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Ethical Issues in Tax Practice

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I. Introduction* -- Recent years have seen dramatic changes in rules governing whether a tax practitioner may advise a client to take a particular position on a return. The basic problem is a result of the "audit lottery": because of the government's far-from-perfect ability to audit positions taken on returns, the self-assessment system requires standards of some kind to limit positions that taxpayers, and hence their advisers, can take. It is exceedingly difficult, however, to devise rules articulating clearly what the limitations should be. The applicable rules, therefore, can be very difficult to apply in practice.

II. Sources of the applicable rules -- The "law" governing practitioners in formulating return positions derives from a number of sources. Perhaps most important are the civil penalty provisions of the Internal Revenue Code, discussed below, governing both taxpayers and "income tax return preparers." Tax professionals also typically are subject to the rules of state licensing authorities, such as state bars and accountancy boards. These state regulatory bodies, in turn, typically base their rules on model codes of conduct of national organizations, such as the ABA and AICPA. In addition, the U.S. Treasury Department has statutory authority, under 31 U.S.C. § 330, to establish disciplinary standards for persons practicing before it. These standards are set forth in Treasury Circular 230 (31 C.F.R. part 10). The IRS Director of Practice and his staff enforce the rules of Circular 230 on behalf of the Treasury. For a handbook of the rules governing tax practitioners, see the two-volume set by B. Wolfman, J. Holden & K. Harris, Standards of Tax Practice (CCH Tax Transactions Library).

III. Two Steps in Applying the Rules: Identifying the Applicable Standard, and Applying Any Disclosure Exceptions -- The discussion below explains the rules governing return preparation, first by describing the development of the various standards (e.g., "realistic possibility of success" and "substantial authority") that govern advice concerning positions on returns, and then by describing the circumstances in which special disclosure on the return will permit the taking of positions that do not meet the standards.

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IV. Rise and Fall of the "Reasonable Basis/Reasonable Support" Standard

A. ABA and AICPA standards, 1965-1985 -- Until relatively recently, tax practitioners subscribed to the "reasonable basis," or "reasonable support," test in assessing practitioner conduct.

1. ABA Formal Opinion 314:[1] "[A] lawyer who is asked to advise his client in the course of the preparation of the client's tax returns may freely urge the statement of positions most favorable to the client [without specifically disclosing the position on the return] just as long as there is reasonable basis for those positions."

2. Former AICPA Statement on Responsibilities in Tax Practice No. 10 (superseded): A CPA "may . . . resolve doubt in favor of his client as long as there is reasonable support for his position."

3. Reasonable basis roughly consistent with "negligence" standard -- The reasonable basis/reasonable support test probably was consistent with the standard traditionally applied under the then-existing taxpayer "negligence or disregard" penalty of I.R.C. section 6653(a), and the related "preparer" penalty of section 6694(a).

a. Section 6653(a), versions of which had been in the Internal Revenue Code since the 1920s, imposed a taxpayer penalty for "negligence or disregard of rules or regulations." (The section 6653(a) penalty has largely been retained in current law under newly enacted Section 6662, as described below.)

b. Section 6694(a) imposed a penalty on preparers for "negligent or intentional disregard of rules and regulations." (Section 6694 was revised substantially in 1989, as described below.)

B. Introduction of "substantial authority" in 1982 -- A turning point in attitudes toward return positions came with

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[1] ABA Formal Opinion 314, which was promulgated in 1965, has been superseded insofar as it applies to advice in connection with the preparation of returns, although it has not been superseded to the extent it provides guidance governing representation of taxpayers in audits and other adversary proceedings.

the enactment, in 1982, of a new taxpayer "audit lottery" penalty. The penalty, formerly contained in Code section 6661, and now reincorporated in the Code as part of section 6662, is described further below. The provision generally imposes a penalty on individual and corporate taxpayers whose returns contain "substantial understatements" of income tax liability, unless there is "substantial authority" for the position taken in the return, or unless the position is "adequately disclosed." A "substantial understatement," under current law, is an understatement that --

> exceeds the greater of --
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> (i) 10 percent of the tax required to be shown on the return for the taxable year, or
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> (ii) $5,000.

