2016 Erwin N. Griswold Lecture Before the American College of Tax Counsel

Stroke of the Scrivener's Pen: Role of a Tax Planner and Litigator

EMILY A. PARKER*

I am truly honored to be asked to deliver this lecture. It is very intimidating for my name even to be included on a list with the prior lecturers. And, of course, speaking to this audience of accomplished tax lawyers is a tremendous challenge. It is a challenge to say something that is new, interesting and somewhat entertaining. Like a woman appearing before a firing squad, if not for the honor and probably my ego, I would have just declined.

I am not a learned tax professor, a deep tax policy thinker, or a former high-level government official. While I had a short tenure with the IRS Office of Chief Counsel several years ago, in essence, I am just a practicing tax lawyer. I am both a tax planner and a litigator in a private law firm in Dallas, Texas. Currently, I am serving as the Managing Partner of that Am Law 200 law firm. From those perspectives, I will address three areas relevant to the ACTC mission of improving the practice of law: The challenges of being a tax planner or a tax litigator and practicing law in a private law firm today.

Tax Planning: By the Stroke of the Scrivener's Pen

The first area is the role of the tax lawyer as a planner and advisor, which I have entitled: "By the Stroke of the Scrivener's Pen." The significance of this title will become clear later.

For most tax lawyers, the practice of tax law involves planning and advising. Tax planning and advising is very difficult because the tax lawyer does not know the right answer. We must apply complicated and sometimes uncertain rules to unclear and changing facts in order to plan transactions and give good tax advice. So, I praise tax planners and advisors for doing a hard job: helping taxpayers to comply with the tax law.

---

* Managing Partner, Thompson & Knight LLP, Dallas, Texas. Fellow, American College of Tax Counsel. B.A., 1970, with highest honors, Stephen F. Austin State University; J.D., 1973, with honors, SMU Dedman School of Law, Order of the Coif. This lecture was delivered on January 30, 2016, at the Annual Meeting of the American College of Tax Counsel in Los Angeles, California.

A prior distinguished Griswold Lecturer said that what taxpayers want is to have their tax matters resolved "quickly, quietly, fairly and with finality."[1] That is true, but what clients really want from their tax lawyer—whether a planner or a litigator—is to pay the least amount of tax possible consistent with the law. This doesn't just apply to my Texas clients; it applies to clients everywhere. Paying taxes has been aptly described as "a group contest to see who pays less."[2]

Each client wants to pay only "my fair share" of taxes. Some clients define their "fair share" as essentially nothing. Many of the abusive tax shelters promoted in the late 1990s and early 2000s were designed to eliminate capital gain tax at 15% and 20% rates.[3] This suggests that, for some people, any marginal income tax rate is too high.

When I first started practicing tax law, my mentor, Waddy Bullion, described what he called the three basic rules of tax planning: (1) paper what you do; (2) do what you paper; and (3) never, ever try to conceal what you have done. I have used those three rules more than once in my career. They are particularly helpful when a client wants to go back in time and do or redo a transaction. Of course, these rules primarily test whether there is proof of knowing and intentional underpayment of tax because they bear on mental state. They do not address whether the tax lawyer's advice will withstand the test of an IRS audit or litigation.

A tax lawyer who only advises clients to take positions that the IRS has expressly approved, or would approve, will not be a very successful lawyer. A tax planner and advisor sometimes must advise clients to take positions that present some risk, including the risk of an IRS challenge.

Years ago, we advised Petroleum Corp. of Texas (Petco) on what was referred to as a section 337 twelve-month liquidation. Under the law at the time, a corporation could sell all its assets and, if it completely liquidated within 12 months, the gain on the sale and liquidation was not taxable to the corporation except for recapture income. This law pre-dated *General Utilities* repeal and resulted in a single tax at the shareholder level, except for corporate tax on recapture income from sale and distribution of recapture assets.[4] Some in this audience likely will recall the sheer joy of tax planning pre-*General*

---

[1] Harry Gutman, The 2012 Erwin N. Griswold Lecture Before the American College of Tax Counsel: The Role of the Tax Advisor in the Changing World of Global Tax Administration (2012)(quoting from Organization for Economic Cooperation and Development (OECD), *Taxpayer's Rights and Obligations*, Practice Note (2001)).

