

# A Tax Lawyer's Manifesto

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**T**Most of what I have written about here has been objective: ways to minimize income, gift and estate taxes, and other financial strategies relevant to the wealthy. I put my own spin on these approaches, trying to balance complexities, timing and expenses with the certainty of result. But in the end my articles are about the law and how to use it to your advantage.

Still, I knew this day would come—my editor has been hinting at it for months. Each time I avoided his question: How do the wealthy choose a tax lawyer? It's a subjective question, and no matter how I answer it I am bound to upset my fellow tax colleagues and possibly some clients. But I do have strong feelings about the topic.

First, there is no one “right” lawyer and no one “right” tax lawyer. The tax attorney you choose should have a focus aligned with your needs and objectives. I receive all my referrals now by word of mouth from my very high net worth clients who, by and large, are satisfied with what I do for them. While some of my clients have recently become wealthy through inheritance, the lottery or a successful exit transaction, most of my clients have been very wealthy and employ a team of professionals that includes a tax attorney and/or a tax-savvy CPA who actually files the necessary tax returns. I believe that the team should include both a tax attorney and a CPA, along with the client's family office manager, insurance professional, financial advisors and money managers, and bankers, among others. The client's relationship with the tax attorney is subject to attorney-client privilege, meaning it can't be admitted at trial or as part of any governmental investigation, thus allowing for a free and open dialogue between the tax attorney and the client.

These wealthy individuals often wish to have someone take a fresh look at their particular situation or a

specific issue. Sometimes this new engagement will result from the death or retirement of a trusted advisor, from a feeling that an individual has outgrown a current advisor or from some dissatisfaction, usually caused by complacency or a lack of attention on the advisor's part.

Other times, the client may just perceive that his team lacks a particular skill.

The client may, for example, have an emerging need for specific expertise in foreign taxation, S corporations or insurance products, and the current tax attorney doesn't have that knowledge base.

### **Due Diligence**

So referrals from respected friends and business associates are a good place to start. Potential clients should conduct diligence on these recommendations through an Internet search and a review of the various services that peer review and rate lawyers—Martindale-Hubbell, Best Lawyers, Super Lawyers and Chambers. These services are not definitive; they often neglect younger, up-and-coming lawyers, and sometimes continue to rate highly older lawyers whose abilities have faded but who still have name recognition. But they're still worth a look.

One difficulty in vetting tax lawyers whose practices focus on the wealthy is that they generally can't give you client references. My clients maintain their anonymity outside the firm, and the firm maintains strict confidentiality about their matters both internally and externally. Any tax lawyer you hire must maintain these protocols.

### **The Interview**

The next step is to interview the candidate and look for the following qualities. A good tax attorney is a good listener; he or she listens to understand the client's wants and needs. However, in the business of tax law, the client isn't always right about what he thinks he wants and needs. More often than not, the client is wrong. The job of the tax lawyer is to decipher the client's real wants and needs from what he says, and then articulate suggestions that achieve reasonable goals. It's easy to tell a client what he wants to hear, but a good tax lawyer tells a client what he needs to hear.

This communication can be difficult: These wealthy clients are often very sophisticated, successful and powerful businesspeople who are surrounded by yes-men all day long. It takes a commanding personality with a strong ethical compass to tell them that they can't do something they think they want to do or that their friends are doing. You may lose business giving them the right advice, but you sleep better at night.

### **Aggressive Strategies**

I am often confronted with clients who think they should deploy aggressive income tax strategies they "know" others use—overreaching prenuptials for their own or a child's new spouse, or estate planning that is too controlling, too generous to heirs, too complicated to implement and maintain or too estate-tax

focused. The tax attorney's job is to explain, politely and clearly, the risks of these strategies in the context of the client's true objectives. Is it better to pay more income or estate taxes but ensure that the plan will be respected by the IRS and the courts? Is it better to give more to the presumptive spouse so as to ensure the enforceability of the prenuptial? Is it better to have some estate-tax leakage, less control over post-death events and less risk of human error—while knowing with a high degree of certainty that the people we care about are being protected? Is it better to give family members less wealth but in the end more rewarding lives?

### **Clear Communication**

Wealthy and successful people generally don't have a lot of time to hear about complex tax-planning strategies, and many such strategies often sound counterintuitive. One example: explaining to a potential foreign client that if he spends too much time in the U.S., he will be treated as a resident for income tax purposes and taxed on *all* his worldwide income. So a good tax lawyer is a good communicator who can explain these strategies without jargon or arrogance. Clients need to understand enough of the details to assess the relative costs, risks and complexities of different approaches.

### **Know Trends**

Tax lawyers also get paid for knowing where the law is going, not where it is. So, during your interview you should ask the tax lawyer where, for example, he thinks Congress will come out on carried interest and GRATs. Push for a nuanced response: Tax attorneys tend to list all the potential negative outcomes without also detailing the probability of the risks or the effect of a negative outcome. This is because they don't want to be criticized if something bad happens; it's like a surgeon who never operates on a high-risk patient and then says he has only positive outcomes. A good tax attorney should have a sense of proportionality and be able to assess the risks of particular strategies.

### **Transparency**

The other extreme, of course, is not telling the client about potential tax risks at all. A tax lawyer must be fully transparent so that a client can make an informed decision, and transparency can't happen when there is groupthink among the client's professional team. One of my pet peeves is when a client tells his group of advisors to reach agreement on how to deploy a strategy or to solve a problem. Professional disagreements are healthy and, in most situations, productive; I don't believe my role is to reach a consensus. Rather, I consider it important to explain the alternative strategies and their relative benefits and detriments. Neither the tax lawyers nor the client's team of professionals should ever come up with a singular strategy or approach to solve a problem.

### **Seek Balance**

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Finally, a good tax attorney needs to apply both a cost-benefit approach and a complexity-versus-simplicity analysis to all strategies. Sometimes simpler and less expensive strategies that offer an imperfect solution are better for a client than more expensive and complicated strategies.

There is certainly no right tax lawyer for all situations, but finding someone who is a good listener and communicator with the confidence to tell you what you need to know and won't engage in groupthink is likely to be your best hire.