The legislative history of the 1982 Act made clear that the new "substantial authority" standard in the taxpayer penalty was intended to be more demanding than the traditional "reasonable basis" standard:

> The standard of substantial authority was adopted, in part, because it is a new standard. . . . The conferees believe such a standard should be less stringent than a "more likely than not" standard and more stringent than a "reasonable basis" standard. Thus, it is anticipated that this new standard will require that a taxpayer have stronger support for a position than a mere "reasonable basis" (a "reasonable basis" being one that is arguable, but fairly unlikely to prevail in court upon a complete review of the relevant facts and authorities). Rather, when the relevant facts and authorities are analyzed with respect to the taxpayer's case, the weight of the authorities that support the taxpayer's position should be substantial when compared with those supporting other positions.

1982 Act Conference Report, reprinted in 1982-2 C.B. 600, 650. The new penalty had the effect of placing on taxpayers for the first time a significant risk of penalty for aggressive return positions that had been approved by practitioners.

C. Ensuing debate concerning whether the "substantial authority" standard for taxpayers established morally binding standard that governed both taxpayers and practitioners -- Following enactment of the new "substantial authority" penalty, a debate ensued among practitioners and academics, essentially over the question whether the new standard was intended to be morally binding on taxpayers and practitioners, or whether the provision instead established a mere "user fee" under which the taxpayer is free to take a position without substantial authority and without disclosure, so long as the taxpayer is willing to risk the penalty. Compare, e.g., Letter from B. Wolfman to L. Shapiro, reprinted at 39 Tax Notes 832 (1987); with Durst, The Tax Lawyer's Professional Responsibility, 39 U. Fla. L. Rev. 1027 (1987).

D. ABA and AICPA adopt "realistic possibility of success" standard -- Ultimately, both the ABA and the AICPA issued revisions to their standards for return preparation. Both the ABA and AICPA opinions rejected the notion that the new taxpayer standard of "substantial authority" was intended to be morally binding on either taxpayers or practitioners. Instead, the ABA and AICPA established for practitioners an entirely new, "realistic possibility of success" standard.

1. ABA Formal Opinion 85-352: Permits statement of position if the position is taken in good faith and has "some realistic possibility of success if the matter is litigated." The opinion makes clear that "some realistic possibility of success" does not require "substantial authority." (Formal Opinion 85-352 is printed at 39 Tax Lawyer 631 (1986)).

2. AICPA's 1988 Revised Statement on Responsibilities in Tax Practice (No. 1): Permits advising a position if there is a "good faith belief that the position has a realistic possibility of being sustained administratively or judicially on its merits if challenged." In addition, even if a position does not meet the "realistic possibility" standard, a CPA may take the position so long as it is "not frivolous," and "the position is adequately disclosed on the return or claim for refund."

3. What is a "realistic" possibility of success? ABA Tax Section Task Force Report:

> A position having only a 5% or 10% likelihood of success, if litigated, should not meet the new standard. A position having a likelihood of

> success closely approaching one-third should meet the standard. Ordinarily, there would be some realistic possibility of success where the position is supported by "substantial authority". . . .

Sax, Holden, Tannenwald, Watts & Wolfman, Report of the Special Task Force on Formal Opinion 85-352, 39 Tax Lawyer 635, 638-39 (1986).

E. Treasury proposes, but ultimately withdraws, disciplinary rule based on "substantial authority" -- Historically, Circular 230 has had no specific standards governing advice in connection with returns, instead containing only a general requirement of "due diligence." In 1986, the IRS proposed amending Circular 230 to the effect that practitioners could be subject to discipline for knowingly advising positions that would violate the taxpayer "substantial authority" standard of section 6662 (then 6661). 31 Fed. Reg. 29,113 (Aug. 14, 1986). The proposal evoked a strongly negative response from practitioners, and the Treasury never finalized it.

V. 1989 Act Penalty Reform -- After considerable study among academics, practitioners and the IRS, Congress enacted the Improved Penalty and Compliance Tax Act (IMPACT) as part of the Revenue Reconciliation Act of 1989.

A. Negligence-or-disregard and substantial authority penalties retained as part of new "accuracy-related penalty" -- Congress in 1989 generally reenacted the taxpayer "negligence or disregard" and "substantial understatement" penalties of prior law, as part of a new "accuracy related" penalty in newly enacted Code § 6662. (Please note that § 6662, and for that matter other provisions of the Code, contain numerous penalties and special rules in addition to those discussed here. This outline is intended to provide an overview of recent developments governing return preparation, rather than provide a comprehensive account of the Code's penalty provisions. Note, for example, the taxpayer penalty under § 6662(e) for substantial valuation misstatements.)