[2] Sheldon Cohen, The 1997 Erwin N. Griswold Lecture Before the American College of Tax Counsel (1997).

[3] *See* Tanina Rostain & Milton C. Regan, Jr., Confidence Games: Lawyers, Accountants and the Tax Shelter Industries 82, 125 (2014).

[4] *See* General Utilities & Operating Co. v. Helvering, 16 A.F.T.R. 1126, 56 S. Ct.185 (1935), *rev'g on other grounds* 74 F.2d 972 (4th Cir. 1935), *rev'g on other grounds* 29 B.T.A. 934 (1934) (holding that the distribution of assets by a corporation to its shareholders is not a taxable sale or exchange).

Utilities repeal, and others will just have to take my word that this was the law at the time.[5]

Petco sold substantially all of its assets, but was unable to sell a relatively small amount of royalties and operating interests in oil and gas properties.[6] We studied the corporate, partnership, and recapture law and concluded that the distribution of partnership interests, rather than distribution of the assets, likely would not result in recapture income to Petco. Unfortunately, there was a case in the Federal Circuit holding to the contrary.[7] We concluded that decision ultimately hinged on the fact there was no business purpose for the distribution of partnership interests rather than the assets. In Petco's case, by contrast, good business reasons existed for forming a partnership and distributing partnership interests. We concluded, therefore, that the partnership's existence as an entity should be fully respected.

Petco's management and Petco formed a limited partnership to hold the remaining assets.[8] Petco then distributed its limited partner interests to its shareholders in complete liquidation.[9] Petco paid the recapture tax on that distribution and filed a claim for refund.[10] Following the Federal Circuit's decision, the district court denied the claim even though it found there was a business purpose for the Petco partnership.[11] Petco appealed to the Fifth Circuit.

In oral argument, the Fifth Circuit panel seemed to accept that, under a literal reading of the Code, Petco's distribution of its partnership interests did not result in recapture. One judge asked, however: "Isn't this result an unintended 'loop hole' in the tax law?"[12] I responded that the Code, as written, reflects Congressional intent so, by definition, this is not an unintended tax result. I also objected to the use of the term "loop hole."

The Fifth Circuit reversed the district court based on the terms of the Code, and the district court's finding that there was a business purpose for the partnership.[13] In his concurring opinion, Judge Brown ruefully commented that the result of the court's decision was a saving of $3 million of income tax "by the stroke of the scrivener's pen."[14]

---

[5] The *General Utilities* doctrine was legislatively changed by the Tax Reform Act of 1986, P.L. 99514, § 631(a).

[6] Petroleum Corp. of Tex. v. United States, 939 F.2d 1165, 1166 (5th Cir. 1991).

[7] Holiday Village Shopping Ctr. v. United States, 5 Cl. Ct. 566 (1984), *aff'd*, 773 F.2d 276 (Fed. Cir. 1985) (adopting an aggregate rather than an entity view of the partnership).

[8] 939 F.2d at 1166.

[9] *Id.*

[10] *Id.*

[11] Petroleum Corp. of Texas v. United States, 71A A.F.T.R.2d 93-3772 (N.D. Tex. 1990).

[12] Transcript of Oral Argument, 939 F.2d 1165 (1991).

[13] 939 F.2d 1165. In so holding, the majority noted that well after Petco's liquidating distributions Congress enacted section 386, prospectively requiring recognition of recapture on distribution of partnership interests.

[14] *Id.* at 1170.

