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HOUSTON LAW CENTER
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Tax Ethics Course Syllabus

Cummings and Prescott

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Assigned Materials: Assigned cases and other materials either are reproduced below or are available online through Lexis or RIA Checkpoint or appear in Wolfman, Schenk and Ring, Ethical Problems in Federal Tax Practice (Aspen 2008) ("Wolfman"). Specifically, all code sections, regulations, rulings and cases assigned that are not in Wolfman are available online. **PLEASE MAKE ARRANGEMENTS WITH THE SCHOOL TO HAVE ACCESS TO Lexis AND RIA Checkpoint BEFORE CLASSES START.**

Approach of Course: These Lessons reflect the subject matters addressed by the ABA Model Rules of Professional Conduct that are particularly pertinent to tax practice (principally federal tax practice, although the same considerations generally apply to state tax practice). The course's premise is that the students can better grasp the peculiarities of tax ethics in contrast with, or relation to, what they already know. Although the course assumes familiarity with the Model Rules, it can serve as a general refresher on many of its subjects. The entire Model Rules and Comments are available on the ABA website (and can be searched on Lexis), but most of the relevant parts and official comments are reproduced below.

The peculiarities of tax ethics are enough to base a course on, primarily because of one fact: the taxing authority, here the IRS, does not occupy the position of an adversary in a traditional legal dispute with the taxpayer (your client), because the government has seen fit to impose on taxpayers, and their representatives, certain duties to which regular disputants and their counsel are not subject.

This somewhat surprising arrangement is easy to overlook for a variety of reasons (although it has become much more intrusive recently, as government enforcement efforts have stepped up as perceptions of tax avoidance have mounted): it is counterintuitive, and there is no single source of the applicable rules in the code (although there is a single set of rules of practice before the IRS in Circular 230, portions of which are bolded and juxtaposed below to the parallel parts of the Model Rules). Most of this course will be devoted to addressing these peculiarities from different angles, and in various settings.

Class Participation: Students will be called on to answer the questions and problems in the assignments and to discuss assigned authorities. We reserve the right to raise or lower your grade one notch (i.e., one-third of a grade) based on class participation.

Exam: There will be a two-hour open-book examination at the end of the course. The final exam will consist of a timed essay that will count 2/3 and short answer questions that will count 1/3. Your final grade will be based upon your grade on the examination, with a possible one-notch upward or downward adjustment for class participation.

Special Needs: Any student with special needs should make the teachers aware as soon as possible.

First Class Assignment: Introduction Lesson and Lesson One, 1, 2 and 3.

CONTENTS

Lesson Six: Information about Legal Services

1. Solicitation

Lesson Seven: Maintaining the Integrity of the Profession/Malpractice

1. IRS Office of Professional Responsibility
2. Malpractice

Appendix: Selected ABA Model Code of Professional Responsibility Rules and Official Comments; selected portions of IRS Circular 230; selected ABA Ethics Opinions and other selected materials.

LESSONS

Introduction: Ethics Don't Necessarily Come Naturally

ASSIGNMENT:

"The Fall of Andersen," Chicago Tribune Sept. 1, 2002, C-1; "Capstone Case Study on Organizational Architecture: Arthur Andersen LLP"; Boyer, "The Bribe," The New Yorker p. 44 (May 19, 2008); Cummings, "Chief Tax Officer Reporting Structures," The Tax Advisor, p. 620 (Oct. 2005, AICPA). [Either hard copies will be made available before classes start or they will be placed online with these materials.]

QUESTIONS:

(1) Sometime in the 1990s Arthur Andersen changed its logo from a pair of closed heavy wooden office doors, which had actually been the main entrance to its Chicago home office, to the rising sun. What bearing might this have had on the firm's ethics, or was the change in compensation determination more important? Identify as many factors as you can that might have led AA to be complicit in Enron's failures

(2) Did the Mississippi trial lawyer set out to commit a crime? Were the factors that got Scruggs in trouble the same as or different from the factors that affected AA, and if different, what were they?

(3) What effect do you think making the corporate tax department a "profit center" has on the conduct of the tax officers? Could the "profit center" concept have affected Enron's tax officer?

Lesson One: Client-Lawyer Relationship

1. Diligence: the importance of facts in tax practice

ASSIGNMENT:

Model Rules: 1.1 and Comment, 2.1 and Comment [3], 3.1 and Comment [2], 3.3

ABA Ethics Opinions: 314, 346 (Making Factual Inquiry), 85-352

Circular 230: §§10.22, 10.33(a)(2), 10.34(d), 10.35(c)(1), 10.37, 10.51(a)(4) and (13)

IRC: §§6694(a)(2), 7201

18 USC §1001

Regs: §1.6694-1(e); Prop. Reg. §1.6694-1(e), -2(b)(1) and (2), (c)(2) (2008)

Federal Rules of Civil Procedure, Rule 11

Issues: (1) what is (are) the standard(s) for verifying facts relevant to client's tax outcome; (2) what is (are) the standard(s) for making factual assumptions in advising client on tax outcome? [We will return to these issues in relation to tax return preparation and shelters and advice generally.]

Comment: The massive and convoluted nature of the federal income tax law tends to encourage disregard of the importance of the facts of the client's transaction. In contrast, no student of the common law would denigrate the facts of a tort or contracts or criminal case. Because a tax code is definitely not common law, its rules tend to be promoted in importance by comparison to the facts. This is obviously a huge error, as this first Lesson tries to show. It may partly explain the tax-specific treatment of certain facts like agency (see Supreme Court decisions in Moline Properties, National Carbide, Bollinger, Cumberland Public Service and Court Holding Company) and debt v. equity, and the mostly tax-unique doctrines "substance over form," "economic substance," "step transaction" and "assignment of income."

QUESTIONS:

1. How does the attorney's duty to diligently ascertain the facts of a client's case differ, depending on whether the case is subject to (1) the general ethical duties of a lawyer under ABA Model Rules, (2) the ethical duties of a tax lawyer under ABA Model Rules and Ethics Opinions, (3) the particular ethical duties of a tax lawyer advising with respect to a "tax shelter" under ABA Model Rules and Ethics Opinions, (4) the duties imposed by Circular 230 on a tax lawyer advising generally or with respect to a "listed transaction," (5) the duties of a tax return preparer under §6694? Are there other possibly applicable rule regimes?

2. To what extent/when can you rely on your client's agreement that you will assume a fact related to the client's case that has substantial relevance to your advice on the case? What are the competing model rules? Is reliance upon an assumption the same as reliance upon a client's representation of facts?

3. You are advising Bigco, which has operated as a conglomerate for 75 years. Its General Counsel informs you that its aircraft engine, appliance and financial businesses

can no longer be managed in one corporation (or actually within one corporate group) and it needs to be split up and they expect you to opine that §355 will apply. The stated business purpose for the split-up is to allow each line of business to be better managed by management dedicated to the business. Do you ask the General Counsel how Bigco has managed to get along as well as it has as a conglomerate for decades, or do you accept the representation as adequate proof of a business purpose? What other reasons might Bigco have to want to split up? Can you rely on the "course of conduct" in the rulings/opinion practice?

2. Communications: function and scope of tax advice

ASSIGNMENT:

Model Rules: 1.1, 1.2, 1.4(a)(1) and Comments

Circular 230: §10.33(a)(3), 10.34(b) and (c), 10.35(c)(3)(v), (e)(3), (4), (f)(1)

IRC: §§ 6662(b)(1) and (2), (d)(2)(B) and (C), 6664(c), 6694(a); also scan 6111, 6112, 6662A, 6663, 6664, 6672, 6676, 6695(a) 6707, 6707A, 6708 [This is not a complete list, but is most of the penalty sections, for scanning only.]