B. Congress adopts "realistic possibility of success" standard as part of revised return preparer penalty -- As part of IMPACT, Congress also substantially revised the return preparer penalty of § 6694. Sections 6694(a) and (b), as amended in 1989 and retained unchanged to date, provide:

> (a) UNDERSTATEMENT DUE TO UNREALISTIC POSITIONS. -- If --
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> (1) any part of any understatement of liability with respect to any return

or claim for refund is due to a position for which there was not a realistic possibility of being sustained on its merits,

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

(3) such position was not disclosed as provided in section 6662(d)(2)(B)(ii) [dealing with the substantial understatement penalty] or was frivolous,

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

(b) WILLFUL OR RECKLESS CONDUCT. -- If any part of any understatement of liability with respect to any return or claim for refund is due --

(1) to a willful attempt in any manner to understate the liability for tax by a person who is an income tax return preparer with respect to such return or claim, or

(2) to any reckless or intentional disregard of rules or regulations by any such person,

such person shall pay a penalty of $1,000 with respect to such return or claim. With respect to any return or claim, the amount of the penalty payable by any person by reason of this subsection shall be reduced by the amount of the penalty paid by such person by reason of subsection (a).

The 1989 House Committee report notes:

The committee has adopted this new standard because it generally reflects the professional conduct standards applicable to lawyers and to certified public accountants. The committee believes that this standard of behavior is stricter than present law, so that negligent

> behavior subject to penalty under present law will continue to be subject to penalty under the new standard.

H.R. Rep. No. 247, 101st Cong., 1st Sess. 1396 (1989).

Caution: "Intentional" disregard of rules or regulations need not be done with an evil intent. Thus, a challenge to a regulation can invoke the penalty under § 6694(b) even if the practitioner believes the challenge is likely to be successful. However, the penalty can be avoided through disclosure, as described further below. Under the current penalty regime, as described further below, such disclosure is essential if a regulation is to be challenged in a return.

C. Congress' action drives "wedge" between practitioner, taxpayer standards -- Congress' 1989 action raises a fundamental practical problem, which continues to affect practitioners and their clients. The "realistic possibility of success" standard governing practitioners is, apparently, stricter than the "negligence" standard that, in many instances, remains the reporting standard governing taxpayers. Thus, tax professionals are in some instances barred from assisting clients in taking positions that the clients are legally free to take on their own. Is this situation desirable? See generally Durst, supra, passim; Zelenak, Reforming Penalty Reform: Congress Should Eliminate the Profusion of Accuracy Standards, 52 Tax Notes 471, 474 (1991).

D. Treasury incorporates the preparer standard of "realistic possibility of success" standard in proposed revisions to Circular 230 -- On October 8, 1992, the Treasury proposed revisions to Circular 230 which would, if adopted, subject to discipline practitioners who advise positions that do not meet the "realistic possibility" standard, unless disclosure requirements are met (see below). Proposed 31 C.F.R. § 10.34, 57 Fed. Reg. 46356 (Oct. 8, 1992). Discipline will be imposed only for violations "that are willful, reckless, or a result of gross incompetence." Because this proposal simply incorporates the standard of the statutory return preparer penalty, it should be noncontroversial. (Other areas of the proposed Circular 230 rules which are not under discussion here, such as rules governing contingent fees in tax practice, have proven more controversial and are likely to be revised.)

VI. Some Highlights of IRS Guidance Under the Penalty Provisions

A. Meanings of the applicable standards

1. Practitioners' "ballpark" views of percentages associated with reasonable basis/negligence, substantial authority standards -- Probably, most practitioners have associated the reasonable basis/negligence standard with about a 10-to-20 percent probability of success. It is not clear that the notion of probability is relevant to an "objective" standard such as the taxpayer "substantial authority" standard, but many practitioners seem to associate it with about a 40 percent probability of success. (For further discussion of quantification of the various standards, see Banoff, Determining Valid Legal Authority in Advising Clients, Rendering Opinions, Preparing Tax Returns and Avoiding Penalties, 68 Taxes 40 (1990).

2. Treasury associates one-in-three probability with realistic possibility of success -- Following the lead of the ABA Tax Section task force report quoted above, the Treasury has associated the realistic possibility of success standard for practitioners with a one-in-three likelihood. Section 1.6694-2(b)(1) of the regulations provides:

> A position is considered to have a realistic possibility of being sustained on its merits if a reasonable and well-informed analysis by a person knowledgeable in the tax law would lead such a person to conclude that the position has approximately a one in three, or greater, likelihood of being sustained on its merits (realistic possibility standard). In making this determination, the possibility that the position will not be challenged by the Internal Revenue Service (e.g., because the taxpayer's return may not be audited or because the issue may not be raised on audit) is not to be taken into account.

