

# **Ethics and Expected Changes To Circular 230**

**Federal Bar Association  
25th Annual Insurance Tax Seminar  
May 30, 2013**

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**J.W. Marriott**  
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**I. Ethics and the Federal Tax Practitioner – Introduction**

- A. Although rules of professional conduct and other standards for tax practice often prescribe terms for resolving ethical conflicts, many difficult issues of professional discretion may be resolved only through the exercise of sensitive professional judgment. See Preamble and Scope, ABA Model Rules of Professional Conduct. In advising a client, a lawyer may refer not only to the law, but other considerations such as moral, economic, social and political factors that may be relevant to the client's situation. See Rule 1.1, ABA Model Rules of Professional Conduct.
- B. Tax lawyers are subject to several types of rules governing their practice. The ABA Model Rules, State Bar rules, ABA ethics opinions, judicial opinions, Circular 230 (31 CFR part 10), Internal Revenue Code and attendant regulations, may provide guidance to lawyers depending on the circumstances.
- C. Although a lawyer's primary duty is to the client, a lawyer also has a duty to the legal process that prevents the lawyer from deliberately or affirmatively misleading the Internal Revenue Service, either by misstatements or by silence permitting the client to mislead. See Preamble, ABA Model Rules of Professional Conduct, ABA Formal Opinion 314.

**II. Competence**

- A. A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation. See Rule 1.1, ABA Model Rules of Professional Conduct. A lawyer's breach of an ethical duty may constitute a lack of competence.
- B. 31 U.S.C. 330 requires that an individual who practices before the Service have the necessary qualifications to enable the person to provide valuable services, and the competency to advise and assist persons in presenting their cases.
- C. Competent representation requires an attorney to know when the individual does not have the expertise to handle a matter, and to rectify the deficiency

by declining representation, acquiring the expertise, or associating with a lawyer of established competence in the field. See Comment 2, Rule 1.1, Model Rules of Professional Conduct.

1. An attorney can provide competent representation in a wholly novel field through “necessary study”, but the attorney cannot expect the client to pay for the lawyer’s education or excessive amounts for tasks that become routine with experience.
2. A practitioner may rely on another professional if the practitioner used reasonable care in engaging and evaluating the other professional. See Circular 230, sec. 10.22(b).

### III. Due Diligence

- A. A lawyer must act with reasonable diligence and promptness in representing a client. See Rule 1.3, ABA Model Rules of Professional Conduct.
- B. A lawyer has a duty to make a reasonable inquiry as to the facts and law on which Tax Court pleadings are based. See Rule 11(b), Federal Rules of Civil Procedure; Rule 33(b), Tax Court Rules of Practice and Procedure.
- C. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to pursue a client’s interests. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may exercise professional discretion in determining the means by which a matter should be pursued. The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. See Comment 1 to Rule 1.3, ABA Model Rules of Professional Conduct.
- D. A lawyer must exercise due diligence in preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters. See Circular 230 sec. 10.22(a)(1).
- E. A lawyer must exercise due diligence in determining the correctness of oral or written representations made by the practitioner to the IRS or made to clients about any matter administered by the Internal Revenue Service. See Circular 230, sections 10.22(a)(2) & (a)(3).
- F. A practitioner who knows that the client has not complied with tax law or has made an error in or omission from a return must advise the client of the error or omission and attendant consequences. See Circular 230, sec. 10.21.

#### IV. Scope of Representation

- A. A lawyer must follow the client's decisions regarding the objectives and purposes the legal representation within the bounds of the governing ethical and legal obligations. Rule 1.2(a), Model Rules of Professional Conduct. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. See Preamble, ABA Model Rules of Professional Conduct.
- B. A lawyer and client may agree to limit the scope of representation when the limitation is reasonable under the circumstances and the client gives informed consent. Rule 1.2(c), ABA Model Rules of Professional Conduct. A limitation is not reasonable, however, if the attorney is not given sufficient time to permit the attorney to yield advice upon which the client could rely. Comment 7 to Rule 1.2(c).
- C. A lawyer must consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by ethical rules or other law. Rule 1.4(a)(5), ABA Model Rules of Professional Conduct.

