



Ethical Issues in Tax Practice and Procedure

Thursday, June 25, 2015
12:20 P.M. – 1:50 P.M.

Presenters

Brian Katusian

Seltzer Caplan McMahon Vitek

750 B Street, Suite 2100

San Diego, CA 92101

Tel. 619.685.3186

Email: katusian@scmv.com

Elizabeth Van Clief

Hughes & Pizzuto

401 B Street, Suite 2400

San Diego, CA 92101

Tel. 619.239.1211

Email: evanclief@hplawsd.com

Ethical Rules

- In tax controversies and litigation, an attorney is subject to at least the following rules:
 - ABA Model Rules of Professional Conduct
 - California Rules of Professional Conduct
 - Treasury Department's Circular 230
 - Tax Court Rules of Practice and Procedure

THE STATE BAR OF CALIFORNIA ETHICS RESOURCES



Rules of Professional Conduct



Ethics Authorities Index



Client Trust Accounting Handbook



Ethics Hotline



Ethics Alerts Articles



Advisory Ethics Opinions



E-Reader Publications



Ethics and Technology Resources



Annual Ethics Symposium



Civility and Professionalism



Senior Lawyers Resources



Attorney Surrogacy

CLICK ON THE ICONS TO BE DIRECTED TO THE ETHICS RESOURCES

California Rules of Professional Conduct

- The California Rules of Professional Conduct are intended to regulate professional conduct of members of the State Bar through discipline.
- They have been adopted by the Board of Trustees and approved by the California Supreme Court pursuant to statute to protect the public and to promote respect and confidence in the legal profession.
- The rules and any related standards adopted by the Board are binding on all members of the State Bar.

California Compendium of Professional Responsibility

- The State Bar Office of Professional Competence publishes and sells a three-volume ethics reference manual, the *California Compendium of Professional Responsibility*, which contains:
- Ethics opinions published by The State Bar of California, the Bar Association of San Francisco, the Los Angeles County Bar Association, the Orange County Bar Association and the San Diego County Bar Association
- The Publication 250 Book (California Rules of Professional Conduct, State Bar Act, Selected Statutes and Rules of Court and more...)
- California Code of Judicial Conduct and a comprehensive subject matter research index.

Client Trust Accounting Handbook

- The trust accounting handbook is a practical guide created to assist attorneys comply with recordkeeping standards for client trust accounts that went into effect Jan. 1, 1993. The handbook includes:
 - a copy of the standards and statutes relating to an attorney's trust accounting requirements,
 - a step-by-step description of how to maintain a client trust account; and
 - sample forms.
- The handbook is currently only available online.

Ethics Hotline

- The Ethics Hotline, a confidential research service for attorneys only, helps lawyers identify and analyze their professional responsibilities.
- All calls to the Ethics Hotline generally are confidential.
- Telephone number: 800-238-4427

Hotliner News

- The *Ethics Hotliner* is an online resource providing the latest information on California legal ethics.

Ethics Opinions

- Ethics opinions issued by The State Bar of California Committee on Professional Responsibility and Conduct.
- The advisory opinions regarding the ethical propriety of hypothetical attorney conduct, although not binding, are often cited in the decisions of the Supreme Court, the State Bar Court Review Department and the Court of Appeal.

Circular 230

- Treasury Department Circular 230 sets forth the rules and ethical standards for persons representing clients in matters before the Internal Revenue Service, including examinations (audits) and administrative appeals.

§10.20 Information to be furnished

- Attorney must promptly submit records or information to the IRS unless privileged.
- *Example* – During an IRS audit, attorney cannot delay case by unreasonably withholding documentation requested in IDR.
- Maintain a privilege log if withhold documentation such as emails.

§ 10.20 Information to be furnished.

(a) *To the Internal Revenue Service.*

(1) A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.

§10.20 Information to be furnished.

- Must promptly notify IRS if taxpayer lacks possession or control of documents.
- Identify of person who may have possession.
- Reasonable inquiry
- *Example* – IRS serves IDR on taxpayer, and taxpayer claims he lacks possession or control over requested information.

(2) Where the requested records or information are not in the possession of, or subject to the control of, the practitioner or the practitioner's client, the practitioner must promptly notify the requesting Internal Revenue Service officer or employee and the practitioner must provide any information that the practitioner has regarding the identity of any person who the practitioner believes may have possession or control of the requested records or information. The practitioner must make reasonable inquiry of his or her client regarding the identity of any person who may have possession or control of the requested records or information, but the practitioner is not required to make inquiry of any other person or independently verify any information provided by the practitioner's client regarding the identity of such persons.