Regs: §1.6662-3(a),(b)(2) and (3), 1.6664-4(c)

Prop. Reg: §1.6694-2(c)(1) and (2)

Cases: *Patridge v. J.K. Harris & Co.*, 101 AFTR 2d 2008-2394 (7th Cir. 2008)

Wolfman, pp. 292-294

Issues: (1) making sure you and your client know and agree upon the scope of your duties; (2) making sure you and your client know and agree upon the fees; (3) communicating with the knowledgeable client versus the unknowledgeable client; (4) the critical need to communicate the taxpayer's duties and potential penalties applicable to taxpayer. [We will return to issue (4) in connection with the counselor function, advice generally, shelter advice, tax return preparation, below.]

Comment: Most of this Lesson overlaps general good practices and will not require much attention except for issue (4). The duties that the tax laws place on taxpayers are substantial, the penalties are high, and equity for the taxpayer is scarce to nonexistent. The tax advisor has a duty to protect the taxpayer and communication is the primary tool.

It is not possible to overcommunicate. However, be wary of appearing to "pad the file"with unnecessary communications that the client will pay for.

PROBLEMS:

1. J.K. Harris at least wrote down some sort of scope of duties memorandum. Do you think this is typical with business clients? Was there something about the Patridge case, or the business J.K. Harris was in that made this particularly prudent? In hindsight did J.K. Harris do enough to delineate its duties?

2. Under what circumstances may a lawyer limit the scope of representation of a client who requests scaled-down tax advice because (1) the amount at issue is small, (2) the client cannot afford more extensive advice, (3) the client is under time constraints that preclude more extensive consideration? What does "scaled down" mean and who "suffers" from scaled down advice?

3. Prop. Reg. §1.6694-2(c) will require you to provide certain tailored advice to your client if you (1) are a return preparer, and (2) cannot give a more likely than not opinion for the position your client will take on her return. What will this advice be, and how does it correlate your duties and the client's duties? Will the advice be in writing and will you retain a copy? What duty do you have to warn your client about possible penalties if you are not a return preparer (for example, the transaction at issue has not occurred when you give your advice), and you (a) have a reasonable basis for the planned reporting position, or (2) have a more likely than not basis?

4. Under what circumstances other than as required by Prop. Reg. §1.6694-2(c) are you required to inform your client of possible penalties and how to avoid them, and when might that involve reliance on your opinion?

3. <u>Contingent fees for tax representation</u>

ASSIGNMENT:

IRC: §6664(d)(3)(B)(ii)(III)

Model Rule: 1.5 and Comment

Circular 230: §10.27

ABA Opinion: 94–389 [for additional information on contingent fee ethics]

Issue: pre-return versus post-return representation and payment therefore.

QUESTION:

1. Can you charge a contingent fee for tax planning like this: the client pays you $10,000 now and if the IRS does not challenge the item or challenges it and the client prevails you get another $50,000 plus FMV time and expenses for defending the challenge if it arises? Alternately, you get paid FMV time and expenses for the planning and agree to arrange a contingent fee if and when the item is challenged. Why does the Treasury Department need to regulate fee arrangements in the tax area? What do the

prohibited contingent fee areas of planning and pre-litigation refund claims have in common?

4. Privileges of the tax client

ASSIGNMENT:

Model Rules: 1.0(m), 1.2(d), 1.4, 1.6(a),(b) 3.3(a), 4.1(b), 8.4(c) and Comments

ABA Opinions: 314, 99-413

Circular 230: §§10.20, 10.51(d)

IRC: §§ 7201, 7203, 7206(2), 7210, 7212, 7216, 7269, 7342, 7461, 7521, 7525, 7602, 7609, 7612

18 USC 1001

Cases: *Fisher v. U.S.*, 425 US 391 (1976); *U.S. v. Arthur Young & Co.*, 465 US 805 (1985) [Wolfman at 220-224]; *Bradford C. Bernardo*, 104 TC 677 (1995); *US v. Textron*, 507 F. Supp. 2d 138 (D. R.I. 2007) [Wolfman at pp. 226-237]; *Stamm Int'l Corp.*, 90 TC 315 (1988); *Long Term Capital Holdings*, 90 AFTR 2d 2002-7446 (D. Conn. 2002)

F. R. Civ. Proc. 26(b)(3)

Tax Court Rule 70(b)(1)

Saltzman, IRS Practice and Procedure, para. 13.11[1][b][iii]

Bittker & Lokken ¶112.2

Background: Accounting and Auditing Standards: [The Securities Act of 1933 requires public companies to report according to GAAP. The Financial Accounting Standards Board establishes the requirements of GAAP accounting. FAS 5 sets forth requirements for auditing for contingent liabilities in general. FASB Statement 109 addresses Accounting for Income Taxes. FASB Interpretation No. 48 addresses Accounting for Uncertainty in Income Taxes and requires the company to determine whether it is more likely than not that a tax position will be sustained on examination by the IRS. AICPA and Public Company Accounting Oversight Board standards require the accountants to review the legal evaluations of the tax contingencies that the company was supposed to obtain from attorneys. PCAOB Audit Documentation and Amendment to Interim Auditing Standards, Release No. 2004-006; AICPA Auditing Standards §326 and 337, AU §9396, Evidential Matter: Auditing Interpretations of Section 326.

Issues: (1) "federally authorized tax-practitioner" privilege versus attorney-client privilege; (2) attorney hiring accountant or other professional; (3) protecting the client's

privileges with respect to information in the client's hands; (4) protecting the client's privileges with respect to information in the hands of third parties; (5) protecting the client's privileges with respect to information in the hands of the attorney; (6) work product and trial preparation materials in litigation; (7) the distinction between return information and privileged information. The Lesson on tax litigation will also consider privileges.

Comment: "In contrast, the [attorney-client] privilege does not apply to material turned over to an attorney that was not protected while in the hands of the client (e.g., work papers prepared by an accountant while preparing a client's tax returns) or to material furnished by the client to an attorney to enable him to prepare the client's tax return if the attorney is not acting as a legal adviser."Bittker & Lokken, para. 112.2. This sentence reflects the crux of the conundrum of privileges in tax matters: the persons most likely to have the relevant information, accountants and other return preparers, do not have any privileges to assert, or not much of a privilege (see §7525). The persons who generally have the strongest ability to protect the client's confidences, attorneys, cannot claim as privileged something that would not be privileged in the client's hands, that was provided to the client by an accountant, or is his own information, relevant to tax return preparation.

PROBLEMS:

1. You are at the IRS Appeals Office. The Appeals Officer has asked you for a copy of the Board minutes reflecting approval of compensation paid to the corporation's sole shareholder/employee. Your client gives you his notes of the Board meeting and asks you to prepare accurate minutes, date them on the meeting date, and furnish them to the Appeals Officer. May you follow your client's request?

2. You represent a taxpayer in a case that is being considered by Appeals. In your discussions with the Appeals Officer, you realize that he has seriously misinterpreted the facts set forth in the Revenue Agent's Report on the examination of your client's tax return. The Appeals Officer offers to settle the case for a small fraction of the tax that is due and owing under any proper interpretation of the facts. You believe that it is unlikely that the misunderstanding will be discovered because the Revenue Agent left the IRS shortly after submitting her report and no one else at the IRS is familiar with the case.

May you recommend to your client that he accept the settlement offer? Or, are you free to correct the Appeals Officer's misunderstanding of the facts? If you correct the Appeals Officer's misunderstanding of the facts, must you first obtain your client's approval?

3. You are negotiating the settlement of a disputed tax case in the Appeals Division of the IRS. In explaining why a very favorable settlement offer is being made, the Appeals Officer misstates the law and it is clear that he is relying on this erroneous understanding. May you point out the error to the Appeals Officer? Must you obtain the consent of his client?