#### V. Zealous Advocacy and Fairness to Opposing Party and Counsel

- A. A lawyer has an obligation to zealously protect and pursue a client's legitimate interests within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system. See Preamble, ABA Model Rules of Professional Conduct.
- B. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. See Comment 1 to Rule 1.3, ABA Model Rules of Professional Conduct.
- C. A lawyer shall not:
  - 1. Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A practitioner shall not counsel or assist another person to do any such act;
  - 2. Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
  - 3. Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
  - 4. Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party; ... or

5. Request a person other than a client to refrain from voluntarily giving relevant information to another party

See Rule 3.4, ABA Model Rules of Professional Conduct

## VI. Communication with the Client

- A. A lawyer must reasonably consult with the client about the means by which the client's objectives are to be achieved and keep the client reasonably informed about the status of a matter. Rule 1.4, ABA Model Rules of Professional Conduct; Baker v. Humphrey, 101 U.S. 494, 500 (1879) ("it is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive").
- B. Generally, a lawyer must inform the client about any settlement offer. In re Steele, 868 A.2d 146 (DC 2005).
- C. A lawyer must promptly comply with reasonable requests for information. Rule 1.4, ABA Model Rules of Professional Conduct. Generally, a practitioner must return the records of a client upon request that are necessary for the client to comply with Federal tax obligations. See Circular 230, sec 10.27(a).

## VII. Conflicts of Interest

- A. A lawyer shall not represent a client or, when representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law. See Rule 1.16(1), ABA Model Rules of Professional Conduct
- B. A practitioner shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent 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 lawyer.
  3. Exception:
    - a. reasonable belief that the practitioner will be able to provide competent and diligent representation to each affected client;
    - b. representation is not prohibited by law;

- c. representation does not involve the assertion of a claim by one client against another client represented by the practitioner; and
- d. each affected client gives informed consent, confirmed in writing.

See Rule 1.7(a), ABA Model Rules of Professional Conduct

- C. A practitioner who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, unless each client gives informed consent, in a writing signed by the client. The practitioner's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. See Rule 1.8(g), ABA Model Rules of Professional Conduct
- D. A practitioner shall not accept compensation for representing a client from one other than the client unless there is no interference with the practitioner's independence of professional judgment or with the client-practitioner relationship. See Rule 1.8(f), ABA Model Rules of Professional Conduct.

### **VIII. Candor to the Tribunal/Administrative Agency**

- A. In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a tribunal or third person, or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. See Rules 3.3 & 4.1, ABA Model Rules of Professional Conduct.
- B. A lawyer appearing before legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity must deal with it honestly and in conformity with applicable rules of procedure. See Comment 1 to Rule 3.9, ABA Model Rules of Professional Conduct.
- C. A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. ABA Formal Opinion 314.
  - 1. Misrepresentations can occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.
  - 2. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

## **IX. Meritorious Claims & Contentions**

- A. A lawyer shall not assert or controvert an issue unless there is a basis in law and fact for doing so that is not frivolous. See Rule 3.1, ABA Model Rules of Professional Conduct.
- B. An action is frivolous if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law. See Comment 1, Rule 3.1 ABA Model Rules of Professional Conduct.
- C. An Advocate has a duty not to abuse legal procedure. See Rule 3.1, ABA Model Rules of Professional Conduct, Comment 1.

## **X. Confidentiality**

- A. A lawyer must not reveal information relating the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation or otherwise permitted under the ABA Model Rules of Professional Conduct or other law. Rule 1.6, ABA Model Rules of Professional Conduct.
- B. The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rules of confidentiality established in professional ethics. Comment 3, Rule 1.6, ABA Model Rules of Professional Conduct.
- C. A lawyer is required to act competently to safeguard information related to the representation of a client against inadvertent or unauthorized disclosure. Comment 16, Rule 1.6, ABA Model Rules of Professional Conduct.