This quote is music to the ears of any tax planner. As a tax planner, my duty to my client and my duty to the tax system is the same. I must advise my client so that they can report and pay the minimum amount of tax owed under the law. My client does not have the duty to overpay taxes, and I do not have a duty to advise my client to overpay taxes. This does not mean that taxpayers may avoid taxes by engaging in transactions that are without economic substance and business purpose. Taxpayers are allowed to plan and effect real business transactions in a manner that avoids or reduces taxes consistent with the terms of the Code and regulations. That is called "tax planning," and sometimes that means taking advantage of a "loop hole" in the rules "by the stroke of the scrivener's pen" as in Petco's case.

Our tax law consists of highly technical, often formalistic, and sometimes inequitable and illogical rules. As the Fifth Circuit once stated: "Tax law is law unto itself. There are no equities in tax law. And there is an area of permissible illogic in tax law."[15] Sometimes illogical and inequitable tax laws work against taxpayers and sometimes against the government. Sometimes, tax savings may appear to be achieved by "the stroke of the scrivener's pen" and, yet, that is the correct result under the law.

That there is no equity in the tax law applies equally to pleas by taxpayers for equity, and by the government that Congress could never have intended to allow this result. Our tax system is governed by rules, not by individual, subjective judgments of tax policy, equity or even logic. Although I sometimes argue to non-tax lawyers that tax law is logical in an alternate universe, they rarely believe me.

Taxpayers and tax lawyers must be able to rely on the statutes, regulations, rulings, and other IRS pronouncements. If tax consequences are unpredictable and IRS challenges are random, then both taxpayers and tax lawyers will develop distain for the tax system. If no one can, with confidence, reasonably predict the outcome of a tax issue or case, then anything goes. Thus, there will be cases where tax lawyers find "loop holes" and save taxpayer's taxes "by the stroke of the scrivener's pen." That is what tax planners do.

Tax Lawyers as Litigators: Advocacy in Tax Litigation

The second area I will address is the challenges of being a tax litigator, and whether there are differences between tax litigation and other types of litigation.

Judge Tannenwald viewed tax litigation as an investigation to determine the truth, and I accept his perspective.[16] As a tax litigator, I am not using Sherlock Holmes-like deductive reasoning to gather the facts and arrive at the right answer. I do not approach the case with an open mind, gathering

[15] United States v. Henderson Clay Prods., 324 F.2d 7, 12 (5th Cir. 1963).

[16] Theodore Tannenwald, Jr., The 2012 Erwin N. Griswold Lecture Before the American College of Tax Counsel: The United States Tax Court: Yesterday, Today, and Tomorrow (1998).

data and drawing conclusions. I am charged with effectively advocating for my client's position.

In tax litigation, my client's position is right and my job is to advocate for that position by presenting the supporting facts and by making the best possible legal arguments. This does not mean that a tax litigator should be "Rambo" or approach tax litigation as if "at war" with the government or pursue positions and arguments that are not supported by the law and the facts. A tax litigator that adopts these approaches is not responsibly representing and advising her client. Those tactics may or may not be successful in other types of litigation, but they are not likely to be successful in a tax case.

The adversary system operates best when both sides are fully and adequately represented, and each party advocates for its position honestly, ethically and to the best of its ability. Proper operation of the adversary system also requires enforcement of discovery, procedure, and evidence rules. The court is far more than an observer sitting on the bench watching the show and refereeing the battle, however. A federal judge, whether in a district court, the Claims Court, or the Tax Court can and should engage with the parties and the witnesses on legal and fact issues.

Before I became a full-time tax lawyer, I tried a variety of types of cases in the Texas state courts. I will never forget cross-examining a very cagey witness at a trial before an inexperienced county court judge. Throughout my cross examination, I had to constantly "refresh" the witness's recollection by showing him documents and prior statements that directly contradicted his testimony at trial. During these exchanges, the judge seemed to be increasingly agitated and eventually called me to the bench. In a hushed and very exasperated tone, he said: "Ms. Parker are you trying to make this witness look like a liar?" I was stunned at the question, and acknowledged, "Well, yes your honor that is exactly what I am trying to do."

