Book Review

Confidence Breach: A Breakdown in Professional Self-Regulation

CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY. By Tanina Rostain & Milton C. Regan, Jr. Cambridge, Massachusetts: The MIT Press, 2014. 424 pages. $29.95.

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At the turn of the twenty-first century, lawyers at several of the country's most prestigious law and accounting firms participated in a fraudulent tax shelter scandal that cost the U.S. Treasury billions of dollars.[1] It was not the first time lawyers had participated in a high-profile corporate scandal, nor would it be the last. What was unique was the extent and nature of the lawyers' involvement. As Mitt Regan and Tanina Rostain explain in their new book, *Confidence Games: Lawyers, Accountants, and the Tax Shelter Industry*, "[lawyers'] fingerprints were everywhere: on the shelters they designed, the promotional materials they prepared, the client pitches they made, and the opinion letters they drafted and signed."[2] The resulting scandal, the authors argue, "likely represents the most serious episode of lawyer wrongdoing in the history of the American bar."[3]

In *Confidence Games*, Regan and Rostain set out to explain how and why such widespread and pervasive wrongdoing occurred. They challenge the narratives that laid blame on a finite number of bad actors[4] and seek to offer a more comprehensive account of the actors and events that gave rise to the scandal.[5] One of their core insights is that a complete understanding must account for institutional factors and not just individual actors.[6] The authors focus on three factors in particular—a lax regulatory environment, a competitive global economy, and intense organizational pressures within

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1. TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY 25 (2014).

2. *Id.* at 4.

3. *Id.*

4. *See id.* at 329 (describing how the government only prosecuted individuals despite the clear link to an organizational structure that promoted the use of these abusive shelters).

5. *See id.* at 6–7 (putting forth their main theory that institutional structures also played an important role).

6. *See id.*

law and accounting firms.[7] In exploring these related causes, Regan and Rostain offer valuable insights on how the structures and cultures of the implicated law and accounting firms undermined and distorted lawyers' professional judgment. They conclude *Confidence Games* with promising proposals for improving the regulation of tax practice.[8]

This Review builds on Regan and Rostain's work by showing that their insights have relevance that extends far beyond tax lawyers. All lawyers in large law firms and corporate settings are subject to intensified competitive pressures, which are magnified rather than buffered by the organizations in which they work. But as Regan and Rostain suggest, these pressures differ by work setting. In combining these two insights—that all lawyers feel the intensified competitive pressures Regan and Rostain identify but that the nature of these pressures varies by work setting—I challenge the scholarly consensus that "context-specific regulation" should be tailored to practice area. I argue that it should instead be tailored to work setting.

I begin in Part I by reviewing Regan and Rostain's argument that responsibility for the tax shelter scandal lies with institutional and organizational pressures as much as with individual actors. I also review their suggestions for reform. In Part II, I argue that the problems Regan and Rostain identify are not limited to tax practice. We should therefore incorporate their insights into the regulation of all lawyers through regulatory structures that account for the institutional pressures of different organizational work settings.

I. The Institutional and Organizational Pressures of Tax Practice

In retrospect, the professional wrongdoing that gave rise to the tax shelter scandal seems blatant. In the late 1990s, however, participation and enthusiasm for the new and aggressive tax shelters pervaded the industry. In this Part, I summarize Regan and Rostain's argument as to how "such a widespread and systemic episode of professional wrongdoing occur[ed]."[9] They identify three principal institutional causes: (1) a lax regulatory environment, (2) a competitive global economy, and (3) intense organizational pressures within law and accounting firms.[10] I then review their suggestions for reform.

7. *Id.*
8. *See, e.g.*, *id.* at 344–47.
9. *Id.* at 4.
10. *Id.* at 6–7.

A. Institutional Causes

1. Weak Regulatory Regime.—The authors begin their account in September 1997 with Senate Finance Committee hearings on the Internal Revenue Service (IRS). These highly critical hearings, they contend, "both reflected and contributed to the fact that the IRS was a beleaguered institution in the 1990s."[11] The IRS lacked public and congressional support at the time and was operating under the burden of outdated collection and enforcement systems. The authors conclude that it was therefore poorly positioned to police the activities of savvy tax professionals who were developing new abusive tax shelters.[12]

The IRS's struggles were rooted in the widespread anti-tax sentiment that had been building since the Reagan Administration and that translated into constant criticism and severe resource constraints.[13] Insufficient resources, in turn, exacerbated existing deficiencies in the IRS's data-collection and analysis systems.[14]

These deficiencies were extensive. Well into the 1990s, the IRS relied nearly exclusively on paper returns, hiring seasonal employees to input taxpayer information into its computers.[15] This time-intensive process left minimal resources for analysis of data and detection of tax evasion. It also led to high error rates—for transcription alone, errors occurred 20% of the time.[16] The IRS's periodic attempts to modernize its methods were impeded by Congress's refusal to appropriate funds for a system overhaul.[17]

Resource shortages were compounded by personnel issues. Regan and Rostain explain that because IRS employment at the time entailed low compensation and little prestige, the most competent and talented agents sought employment elsewhere, leading to "significant brain drain at the agency."[18] For those who remained, there was little incentive to audit taxpayers to detect evasion, as job performance was evaluated by the number of cases resolved rather than the amount of revenue collected.[19]

Desperate to avoid continued scrutiny and negative publicity, IRS officials were reluctant to engage in aggressive enforcement efforts. Instead, they focused on the mandate of the 1998 Restructuring and Reform

11. *Id.* at 12.
12. *Id.* at 13, 331.
13. *Id.* at 12–13.
14. *Id.* at 17–19.
15. *Id.* at 17.
16. *Id.*
17. *See id.* at 17, 19.
18. *Id.* at 18–19.
19. *Id.* at 19.