## **XI. When the Client is an Organization**

- A. A lawyer employed by an organization represents the organization acting through its duly authorized constituents. The lawyer must act in the best interests of the organization rather than any one constituent in the organization. A lawyer with the organization as the client may have special reporting duties under ABA Model Rule of Professional Conduct 1.13 when the lawyer knows that a person associated intends to act in a manner that is a violation of the law and that is reasonably likely to result in substantial injury to the organization. See Rule 1.13, ABA Model Rules of Professional Conduct.
- B. The duty to the organizational client in Rule 1.13 applies to governmental organizations. When the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring

that a wrongful act is prevented or rectified, because public business is involved. Comment 9, Rule 1.13, ABA Model Rules of Professional Conduct.

## **XII. Fees**

- A. A lawyer's fee must be reasonable under the circumstances and not unconscionable. See Model Rule 1.5, ABA Model Rules of Professional Conduct, Circular 230 sec. 10.27. Rule 1.5 provides a non-exhaustive list of factors to be considered when determining the reasonableness of a fee.
- B. A fee with terms that would induce the lawyer to improperly curtail services to the client or perform them in a way contrary to the client's interest is not reasonable. Comment 5, Rule 1.5, ABA Model Rules of Professional Conduct.
- C. A lawyer may charge a fee contingent on the outcome of the matter for which the fee is charged unless prohibited by law. Contingent fees generally may not be charged for services rendered in connection with a matter before the Service except in the limited circumstances set forth in Circular 230.

# Hypothetical # 1

Melissa, a sole practitioner, represents Wilson in connection with a Whistleblower claim he filed with the IRS reporting on his former employer, IN THE BLACK Insurance. Perry is Melissa's fiancée and an equity partner in the San Diego office of a national accounting firm. Two days before the wedding, Perry receives a call from Chad, a partner in the firm's New York office. The revenue agents examining Chad's longstanding client, BLACK & BLUE Holding, are expanding the scope of the audit because they want to take a look at losses claimed by BLACK & BLUE Holding's subsidiary, IN THE BLACK Insurance. One of the revenue agents will be travelling to San Diego in two weeks to review the books and records of IN THE BLACK. Because other revenue agents will continue working in BLACK & BLUE Holding's New York office, Chad can't travel to San Diego, so he asks Perry if he is available to represent IN THE BLACK during the agent's visit.

## Hypothetical # 2

Peter, a partner in the insurance group of a large law firm, previously was a principal at a large accounting firm where he issued several tax opinions on an investment opportunity sold to several insurance companies. Barbara, Peter's partner at the law firm, is representing Peter in a OPR disciplinary proceeding concerning a tax opinion he gave BIG Insurance on this investment opportunity while at the accounting firm. Jan, tax counsel for Gigantic insurance company, has asked Barbara to represent her company in a Tax Court proceeding concerning the same investment opportunity. Jan tells Barbara that her company received a more likely than not opinion on the transaction from Joe, a principal at Peter's old accounting firm. Peter did not write (or work on) the opinion that Gigantic received, but the opinion Gigantic received is similar to the one Peter provided to BIG.

## Hypothetical # 3

Thomas is a first-year associate with a boutique tax controversy firm representing WE LOVE OUR CLIENTS Insurance Company before IRS Appeals. While reviewing the file, Thomas attends the firm's ethics training for new associates, where Fred, the firm's General Counsel, tells everyone that their firm is always concerned about doing the right thing and that if they have any issues to come see him. Later that week, Thomas finds four (4) e-mails between the CEO of WE LOVE OUR CLIENTS and the company's Comptroller concerning one of the transactions that the IRS had under examination. Thomas discovers that none of the e-mails were turned over in response to the IRS's IDRs for e-mail related to the transaction, although he does not believe that they were privileged. Thomas mentions the e-mails to Joan, the partner who is representing WE LOVE OUR CLIENTS before Appeals and who represented the company during the examination. Joan tells Thomas not to worry about it because the audit team set the company up for an adjustment even without the e-mails.