4. You are at the Appeals Office again. This time the proposed deficiency adjustment disallows a bonus deduction paid by a C corporation. The Agent's report is not specific as to the IRS's theory. The corporation's practice has been to eliminate its taxable income by means of a year-end bonus payable proportionately to stockholdings of employees. Your client suggests that by leading the Appeals Officer to believe that the issue is reasonable compensation you could deflect his inquiry and produce an acceptable settlement. Your client offers to obtain documentary evidence of others' compensation that is comparable but at the low end of the range, in order to help the Appeals Officer understand that the issue is reasonable compensation. May you follow your client's suggestion?

5. Following the *Arthur Young* decision (which held what?), there were suggestions that taxpayers should engage lawyers rather than accountants to review the tax reserve because of the existence of the attorney-client privilege and the absence of an accountant-client privilege. Is this sound advice? Are public companies required to do this now anyway? Assuming the attorney's analysis of tax contingent liabilities is provided to the auditors, has the attorney-client privilege been waived? What other privilege might exist? Does it depend on litigation being imminent and is it limited to advice provided by attorneys?

5. Conflicts and the tax client

ASSIGNMENT:

Model Rules: 1.7-1.13, 1.16, 1.18, 2.2, 3.4, 4.3 and Comments

ABA Opinion: 05-436 [Wolfman at 144-147]

Circular 230: §§10.28, 10.29

IRC: §6013(a), 6015(a), 7602(a)

Internal Revenue Manual: §25.5.5.5 (available through RIA Checkpoint and the IRS's website)

Saltzman, IRS Practice and Procedure, para. 13.03[4][b].

Wolfman pp. 134-148

Cases: *Backer v. US*, 275 F2d 141 (1960) [Wolfman at 159-162]

Issues: (1) representing the taxing entity (mostly a state tax issue); (2) obtaining advance blanket waivers of future conflicts from tax clients; (3) representing taxpayers with adverse tax interests in one transaction or entity; (4) representing unrelated parties with adverse tax interests in relation to a common legal issue; (5) representing summonsed third parties and the taxpayer; (6) interests of taxpayer and tax return preparer in

standards for reporting positions and disclosure; (7) corporations versus their officers and employees.

PROBLEMS:

1. Albert is a CPA and an attorney, and prepared a Form 1040 return for Tax Year 2005 for Claire and Charlie Smith, who itemize their deductions. When Albert got to the part about deducting charitable contributions, Charlie asks, "What do most people claim?" Albert responded that the IRS will typically not question deductions in the range of 3 to 5 percent of income, but that it's the actual amount of the contributions that matters. Seizing on the numbers that Albert just cited, Claire replied, "That's us! Put down for 5 percent." Shortly after this the IRS's audit of the Smiths' 2005 tax year ended with a substantial increase in tax due on account of lack of documentation of the charitable contributions. (Albert represented them during the audit.) The Smiths refuse to pay Albert for the services rendered, saying they were "disappointed" with how the audit played out. The parties agreed on a fee for the 2005 return work, including the audit representation, but the Smiths have not paid it.

Albert has now prepared the Smith's 2006 tax return, but not yet filed it, and it is due next week. Albert is in possession of the completed return and a W-2 from Claire's part-time job as a secretary.What documents can Albert withhold from the Smiths as he attempts to collect his fees for the 2005 and 2006 return work?

2. You prepared a joint return filed by two married clients. The couple later divorced. May you represent both spouses in connection with an IRS challenge to expenses that were claimed on the joint return? Consider the impact, if any, of I.R.C. § 6015 (innocent spouse relief).

3. You represent a client in a tax audit. The IRS wishes to interview a third party (P) who it believes possesses information about client's financial affairs. P desires counsel and asks you to accompany him when he appears before the IRS. Can you represent both client and P? Would it be better for client (or P) to have separate representation? Should either client have the right to waive their right to conflict-free counsel?

What if P is an employee of client and client encourages you to accompany P so that you can prevent the IRS from obtaining adverse information against client. May you follow C's request?

4. For some years, you have represented a closely-held corporation. The sole shareholder (X) has decided to sell the business and to retire. Two long-time, trusted employees (Y and Z) desire to buy it. X asks for an appointment and arrives with Y and Z. They sketch out their plans, stating that they want the most favorable tax consequences. You advise them that their interests may be inconsistent and that each party should have separate counsel. At this they express great impatience. They point out that there is no disagreement, that they have no desire to make lawyers rich by employing them more than necessary, and that they strongly desire that you represent all of them. What do you do?

5. You have become known nationally as a brilliant tax lawyer and so you are contacted by Fortune 100 company to represent it in a federal tax dispute; alternately, you do a lot of state corporate income tax work in your state and the Fortune 100 company wants to hire you. You work for a large law firm and from time to time your attorneys have been adverse to Fortune 100 company, but are not currently. However, your firm is highly resistant to your taking on this one-time engagement without obtaining a prior agreement of company to waive any future conflict so that your firm may become adverse to it; company also has the right to terminate you at that time. Is it ethical to obtain such a waiver and will it work? How about this:

> Finally, you should be aware that we are a large law firm and represent many clients. It is possible that during the time we are representing _____, another client of ours may have a dispute with _____ or one of the entities with which _____ is affiliated. In order to distinguish those instances in which _____ consents to our representing such other client from those instances in which _____ does not consent, _____ has agreed, as a condition to our undertaking this engagement, that during the period of this engagement we will not be precluded from representing clients who may have interests adverse to _____ or its affiliates, so long as (1) such adverse matter is not substantially related to our work for _____, and (2) our representation of the other client does not involve the use, to the disadvantage of _____, of confidential information about _____ that we have obtained as a result of representing _____.

Lesson Two: Counselor

1. Dealing with tax client's past noncompliance (where noncompliance is certain, as contrasted with possible, i.e. return position was no better than frivolous; or client misled IRS)

ASSIGNMENT:

Model Rules: 1.2(d), 1.6, 1.16, 2.1, 4.1 and Comments

ABA Ethics Opinion: 314

Circular 230: §10.21

IRC: §§6694(b(, 6701(a), 7206(1)

Cases: *Badaracco v. CIR*, 464 US 386 (1984)
IRM 9.5.11.9

Wolfman pp. 127-129, 202-211

Issues: (1) duty to file amended return; (2) effect on future return of past error (for example, basis); (3) discovery that client has previously misled IRS.

PROBLEMS:

1. What are your ethical obligations when you discover that your client has fraudulently reported an item on an already filed tax return? Does it matter whether the item in question is the subject of an audit or an item as to which the IRS has paid no attention? Does it matter whether you prepared the return? What if the underpayment is merely the result of an error, not fraud?

2. You are engaged to represent a partnership on audit by two of the partners of the partnership. Your new clients candidly admit that they created two bank accounts for the partnership and only provided their CPA with records on one account from which he prepared their tax returns. The CPA, who is relatively unsophisticated and had no reason to know about the second account, prepared the incorrect returns. Everything was fine until your new clients tried to freeze out their third partner, who has sued them and is currently threatening to "send them to jail" unless they pay him off.

You advise your new clients that the IRS tends not to bring criminal charges when taxpayers correct their underpayments before being caught. Realizing that they are in a tight spot, your new clients ask you to file administrative adjustment requests (for the partnership) and amended returns (for themselves) for the tax years in question reporting the income in the second bank account but leaving everything else unchanged. Assuming that they provide all the bank statements for both partnership bank accounts, can you prepare the returns?

Several of their comments suggest that they may try to blame their CPA for the omitted income if the IRS brings criminal charges anyway. The fact that they hired you to correct the returns may be used to support their claim that they fixed the problem once they discovered it. If you decide to amend the returns as requested and a criminal investigation commences, can you do anything to prevent them from using your employment in that manner? What steps can you take? Should you take them?