Act to create a more "user friendly agency."[20] Regan and Rostain argue that although this may have helped with customer relations and public perceptions, it left the IRS poorly positioned to identify and address the growing tax shelter industry.[21]

2. Increasing Global Economic Competition.—While the IRS was struggling, the global economy of the 1990s was booming. Regan and Rostain identify this as the second institutional factor driving the tax shelter boom.[22] They explain that intensified economic competition led many corporations to pressure their tax departments to minimize tax liability as a means of improving their bottom lines. Tax departments, in turn, began looking for new and aggressive ways to shelter income.[23]

As increased competition was fueling demand, changes in the market for legal services was fueling supply. Regan and Rostain emphasize two shifts in particular that created an increasingly fluid and competitive practice environment. First, whereas law firms had historically enjoyed long term relationships with clients, clients began shopping around for the best and most cost-efficient legal services. Second, whereas lawyers had traditionally spent their entire careers at the firms they joined out of law school, many successful lawyers began lateralling mid-career. As a result, law firms were forced to compete for both lucrative client engagements and lawyers with impressive books of business.[24]

These firms competed not only with other law firms but also with accounting firms.[25] With revenues from traditional audit services flattening out, accounting firms were working to identify new products and services that would increase revenues and growth.[26] They were also recruiting talented tax lawyers to develop new products and services. Given that the 1998 IRS Restructuring and Reform Act had afforded accountant–taxpayer communications the same confidentiality protections as attorney–client communications,[27] clients would (and did) give their business to accounting firms rather than law firms if the former were offering more attractive products and services.[28]

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20. *Id.* at 21–23 (discussing the effects of the act, including its effect on straining agency resources, and its effect, in practice, of reducing the amount of auditors available for enforcement).

21. *See id.* at 13, 23–24.

22. *Id.* at 24.

23. *Id.* at 45–46. New sources and concentration of personal wealth led to demand by sophisticated individuals as well. *Id.* at 45.

24. *Id.* at 66.

25. *Id.* at 71.

26. *Id.* at 45–46.

27. *Id.* at 21.

28. *Id.*

Against this background, Regan and Rostain describe how tax professionals at both types of firms looked to standardized tax products as a means of fueling growth, increasing profits, and staying competitive.[29] Firms that developed these products could market and sell them to countless clients for a percentage of the taxes saved. They therefore viewed these products as the key to breaking free from the constraints of hourly billing and dramatically increasing revenues.[30]

3. Organizational Structures.—The third factor that Regan and Rostain identify as fueling the tax shelter boom—new organizational structures and pressures—was itself a product of the second.[31] The authors explain that although accounting and law firms responded to the increased economic competition in distinct ways, their responses had a common consequence. In both cases, the responses directed attention away from the delivery of individualized professional services and towards profit maximization.[32]

a. Accounting Firms.—Regan and Rostain argue that the implicated accounting firms (including KPMG, Ernst & Young, PriceWaterhouseCoopers (PwC), Arthur Andersen, and BDO Seidman) actively and intentionally institutionalized tax shelter practice.[33] By this, they mean two things: First, these firms devoted significant resources to encouraging and rewarding the development of new and aggressive shelters.[34] Among other things, they recruited elite tax lawyers away from law firms and directly out of law school to design shelters,[35] and they began aligning compensation and advancement with revenue generation.[36] Given that tax shelters were vastly more lucrative than any other type of work these firms performed, this directly incentivized shelter work.[37]

Second, the implicated accounting firms declined to institute rigorous internal review mechanisms.[38] At some firms, review was conducted by the individuals who had designed the shelters.[39] At other firms, it was highly fractured, with individual reviewers responsible only for the validity and

29. *See id.* at 24.

30. *Id.* at 56–57, 78.

31. *See supra* note 7 and accompanying text.

32. *See* ROSTAIN & REGAN, *supra* note 1, at 52 (discussing the transformation of a law firm's tax practice); *id.* at 53–57 (discussing the parallel transformation in accounting firms).

33. *See id.* at 326 (concluding that it was the firms' internal cultures that valorized tax shelters and sales). *See generally id.* at 77–176.

34. *Id.* at 332.

35. *Id.* at 57.

36. *Id.* at 332.

37. *See id.* at 332–33.

38. *See, e.g., id.* at 153–54 (outlining the weak internal review structure at PwC).