The regulation's incorporation of a one-in-three likelihood has been controversial.

3. "Authorities" taken into account in determining whether one-in-three likelihood exists -- Section 1.6694-2(b) makes clear that, in determining whether a one-in-three likelihood of success exists, those items considered "authorities" for purposes of the

taxpayer substantial understatement penalty should be taken into account.

B. Disclosure

1. Disclosure rules vary considerably among the different penalties -- Disclosure rules under the substantial understatement and negligence-or-disregard portions of the taxpayer accuracy-related penalty differ considerably. Disclosure rules under the preparer penalty contain pitfalls. In addition, disclosure rules for taxpayers have been changed very recently, in the 1993 Reconciliation Act.

2. Substantial understatement penalty -- The taxpayer "substantial understatement" penalty has always had a statutory disclosure "out" (except with respect to positions attributable to "tax shelters").[2] Under pre-1993 law, disclosure of any position (other than one associated with a "tax shelter" could avoid the substantial understatement penalty (although taxpayers might still be subject to the negligence-or-disregard penalty). In 1993, however, Congress amended section 6662(d)(2)(B) to provide that disclosure will provide protection from the substantial understatement portion of the taxpayer accuracy-related penalty only if the position has reasonable basis. Thus, Congress has breathed new life into a standard that was almost extinguished in 1989.

3. Form of disclosure under substantial understatement penalty

a. Old regulations allowed several forms of disclosure -- Under prior guidance, disclosure under the taxpayer substantial understatement penalty was adequate if it was made either on a Form 8275 attached to the return, or on the return itself. The IRS has issued a series of annual revenue procedures specifying certain kinds of positions with respect to which disclosure would be deemed made simply by filling out applicable returns and schedules (e.g., Schedule A with respect to charitable or medical deductions). See Rev. Proc. 92-23, 1992-13 I.R.B. 21; Rev. Proc. 93-33, 1993-28 I.R.B. 49. Prior regulations were unclear whether disclosure of an item not on Form

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[2] As described below, however, taxpayers avoiding the substantial understatement penalty by disclosure might still have been subject to the negligence-or-disregard penalty.

8275, but rather "on the return," could be considered adequate even if the item was not listed in the Service's revenue procedure. The Tax Court held under prior law that such disclosure can be sufficient in some circumstances, and the IRS acquiesced in that view. <u>See</u> <u>Schirmer v. Commissioner</u>, 89 T.C. 277 (1987), <u>acq. on issue of disclosure under § 6661</u>, 1989-1 C.B. 1.

b. <u>Current regulations do not permit disclosure "on the return," except as provided by the Service's annual revenue procedure</u> -- The current regulations provide that items not mentioned in the Service's annual revenue procedure can be disclosed <u>only</u> on the IRS's special disclosure forms. Moreover, in what may be an excess of regulatory detail, the IRS now provides <u>two</u> disclosure forms -- a regular Form 8275 for general use, and a Form 8275-R for use when a position taken is contrary to a regulation.

c. <u>Qualified amended returns</u> -- Both the old and new regulations permit disclosure, for purposes of the substantial understatement penalty, to be made on a "qualified amended return" (generally, an amended return filed before the IRS contacts the taxpayer for audit, although special rules have been provided for large taxpayers in the coordinated examination program). <u>See generally</u> Reg. §§ 1.6662-4(f), 1.6664-2(c)(2), (3).

4. <u>Disclosure under the taxpayer negligence-or-disregard penalty</u> -- Disclosure under the "negligence or disregard" penalty has a somewhat more complicated background.

a. <u>Disclosure may not have provided protection from pre-1989 taxpayer negligence-or-disregard penalty</u> -- Traditionally, practitioners believed that disclosure of a questionable position, except in extreme cases, provided a taxpayer with protection against the penalty for "negligence or disregard of rules or regulations." <u>See</u> Coustan & Banoff, <u>supra</u>, at 361. In <u>Druker v. Commissioner</u>, 697 F.2d 46, 52-56 (2nd Cir. 1982), however, the Court of Appeals, overruling the Tax Court, indicated that disclosure would not avoid the penalty when the taxpayer took a position directly contrary to a regulation. The court determined that, historically, Congress had enacted the "disregard" portion of the penalty as a "no-fault" toll charge for the privilege of taking a questionable position in a return, and then defending the position before actually paying the tax.