2. <u>Dealing with tax client's contemplated noncompliance (where noncompliance, if plan is effectuated, is certain, as contrasted with possible, i.e. position is no better than frivolous)</u>

ASSIGNMENT:

Model Rules: 1.2, 1.16, 2.1 Comment [5], 8.4

Circular 230: §10.22, 10.33, 10.34(b)(1) and (c), §10.51 generally and (a)(13)

IRC: §6701

PROBLEMS:

1. Your long-time client owns and is President/CEO of a subchapter S corporation that conducts research & development activities for larger oil and gas companies. Your fees for preparing both the S corporation's and your client's tax returns, and for providing day-to-day tax advice, are considerable. Your client, who is an engineer, pays himself a $5 million salary as President/CEO. His salary has always been deducted as a trade or business expense under § 162(a).

One afternoon, your client calls you up to tell you that he just hired some R&E consultants who told him they could provide him with a R&E study that would allow him to file amended tax returns claiming credits for increasing research activities under § 41. You are skeptical, but your enthusiastic client ignores your concerns so you decide to reserve judgment. Once the report is complete, you are asked to prepare the amended returns. The report concludes that a credit in excess of $500,000 is available in each of the past three tax years and treats 75% of your client's $5 million salary as a qualified research expense despite the fact that most of your client's time is spent managing the company, not conducting or directly supervising research (a necessary requirement). Furthermore, your client has little or no documentation supporting that new expense classification (other than the consultant's report).

What are the penalty risks to your client, your own firm, and the R&E consultants who prepared the report, if the amended returns are filed?

Assume you conclude that you cannot prepare or sign the amended returns without being subject to possible penalties. Your client is very upset (he just spent $200,000 on the study) and tells you he is inclined to find someone else who is more reasonable than you. Then, he offers to indemnify you against those penalties if you prepare the returns. Is it ethical for you to accept the indemnification and prepare them? If you do, and a penalty is imposed, is the indemnification agreement enforceable? Should it be? Do you really care at that point?

2. Client (C), an associate at a law firm in Houston, consults with you with respect to the tax consequences of C's planned departure from the law firm for a one year period to pursue an LL.M. degree at New York University Law School. The law provides that C may deduct her tuition expenses (as well as room and board) if the expense is incurred to improve or maintain her existing lawyering skills. C has stated that it is unlikely that she will return to the law firm, and instead is attending NYU in hopes of landing a teaching job at a law school. C asks you to draft a "leave of absence" document to be signed by the firm reflecting the fact that C may return to the firm after her study and that the firm will keep her position open for her. C believes that such document will give C a defense if the deduction of her education expenses is challenged by the IRS.

If you prepare C's document as requested, have you crossed the line separating the ethically permissible creation of facts from the preparation of false or misleading evidence? Does it matter when that determination is made and by whom?

3. Your client has told you that he plans to donate a large amount of stock in a Fortune 500 company to a charity some time within the next month. He tells you that he plans to be vacationing in Europe during that month. Your client asks you to prepare the paperwork for the donation, and tells you that he will sign and date the paperwork on the day he selects for the donation, and he will then send it off to the charity.

On your client's return from Europe, he gives you his copy of the paperwork dated on the day the stock reached its highest price during the month. You strongly suspect—but are not sure—that the client signed the paperwork at the end of the month and back-dated it as of the day for which he would get the largest charitable contribution deduction. Should you have prepared the paperwork for the client in the manner requested? How else might you have handled your client's request?

Lesson Three: Advocate

1. Return preparation

ASSIGNMENT:

IRS Circular 230: §10.2(a)(4), (6), §10.22, §10.34 and Proposed §10.34, §10.51 (2008)

IRC: §§6107(a), 6662(a)-(d), 6694 (a),(c), 6695(a) and (b), 7216, 7701(a) (36) [observe that we pass by the fraudulent and frivolous rules, not because they are unimportant, but because we assume the students will not be guilty of those acts as advisors]

Regs: §§1.6662-4(d)(3), 1.6694-1, -2, -3, -4, 301.7701-15; Prop. Regs. 1.6694-1(a)(1), (b), (e), 1.6694-2 (2008), Reg. 301.7701-15(2008) (for decision tree, see 119 Tax Notes 401, 4/28/2008)

Cases: Larry J. Wadsworth, TC Memo 2008-171

ABA Model Rules: 4.1, 8.4

ABA Ethics Opinions: 314 and 85-352

Wolfman, pp. 99-106, 115-127

Bittker & Lokken, para. 110.3.

Issues principally for the NON-SIGNING ADVISOR: (1) avoiding return preparer status for the two purposes (in addition to liability to the client) for which it matters: Circular 230 and §§6694, 6695, 6696, 6701; (2) knowing what to do when you are a preparer; (3) standard for return preparer advice; (4) reliance on the good faith/reasonable cause exception?

Comment: This Lesson does not involve tax shelters, covered generally in the next lesson. Because the signing preparer knows she is in the soup, we focus here on the non-signing

advisors, who might not suspect the standards applicable to them. This lesson strongly emphasizes a basic concept of this Course: if the jailhouse door has to close behind someone, you want to be the one left on the outside.

QUESTIONS:

1. Does the same definition apply to determine whether you are a return preparer for purposes of Circular 230 and §6694 and what is it?

2. What is the distinction between signing, preparing and advising for purposes of §6694? Did you expect to find that a non signing advisor who did not prepare anything is a return preparer by looking at the part of the regulation entitled "substantial preparation"?

3. How critical is the fact that your advice is given before or after the event that gives rise to the tax liability or tax effect? Why should that make a difference? Which do you think is a more common role for attorneys: (a) advising on likely treatment of contemplated transaction, or (b) advising on treatment of transaction that has occurred, but before the return is filed, or (c) advising on the strength of taxpayer's position after IRS has questioned the item? Do you think that the actual return preparer, or the client itself, is likely to rely in preparing the return on your opinion given before the transaction closed?

4. If you orally told the client that it would enjoy a certain tax result before the deal closed, and even provided to it a draft of the opinion that you would furnish but were too busy to complete at the moment, but provided the written opinion two weeks after the deal closed, but dated the date of the closing, are you a return preparer?

PROBLEMS: [the first three problems are examples in Prop. Reg. §301.7701-15(b)(2)(ii) (2008):

Example 1. Attorney A, an attorney in a law firm, provides legal advice to a large corporate taxpayer regarding a completed corporate transaction. The advice provided by A is directly relevant to the determination of an entry on the taxpayer's return and this advice constitutes a substantial portion of the return. A, however, does not prepare any other portion of the taxpayer's return and is not the signing tax return preparer of this return. Is A a tax return preparer?

Example 2. Attorney B, an attorney in a law firm, provides legal advice to a large corporate taxpayer regarding the tax consequences of a proposed corporate transaction. Based upon this advice, the corporate taxpayer enters into the transaction. Once the transaction is completed, the corporate taxpayer does not receive any additional advice from B with respect to the transaction. Is B a tax return preparer?

Example 3. The facts are the same as Example 2, except that Attorney B provides supplemental advice to the corporate taxpayer on a phone call after the transaction is

completed. The time incurred on this supplemental advice by B represented less than 5 percent of the aggregate amount of time spent by B providing tax advice on the position. Is B a tax return preparer?

4. You believe that a client's return position does not have a realistic possibility of being sustained on its merits, but that it is not frivolous (therefore, presumably it has a "reasonable basis," somewhere between frivolous and realistic possibility). After discussing the potential penalties with you, the client decides that she does not want to disclose the position on her return. May you sign the return? May you continue to advise this client? What risks do you and the client face if the return is filed (assume you sign it)? Alternately, you believe that the position has a 1 in 3 chance of success but is not more likely than not.

5. Your firm's client is a family owned C corporation, which during the past year borrowed money from the shareholders against a subordinated note. While the matter is not free from doubt, in your view this note would be classified as equity rather than debt by the IRS. The instrument was prepared by your partner who specializes in corporate law. Unfortunately, he did not consult you as to the tax consequences. You learn that the client clearly expects that the interest paid on the note will be a deduction on its corporate tax return. You will not have to sign the return and have not been asked specifically to advise; should you and if you do, what standards govern your advice? What would you do if you had a call from the corporation's accountant who is preparing the return and he asks whether in your opinion the note is debt or equity? Alternatively, what would you do if you were preparing the return?