39. *See id.* at 333 (noting this occurrence at Ernst & Young).

legality of one particular aspect of a shelter.[40] Few individuals paused to ask whether the shelter as a whole had sufficient economic substance to be valid.[41] Those that did voice concerns—even repeatedly—were ignored or marginalized.[42]

Regan and Rostain conclude that by the late 1990s, shelter activity had gained momentum within accounting firms that no single individual could stop.[43] But tax professionals at accounting firms were not acting alone. They had realized early on that if they could obtain a favorable opinion as to a shelter's validity and legality from an (allegedly) independent law firm, they could significantly strengthen the shelter's marketability.[44]

b. Law Firms.—Regan and Rostain contend that prior to the 1990s, most elite tax lawyers would have refused to provide such an opinion because of a long-standing consensus disfavoring excessively aggressive tax strategies.[45] The authors further contend that as the increasingly fluid market for legal services led to an overwhelming focus on profits per partner, this consensus among the elite tax bar broke down.[46] The result, they argue, was shelter activity in law firms that was just as robust as in accounting firms but of a different character. While accounting firms actively institutionalized aggressive shelter practice, law firms facilitated it more passively—frequently, by looking the other way.[47]

Regan and Rostain acknowledge that initially some law firms took active roles in encouraging shelter activity.[48] The Dallas-based firm of Jenkens & Gilchrist, for example, hired a lateral partner, Paul Daugerdas, to open a Chicago office devoted exclusively to shelter work.[49] The firm's management did so notwithstanding concerns expressed by existing tax partners and other warning signs.[50] After hiring Daugerdas, however, the

40. *See id.* at 333–34 (exploring this deficiency with the KPMG approval process).

41. *See, e.g., id.* at 109–13 (describing the "review" process of BLIPS, which consisted of multiple actors who continuously punted important questions of legality and shirked responsibility for making final decisions).

42. *Id.*

43. *Id.* at 97.

44. At the time, a taxpayer could avoid penalties for an arrangement later deemed invalid if the taxpayer had relied in good faith on an opinion from an independent, professional tax advisor. *Id.* at 37.

45. *Id.* at 61, 65.

46. *Id.* at 73.

47. *See id.* at 217–18 (noting how law firms turned a "blind eye" toward shelter activity, which was a result, in part, of the firms' loose oversight structures).

48. *See, e.g., id.* at 183–84 (explaining that Paul Daugerdas's practice would be valuable to Jenkens & Gilchrist because it would boost the firm's prestige and profits per partner).

49. *See generally id.* at 177–216 (detailing the birth of a tax shelter practice at Jenkens & Gilchrist).

50. *See id.* at 186–87 (discussing the concerns raised among partners about Daugerdas's tax shelter practice and business model and the reservations that accompanied his hiring).

firm's role was much more passive. The partnership allowed Daugerdas to practice thousands of miles away from the Dallas office and free from any meaningful system of monitoring and review.[51] Daugerdas brought in staggering amounts of income—$28 million in 1999 alone, representing more than 13% of the firm's total revenues[52]—making it easy for other partners to turn a blind eye to signs of trouble.[53]

Shelter practices at other law firms grew up from within, often without the full partnership's awareness or understanding. At Brown & Wood, for example, long-standing partner R.J. Ruble began working closely with both KPMG and Ernst & Young in developing aggressive tax shelters.[54] Ruble then wrote favorable opinion letters, falsely representing to clients that he could offer an independent opinion that would shield them against penalties if the IRS ultimately characterized the arrangement as invalid.[55] Ruble, who diverted many of his fees straight to his own pocket rather than to the firm's coffers, was later described by lawyers in his firm as a rogue partner and bad actor.[56] But in overlooking numerous and frequent warning signs, the firm's partnership was complicit.[57]

Ruble is an extreme example, but countless other lawyers succumbed to organizational pressures within their law firms to accept new and more aggressive norms of practice, or to look the other way when their partners did so, in the name of increased revenues.[58] Regan and Rostain explain that at the height of the shelter boom, many tax lawyers believed that if they declined to write a favorable opinion letter, their clients would quickly and easily find another lawyer who would. Based on this belief, and in the face of intense competition for clients, more and more lawyers began providing such letters, even in support of excessively aggressive and abusive transactions.[59] Far too often, they issued these opinions without sufficient—or sometimes even any—investigation or personal knowledge.[60]

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51. *See id.* at 336–37.

52. *Id.* at 208.

53. *See id.* at 217–18.

54. *See id.* at 220–22.

55. *Id.* at 223; *see also id.* at 139–40, 199, 203 (describing Ernst & Young's development of the COBRA, with which Daugerdas and Ruble were similarly involved from the beginning).

56. *Id.* at 281.

57. *See id.* at 228 ("At a minimum, Ruble's involvement in the shelter design process should have raised a serious question about whether any investor could reasonably rely on his opinion to avoid a penalty.").

58. *See id.* at 52–53 ("Many individuals swept up in the shelter market were highly regarded tax professionals with lengthy experience in practice.").

59. *Id.* at 70.

60. *See, e.g.*, *id.* at 206 ("Jenkens lawyers never received any representations from purchasers about their particular circumstances or their purpose in engaging in the transactions. . . . Indeed, sometimes the firm had no contact with the client at all.").

In this way, Regan and Rostain illustrate how law and accounting firms magnify "the competitive forces to which they are prey."[61] In the late 1990s, these competitive forces led lawyers within both types of firms to push aside their previous views of professionalism and to pursue, or to allow their colleagues and firms to pursue, fraudulent tax shelters.[62] Based on this, Regan and Rostain conclude that the accounting and law firms in which tax lawyers practice can no longer be trusted to instill professional norms or to buffer lawyers from competitive market forces.