b. Congress provides disclosure "out" in 1989 -- The 1989 Act specified, in a new section 6664 of the Code, that all of the taxpayer accuracy-related penalties in section 6662 are subject to a "reasonable cause and good faith" exception, and the 1989 legislative history indicated that this exception would be available with respect to a nonfrivolous position that was disclosed plainly on the return. The legislative history stated:

> The committee believes that the application of standardized exception criteria to the negligence component of the accuracy-related penalty will result in several consequences that are beneficial to taxpayers . . . . [T]he complete, item-specific disclosure of a non-frivolous position on a tax return may generally be considered to permit an exception from the negligence penalty insofar as such disclosure would tend to demonstrate that there was not intentional disregard of rules or regulations. Disclosure must be full and substantive, parallel to the disclosure required under the substantial understatement component of the accuracy-related penalty; completing and filling in a tax form is by itself insufficient disclosure for this purpose. In addition, the disclosure must be clearly identified as being made to avoid the imposition of the accuracy-related penalty. . . . [T]he application of standardized exception criteria to the negligence component of the accuracy-related penalty may also permit a taxpayer to avoid imposition of that penalty where the taxpayer makes a good-faith challenge to the validity of an IRS regulation, if the taxpayer discloses (in the manner just described) that the taxpayer is taking the position and makes specific reference to the regulation being challenged. As under present law, frivolous challenges to IRS regulations would be subject to penalty.

H.R. Rep. No. 247, supra, at 1393. The "nonfrivolous" standard generally is consistent with legal ethical rules governing when positions can properly be taken in litigation.[3] Regulations issued under the 1989 Act define a "frivolous" position as "one that is patently improper." Reg. § 1.6662-3(b)(3).

c. <u>Congress arguably tightens disclosure under the negligence-or-disregard penalty in 1993</u>

i. In 1993, when Congress tightened disclosure under the substantial understatement penalty as described above, Congress also indicated in legislative history that disclosure could avoid the negligence-or-disregard penalty only with respect to a position for which there is "reasonable basis."[4] The conference committee report indicates that "'reasonable basis' [is intended to] be a relatively high standard of tax reporting, that is, significantly higher than 'not patently improper.'"

ii. It is unclear whether this legislative history has the force of law, because neither the Finance Committee's version of the 1993 Act, nor the Act as ultimately passed, actually amends the negligence-or-disregard component of the accuracy-related penalty.

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[3] ABA Model Rule of Professional Conduct 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

[4] The 1993 Senate Report provides:

> Under the bill, a taxpayer can avoid a substantial understatement penalty by adequately disclosing a return position only if the position has at least a reasonable basis. Similarly, a taxpayer can avoid the penalty that applies to disregarding rules or regulations by adequately disclosing a return position only if the position has at least a reasonable basis. The disclosure exception is no longer relevant with respect to the penalty for negligence, because a taxpayer generally is not considered to have been negligent with respect to a return position, regardless of whether it was disclosed, if the position has a reasonable basis.

iii. If the legislative history is followed (perhaps through amended IRS regulations under section 6662), taxpayers will be precluded, even with disclosure, from taking certain nonfrivolous positions which would, under applicable rules governing standards in litigation, be litigable in Tax Court. Thus, the only way for a taxpayer to assert a nonfrivolous, but non-reasonable basis, position would be to file a refund request and pursue the claim in the district court or the Court of Federal Claims.

d. <u>Procedures for disclosure under the negligence-or-disregard penalty</u> -- Based on the 1989 legislative history, the Treasury has set forth demanding standards for disclosure under the taxpayer negligence-or-disregard penalty.

i. <u>Disclosure must be made on IRS forms</u> -- To avoid the negligence or disregard penalty, disclosure must be made on either a Form 8275 or Form 8275-R. The rules described above that, for purposes of the substantial understatement penalty, permit disclosure on the return in some cases pursuant to an annual revenue procedure, do <u>not</u> apply to disclosure for purposes of the negligence-or-disregard penalty. This fact greatly diminishes the usefulness of making disclosure on the return under the revenue procedure.

ii. <u>Revenue rulings as "rules or regulations"</u> -- There has been some controversy whether revenue rulings constitute "rules" within the meaning of the words "rules or regulations." The regulations resolve this question in Solomonic fashion. Under the regulations, "[t]he term '[r]ules or regulations' includes the provisions of the Internal Revenue Code, temporary or final Treasury regulations issued under the Code, and revenue rulings or notices (other than notices of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin." Reg. § 1.6662-3(b)(2). However, the regulations indicate that the Service will not impose a penalty for an undisclosed position contrary to a revenue ruling or notice if the contrary position has a realistic possibility of being sustained on its merits. Reg.