6. Albert is a CPA and an attorney, and is preparing a Form 1040 return for Tax Year 2005 for Claire and Charlie Smith, who itemize their deductions. When Albert gets to the part about deducting charitable contributions, Charlie asks, "What do most people claim?" Albert responds that the IRS will typically not question deductions in the range of 3 to 5 percent, but that it's the actual amount of the contributions that matters. Seizing on the numbers that Albert just cited, Claire replies, "That's us! Put down for 5 percent."

If Albert follows the Claire's wishes, would he be practicing properly? If your answer to this question is in the negative, what rules of any sort has he violated? If your answer to the question is in the affirmative, please show how Albert has complied with the rules.

7. Your client advises you that he has to help his mother financially. He has decided to put her on the payroll of his corporate business at $30,000 a year, perhaps as Secretary and Director. She comes to the city from Florida several times a year to visit the family, and the corporation could arrange to have meetings at that time so that his mother could attend and sign the minutes. He asks you for your reaction. What do you tell him?

8. A taxpayer seeks professional advice as to whether a particular item may be taken as a deduction on the taxpayer's return. In researching the matter, the practitioner discovers three revenue rulings suggesting that the item is not deductible. The practitioner also discovers one case decided by a district court, which, although not on

"all fours," contains some language that appears to support the taxpayer's position. What are the attorney's ethical responsibilities?

9. You are advising one of your Houston clients who wants to adopt what appears to you to be an aggressive tax return position, not involving a tax shelter. You determine that the Southern District of Texas supports the position, but the Seventh and Federal Circuits have rejected it. (The Tax Court has not addressed the issue yet.) You also find a 15-year old private letter ruling that appears to support your client's preferred position. Is there substantial authority for that position?

10. You are preparing the federal income tax return for an individual client who tells you that he had realized and recognized both a $30 million long-term capital gain on selling his business and a $31 million long-term capital loss from a "financial transaction" for the year. Read § 1211(b).

The client asks you not to show the transactions on Schedule D to the Form 1040, but instead to write "See attachment #4" on the lines where information is called for on the Schedule D, and leave the lines on that schedule otherwise blank. Attachment #4 will be on a plain piece of paper that would set forth the $30 million gain and the $31 million loss without any netting or other computation. He asks you to enter a $3,000 loss on the line on the first page of the Form 1040 that calls for an entry from Schedule D. The reason the client gives to you is that, while he is willing to include all required information on his federal income tax return, he doesn't want the $31 million loss "to stick out like a sore thumb."

If you follow the client's wishes, would you be practicing properly? If your answer to this question is in the negative, what rules of any sort have you violated? If your answer to the question is in the affirmative, please show how you have complied with the rules. [See I.R.C. § 6011(a); Treas. Reg. § 1.6011–1(a); Treas. Reg. § 1.6012–1(a)(6); instructions to Schedule D, Form 1040; I.R.S. Notice 2000–44, 2000–2 C.B. 255]

11. It has been suggested that boilerplate like the following will appear on tax advice: "If any statement herein indicates that there is a reasonable basis for a position to be taken on a tax return but does not indicate that such position is more likely than not correct, you may be able to avoid penalties by making the appropriate disclosure. Please discuss the need for any such disclosure with your tax return preparer." Lipton, Preparer Penalties: The Service's Interim Response to the Sec. 6694 Amendments, Journal of Taxation (Feb. 2008). Will this work? See preamble to the 2008 proposed return preparer regulations under §6694.

2. Tax shelter advice/reportable transactions

ASSIGNMENT:

ABA Ethics Opinion: 346

Circular 230: §10.35, proposed 10.35 (2008)

IRC: §§6011(a), 6111, 6112, 6662A, 6664(d), 6707, 6707A

Regs: §1.6011-4(b) and 2007 Prop. Reg. §1.6011-4(b); 1.6662-4(d), 301.6111-3(b)

Bittker & Lokken, para. 111.1A

Wolfman, pp. 267-270, 280-282

Issues: (1) avoiding tax shelters, (2) knowing when you are advising on a tax shelter, (3) knowing when you are a "material advisor," (4) knowing when you are a "promoter," (5) identifying reportable transactions and advising your client thereon.

Comment: This subject involves a web of overlapping requirements on taxpayers and advisors that apply both to egregious activities and garden-variety activities that trip over an arbitrary line. We assume that advisors of egregious transactions will address their problems as they arise; we focus here on the footfaults. The primary rules applicable to the attorney are found in the Ethics Opinion 346, Circular 230 §10.35; the primary rule applicable to the taxpayer is that "reportable transactions" have to be reported by the taxpayer (§6111). But the attorney may also be a "material advisor" (§§6111, 6112) or a "promoter" of a tax shelter (§6700).

QUESTIONS:

1. Devise a checklist you would go through to determine if you or your client were subject to any of the various duties or penalties that relate to "tax shelters," "listed transactions", or "reportable transactions."

2. Does it matter to you or your client whether your opinion on the tax shelter is rendered before the transaction occurs so that you will not be a tax return preparer?

3. Will you search to see if your planning ideas are patented by someone else?

3. <u>Non-return preparation, non-tax shelter, tax planning</u>

ASSIGNMENT:

Model Rules: 2.1, 2.3, 3.1 and Comments

ABA Ethics Opinions: 314, 85-352

Circular 230: §10.37

Regs: §1.6662-3(b)(3)

Report of Investigation of Enron Corporation and Related Entities Regarding Federal Tax and Compensation Issues and Policy Recommendations, Vol. I, 25-26, Vol. III, App. C, pages C-128 et seq. (McKee Nelson, Project Cochise opinion) , JCS-3-03 (Feb. 2003) (available through the Joint Committee on Taxation website); Cummings, The Range of Legal Tax Opinions with Emphasis on the "Should" Opinion, 2003 TNT 33-19 (2003); McCallum and Young, Ethics Issues in Opinion Practice, 62 Business Lawyer 417 (Feb. 2007) (summarizes guidance on legal opinion practice generally).

Issues: (1) standards for general legal opinions; (2) standards for legal opinions on tax consequences of future transactions; (3) the McKee Nelson opinion in Enron Project Cochise.

Comment: This Lesson treats the core of the tax opinion practice concerning events that have not occurred at the time of the advice, without regard to the special rules related to return preparation and tax shelters and reportable or listed transactions.

QUESTIONS:

1. What is the difference between a "will" opinion and a "should" opinion?

2. Why did the "should" opinion develop?

3. What level of opinion does a federal judge give? What level of opinion does the IRS give in a letter ruling?

4. What is a legal opinion really measuring, and do you think that gradations of opinion, like 51% versus 60% versus 66 2/3% versus 80% make sense?

5. If you give less than a "will" opinion, should it be an "explained" opinion?

6. Why did the advisor standard for an "undisclosed" position rise to more likely than not, when, and what will the consequences be?

7. Read the McKee Nelson opinion on Project Cochise. Try to figure out whether it was a "tax shelter." What do you think of the reasoning of the opinion as to §269? You may need to look at some cases McKee relied on.

4. <u>Audit representation</u>

ASSIGMNENT:

Model Rules: 1.2, 1.3, 1.6, 1.16, 3.3, 3.9, 4.1 and Comments

IRC: §§ 7201, 7206

Circular 230: 10.51

ABA Ethics Opinions: 314, 85-352, 94-387, 06-439

ABA Informal opinion: 86-1518

Cases: U.S. v. McRee, 7 F3d 976 (11th Cir. 1993); U.S. v. Miller, 491 F2d 638 (5th Cir. 1974) (issue E); Holland v. US, 348 US 121 (1954); Stamm Intl. Corp., 90 TC 315 (1988)

Chicago Bar Assoc. Op. 86-4

Standards of Tax Practice Comm. Prop. Stmt. 1998-1

Bittker & Lokken ¶112.2, 114.9

Issues: balancing (1) candor as to facts, (2) not misleading IRS, (3) not pointing out weaknesses in client's case or revealing client's confidences, and (4) dealing with lack of candor of client.

