

Ethical Issues in Representing Clients Before, During, and After Tax Court

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Ethical Standards for Practitioners

- **Virtually all difficult ethical problems arise from conflicts between a practitioner's responsibilities:**
 - 1. to clients,**
 - 2. to the tax system, and**
 - 3. to the practitioner's own interest in remaining an ethical person while earning a satisfactory living.**

Authorities Relating to Tax Court Practice

- **Principal Authorities**

1. Tax Court Rules of Practice and Procedure
2. ABA Model Rules of Professional Conduct

- **Other Authorities**

1. State Bar Ethical Rules
2. ABA Ethical Opinions
3. AICPA Statements on Standards for Tax Services
4. Circular 230
5. Civil Penalty Standards
6. Criminal Penalty Standards

Tax Court Rules of Practice and Procedure

1. Rule 24(a) Appearance
2. Rule 24(c) Withdrawal of Counsel
3. Rule 24(g) Counsel's Obligations Regarding Conflict of Interest
4. Rule 201(a) Counsel's Obligation To Follow ABA Model Rules of Professional Conduct
5. Rule 201(b) Court's Authority To Require Statement Regarding Terms of Employment

ABA Model Rules of Professional Conduct

- **A. Client-Lawyer Relationship**

1. Rule 1.1 Competence
2. Rules 1.7, 1.8 Conflict of Interest: Current Clients
3. Rule 1.9 Duties to Former Clients
4. Rule 1.10 Imputation of Conflicts of Interest: General Rule
5. Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees
6. Rule 1.16 Declining or Terminating Representation
7. Rule 1.18 Duties to Prospective Client

ABA Model Rules of Professional Conduct

- **B. Advocate**

1. **Rule 3.1 Meritorious Claims and Contentions**
2. **Rule 3.2 Expediting Litigation**
3. **Rule 3.3 Candor Toward the Tribunal**
4. **Rule 3.4 Fairness to Opposing Party and Counsel**
5. **Rule 3.7 Lawyer as Witness**

ABA Model Rules of Professional Conduct

- C. Transactions with Persons Other Than Clients
 1. Rule 4.2 Communication with Person Represented by Counsel
 2. Rule 4.3 Dealing with Unrepresented Person

Hypothetical 1: The Charitable Donation.

Can You Advise the Accountant?

- Your best client, who owns a real estate development company, calls you on October 10th and says:

Last year, one of our family partnerships donated a conservation easement on some property we own to a conservation trust. My siblings and I are partners. My accountant is telling me that that is a tax shelter and that we shouldn't take a deduction for a charitable contribution. The guy from the conservation trust told us this was standard stuff. Can you tell the accountant it is ok?

Issues that Arise

1. Why are they calling you?
2. Are you the preparer?
3. What standards apply?
4. What advice can you give?
5. How do you proceed in the compressed time frame?

Discussion Points

1. ABA Model Rules 1.1 and 1.3 (competence and diligence).
2. Cir. 230, secs. 10.22, 10.33, 10.34, and 10.35 (diligence, best practice, and standards for advice and competence).
3. IRC secs. 6662, 6664, 6694 and 7701 (substantial understatement penalty, substantial understatement penalty for reportable transactions, reasonable cause, and definition of preparer).
4. IRS Notice 2017-10 (listing notice for syndicated conservation easement transactions).

Hypothetical 2: The Charitable Donation. Can You Represent the Client(s)?

- Your client and his wife file a joint return claiming the deduction.
- A couple of years later, the return is audited and client asks you to handle the audit.
- After the audit, the IRS issues a statutory notice of deficiency disallowing the deduction and asserting an accuracy-related penalty. The client asks you to file a petition.

Issues that Arise

1. Do you represent both husband and wife?
2. Is there a conflict between husband and wife?
3. Is there a conflict between lawyer and client?

Discussion Points

1. ABA Model Rules 1.7, 1.8, 1.18, and 3.7 (conflicts of interest between current and former clients, duties to prospective clients, lawyer as witness).
2. Tax Court Rules 24(g) and 201(a).
3. Cir. 230, sec. 10.29 (conflicts of interest).

Hypothetical 3: The Charitable Donation. Now Things Become Really Taxing.

- At trial, your client insists that you provide evidence that he was planning to develop the property prior to creating the conservation easement, but you are concerned that your client never had any real plans to do so.
- You call him as a witness, and, on the stand, he blurts out that he had development plans, and you believe that he is lying?
- As part of the penalty defense, you seek to introduce your own email to the client stating the donation should be deductible.