## Hypothetical # 4

Corrine is a lawyer and the Director of Tax at Life's Too Short Insurance. Life's Too Short Insurance uses Pam, a principal at a reputable accounting firm, to prepare its tax returns, but Corrine is responsible for reviewing the return to ensure that the return is accurate and complete. In 2012, the CEO of Your Best Policy Incorporated contacts the CEO of Life's Too Short to discuss a possible merger. During the talks, Your Best Policy request the tax returns for Life's Too Short for the past 6 years. While reviewing the returns, Your Best Policy's accountants notice that Life's Too Short did not timely file its request to extend the time to file it's 2010 tax return, making the return for 2010 five month's late. Although Life's Too Short's 2010 tax year is currently under examination, the agents have not asserted a late filing penalty.

# Hypothetical # 5

Jessica, a partner in the insurance group of a large law firm, is a former attorney for the Department of Justice's tax division. Jessica teaches an insurance tax class in University's LLM program. While discussing the court's opinion in a case in which Jessica represented the United States, Jessica noted that the IRS had included an update of the regulations at issue in the case on its guidance plan for the upcoming year. Jessica says she has spoken to a few former colleagues at the Department of Justice who speculate that the purpose of the regulations project is to "in effect" reverse the adverse opinion issued by the district court. Jessica asks Vera, an IRS attorney, enrolled in Jessica's class if she knows if that is correct. Vera is not working on the regulations project, but she has spoken to Stacey, a colleague who is working on the project, and knows that the purpose for the regulations project is to make a technical correction unrelated to the litigation.

# Hypothetical # 6

The IRS has published proposed regulations on demutualization. Early press reports suggest that the regulations make hard choices that has some believing there are a few “winners” and several “losers”. Thad is outside counsel to a national trade association whose members generally believe they are among the “losers”. Thad drafts comments on behalf of the association supporting a withdrawal of the proposed regulations. At the agency’s public hearing, Thad responds to a panelist’s question about the reasonableness of the proposed rule by stating that the regulations are “completely unreasonable”. Thad also starts a letter writing campaign among his association’s members advising them to write their Congressional delegations to request legislation to override the proposed regulations because the “regulations are baseless and unreasonable”. During lunch with Emily, a friend in the Insurance Tax Bar, Thad admits that, although the regulations do not favor the companies his association represents, they are neither “unreasonable” nor “baseless”.

## Hypothetical # 7

Wendy is the CFO of WE'VE GOT YOU COVERED, a life insurance company. WE'VE GOT YOU COVERED uses a reputable accounting firm to prepare its tax returns and occasionally provide tax advice. Wendy occasionally "verifies" the opinions the company receives by talking informally to her brother-in-law Frank, a lawyer who was an associate at a boutique tax firm from 2005 to 2010. WE'VE GOT YOU COVERED did not timely pay its employment taxes for six months in 2009 due to a financial crisis caused by the general economic downturn. The IRS is now seeking the missed payments. At Frank's suggestion, Wendy hires Joe, a partner at the boutique tax firm where Frank worked from 2005 to 2010, to represent the company. During a meeting with Wendy, Joe asks who made the decision not to pay the employment taxes and how the decision was made. Wendy advises that the CEO made the decision on Wendy's recommendation. Wendy explains that, while the accounting firm had recommended against "borrowing" the employment taxes to pay other creditors, she made her recommendation to the CEO after conversing with Frank at dinner one evening.

# Hypothetical # 8

Alexis is an associate at a boutique tax controversy law firm representing an Insurance Company in a Tax Court proceeding. Alexis assisted in the preparation of the petition and attended the entire trial, but never entered an appearance in the case. In reviewing the government's Rule 155 computations for Paul, a partner and the lead attorney on this case, Alexis identifies 2 omissions:

- A \$10 million concession the government made on answer
- A \$15 million loss that the parties had stipulated should have been disallowed.

Alexis discusses the omissions with Paul who tells her to contact opposing counsel about the government's concession on answer. Paul provides no instruction on the loss. Opposing counsel tells Alexis she will update the computations to reflect the concession and asks if there is anything else.