graduation, these professionals could give competent tax advice. Further, a significant portion of the state bar associations' time would go to prosecuting the myriad number of nonlawyer tax practitioners and firms. Second, giving the business of taxation solely to the CPAs would mean the loss of privileged client communications, court control of disciplinary actions, and the problem of malpractice due to a lack of adequate educational standards.[677] Third, a requirement that both professionals work together involves fee sharing, the possibility of client fraud, and the doubling of fees to the client for two professionals. However, the level of competency would rise.

Perhaps it is time to consider a new alternative. We propose creating a new classification which could be called "Tax Practitioner." Tax Practitioners could have a background in either law or accounting, but would become certified as a Tax Practitioner only after satisfactory completion of course work in specific areas and an examination demonstrating competency in the numerous areas of taxation, including related law. An experience requirement could also be imposed before the practitioner could practice on his own. To ensure continuing competency, a requirement of re-testing every five years or completion of a number of hours of continuing education could be imposed. These new practitioners would have the same requirements of character imposed upon members of the bar and would be subject to supervision and discipline by the courts. In effect, a new "bar association" could be created for Tax Practitioners.

These new professionals would be allowed to practice in the area of taxation by giving advice, rendering opinions, representing clients before taxing agencies, completing the same kind of exam now administered by the tax court to nonattorneys, and prosecuting tax

677. *See* John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market, Lawyers may Find Themselves Not Only Blindsided by the Assault but also Limited by Professional Rules*, 84 A.B.A. J. 42, 44 (1998) (noting that accountants cannot offer their clients the same type of confidentiality as lawyers can).

cases in any court in which the practitioner has met the requirements for practice.

In addition, a second classification called "Tax Preparer" could be established for those who have not met the qualifications of the Tax Practitioner. Tax Preparers would be allowed to fill out tax returns; however, they would be required to pass an exam and complete annual continuing education requirements. They would not be allowed to give tax advice unrelated to the preparation of the return. Of the four areas of tax practice,[678] they would be limited to preparing only tax returns.

Since the regulation of the practice of law rests with the courts, both groups would be created by adoption of a set of court rules. Two scenarios are possible. The first would be to create a model set of court rules to be adopted by the highest court in each state. Each Tax Practitioner or Tax Preparer would apply for membership in a state's Tax Bar. This proposal gives each state control over the practice of law within its borders, but creates the possibility of disparate treatment of practitioners engaged in federal law.

The other scenario would be a National Tax Bar, created and governed by the United States Supreme Court. Each admitted applicant would then be empowered to practice nationwide.

By establishing a new type of tax practitioner, the public would have some assurance of at least a minimal level of education and competency in the area of taxation. We are long overdue for some standard regulating the entrance requirements and continuing competency level in this field. In addition, by establishing a new type of Tax Practitioner, we could legitimize the practice of tax by those nonlawyers who have achieved the competency to practice in this area.

VIII. CONCLUSION

Taxation is a field that is so pervasive that its effect is felt by practically all people. In fact, the ramifications of taxation can be so devastating that they can literally destroy businesses and disrupt families. Superimposed upon the monetary effects of taxation, are the potential criminal penalties for willful failure to comply with a maze of complex and practically unintelligible rules.

---

678. The areas include: source tax preparation, tax planning, representation before administrative bodies, and court appearance.

Despite the critical need for competent, professional help in the area of taxation, the current state of tax practice is confused, virtually unsupervised, and without definite standards for practitioners.[679]

Accountants who do a great deal of the tax practice in this country have refused to create a certification that would protect the public and ensure a high level of competency among practitioners in the area of taxation. Despite their reluctance to demand a high standard of competency, they have begun to move into additional areas of "law" in an effort to expand their practice.

The state courts have said that the practice of tax is the practice of law, and as such is subject to its supervision. Presumably, these decisions establish the law that only lawyers can practice tax, but these holdings are flaunted and not enforced. Further, enforcement would bring about chaos and be to the public detriment, as there are not enough lawyers to do the work done by accountants. The federal courts are split on the issue, but generally hold that the practice of tax is the practice of accounting, even when performed by an attorney. Generally, their rulings are not so much an analysis of whether tax is the practice of law, as they are an effort to limit the use of an accountant-client privilege. Thus, although the states hold the practice of tax is the practice of law, the federal courts generally hold that the practice of tax is the practice of accounting unless it involves a criminal prosecution.

Accountants practicing tax, however, do so under the threat of prosecution for the unauthorized practice of law under state law. Since there is no one else to do a job that is in such critical demand, this threat of prosecution is an unfair burden to put upon the accounting profession.

It is time for the legal profession to set realistic standards ensuring the public welfare in terms of providing both sufficient and competent tax assistance. This can be done by creating a new classification of professionals who must meet standards of competency in the areas of taxation and who are supervised by the courts.

---

679. *See generally* John Gibeaut, *Squeeze Play: As Accountants Edge into the Legal Market, Lawyers may Find Themselves Not Only Blindsided by the Assault but also Limited by Professional Rules*, 84 A.B.A. J. 42, 44 (1998) (noting that attorneys in Texas believe accountants are invading their practice, and a Texas committee is investigating whether Arthur Andersen engaged in the unauthorized practice of law).