Cross examination is one of the most difficult things to do well in a trial. I have seen and personally conducted only a few truly effective cross examinations. Cross examination is impossible to do well if subjected to constant interruption. Thus, the court should not allow the opposing party, and should not itself, unnecessarily interrupt cross examination of opposing witnesses during trial. This is my perspective as a tax litigator.

Of course, any litigator—including a tax litigator—may become too committed to her client's position. Years ago, a client wanted us to contest a revenue ruling issued by the IRS. We were reluctant to pursue the case; not because we believed the ruling was correct, but because the anti-injunction act likely prevented contest of the ruling prior to assessment or proposed assessment of tax. We concluded that we could make a reasonable case to avoid application of the anti-injunction act and fully advised the client of the risk. As feared, the district court dismissed the case based on the anti-injunction act, and the client nonetheless wanted to appeal.[17]

[17] Burke v. Blumenthal, 47 A.F.T.R.2d 81-888 (N.D. Tex. 1980).

I thought that our brief to the Fifth Circuit raised persuasive, new and creative arguments to avoid application of the anti-injunction act. The Fifth Circuit did not agree and referred to our brief as 35 pages of "legal spun sugar" and imposed double costs of the appeal.[18] To this day, I don't believe the court understood our argument.

Imposition of double costs was a minor rebuke by the court for excessive advocacy. This is the type of risk that tax litigators and their clients run if they advocate for new and creative interpretations of the law in court.[19] Tax planners and advisors and their clients, however, risk incurring significant penalties and costs when they take new and creative tax positions on returns. That is one reason why tax planning and advising is so difficult.

In my view, compared to private litigants, a different standard should apply to the government when it pursues tax litigation. For both policy and practical reasons, the government should not pursue litigation positions that are new, creative and, thus, are departures from accepted law.

When the government makes new and creative arguments in tax cases, the law of unintended consequences often applies. The government's argument or position becomes a tax avoidance tool for other taxpayers. Comparing this situation to Moses's rod from the Bible, Marty Ginsberg colorfully argued many years ago that "every stick crafted to beat a taxpayer will metamorphose into a snake that bites the Commissioner in the hind part.[20] Therefore, out of self-interest, the government should not make new and creative arguments inconsistent with accepted law. Of course, views may differ on what is accepted law, but the government should clear a high hurdle when it pursues new and creative positions and arguments.

When the government argues for interpretations of the law that are inconsistent with its prior interpretations, even its informal interpretations, taxpayers lose confidence in their tax lawyer's ability to give reliable tax advice. If the government's changing interpretation of the law appears to be motivated by principal (money) rather than principle (the rule of law), the government's actions potentially damage taxpayers' and tax lawyer's respect for the rule of law.

In a case I tried many years ago, the IRS argued that lease bonus must be *included in* "gross income from the property" to apply the net income limitation on windfall profit tax (WPT) under section 4988(b).[21] The WPT regulations defined "gross income from the property" by reference to income tax regulations that expressly *excluded* lease bonus from "gross income from the

---

[18] *Sub nom. Burke v. Miller*, 47 A.F.T.R.2d 81-1419 (5th Cir. 1981).

[19] Taxpayers also run the risk of the 20% penalty on excessive refund claims if there is no "reasonable cause" for the claim. I.R.C. § 6676, as amended for claims filed after December 18, 2015.

[20] Martin J. Ginsberg, *Making Tax Law Through the Judicial Process*, 70 A.B.A.J. 74, 76 (Mar. 1984) (making the case for a single court of appeals for federal tax cases).