PROBLEMS:

1. On behalf of your client, you have reached a settlement in the Appeals Office that will affect three taxable years. The consequences will be significantly less income and a lower tax liability for the third year, but increases in income and tax liability for each of the preceding two years.

You and your client meet with the Appeals Officer who presents you with calculations implementing the settlement, together with a Form 870AD [a binding settlement document] to effectuate it. After looking at the calculations, your client asks you to step outside. There he informs you that the Appeals Officer has neglected to include the increase that should have been included in gross income in the first of the three years. After a short discussion, the client instructs you to return with him to the conference room and to conclude the matter without disclosing the error.

What do you do? Would matters be different if you, rather than your client, had discovered the error? Is the answer affected if this is a docketed case in which the settlement papers will be filed with the Tax Court?

2. You are representing a client in an audit by the IRS. The examination is one that involves a valuation issue, and will probably be settled. The range of probable settlement is that your client would have to pay somewhere between 20 and 60 percent of the proposed deficiency. You believe that the IRS reviewing officials will accept the agent's recommendation as to the settlement. During the course of the representation, you discover that the Revenue Agent has incontrovertibly violated one of the "10 deadly sins" [of § 1203 of the 1998 IRS Restructuring Act]. The punishment for such a violation is that the agent will be fired without any appeal. The agent knows he committed the violation and he knows that you know it as well. You offer to settle "all the aspects" of

the case by your client making a payment of 20 percent of the proposed deficiency. The agent accepts your offer and sends it along for further IRS review. Have you behaved properly in this matter?

> [PL 105-206 (1998) SEC. 1203. TERMINATION OF EMPLOYMENT FOR MISCONDUCT.
>
> (a) IN GENERAL- Subject to subsection (c), the Commissioner of Internal Revenue shall terminate the employment of any employee of the Internal Revenue Service if there is a final administrative or judicial determination that such employee committed any act or omission described under subsection (b) in the performance of the employee's official duties. Such termination shall be a removal for cause on charges of misconduct.
>
> (b) ACTS OR OMISSIONS- The acts or omissions referred to under subsection (a) are--
>
> (1) willful failure to obtain the required approval signatures on documents authorizing the seizure of a taxpayer's home, personal belongings, or business assets;
>
> (2) providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer representative;
>
> (3) with respect to a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, the violation of--
>
> (A) any right under the Constitution of the United States; or
>
> (B) any civil right established under--
>
> (i) title VI or VII of the Civil Rights Act of 1964;
>
> (ii) title IX of the Education Amendments of 1972;
>
> (iii) the Age Discrimination in Employment Act of 1967;
>
> (iv) the Age Discrimination Act of 1975;
>
> (v) section 501 or 504 of the Rehabilitation Act of 1973; or
>
> (vi) title I of the Americans with Disabilities Act of 1990;
>
> (4) falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative;
>
> (5) assault or battery on a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, but only if there is a criminal conviction, or a final judgment by a court in a civil case, with respect to the assault or battery;
>
> (6) violations of the Internal Revenue Code of 1986, Department of Treasury regulations, or policies of the Internal Revenue Service (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service;
>
> (7) willful misuse of the provisions of section 6103 of the Internal Revenue Code of 1986 for the purpose of concealing information from a congressional inquiry;
>
> (8) willful failure to file any return of tax required under the Internal Revenue Code of 1986 on or before the date prescribed therefor (including any extensions), unless such failure is due to reasonable cause and not to willful neglect;
>
> (9) willful understatement of Federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect; and

(10) threatening to audit a taxpayer for the purpose of extracting personal gain or benefit.
(c) DETERMINATION OF COMMISSIONER-
(1) IN GENERAL- The Commissioner of Internal Revenue may take a personnel action other than termination for an act or omission under subsection (a).
(2) DISCRETION- The exercise of authority under paragraph (1) shall be at the sole discretion of the Commissioner of Internal Revenue and may not be delegated to any other officer. The Commissioner of Internal Revenue, in his sole discretion, may establish a procedure which will be used to determine whether an individual should be referred to the Commissioner of Internal Revenue for a determination by the Commissioner under paragraph (1).
(3) NO APPEAL- Any determination of the Commissioner of Internal Revenue under this subsection may not be appealed in any administrative or judicial proceeding.
(d) DEFINITION- For purposes of the provisions described in clauses (i), (ii), and (iv) of subsection (b)(3)(B), references to a program or activity receiving Federal financial assistance or an education program or activity receiving Federal financial assistance shall include any program or activity conducted by the Internal Revenue Service for a taxpayer.]

3. Can you say to the IRS agent during settlement negotiations that your client's bottom line is a 25% concession by her, even though she has told you she will go up to a 50:50 settlement?

4. You filed a claim for refund on behalf of your client even though you knew the statute of limitations had run. The claim did not make any misstatement of fact or any representation about the statute of limitations. During meeting with the IRS on the claim it is apparent to you that the agent does not know that the statute had run. What do you do?

5. Tax litigation

ASSIGNMENT:

Model Rules: 1.2, 1.6, 1.7, 3.1-3.7, 4.2, 4.4

ABA Opinions: 92-362, 93-376, 95-396, 94-387, 97-408

Circular 230: §10.51

F.R.Civ. P: Rule 26(c)

Tax Court Rules: 70(b)(1), 201

IRC: §§6001, 7203, 7491

Regs: §1.6001-1, 1.6662-3

Cases: *Long Term Capital Holdings*, 2003-1 USTC 50304 (D Conn 2003)

Wolfman pp. 154-159, 174-176

Issues: (1) added duties that come into play in Tax Court litigation, (2) added duties that come into play in District Court litigation.

PROBLEMS:

1. You have a case pending in Tax Court. Your case is a dog; your objective is any reasonable settlement. District Counsel assigned to the case proves to be new and young. Your client tells you that by local reputation this attorney is too sensitive for this kind of work and will not last long. He tells you to be as abusive as possible. He wants you to be as loud, profane, engage in name-calling, and use whatever slurs will work in order to make life so miserable that a settlement will soon follow. May you follow your client's direction?

2. I.R.C. § 7491 shifts the burden of proof to the IRS when a taxpayer produces in any court "credible evidence with respect to any factual issue." In order for the burden to shift, the taxpayer (1) must have complied with substantiation requirements; (2) must have maintained all required records and "[have] cooperated with reasonable requests by [the IRS] for witnesses, information, documents, meetings and interviews"; and (3) if an entity, must fall within the net worth limitations under I.R.C. § 7430 (relating to the award of attorney's fees).

How should a lawyer advise a client who inquires about the chances that the IRS would audit her return and/or the likelihood that the government could satisfy its burden of proving that tax was owed? Can a lawyer advise a client to retain only the bare minimum of records necessary to mount "credible evidence" for the client's position, but not enough to permit the government to obtain sufficient documentation to meet its burden of proof through the discovery process?

3. You are litigating in District Court, so the IRS is represented by a Justice Department, Tax Division, trial counsel. The legal issue is a novel corporate tax question and you would like to call the Associate Chief Counsel (Corporate) to discuss settling it. Can you do so, and on what terms. Alternately, you would like to call the examining agent about settling the case.

4. Same as 3, but you submitted a settlement offer to the DOJ attorney three months ago and have heard nothing and you suspect he has not communicated it to the IRS. Can you contact the IRS settlement review officer to see if he has heard anything about it?

5. The Chief Counsel lawyer representing the IRS in your Tax Court case has just called your client to ask for copies of back tax returns. Can the lawyer do this without your consent?