B. Proposals for Reform

Regan and Rostain conclude *Confidence Games* by suggesting strategies for reducing the likelihood of a repeat wave of fraudulent tax shelters. These include continued bar corporatism and new efforts to lessen organizational pressures.

Citing Professor Ted Schneyer, Regan and Rostain define "bar corporatism" as follows: "[u]nder this approach, a regulatory agency with expertise in the field oversees practice in a specialized area, guided by dialogue and negotiation with practitioners."[63] As the authors note, bar corporatism has existed in tax practice for years.[64] The IRS has long sought feedback and participation from the bar in its regulation of tax lawyers who practice before it.[65] Regan and Rostain endorse this general approach but argue that these efforts need to be broadened to address not only the conduct of individual tax professionals but also the institutional and organizational pressures under which they work.[66]

To address these pressures, Regan and Rostain suggest that the tax bar and IRS should "focus on developing approaches that limit professional organizations' incentives to engage in tax shelter activity."[67] Circular 230, which contains the standards governing tax practitioners appearing before the IRS,[68] requires the writer of a tax opinion to inquire into all relevant facts and to address all relevant judicial doctrines.[69] Regan and Rostain contend that the prospect of vicarious liability would create a strong incentive for firms to address the institutional and organizational pressures that encouraged shelter activity in the first place.[70] To mitigate excessive

61. *Id.* at 339.
62. *Id.* at 52–53.
63. *Id.* at 344.
64. *Id.* at 344–45.
65. *Id.* at 345.
66. *Id.* at 346.
67. *Id.* 345.
68. *Id.* at 263.
69. *Id.*
70. *Id.* at 345–47.

harshness, the authors suggest a safe harbor defense of adequate internal compliance measures.[71]

Confidence Games suggests a number of productive directions for reform, but the authors are explicit that their principal goal is to understand how the tax shelter wave of the late ’90s arose, not to determine how a repeat wave can be prevented.[72] Accordingly, after offering a number of discrete suggestions, they invite tax lawyers and the profession more generally to build upon their descriptive account in order to strengthen the regulatory regime and improve organizational work environments.[73] I take up this invitation in the next Part.

II. Looking Beyond Tax Practice

In this Part, I argue that the relevance of Regan and Rostain’s insights extends far beyond tax practice. The authors’ core insight—that market pressures are expressed through organizational structures and that organizational structures influence lawyers’ conduct—should therefore be incorporated into the professional regulation of all lawyers. But it should be done so in a way that accounts for differences among work settings. Together, these insights challenge the scholarly consensus that “context-specific regulation” should be tailored to practice area, suggesting instead that it should be tailored to work setting.

A. The Organizational Work Settings of Today’s Lawyers

As Regan and Rostain’s account reveals, lawyers working in law firms face different challenges and constraints than those working in accounting firms and other business settings. Lawyers working in corporate in-house counsel offices face a third set of distinct challenges. In this subpart, I review the specific challenges faced in each context. I argue that these challenges are not limited to tax practice. They reverberate through each work setting, affecting a broad range of practice areas.

71. *Id.* at 345.
72. *Id.* at 7.
73. *Id.*

1. Law Firms.—As Regan and Rostain describe, the challenges faced by and within law firms stem from the increasingly fluid and competitive market for legal services. Historically, long-term client relationships insulated firms from the competitive pressures of the market and allowed them to foster cultures that prioritized professional judgment. But the need to compete for clients and lawyers and to increase revenues led to an erosion of traditional practice norms and informal peer controls.

Although Regan and Rostain focus on tax practice, their own account suggests that tax lawyers were not uniquely susceptible to these pressures.[74] *Confidence Games* document how lawyers in a variety of practice areas and throughout firm management structures overlooked warning signs and condoned shelter work as a valid and desirable means of increasing revenue and spurring firm growth.[75]

A substantial and growing literature on large firm practice supports the conclusion that firm lawyers in a variety of practice areas feel the pressures that Regan and Rostain describe.[76] Scholars and commentators have documented how and why the growing focus on profit maximization has led many firm lawyers, in a variety of practice areas, to make unethical choices and to engage in unethical conduct.[77] The choices may begin with

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74. *See id.* at 52–53 (revealing how the non-tax partners in law firms turned a blind eye and succumbed to the pressures of making more profit).

75. *See supra* notes 43–47 and accompanying text.

76. *See, e.g.*, John M. Conley & Scott Baker, *Fall from Grace or Business As Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 LAW & SOC. INQUIRY 783, 817 (2005) (concluding from a survey of forty years of empirical studies that lawyers in large firms cope with demanding clients and intense competition, which may lead to unethical behavior); Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 263, 267, 269, 273, 279, 291 (2000) (finding that the increase in billable hour requirements for lawyers has created a pressured work environment, is a significant cause of dissatisfaction with work, increases stress, lowers work quality, harms ethical standards, and damages lawyers' reputations and client relationships); Marianne M. Jennings, *The Disconnect Between and Among Legal Ethics, Business Ethics, Law, and Virtue: Learning Not to Make Ethics So Complex*, 1 U. ST. THOMAS L.J. 995, 997 (2004) (discussing scandals that have occurred since 2001 and asserting that the individuals involved were fully aware that they were engaging in unethical behavior); Melissa Mortazavi, *Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession*, 96 MINN. L. REV. 1482, 1482–83 (2012) (stating that lawyers work in a high-pressure environment that can lead not only to dissatisfaction but also to ethical breaches); Christine Parker & David Ruschena, *The Pressures of Billable Hours: Lessons from a Survey of Billing Practices Inside Law Firms*, 9 U. ST. THOMAS L.J. 619, 619 (2011) (arguing that even without demanding billable hour requirements, lawyers will still be prone to engaging in unethical business practices if they believe such behavior is required for success and employed by others at the firm).