[21] Transco Exploration Co. v. Commissioner, 949 F.2d 837, 69 A.F.T.R.2d 92-1481 (5th Cir. 1992), *aff'g* 95 T.C. 373 (1990).

property." The IRS also had previously expressly ruled—albeit in private rulings—that lease bonus was excluded from "gross income from the property" to apply the WPT net income limitation. In court, the IRS disavowed both the reasoning and the result of these private rulings.

The Fifth Circuit rejected the IRS's new interpretation of the law because it was inconsistent with the plain meaning of the statute and regulations. Regarding the IRS's conflicting interpretations, the court stated: "We think the Commissioner's previous interpretation of §4988(b) is a significant indication that Transco's treatment of the lease bonuses was proper. *Although the Commissioner is entitled to change his mind, he ought to do more than stride to the dais and simply argue in the opposite direction*."[22]

In addition to excluding lease bonus from gross income, Transco also properly deducted lease bonus in its WPT "as if" cost depletion deduction (which the IRS did not contest). The IRS objected to Transco's claiming a double benefit for lease bonus by excluding it from gross income and also deducting lease bonus in computing its WPT net income limitation. The IRS's concern is understandable, and I believe Treasury could have amended the relevant WPT regulations to disallow this double benefit. Treasury has vast power to issue regulations and should use that power, rather than ask courts to rewrite the law. Taxpayers have the right to due notice of, input into, and equal application of regulations. Results of a case are unpredictable, random and retroactive.

It is difficult to predict the outcome of any particular tax case. I have personally won a "sure loser" and lost a "sure winner"—but I will not tell you what case falls into each category. It is even more difficult to predict the impact of a court decision on other taxpayers whose facts and tax liabilities are not before the court. Even when the government wins a tax case as to one taxpayer, the "law of unintended consequences" may apply, and the rod to beat a single taxpayer often will become a snake that bites the Commissioner as to other taxpayers. Or, the government may lose a tax case in a "close call" and clearly establish a beneficial tax result for other taxpayers. Of course, the government also may or may not seek to change the law by legislation or by regulation to correct the impact of a tax case.

An example of this phenomenon is *Container Corp. v. Commissioner*[23] that I tried before the Tax Court and argued successfully before the Fifth Circuit. The Tax Court held that a guarantee fee paid by a U.S. subsidiary to its Mexican parent was Mexican source income, and the Fifth Circuit affirmed that decision. Before trial, I had argued to the IRS that it should not pursue the case because the outcome of the case—*if the IRS prevailed*—likely would benefit many taxpayers. The IRS apparently did not agree, and so we tried the case.

---

[22] 69 A.F.T.R.2d 92-1484 (emphasis added).

[23] 134 T.C. 122 (2010), *aff'd*, 107 A.F.T.R.2d 2011-1831 (5th Cir. 2011).

While *Container Corp.* was pending in the Tax Court, no one seemed interested in my little case. When the Tax Court issued its opinion, I received irate emails and telephone calls from a number of private tax lawyers expressing chagrin at the taxpayer victory. This suggests that their clients would have been benefitted by a government victory. No one seemed to like the result in *Container Corp.*—except my client. With the support of Treasury and some taxpayers, about six months after the Tax Court's decision, the U.S. Congress enacted a statute expressly defining the source of income from guarantee fees. In effect, this statute prospectively reversed the decision in *Container Corp*.[24] I know this change in the law was scored as revenue for the Treasury.

To this day, I honestly don't know if the taxpayer victory in *Container Corp.* ultimately would have harmed or benefitted the U.S. Treasury if applied to all taxpayers. In oral argument before the Fifth Circuit, the Department of Justice lawyer stated that, to his knowledge, there were no other cases pending in court or administratively presenting the issue in *Container Corp.* The panel asked this question because by the time of oral argument the law had been changed to reverse prospectively the Tax Court's decision. A change in the tax law so promptly after the Tax Court decision certainly suggests that there were many taxpayers potentially impacted.