§ 1.6662-3(a). Thus, the regulations do not subject undisclosed positions in disregard of revenue rulings or notices to the "no-fault" disclosure standard that applies to undisclosed positions in disregard of regulations.

5. Disclosure under the return preparer penalty can involve pitfalls.

a. Section 6694(a) -- In order for a preparer to avoid the penalty under § 6694(a) for positions without a "realistic possibility of success," the taxpayer need only make disclosure of the kind sufficient to avoid the substantial understatement component of the accuracy-related penalty. Thus, disclosure on the return, pursuant to the Service's annual revenue procedure, will suffice. Reg. § 1.6694-2(c).

b. Section 6694(b) -- However, the penalty under § 6694(b), which is misleadingly labeled "Willful or Reckless Conduct," applies, among other things, to "intentional disregard of rules or regulations." Thus, a preparer who advises even a good-faith challenge to a regulation could fall within this penalty. Only disclosure by the taxpayer in a form adequate to protect against the negligence-or-disregard component of the accuracy-related penalty will suffice to protect a preparer from application of this penalty. Reg. § 1.6694-3(e). Disclosure according to the Service's annual revenue procedure therefore will not suffice. (As is true under the taxpayer negligence-or disregard penalty, a position contrary to a revenue ruling or notice need not be disclosed by the taxpayer in order for the preparer to avoid penalty if the position has a realistic possibility of success).

c. The 1993 Finance Committee bill proposed, but Congress ultimately rejected, a provision that would have required "reasonable basis" for disclosure to be effective under the return preparer penalty -- The version of the 1993 Act originally passed by the House, as well as the Senate Finance Committee version of the Act,would have recognized disclosure by the taxpayer as an exception to the return preparer penalty only with respect to a position that has reasonable basis. This would have raised a special problem, because the return preparer penalty, unlike the taxpayer negligence-or-disregard and substantial understatement penalties, is applicable to claims for refund as well as returns. Thus, practitioners would have been barred entirely from assisting taxpayers in taking some litigable positions. This amendment to the return preparer penalty was, however, eliminated from the Senate bill during floor consideration on a "point of order," and the conference committee accepted the Senate version of the bill. Thus, the preparer penalty remained unchanged by the 1993 legislation.

d. Non-signing preparers

i. In many circumstances, a practitioner will be a "preparer" by virtue of having provided advice with respect to a substantial portion of a return, but, because another person prepares the bulk of the return, the practitioner will not be the preparer required to sign the return. Cf. I.R.C. §§ 7701(a)(36) (defining "income tax return preparer"); 6695(b) (setting forth return signature requirement). A nonsigning preparer might be providing advice directly to a taxpayer, or indirectly through another preparer.

ii. The regulations indicate that a nonsigning preparer can satisfy disclosure obligations by notifying the taxpayer or the other preparer, as the case may be, that disclosure should be made (or, in appropriate cases, that a substantial understatement penalty may be applied if disclosure is not made). Reg. §§ 1.6694-2(c)(3)(ii), 1.6694-3(e)(2). The regulations indicate that, if the underlying advice given is in writing, the advice with respect to disclosure must be in writing, and if the underlying advice is oral, the advice with respect to disclosure may be oral as well. However, the question whether the advice actually has been given is a question of fact, and the regulations indicate that "[c]ontemporaneously prepared documentation of the oral advice regarding disclosure (or the oral advice regarding possible penalty under section 6662(d)) generally is sufficient to establish that the advice was given to the taxpayer." The moral of the story: keep careful written records of all advice concerning disclosure.

6. Note on disclosure under ABA Formal Opinion 85-352 -- As indicated above, the AICPA's ethical guidance contains an explicit "disclosure out" for nonfrivolous positions; indeed, § 6694(a) is modeled after the AICPA approach. ABA Formal Opinion 85-352, however, is silent on the question of a disclosure out. The opinion simply states that a lawyer can state a position without disclosure if the position has a realistic possibility of success. Formal Opinion 85-352, 39 Tax Lawyer at 633-34. In light of the subsequent penalties legislation, however, a practitioner who advises a taxpayer to take a disclosed position having reasonable basis should not violate Formal Opinion 85-352. Cf. B. Wolfman, J. Holden & K. Harris, supra, at ¶ 214.0242.