77. *See, e.g.*, James M. Altman, *Trouble with the Bottom Line*, N.Y. ST. B.J., Nov. 1996, at 6, 6 (arguing that many firms' "unbridled pursuit of profits" leads attorneys to make questionable ethical decisions); Conley & Baker, *supra* note 76, at 784 (surveying forty years of empirical research about the pressures faced by small- and large-firm attorneys to make questionable ethical decisions); Mortazavi, *supra* note 76, at 1483 (arguing that the emerging profit-driven business models in law firms creates a system that "marginalizes professional responsibility").

questionable practices, such as rounding up in recording time[78] before moving to more blatant forms of wrongdoing.[79] In a now familiar example, Vinson & Elkins lawyers conducted a company-wide investigation of Enron and, notwithstanding serious and specific concerns raised by a vice president, concluded that further investigation by independent counsel and auditors was not necessary.[80]

2. Quasi-Legal Roles.—Regan and Rostain observed that the pressures and tensions lawyers faced in accounting firms were more direct than those in law firms. Many of the lawyers working in these firms had been recruited from law firms for the specific purpose of developing standardized tax products that could generate significant profits.[81] The traditional model of individualized services had been fully discarded in both theory and practice, and the profit motive was more explicitly at the forefront. The lawyers were not technically practicing law and, thus, had no countervailing commitments to an independent profession. Nor did they have the support and protection of an independent profession if and when they voiced concerns.

The competitive pressures that Regan and Rostain identify in the business sector are not limited to tax practice, nor to accounting firms. Lawyers in many other areas of law occupy quasi-legal roles in investment banks, trust companies, private equity firms, and large corporations.[82] They were hired for their legal expertise, but they do not technically practice law.

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78. *See* Fortney, *supra* note 76, at 279–81 (noting how the pressure to lie about billable hours may cause the most ethical attorneys to leave the profession); Parker & Ruschena, *supra* note 76 (arguing that "billable hour pressure is merely the face of more fundamental pressures stemming from the way that lawyers in private practice perceive their work environments").

79. *See, e.g.*, Jennings, *supra* note 76, at 997–1017 (reviewing the corporate scandals of recent years and determining that those scandals were not even a close ethical call); *see also* Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1089 (2004) (referring to Enron's duplicitous methods of hiding its true financial state and presenting itself as a profitable company).

80. *See* Jennings, *supra* note 76, at 1005 (describing an incident at Vinson & Elkins where the lawyers should have realized what was going on, but, "they were not inclined to raise the flag in the beginning days of the spin-offs and by the time of the extensive spin-offs, fear of collapse consumed them and their better judgment in halting the bizarre financial empire").

81. *See* ROSTAIN & REGAN, *supra* note 1, at 57, 71.

82. Dana A. Remus, *Out of Practice: The Twenty-First Century Legal Profession*, 63 DUKE L.J. 1243, 1259–60, 1265–66 (2014). For example, many trust companies regularly recruit trusts and estates lawyers to serve as trust officers. *Id.* at 1264–65. A law license is not a prerequisite of the job, but it is considered valuable, both for the legal knowledge it represents and for the confidence it inspires among clients. *Id.* Another example, provided by Rostain herself in a 2006 article, is the role of law consultants. Tanina Rostain, *The Emergence of "Law Consultants,"* 75 FORDHAM L. REV. 1397, 1397 (2006). By design, these lawyers work outside of the scope of professional regulation. *Id.* at 1398. Their appeal to corporations lies in the fact that they can engage in conduct that is otherwise prohibited by the rules of professional conduct. *Id.* at 1409–10. They can, for example, interview employees without explaining their relationship to management and offer expert testimony at trial. *Id.* at 1420–21, 1423.

Like the tax professionals working at accounting firms in Regan and Rostain's account, they are untethered from the profession's regulatory regime and vulnerable to enormous pressures to elevate profit-maximization above all else.[83]

3. In-House Counsel.—A third distinct work setting occupied by many lawyers today—in-house counsel offices at corporations and other organizations—is not central to Regan and Rostain's account. The authors gesture towards these roles, however, in discussing the increasing demand for aggressive shelters from within corporate tax departments. Presumably, lawyers working in tax departments and within general counsel offices participated in the growth of shelter activity.[84] At the very least, they did not stop it. They do not appear to have voiced strong concerns about the shelters' legality or the validity of the legal opinions approving them.[85] To the extent they did, they must have been dissuaded from pressing their concerns.

This highlights a problem, long noted by commentators and scholars of the legal profession, which extends far beyond tax practice—insufficient autonomy and independence among in-house counsel. Nearly forty years ago, as part of their groundbreaking study of the Chicago bar, John Heinz and Edward Laumann questioned the ability of in-house lawyers to exercise independent judgment when doing so could require them to "bite the hand that feeds them every day."[86] Since then, many scholars have suggested that the problem might run deeper than a fear of voicing opposition.[87] In-house lawyers may become so involved in management's decision-making processes and enmeshed in corporate culture that they identify more closely with the company than with the legal profession.[88] Their perspective may

83. *See* Remus, *supra* note 82, at 1271–72.