My client in *Container Corp.* was not concerned about the impact of its victory on other taxpayers or on the U.S. Treasury. As my client's advocate in that case, I wasn't concerned either. By contrast, the government and its lawyers must consider the impact of a case, and even their arguments in a case, on other taxpayers and on the tax system itself. In my opinion, the government often fails to take these considerations into account due to basic human nature. Tax litigators, representing both taxpayers and the government, often become too certain of their position, too concerned about the dollars involved in the case, and too driven by their desire to win the particular case. In this respect, tax litigators are like all other litigators.

Private Law Firms: An Industry Managed by a Magazine

The final area I will address is the challenges faced by tax lawyers—or any lawyer—practicing in private law firms today.

For essentially all of my career, I have practiced in a private law firm. For the last four years, I have been the Managing Partner of that firm. I have heard all the jokes about the challenges of this job. It is like herding cats or possibly like presiding over a group of thirteen year old girls. It is not like being the CEO of Coca Cola. If the CEO of Coca Cola says "jump" then all the employees of Coca Cola are listening and jump. If the Managing Partner of a law firm says jump, then a third of the lawyers are not listening; a third listen but choose not to jump; and a third listen and ask why, when, how high and what will you give me. Notice that no one just jumped.

---

[24] *See* I.R.C. § 861(a)(9), added by P.L. 111-240, § 2122(a), effective for guarantees issued after September 27, 2010.

I love a challenge, so I have actually enjoyed (for the most part) my time as a managing partner. Over this period, I have been at various times honored, excited, depressed, proud, frustrated, and angry. As a soon-to-be former managing partner, however, I want to comment on the business of practicing tax law in a law firm.

Erwin Griswold titled the first Griswold Lecture "Is the Tax Law Going to Seed?"[25] His question was whether lawyers, including tax lawyers, were failing to live up to the standards of a profession by operating like any other business. James Holden expressed similar concerns in 1999 under the title "Dealing With the Aggressive Corporate Tax Shelter Problem."[26] Randolph Thrower entitled his 2001 lecture "Is the Tax Bar Going Casual – Ethically?" His theme was that the "bottom line" and its "hand maiden" the "unconscionable increase in lawyer billable hours" were undermining the ethical practice of law. Thrower summarized his concern as follows: "[U]nswerving dedication to the bottom line is a threat to our clients, the public interest, and, in the long run, our own interests."[27]

The debate about whether the practice of law is a business or a profession presents a false choice. The practice of law is clearly a business and is also a profession. Law firms must operate in a business-like manner in order to continue to exist and serve clients. From the law firm's and each lawyer's perspective, we are practicing the profession of law to earn income for our firms, ourselves, and our families.

Talented and hard-working lawyers should be well rewarded for their efforts because they bring great value to their clients. Not in every case, but overall, if my clients had shared the results of their tax matters with me, I would have received substantially more than the amount of my fees based on rates and hours. If short-term money and "profits per equity partner" are the only drivers for a lawyer and a law firm, however, these drivers will become a threat to the client's, the public's, the lawyer's, and the law firm's interests.

The book *Confidence Games: Lawyers, Accountants and the Tax Shelter Industries* provides a revealing description of the abusive tax shelter era of the late 1990s and early 2000s.[28] Most in this room are aware of the role that lawyers played this tax shelter era. If you are not, you should read this book, although I am confident that the story told in this book is not always correct or complete. The chapters of *Confidence Games* most interesting to me were those that described the politics, business strategies, and decision-making process within highly-respected law and accounting firms that allowed these

[25] Erwin N. Griswold, Is Tax Law Going To Seed? (1993).

[26] Of course, at that time and later it was clear that we were dealing with both an individual and a corporate tax shelter problem.

[27] Randolph W. Thrower, The 2012 Erwin N. Griswold Lecture Before the American College of Tax Counsel: Is the Tax Bar Going Casual—Ethically? (2001).