6. After you served answers to interrogatories signed by your client and you, you discovered the taxpayer had lied.

7. You advised your client in setting up several similar "tax shelters" and provided several "reasonable basis" opinions. The IRS threw out the shelter upon audit and assessed substantial taxes, which you client paid. Some but not all of the opinions were provided to the IRS during audit; none of your internal memoranda were provided. Now client plans to sue for refund either in the local District Court or the Court of Federal Claims and the question has arisen whether you or your firm can and should handle the litigation, given the likelihood that the Justice Dept. lawyers will conduct discovery on your opinion and workpapers, etc., and might depose you and call you as a witness at trial, and the client might need to call you as a witness at trial. Can you ethically represent the client in the litigation; should you?

6. Advocacy Duties in Dealings with Adverse Parties in Transactions

ASSIGNMENT:

Model Rules: 1.2, 1.6, 1.7, 1.16, 4.1

PROBLEM:

1. You represent a client who is seeking to buy a closely held business. From a remark made by the seller's counsel, you gather that he mistakenly believes that the seller can avoid corporate level tax by making the sale during the course of a one-year liquidation of the selling corporation (i.e., the old *General Utilities* doctrine). Seller's counsel is a friend of yours and you would like to warn him of his mistake, but you are concerned that the result will be that the seller will try to raise the price to cover at least part of the unanticipated corporate level tax. What are the constraints on your ability to act? May you do anything to alleviate this problem?

Lesson Four: Transactions with Persons other than Clients

1. Dealing with IRS generally

[see audit representation, above]

2. Represented party issues (also see lesson on conflicts, above)

ASSIGNMENT:

Model Rules: 4.2

ABA Opinion: 06-443

IRS Form 2848

Case: *Fu Investment Co.*, 104 TC 408 (1995) [Wolfman at 196-201]

Issues: (1) dealing with IRS agent rather than IRS counsel; (2) IRS dealing with your client directly; (3) represented client dealing with IRS agent; (4) IRS dealing with third parties.

Comment: "Generally, IRS agents must deal with the representative if a power of attorney is filed. However, it appears that even when a taxpayer has executed a power of attorney in favor of an attorney, the taxpayer may be contacted by IRS agents without the knowledge of the representative and any admissions the taxpayer makes may be used against the taxpayer." Saltzman, IRS Practice and Procedure, para. 1.06[9].

QUESTION:

1. Revenue agent has been dealing with you under a POA but tries to call you and can't reach you easily, so she calls the corporate client's in house tax director, who is a lawyer. Is this proper?

3. Opinions provided to accountants and others

ASSIGNMENT:

Model Rules: 2.3

Circular 230: §10.37

Review Lesson One,4, above, on privilege

Issues: (1) accountants; (2) SEC; (3) conditions of closing.

Comment: This area is governed by non-tax guidelines, such as "Guidelines for Preparing Closing Opinions," 57 Bus. Lwyr. 345, 348 (Nov. 2001), and" "Third Party Legal Opinions," 47 Business Lawyer 226 (1991). The SEC applies its own unstated requirements for disclosures of the "Material Federal Income Tax Consequences" of public offerings.

Question:

1. Would you recommend to your client that is the acquirer in a corporate acquisition that the acquisition agreement be drafted so that as a condition of closing you give an opinion to both parties that the hoped-for tax consequences of the transaction will be obtained (say it is to be a tax-free merger), or would you advise that each party get an opinion from its own counsel? Will it make a difference whether the target shareholders are the public?

Lesson Five: Law Firms and Associations

1. Tax shelter responsibilities

ASSIGNMENT:

Model Rules: 5.1

Circular 230: §10.36.

2. Limitation of Practice

ASSIGNMENT:

Model Rules: 1.9, 5.6(a) and (b)

ABA Opinions: 94-381, 00-417

QUESTIONS:

1. State DOR proposed to require you and your client to sign a settlement agreement that states that neither you nor the client can reveal to anyone that you know that the DOR has settled this type of case this way. Can you sign?

2. Fortune 100 company wants to hire you on a tax project but wants you to agree that your firm will never accept an engagement adverse to the company in the future. Can you sign?

Lesson Six: Information about Legal Services

1. Solicitation

ASSIGNMENT:

Model Rules: 7.1-7.4 and Comments

US Tax Court Rule 202

Circular 230: §10.30, 10.51(a)(5)

Wolfman, pp. 420-422

PROBLEMS:

1. Can you list yourself in various publications and websites as “specializing” in federal income taxation? Assume your state has a specialty certification program, but not in tax.

2. You are a Texas tax lawyer and would like to expand your client base. You decide to make telephone calls to taxpayers who have filed petitions in the U.S. Tax Court where the taxpayer's residence is shown to be in Texas. The taxpayers you plan to call are those who are not represented by anyone (pro se) and those who are represented by a lawyer who is not a tax lawyer.

You plan to offer your services to these taxpayers on an "affordable" basis and think you can make money by doing so. You plan to point out to the pro se taxpayers the importance of having someone knowledgeable in tax law to help them for a reasonable fee. You plan to point out to those taxpayers represented by a non-tax practitioner lawyer the importance of having a lawyer who fully understands the tax law to represent them.

You hope you can get the State Bar of Texas to give you an informal ruling that your conduct in making the telephone calls does not violate Texas ethical rules. Will you be behaving properly if you do not get the informal ruling? Will you be behaving properly if you do get the informal ruling?

3. Can you call up Tax Director of public company who you met briefly at a CLE program and ask to take him out to lunch, at which time you will pitch your legal services?

Lesson Seven: Maintaining the Integrity of the Profession

1. IRS Office of Professional Responsibility

ASSIGNMENT:

Model Rules: 8.4, 8.5

Circular 230: §§ 10.50, 10.51 et seq. scan

IRC: §7206

Wolfman pp. 11-12 (*Owrutsky v. Brady*)

PROBLEMS:

1. Based on your advice, Jack Richards yesterday created an irrevocable family trust and transferred $2,000,000 of separate property to it, intending to utilize fully both his and Mrs. Richards' unified credit. It suddenly occurs to you that Mrs. Richards is also one of the spray beneficiaries of the trust. This means that she cannot consent to treat the gift as made one-half by her. Can you now change the trust or limit Mrs. Richards' participation in it so as to avoid the need of Mr. Richards having to pay a substantial gift tax?

2. Malpractice

ASSIGNMENT:

Circular 230: Scope

Cases: *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 117 (Tex. 2004); *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989); *Fortson v. Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469, 474–75 (4th Cir. 1992).

Issues: (1) malpractice; (2) IRS v. state licensing authority discipline.

Comment: Civil liability of the lawyer for malpractice is, of course, a separate matter from discipline by ethics authorities. There is no doubt that a plaintiff will assert ethical failings in support of a civil lawsuit, whether or not probative.

PROBLEM:

1. Four years ago, you represented Christopher Pike in what appeared to be a routine audit of his 2000 federal income tax return. The Revenue Agent's first two Information Document Requests ("IDRs") appeared to be standard questions and gave no signal that anything was amiss. You promptly submitted the requested information on Pike's behalf. When the third IDR arrived and the requests appeared to be random, you decided that the Agent was merely fishing and that the best thing to do was not to respond further. The Agent sent several more "random" IDRs, which you ignored. The Agent then became frustrated and, before you knew it, Pike received a Notice of Deficiency that greatly increased his tax liability and imposed civil penalties.

Dissatisfied with your service, Pike hired Sean Finnegan to represent him in Tax Court. Although the litigation was extremely costly, Finnegan was ultimately successful in getting the penalty assessment and most of the additional taxes reversed. (Pike lost on a few minor substantiation issues.) Afterward, Finnegan told Pike his belief that the Agent would have concluded the audit with no adjustment if you had simply responded to the IDRs. Pike filed a legal malpractice suit against you alleging that you violated 31 C.F.R. § 10.20(a)(1), which states:

> 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.