Issues that Arise

1. What are your duties to client?
2. What are your duties to the system?
3. What questions should you ask?
4. Do you have to withdraw?
5. If so, how do you withdraw?

Discussion Points

- ABA Model Rules 1.2, 1.3, 1.16, 3.3, and 4.1 (scope of representation, diligence, termination and withdrawal, candor to the tribunal, truthfulness to others).

Hypothetical 4: Candor and Truthfulness

- At calendar call, you volunteer to represent low-income taxpayer in a substantiation case. You review your client's evidence and a stipulation already signed and discover that a receipt supporting one sizable expenditure is for an expenditure made for a year not in issue.

Issues that Arise

1. What is your obligation to the client?
2. What is your obligation to the court?
3. Can or must you tell respondent's attorney that the stipulation is incorrect?
4. What if the client instructs you not to do so?
5. Does it matter if you have not yet entered an appearance?

Discussion Points

1. ABA Model Rules 3.3, 4.1.
2. Tax Court Rule 91.

Hypothetical 5: Volunteer Counsel. Conflicts and Confidentiality.

- You have volunteered to counsel unrepresented petitioners at calendar call. Mrs. Smith approaches you and explains that she and her husband, who is parking the car, got audited by the IRS, and she thinks it has to do with him taking a deduction for a child from his prior marriage. She relies upon her husband to take care of these things, but, when she notices a letter from the Tax Court saying to show up for trial, she convinced him to attend. He should arrive shortly.
- You and Mrs. Smith talk about the case. She discloses some confidences that (1) indicate that perhaps she may have the right to ask for innocent spouse relief and (2) her husband has a pending suit against one of the businesses that your firm represents. You are not involved with or familiar with that matter.
- Mr. Smith shows up at that point.

Issues that Arise

1. After receiving confidences from Mrs. Smith, can or should you talk with Mr. Smith?
2. Assuming you conclude that Mr. and Mrs. Smith do not have opposite interests (e.g., Mrs. Smith does not have a viable innocent spouse claim), can you continue to advise Mr. Smith?
3. Can you disclose that confidential information if you do not enter an appearance for Mr. Smith?
4. When does an attorney-client relationship begin?

Discussion Points

1. ABA Model Rules 1.6, 1.7, 1.8 and 1.10.
2. Tax Court Rule 24(g).
3. What if Mr. Smith supports Mrs. Smith request for innocent spouse relief?
4. Can an ethical wall allow pro bono attorney to represent Mr. Smith?

Hypothetical 6: Limited Scope Representation

- Angela is an IRS Counsel attorney litigating a deficiency case docketed in the Tax Court. Angela knows that the pro se petitioner in this case has a Form 2848 representative, Jeremy, who is an attorney. The Form 2848 covers the tax year before the court. Jeremy calls Angela to explain that he represented the petitioner before Exam and is going to continue to work with the petitioner while the case is pending in Tax Court, but he does not want to enter an appearance unless he absolutely has to and prefers having the petitioner sign all of the documents.

Issues that Arise

1. To what extent may Angela work with Jeremy with respect to petitioner's case?
2. Does the result change if Angela is not aware of any Form 2848 representative, and receives no call, but notices that the petition is drafted with the skill ordinarily attributable to a skilled tax attorney?
3. In what low-income taxpayer clinic situations might these issue arise?

Discussion Points

1. ABA Model Rules 1.0(f), 1.2(c), 4.2 and 4.3.
2. Tax Court Rules 21, 24, 50, 70(a), 71(a), 72(a), 74(b).
3. ABA Formal Opinion 472.
4. Chief Counsel Notices 2014-003, 2017-006, 2017-007.
5. IRC sec. 6103.

Hypothetical 7: Promoter's Conflicts of Interest as Attorney and Witness

- IRS Counsel attorney Robert is preparing to file an answer in a case where the IRS asserts the petitioner participated in an abusive offshore employee leasing program. The petitioner is represented in the case by attorney Jack. In reviewing the administrative file, Robert discovers that Jack was the attorney who marketed the offshore employee leasing program to the petitioner. In the notice of deficiency, the IRS took the position that the transaction lacks economic substance and asserted the I.R.C. § 6662 penalty.

Issues that Arise

1. Are there any potential conflicts with attorney Jack's continued representation of petitioner?
2. What steps should Robert take to discuss those potential conflicts with Jack?
3. Can petitioner waive those potential conflicts?
4. May Jack continue to represent petitioner? In what capacity?
5. Do any of the answers change if Robert is not aware of the potential conflict until petitioner files his pretrial memo 14 days before trial?