84. *See* ROSTAIN & REGAN, *supra* note 1, at 49.

85. At the very least, Regan and Rostain do not mention them doing so. Given the meticulously detailed account that the authors offer of all involved actors, entities, and events, this suggests that in-house counsel did not vocalize any concerns. In fact, in one account given by Regan and Rostain, a King & Spalding partner tried to rely on the fact that he had lengthy discussions with a corporation's in-house counsel, but the court found the testimony to be uncreditable, believing that the in-house lawyer played little role in assessing the merits of the shelter. *Id.* at 237–38.

86. John P. Heinz, *The Power of Lawyers*, 17 GA. L. REV. 891, 900 (1983).

87. *See, e.g.*, Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 958–60 (2005) (tracing the history of the role of in-house counsel and the counsel's increasing role in the direction of the business); Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 466–68 (2000) (discussing entrepreneurial lawyers and using as an example the general counsel to a holding company who is motivated by business interests rather than by his legal responsibilities and whose responsibilities in general went "well beyond" giving legal advice).

88. *See* DeMott, *supra* note 87, at 967–69 (discussing the possibility that general counsels' close relationships with their companies limit their ability to act impartially).

become entirely aligned with corporate management, precluding the possibility of independent judgment.[89]

As with pressures within law firms and business settings, the pressures within in-house counsel offices are not unique to tax lawyers. In all three contexts, the institutional and organizational pressures that Regan and Rostain describe are felt by lawyers working in all areas of law. Accordingly, the profession's failure to recognize and address these pressures is not just a shortcoming in the regulation of tax lawyers; it points to system-wide problems with the professional regulation of all lawyers.

B. Proposals for Reform

In this final subpart, I argue that the profession should incorporate Regan and Rostain's insights into new regulatory structures. These new structures should acknowledge and account for the financial and competitive pressures that interfere with lawyers' independent professional judgment in all areas of law, but that vary by work setting. I offer examples of the types of new regulatory structures that the profession should consider, which address the specific pressures and tensions of: (1) law firm practice, (2) quasi-legal work, and (3) in-house practice.

1. Law Firms.—As an initial matter, the profession should impose more stringent regulation on law firm lawyers in an effort to counteract the competitive pressures that are currently distorting professional judgment. This regulation could take many forms, including allowing for the professional discipline of law firms as well as lawyers, and establishing a constructive knowledge standard for legal opinions.

As described above, Regan and Rostain suggest the first of these proposals for tax practice. They suggest imposing vicarious liability on all firms for the Circular 230 violations of their tax professionals. Their proposal is appropriate and desirable for law firms generally. Two states—New York and New Jersey—have already implemented such rules. Both impose an affirmative duty on law firms to make "reasonable efforts" to ensure ethical compliance by a firm's lawyers.[90] Law firms that fail to do so can be disciplined for their lawyers' ethical violations.[91] The result, as

89. *See id.* (describing the challenge for a company's general counsel of remaining impartial when he or she is involved closely in the affairs of the business).

90. N.Y. RULES OF PROF'L CONDUCT R. 5.1 (2014); N.J. RULES OF PROF'L CONDUCT R. 5.1(a) (2012).

91. N.Y. RULES OF PROF'L CONDUCT R. 5.1 (2014); N.J. RULES OF PROF'L CONDUCT R. 5.1(a) (2012). Despite the advancements made in New York and New Jersey, the ABA, in its *Model Rules of Professional Conduct*, declined to impose liability on the entire firm. *See* Margaret Colgate Love, *The Revised ABA* Model Rules of Professional Conduct*: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 470–71 (2002) ("The Commission initially proposed to extend the duties in Rules 5.1 and 5.3 to law firms as well as individual lawyers.

Regan and Rostain predict in the tax context, is a powerful incentive for firms to develop effective compliance programs.[92] Effective compliance programs, in turn, could lessen organizational pressures to engage in aggressive and questionable conduct.

A second measure to improve the practices of law firm lawyers would be a constructive-knowledge standard for legal opinions. A frequent criticism, supported by Regan and Rostain's account, is that lawyers engage in insufficient investigation before making representations in opinion letters,[93] sometimes relying exclusively on statements made by their clients.[94] These practices could be changed by a constructive-knowledge standard, which would hold a lawyer responsible for any information she knew, had reason to know, or should have known concerning flaws and misrepresentations in an opinion. Relying on a client's statements and representations would not constitute a defense.[95]

However, it became persuaded that any possible benefit . . . was small when compared to the potential cost of de-emphasizing the personal accountability of partners and supervisors.").

92. The incentives would be even stronger under a proposal advanced by Ted Schneyer over two decades ago to impose vicarious liability on the firm under a respondeat superior standard for the misconduct of firm personnel. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 28–29 (1991). Additional and potentially problematic incentives would be created by this standard, however. Given that firms could be held liable even with reasonable assurances of ethical compliance, firms would have to devote significant resources to overseeing and evaluating the work of all firm employees. *Id.* at 29–30. This could significantly increase the cost of legal services.