[28] Tanina Rostain & Milton C. Regan, Jr., Confidence Games: Lawyers, Accountants and the Tax Shelter Industries (2014).

events to occur. I am a lawyer practicing in a law firm, so I am going to focus solely on the law firms.

Based on personal observations, and as described in *Confidence Games*, law firms were striving to grow revenue and to achieve higher and higher levels of reported profits per equity partner. At Jenkens & Gilchrist (J&G), for example, the priority was "to figure out a way to boost profits per partner so that it could compete for laterals and with other Am Law 100 firms, as well as defend itself from firms seeking to raid its own partners."[29] This is not a surprising goal for a law firm at the time and today. J&G's managing partner was so focused on revenue growth and profits per equity partner that there was a poster of the *American Lawyer* Top 100 law firms on the wall in his office.[30] The imperative to grow and increase revenue and profits seemed to drive the firm's decision to enter and to continue to participate in the tax shelter market.

At most law firms, partners were directly financially rewarded or punished based on their personal revenue and profits. Law firm management exercised little, if any, actual management and supervision over a partner's activities. Even where a partner produced outsized revenues from his tax practice, the law firms gave the partner almost complete independence and autonomy. Law firms also pressured individual partners to produce more and more revenue and profits. Since there are only so many billable hours in a day, the logical solution for the individual partner was to find other ways to produce revenue. Law firm management then was "shocked" when partners developed and promoted tax shelter products.

America's law firms have been aptly described as "an industry managed by a magazine."[31] Similarly, our law schools appear to be managed by a magazine. Reports in the *American Lawyer* and other legal online outlets drive decision-making by law firms. Lists published by *U.S. News & World Report* and others drive decision-making by law schools. There is nothing wrong with the transparency created by such publications. In fact, if used properly and critically, their insights and information could improve both law firms and law schools. Unfortunately, these publications have created in law firms and law schools an unhealthy competition—often based on the wrong criteria—that undermines the best interests of the profession and even the business of law.

For law firms, the focus often is only on annual increases or decreases in revenues, compensation to partners, profits per equity partner and movement of laterals. This focus leaves the impression that we are engaged in the practice of law solely for the money and without regard to any professional obligations to clients, the legal system, or the public. The ultimate reason for this focus is the old adage that everyone can be happy with their absolute compensation,

[29] *Id.* at 46.

[30] *Id.*

[31] I heard this phrase first from Tanina Rostain, and, of course, she was referring to the *American Lawyer*.

but no one is ever happy with their relative compensation. Therefore, we are constantly comparing ourselves to other lawyers and other law firms. The legal industry media understands this aspect of human nature, and also that lawyers just love gossip about other lawyers and law firms.

When Charles Rossotti was leaving the Commissioner's position in 2002, he was very concerned about the growth of abusive tax shelters and how the IRS could effectively combat them. Looking at the issues as a businessman, he asked me, "How can responsible tax lawyers compete with tax shelter promoters and lawyers when clients demand tax shelters and will pay handsomely for them?" Now that is a very good question.

At any particular point in time, the answer is that responsible lawyers cannot compete if money is the sole focus of the practice of law. As events have shown, however, over time, the client's, the public's and the law firm's and lawyer's own interests were not served by promoting or supporting abusive tax shelters. So a lawyer can serve her clients' and the public's interests and still serve her own interests. At any point in time, however, the reward for doing the right thing may be just knowing we have done the right thing.

As a first year associate, an experienced lawyer sent me to a real estate closing with a check and checklist of what the seller had to deliver at the closing. He said, when you get to the closing you must remember "The Golden Rule." Immediately, my mind raced to "do unto others as you would have others do unto you." He interrupted me: "No, the golden rule you need to remember is: 'The person with the gold makes the rule.' Don't deliver the check without everything on the checklist no matter what the seller or his lawyers or the broker says or promises." This turned out to be very good advice at the closing, but that is another story.