§10.20 Information to be furnished

- Cannot interfere with IRS effort to obtain records unless privileged.
- *Example* – Practitioner contacts a third-party witness and instructs witness to not talk to IRS. Practitioner has conflict of interest in representing both witness and taxpayer during IRS audit.

(b) *Interference with a proper and lawful request for records or information.* A practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the Internal Revenue Service, its officers or employees, to obtain any record or information unless the practitioner believes in good faith and on reasonable grounds that the record or information is privileged.

§10.21 Knowledge of client's omission

- An attorney must advise the client of any noncompliance, error or omission.
- The attorney also must advise the client of the consequences (i.e., civil penalties and criminal offenses).
- *Example* – Taxpayer submits false document to IRS

§ 10.21 Knowledge of client's omission.

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, **must advise the client promptly of the fact of such noncompliance, error, or omission.** The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

§ 10.22 Diligence as to accuracy

- Practitioner must exercise diligence as to accuracy.
- Tax returns, affidavits and other documents must be accurate.
- *Example* – Practitioner makes oral representations to IRS agent during audit that are not factually accurate.

§ 10.22 Diligence as to accuracy.

(a) *In general.* A practitioner must exercise due diligence —

(1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;

(2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and

(3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.

§ 10.27 Fees

- Issue monthly statements to clients
- Statements should detail work performed, hours worked, and hourly rates
- Flat fee?

§ 10.27 Fees.

(a) *In general.* A practitioner may not charge an **unconscionable fee** in connection with any matter before the Internal Revenue Service.

§ 10.27(b) Contingent Fees

- When may a practitioner charge a contingent fee for services?
- Practitioner may not charge a contingent fee for services rendered in connection with any matter before the IRS except under specified circumstances.

(b) *Contingent fees* —

(1) Except as provided in paragraphs (b)(2), (3), and (4) of this section, a practitioner may **not charge** a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.

(2) A practitioner **may charge** a contingent fee for services rendered in connection with the Service's examination of, or challenge to —

(i) An original tax return; or

(ii) An **amended return or claim for refund or credit** where the amended return or claim for refund or credit was filed within **120 days** of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return.

(3) A practitioner **may charge** a contingent fee for services rendered in connection with a **claim for credit or refund** filed solely in connection with the determination of **statutory interest or penalties** assessed by the Internal Revenue Service.

(4) A practitioner **may charge** a contingent fee for services rendered in connection with any **judicial proceeding arising** under the Internal Revenue Code.

§ 10.28 Return of client's records.

- Promptly return all records
- Fee dispute generally not relieve practitioner of his responsibility

§ 10.28 Return of client's records.

(a) In general, a practitioner must, at the request of a client, promptly return any and all records of the client that are necessary for the client to comply with his or her Federal tax obligations. The practitioner may retain copies of the records returned to a client. The existence of a dispute over fees generally does not relieve the practitioner of his or her responsibility under this section. Nevertheless, if applicable state law

§10.28 Return of client's records.

- Records of the client do not include documents prepared by practitioner or agents if practitioner is withholding document pending client's payment of fee
- *Example* – Written appraisal report prepared by expert witness in estate tax audit.

Federal tax obligations. The term does not include any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the practitioner or the practitioner's firm, employees or agents **if the practitioner is withholding such document pending the client's performance of its contractual obligation to pay fees with respect to such document.**

§10.29 Conflict of interest.

- Representation of one client will be directly adverse to another client.
- Significant risk that representation will be materially limited

§ 10.29 Conflicting interests.

(a) Except as provided by paragraph (b) of this section, a practitioner shall not represent a client before the Internal Revenue Service if the representation involves a conflict of interest. A conflict of interest exists if —

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner.

§10.29 Conflict of interest

- Reasonably believes provide competent and diligent representation
- Client waives conflict and gives informed consent in writing
- 36 months

(b) Notwithstanding the existence of a conflict of interest under paragraph (a) of this section, the practitioner may represent a client if —

(1) The practitioner reasonably believes that the practitioner will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law; and

(3) Each affected client waives the conflict of interest and gives informed consent, confirmed in writing by each affected client, at the time the existence of the conflict of interest is known by the practitioner. The confirmation may be made within a reasonable period of time after the informed consent, but in no event later than 30 days.

(c) Copies of the written consents must be retained by the practitioner for at least 36 months from the date of the conclusion of the representation of the affected clients, and the written consents must be provided to any officer or employee of the Internal Revenue Service on request.