93. *See supra* note 60 and accompanying text; *see also* Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1247 (2003) (noting, in connection with the Enron scandal, that the "knowing" requirement in ethical cannons fails to capture even the most egregious conduct because lawyers are trained to zealously represent their clients, which shades their reasoning into thinking that their clients are not violating the law); Mike France, *What About the Lawyers?*, BUS. WK., Dec. 23, 2002, at 58, 59 ("Whether [Enron's lawyers] worked inside or outside the company, they all mount the same defenses: that the deals they worked on were legal, they had nothing to do with the company's accounting, and they didn't have enough facts to grasp the big picture . . . .").

94. In most contexts, governing standards do not require a lawyer to investigate each fact personally rather than relying on statements of their client. For example, an ABA formal opinion states that in rendering an opinion concerning the sale of unregistered securities, although counsel "should not accept as true that which he should not reasonably believe to be true, he does not have the responsibility to 'audit' the affairs of [the] client[] or to assume, without reasonable cause, that [the] client's statement of the facts cannot be relied upon." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 335 (1974).

95. This standard should also be adopted by various regulatory bodies, such as the IRS and SEC, which have disciplinary authority over lawyers who issue particular types of opinion letters. *See, e.g.*, Press Release, Internal Revenue Serv., KPMG to Pay $456 Million for Criminal Violations (Aug. 29, 2005), *available at* http://www.irs.gov/uac/KPMG-to-Pay-$456-Million-for-Criminal-Violations (forcing KPMG to pay criminal sanctions for issuing fraudulent opinion letters); Press Release, Sec. & Exch. Comm'n, SEC Charges California-Based Lawyer with Issuing Fraudulent Legal Opinion Letters (Mar. 7, 2013), *available at* http://www.investor.gov/news-alerts/press-releases/sec-charges-california-based-lawyer-issuing-fraudulent-legal-opinion-lett#.Ux8xWfldXTo (charging a lawyer with issuing baseless opinion letters).

This change would go a long way in addressing a central concern of commentators and reformers seeking to encourage lawyer gatekeeping. As Sung Hui Kim observes, effective gatekeeping entails two distinct functions: (1) the ability and willingness to stand up to corporate management, and (2) the ability and willingness to monitor corporate activity and gather relevant information.[96] Conventional wisdom holds that outside counsel are better positioned to act as effective gatekeepers because their increased independence facilitates the first of these functions.[97] As Kim points out, however, in-house counsel are better suited for the second function by virtue of being embedded within the structures and cultures of their clients.[98] Kim observes an additional factor complicating the conventional wisdom—it is unlikely that outside counsel will perform tasks for which they cannot bill and unlikely that clients will pay outside counsel to perform tasks, such as monitoring corporate affairs, that inside counsel can perform more efficiently.[99]

Holding outside counsel to a constructive-knowledge standard would leverage the respective strengths of each role, recognizing that we need not locate gatekeeping responsibilities exclusively with one or the other. Outside counsel would be required to spend the necessary resources to gather relevant information. Given that they would face pressure to do so in a cost-effective manner, they would likely team with inside counsel, tapping into inside counsel's heightened access to information regarding corporate affairs. This, in turn, would combine the benefits of inside counsel's ability to monitor with outside counsel's heightened independence.

2. Quasi-Legal Roles.—Addressing the challenges faced by lawyers in quasi-legal roles is a harder task. These lawyers are not practicing law and, accordingly, are not subject to the strictures of professional regulation. This is a core difficulty in insulating them from competitive pressures—they have no ethical duties imposed by and no ethical guidance offered by a professional body independent from their employer.

It is important to recognize that although the profession's codes of conduct are frequently viewed as a means of constraining poor behaviors, they serve an equally important function in compelling good behaviors.[100] By requiring lawyers to act in certain ways and threatening a loss of

96. Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 413–14 (2008). Kim does not conclude that in-house counsel are necessarily better suited to act as gatekeepers, but that the question is far more complicated than conventional wisdom holds. *Id.* at 460–61.

97. *See, e.g.*, JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 195 (2006); DeMott, *supra* note 87, at 967–68.

98. Kim, *supra* note 96, at 452–54.

99. *Id.* at 447.

100. Remus, *supra* note 82, at t 1275–76.

licensure if they do not, the codes of conduct (backed by enforcement mechanisms) can both empower and incentivize lawyers to check unethical business strategies.[101] Lacking this source of empowerment and incentive, lawyers in quasi-legal roles have diminished ability and motivation to adopt a remedial orientation towards their employers.

Elsewhere, I have argued that the profession should remedy this situation by extending baseline conduct regulations to lawyers working in all settings, regardless of whether they are practicing law.[102] These rules would create a unifying superstructure over context-specific practice rules. They could include, for example, baseline duties of candor and fair dealing in business interactions.[103]

3. In-House Counsel.—As discussed above, new forms of regulation have the potential to bolster lawyers' independence in law firms. They may be powerless, however, where lawyers are employed by, and embedded within, their sole client. For these reasons, many European countries do not view in-house lawyers as members of the bar and do not afford them the protections of the attorney–client privilege.[104]

The American bar should similarly regulate in-house lawyers differently than lawyers working at law firms, subjecting them to different obligations and affording them different protections. A full discussion of such potential changes is a subject for future work. Here, I offer two representative examples. First, we should not afford the legal opinions and advice of in-house counsel the same weight as opinions and advice from law firm lawyers. Just as in-house counsel opinions regarding the legality

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101. Empirical research indicates that lawyers are able to (and sometimes do) dissuade businesses from unwise or unethical practices. For example, lawyers can counsel businesses to be cautious about tolerating risk and ensure that businesses properly disclose information. *See* Christine E. Parker et al., *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEGAL ETHICS 201, 240 (2009) (finding through empirical evidence that some lawyers do act as compliance monitors); *see also* Nelson & Nielsen, *supra* note 87, at 463–64 (analogizing the role of a lawyer to that of a cop, where the lawyer "polic[es] the conduct of [his] business clients").