This Golden Rule has always operated in the private practice of law. Clients have the gold and make the rules for their lawyers. From a business perspective this could be phrased as "the customer is always right." We all know that the customer is not always right, but successful businesses cater to their customers wishes, respond immediately to their complaints (valid or invalid) and regularly solicit their customers' views. Lawyers have the same relationship with clients in many respects, especially in today's very competitive legal market.

Clients are under severe competitive pressures and they transfer those pressures to their lawyers. Years ago, one of my antitrust partners called it "The Client's Lament." A lawyer advises the client that its proposed course of action is not lawful and the client's responses are: First, everybody is doing it. Second, if I don't do it I will go out of business. Third, I don't hire you to tell me what I can't do—I hire you tell me how to do what I want to do. And, finally, if you can't tell me how to do what I want to do, then I will find someone else who can. The Client's Lament should sound very familiar to every private tax lawyer. The question is not whether you will hear The Client's Lament; the question is how you will respond.

The dual pressures of The Golden Rule and The Client's Lament have always existed, but they have clearly increased over my career. I have felt the

pressures both as a practicing tax lawyer and as the managing partner of a law firm. During the latest tax shelter era, I observed otherwise principled lawyers succumb to the pressures. While a number of law firms and lawyers got caught up in the tax shelter market, it is actually surprising that even more did not become actively involved. For years, tax shelter promoters and lawyers were reaping huge profits, and it appeared as if no effective actions were being taken by the government or anyone else to stop them. During this period, many responsible tax lawyers asked themselves: "Am I a chump for not getting on this bandwagon?" Clients were demanding this "service" and a tax lawyer could royally serve her and her firm's financial interests by providing this service.

Unfortunately, the law firm dynamics that contributed to the tax shelter era have not changed appreciably. In many ways, the competitive pressures have increased due to the essentially flat demand for legal services and increased pressures on rates and fees at private law firms since 2008. Lawyers and law firms continue to be driven by short-term thinking, and a focus on year-to-year increases or decreases in revenues and profits per equity partner. Most law firms still operate without active practice management and with almost complete partner autonomy over individual practices. Law firms and lawyers continue to have higher-and-higher annual revenue, billable hours, and income expectations. As the authors of *Confidence Games* point out, due to these pressures, the conditions are ripe for other types of ethical and even criminal lapses by lawyers and law firms.

As tax lawyers, we are constantly asked to draw the line for our clients between compliance and non-compliance with the law. Clients want to pay the minimum amount of tax, and our firms want us to keep those clients happy and paying fees. Lawyers and law firms are no different than other businesses in that respect. Lawyers are different in that we also owe professional obligations to the legal system and to the public. How to balance those obligations against the imperative to attract, keep and satisfy clients will always be a challenge.

The Bible says that the "love of money" is the root of all evil. In my opinion, however, the primary cause of bad decisions by lawyers and law firms is our short-term thinking. Short-term rewards and incentives can blind us to our and our client's long-term best interests. Short-term thinking pervades the business world today, and lawyers and law firms are part of that business world. As tax lawyers, we can serve our client's, the public's and our own interests by focusing on our and our client's long-term best interests, including reputational and financial interests. That is true for all businesses, including the profession and business of practicing law.

Conclusion

The stated mission of the American College of Tax Counsel is to improve the practice of tax law by (1) fostering excellence and elevating professional standards, (2) stimulating skills development and knowledge; (3) providing

input into the development of the tax law; and (4) facilitating the discussion and examination of tax policy issues. Tonight, by sharing some of my experiences and perspectives, I hope I have supported ACTC's mission.

When I was at the IRS, I often spoke to taxpayer groups and tax lawyers. The audiences always acted as if they were interested in what I had to say. Since returning to private practice, my audiences don't seem to be nearly as interested in my musings. Also, judging from the laughter, I am not nearly as entertaining as I was when I was at the IRS. So, I truly appreciate this audience for at least acting like you are interested in and entertained by my thoughts tonight.