Discussion Points

1. ABA Model Rule 1.7, 3.7.
2. Tax Court Rule 24.
3. Chief Counsel Directive Manual 35.4.1.8.2.
4. Involvement of IRS procedures in addressing conflict issues.
5. Language differences between T.C. Rule 24(g) and ABA Model Rule 3.7.
6. Methods to obviate conflicts.
7. What is “advocacy” for purposes of the lawyer-as-witness issue?

Hypothetical 8: Former Government Attorney's Conflict and Imputation to the Firm

- At a conference about widgets, a large company named We Love Widgets Too, Inc., sought out Alexander, a senior associate in Tax Law, LLC, for purposes of engaging the LLC to draft a private letter ruling (PLR) request for it on how their upcoming transfer of various widgets to a third party would be taxed. Alexander is very pleased with himself because he feels he is beginning to bring in business to the firm. Additionally, the nature of this work – the taxation of widgets – is particularly gratifying given it is the area of expertise of Shelley, the managing member at the LLC, who is Alexander's mentor and role model. In fact, Shelley worked as a manager in the IRS Office of Associate Chief Counsel, National Office, at the time the regulation titled How Widgets Should be Taxed was promulgated and worked on many PLRs addressing that issue.

Issues that Arise

1. Under ABA Model Rule 1.9 what is meant by the same or a substantially related matter?
2. Under ABA Model Rule 1.11(a)(2) what is meant by “participated personally and substantially as a public officer or employee”?
3. Under ABA Model Rule 1.11(b), what constitutes “knowingly” undertaking or continuing representation?
4. How might Circular 230 sec. 10.25 or other authority apply to this situation?
5. Will an ethical wall work?

Discussion Points

1. ABA Model Rules 1.9(c), 1.11.
2. 18 USC secs. 203, 207.
3. 5 CFR Part 2641.
4. Circular 230, sec. 10.25.

Hypothetical 9: Know Your Client

- You are contacted by a prospective client who found your name on the web. He sends you a statutory notice of deficiency based on unreported income and unsubstantiated deductions and proposing a civil fraud penalty or, in the alternative, an accuracy-related penalty. You have a meeting with the client at which he provides information and documents sufficient to support a petition assigning error to the notice. It is clear that English is not his primary language. You file a petition and are contacted by an Appeals officer. There is a lot of haggling and, with your client's consent, you agree to a deficiency without a fraud penalty. Counsel and you execute a stipulation of settled issues, and the Court enters a decision. You say "farewell" to the client.
- Two years later, former client shows up at your office with another man, his brother, who speaks no English, but who wants you to represent him during a witness interview with IRS CI involving a business associate. You discover that, two years past, it was that brother to whom the statutory notice had been issued, but, since his English was so poor, the first man had represented himself as his brother to "facilitate communications."

Issues that Arise

1. Duty to “know your client”.
2. What are your current ethical obligations, if any, to the IRS, both Appeals and Counsel? Does Circular 230 apply?
3. What are your current obligations, if any to the Tax Court?
4. If the case had proceeded to trial, how might your obligations have changed?
5. Will you represent brother during CI interview?

Discussion Points

1. Circular 230 Rules 10.2(a)(4); 10.21; 10.22; 10.34(b), (d); 10.35; 10.51(a)(4); 10.51(a)(18).
2. ABA Formal Opinion 314 (1965); 346 (revised 1982); 479 (12/15/17).
3. Tax Court Rules 33(b); 60(a); 122(a); 155; 160; 161; 162.
4. ABA Model Rules of Professional Conduct, Rules 1.1; 1.2(d); 1.6(b); 1.16; 3.3; 3.4; 4.1.

Hypothetical 10: Privilege/Confidentiality

- Client is planning a restructuring and the bank requires a joint memorandum from client's accountant and attorney explaining the tax aspects. Client shares that memo with the bank.
- Client's return is audited. The IRS requests a copy of the memorandum.

Issues that Arise

1. Is the memo if it is joint subject to the evidentiary privilege?
2. What if there were two separate memos?
3. What if anything does the prior disclosure of the memo to the bank do to the privilege?
4. How do you raise the privilege with the IRS auditor?

Discussion Points

1. Circular 230, sec. 10.20.
2. ABA Model Rules of Professional Responsibility.
3. IRC sec. 7525.
4. Federal Rule of Evidence 501.
5. Common interest doctrine.
6. Work product protection.