102. Remus, *supra* note 82, at 1282–84.

103. *Id.* at 1282.

104. *See* Case C-550/07P, Akzo Nobel Chems. v. Comm'n, 2010 E.C.R. I-8309, I-8325, at I-8382 ("[A]n enrolled in-house lawyer . . . does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his clients." (emphasis omitted)); Case T-125/03 & T-253/03, Akzo Nobel Chems. Ltd. v. Comm'n 2007 E.C.R. II-3532, II-3587 ("The Commission concludes that, in their great majority, the Member States do not grant LPP [privilege] to in-house lawyers, even where they can be members of a Bar or Law Society."); *see also* Andrew R. Nash, *In-House but out in the Cold: A Comparison of the Attorney–Client Privilege in the United States and European Union*, 43 ST. MARY'S L.J. 453, 477 (2012) ("According to the Court of Justice's interpretation, the varied nature of exact services provided, the close ties that in-house counsel maintains with the business entity, and the counsel's knowledge of commercial strategies negatively impact the attorney's professional independence.").

of a tax strategy cannot be used in a subsequent defense for underpayment of taxes based on good faith reliance on the advice of a tax professional,[105] in-house counsel opinions and advice should not be available for advice-of-counsel defenses in lawsuits generally. In addition, in-house counsel should be precluded from issuing third party opinion letters to validate and endorse business dealings between their clients and third parties.[106]

Second, following the European model,[107] communications with in-house counsel should not be protected by the attorney–client privilege. Notwithstanding the privilege's traditional position at the foundation of the attorney–client relationship, this change would not be as drastic as it first sounds. In recent years, the privilege has been weakened significantly in the corporate context, as government investigations are routinely premised on its waiver.[108] Given that corporate management often uses the privilege in troubling ways, to protect itself at the cost of individual employees, this may be appropriate.[109] Moreover, the traditional rationale of the privilege—facilitating the lawyer's role in mediating between the client and the state to persuade the client to pursue legal courses of action—has lost meaning in the corporate context.[110] As commentators have long suspected, and as research now confirms, most in-house counsel do not inhabit this mediating role.[111] They are intimately involved in their companies'

105. Mortensen v. Comm'r, 440 F.3d 375, 387 (6th Cir. 2006).

106. *See* 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 cmt. b (1998) (noting that such opinions are currently permissible).

107. *See supra* note 104 and accompanying text.

108. See William R. McLucas et al., The Decline of the Attorney-Client Privilege in the Corporate Setting, 96 J. CRIM. L. & CRIMINOLOGY 621, 621 (2006) (illustrating how agencies seeking to "restore public confidence in our capital markets" tend to measure corporation cooperation by whether a corporation has waived attorney–client privilege); Report of the American Bar Association's Task Force on the Attorney-Client Privilege, 60 BUS. LAW. 1029, 1043 (2005) (noting that many corporations disclose otherwise privileged documents and information lest agencies exercise discretionary authority to bring costly actions under civil or criminal law); David M. Zornow & Keith D. Krakaur, On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations, 37 AM. CRIM. L. REV. 147, 148, 154 (2000) ("Federal prosecutors are no longer content to build criminal cases by relying on the powerful tools of grants of immunity and grand jury subpoenas . . . . Instead, they now often insist, even at the outset of an investigation, that corporations turn over privileged communications . . . .").

109. *See* George M. Cohen, *Of Coerced Waiver, Government Leverage, and Corporate Loyalty: The Holder, Thompson, and McNulty Memos and Their Critics*, 93 VA. L. REV. IN BRIEF 153, 160–61 (2007) ("Long before the government's waiver policy was ever dreamed up, corporations were exercising this right to waive the privilege and put the blame for illicit conduct (rightly or wrongly) on their employees.").

110. *See* Rostain, *supra* note 82, at 1426 ("The privilege not only exists to assist counsel in formulating legal advice; it is also intended to create a zone of privacy that lawyers are supposed to use to convince corporate clients to abide by the law.").

111. *See supra* notes 86–89 and accompanying text.

business as well as legal strategies, and they identify much more closely with their clients than with the legal profession.[112]

* * *

Regan and Rostain conclude that "the organizations in which tax lawyers practice can no longer be trusted to buffer lawyers from competitive market forces or instill professional norms."[113] Currently, their conclusion is relevant not only to tax lawyers but to all lawyers working in the business sector. There is reason for optimism, however. If the profession incorporates the insights of *Confidence Games* into new regulatory structures that account for the particular challenges of various work settings, organizational influences may bolster rather than undermine lawyers' professional norms and ethical standards.

112. *See supra* notes 88–89 and accompanying text.

113. ROSTAIN & REGAN, *supra* note 1, at 343.