Cal Rules of Professional Conduct 3-310 Avoiding the Representation of Adverse Interests

- Husband and wife in Tax Court case
 - Individual in IRS audit and witness who receives IRS summons
 - Employer and employee
 - Partnership and partners
 - LLC and members
 - Corporation and shareholders
- (C) A member shall not, without the **informed written consent** of each client:
- (1) Accept representation of more than one client in a matter in which the interests of the clients **potentially conflict**; or
 - (2) Accept or continue representation of more than one client in a matter in which the interests of the clients **actually conflict**; or
 - (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

Conflicts of Interest

- ***Para Technologies Trust v. Commissioner***, T.C. Memo 1992-575 (Tax Court granted Commissioner's motion to compel the withdrawal of taxpayers' attorney where attorney had conflict of interest; Tax Court cited ABA Model Rule 1.7(b) and 24(f)).
- ***Eriks v. Denver***, 824 P.2d 1207, 1211-1212 (Wash. 1992) (citing Model Rules Rule 1.7 comment (1984) and holding that as a matter of law there was a conflict of interest between promoters of and investors in a tax shelter).
- ***Devore v. Commissioner***, 963 F.2d 280 (9th Cir. 1992) (case remanded to Tax Court for evidentiary hearing to determine if Devore prejudiced by former counsel's conflict of interest).

Engagement letter

- Scope of engagement
- Client's responsibilities
- Legal fees, billing statements and advance deposits
- Handling of client files
- Discharge and withdrawal
- Joint representation

Tax Court Rule 33

- Rule 33 applies to any pleadings that you file in Tax Court.
- *Example* – Petitions, motions, etc.
- Fed. R. Civ. Proc. 11 applies in federal district court. It deals with signing of pleadings, motions, and other papers; representation to the court; and sanctions.

RULE 33. SIGNING OF PLEADINGS

¹(a) **Signature:** Each pleading shall be signed in the manner provided in Rule 23. Where there is more than one attorney of record, the signature of only one is required. Except when otherwise specifically directed by the Court, pleadings need not be verified or accompanied by affidavit or declaration.

(b) **Effect of Signature:** The signature of counsel or a party constitutes a certificate by the signer that the signer has read the pleading; that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The signature of counsel also constitutes a representation by counsel that counsel is authorized to represent the party or parties

Client Pays You Cash or Cashier's Check

- IRS Form 8300
- Business receives more than \$10,000 in “cash” in a single transaction or related series of transactions.
 - “Cash” does not include personal checks. Includes U.S. *and* foreign currency, coins, money order, cashier's check, bank draft, traveler's check.
- Can a lawyer refuse to disclose the identity of the client on Form 8300 based upon the attorney-client privilege? See ***U.S. v. Blackman***, 72 F.3d 1418 (9th Cir. 1995).
 - Probably not. Only if disclosure would be “tantamount to [the revelation of] a confidential privileged communication.”
 - Identity of client would have to be “inextricably intertwined with confidential communications.”

Client uses proceeds from crimes to pay fees

- If the client uses proceeds from certain crimes to pay his lawyer, the fees may be subject to forfeiture by the government. *See* 21 U.S.C. § 853.
- Be cautious in ensuring that funds used to pay fees come from a legitimate source.

Client Must Designate Representative by Written Authorization (IRS Power of Attorney Form)

- By law, the IRS is prohibited from disclosing “confidential tax return information.” Internal Revenue Code § 6103. IRS agents will not talk to or correspond with an attorney without a valid Power of Attorney on file.
- Use **Form 2848 Power of Attorney and Declaration of Representative**. A separate form is required for each spouse, even if a joint tax return was filed. (Be aware that spouses may have a conflict of interest!)
- Link to Form 2848 on IRS website: <http://www.irs.gov/pub/irs-pdf/f2848.pdf>
- Fax the completed form to the central POA unit at (801) 620-4249 (for California Taxpayers – or see 2848 Instructions for taxpayers residing elsewhere) as well as to the particular agent handling the matter.

Formal Opinion No. 2010-179
(Confidentiality and Technology)

Formal Opinion No. 2011-180
(Gifts from Clients)

Formal Opinion No. 2012-183

(Duty of Confidentiality and Seeking Legal Advice)

Formal Opinion No. 2012-184
(Virtual Law Office)

Formal Opinion No. 2012-185
(State Bar Complaints Threats)

Formal Opinion No. 2012-186
(Social Networking)

Formal Opinion No. 2013-187
(Third Party Payor)

Formal Opinion No. 2013-188
(Confidential Information and Unsolicited
E-Mail Correspondence)

Formal Opinion No. 2013-189
(Deceitful Conduct)

Formal Opinion No. 2014-190
(Dissolving and Moving to New Firm)

Formal Opinion No. 2014-191
(In Rem Bankruptcy Proceedings)

Formal Opinion No. 2015-192
(Disclosure of Confidences at Motions
for Withdrawal)