Pike wants to recover the considerable fees he paid to Finnegan and the additional taxes he had to pay because you angered the Agent. Did you committed malpractice and, if so, how much will Pike receive?

APPENDIX

SELECTED PORTIONS OF AMERICAN BAR ASSOCIATION
MODEL RULES OF PROFESSIONAL CONDUCT (last amended 2003),
AND THEIR OFFICIAL COMMENTS
AND
CIRCULAR 230 EXCERPTS
AND
RELATED ABA OPINIONS,
THAT MAY HAVE PARTICULAR APPLICATION
TO FEDERAL TAX PRACTICE
AND
AND FEDERAL STATUTES AND TREASURY RULES
ADDRESSING RELATED TAX-SPECIFIC MATTERS.

[Material other than ABA Model Rules and Comments appears in bold type and is indented. http://www.abanet.org/cpr/ is source for Model Rules and Comments. Complete Circular 230 and statutes on RIA Checkpoint.]

Rule 1.0 Terminology

Rule: … (d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

… (f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

… (h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

.. . (l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Comment: … [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Client-Lawyer Relationship

Rule 1.1 Competence

Rule: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment: …Expertise in a particular field of law may be required in some circumstances….A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question. …Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. …

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

Rule: (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. …

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment. … [2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3). …

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1. [11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Rule 1.3 Diligence

Rule: A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment: [1] 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 vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. 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.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing

basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2. ….

Rule 1.4 Communications

Rule: (a) A lawyer shall:

> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment: ….[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the

character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. ….

Rule 1.5 Fees

Rule: …(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

> (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
>
> (2) a contingent fee for representing a defendant in a criminal case.

Comment: … Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matter. …

Rule 1.6 Confidentiality of Information

Rule: (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

> … (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> … (6) to comply with other law or a court order.

Comment: … [3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

..... [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the

lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

…[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

… [16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Rule 1.7 Conflict of Interest: Current Clients

Rule: a) Except as provided in paragraph (b), a lawyer 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 lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

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

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment [6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.

Comment: ….[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. ….

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will

be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b). ….

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

… [27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

…[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

Rule: … b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. …

(h) A lawyer shall not:

> (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

Comment: … [5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Rule 1.9 Duties to Former Clients

Comment: … [4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

… [8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Rule 1.10 Imputation of Conflicts of Interest: General Rule

Rule: (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Comment: … [7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

Rule: (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law

from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

[There are other rules, including federal statutes and§10.25 of Circular 230, that can apply to these cases. We will not consider them further because the limited number of attorneys to whom they apply will have the leisure and forewarning to investigate them at the appropriate time.]

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

Rule 1.13 Organization as Client

Rule: (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment: … [3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Rule 1.14 Client with Diminished Capacity

Rule 1.15 Safekeeping Property

Rule 1.16 Declining or Terminating Representation

Rule: (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment: … [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

… [7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

Rule 1.17 Sale of Law Practice

Rule 1.18 Duties to Prospective Client

Counselor

Rule 2.1 Advisor

Rule: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Comment: [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters,

however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

… [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 2.2 Intermediary

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Comment

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as

to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary. ……..

Rule 2.3 Evaluation for Use by Third Persons

Rule: (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment: … In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

… [3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be

incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

… [6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Rule 2.4 Lawyer Serving as Third-Party Neutral

Advocate

Rule 3.1 Meritorious Claims and Contentions

Rule: A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment: [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, 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.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Rule 3.2 Expediting Litigation

Rule 3.3 Candor toward the Tribunal

Rule: (a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment: [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with

persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the

advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Rule 3.4 Fairness to Opposing Party and Counsel

Rule: A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

> [ABA Formal Opinion 94-386R applies this to citing a court's unpublished opinions that a court directs not be cited to it, even in other jurisdictions.]

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

> (1) the person is a relative or an employee or other agent of a client; and
>
> (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment: … [2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Rule 3.5 Impartiality and Decorum of the Tribunal

Comment: … [4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Rule 3.6 Trial Publicity

Rule: (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (2) information contained in a public record;
>
> (3) that an investigation of a matter is in progress;
>
> (4) the scheduling or result of any step in litigation;
>
> (5) a request for assistance in obtaining evidence and information necessary thereto;
>
> (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; …

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Rule 3.7 Lawyer as Witness

Rule: (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 3.8 Special Responsibilities of a Prosecutor

Rule 3.9 Advocate in Nonadjudicative Proceedings

Rule: A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Comment: [1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer’s client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client’s compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client’s affairs conducted by

government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

Transactions with Persons Other Than Clients

Rule 4.1 Truthfulness in Statements to Others

Rule: In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) 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.

Comment: [1] 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. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Rule 4.2 Communication with Person Represented by Counsel

Rule: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment: … [3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. … [4] … Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. … [5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

Rule 4.3 Dealing with Unrepresented Person

Rule 4.4 Respect for Rights of Third Persons

Law Firms and Associations

Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer

Rule: (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable

efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.2 Responsibilities of a Subordinate Lawyer

Rule: (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment: [1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistant

Rule 5.4 Professional Independence of a Lawyer

Rule: (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: …

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

Rule: (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

… (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a

jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment: … [9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

…. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

… [16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

Rule 5.6 Restrictions on Rights to Practice

Rule 5.7 Responsibilities Regarding Law-related Services

Rule: A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment: [1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted. …

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking **tax** advice from a lawyer-accountant or investigative services in connection with a lawsuit. …

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

Public Service

Rule 6.1 Voluntary Pro Bono Publico Service
Rule 6.2 Accepting Appointments
Rule 6.3 Membership in Legal Services Organization
Rule 6.4 Law Reform Activities Affecting Client Interests
Rule 6.5 Nonprofit and Court Annexed Limited Legal Services Programs

Information About Legal Services

Rule 7.1 Communication Concerning a Lawyer's Services

Rule 7.2 Advertising

Rule 7.3 Direct Contact with Prospective Clients

Rule: (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment. …

Comment: … Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. …

Rule 7.4 Communication of Fields of Practice and Specialization

Rule: (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

Comment: [1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

… [3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Rule 7.5 Firm Names and Letterhead

Rule 7.6 Political Contributions to Obtain Legal Engagements or Appointments by Judges

Maintaining the Integrity of the Profession

Model Rules Scope Section

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

Rule 8.1 Bar Admission and Disciplinary Matters

Rule 8.2 Judicial and Legal Officials

Rule 8.3 Reporting Professional Misconduct

Rule 8.4 Misconduct

Rule: It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Rule 8.5 Disciplinary Authority; Choice of Law

Rule: (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct. …

CIRCULAR 230 EXCERPTS

> IRS Circular 230 §10.2(a)(4): Definition: Practice before the Internal Revenue Service comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion, and representing a client at conferences, hearings and meetings. …

IRS Circular 230 §10.2(a)(6): Definition: A tax return includes an amended tax return and a claim for refund. A tax return includes an amended tax return and a claim for refund.

Circular 230 §10.20(a)(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.

(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. …

(c) A practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the Internal Revenue Service, its officers or employees, or the Director of Practice, or his or her 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.

Circular 230 § 10.21: 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.

Circular 230 §10.22 (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.

(b) Reliance on others. Except as provided in §§10.34, 10.35, and 10.37, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.

Circular 230 §10.23. A practitioner may not unreasonably delay the prompt disposition of any matter before the Internal Revenue Service.

Circular 230 §10.26. A practitioner may not take acknowledgments, administer oaths, certify papers, or perform any official act as a notary public with respect to any matter administered by the Internal Revenue Service and for which he or she is employed as counsel, attorney, or agent, or in which he or she may be in any way interested.

Circular 230 §10.27 (a) In general. A practitioner may not charge an unconscionable fee in connection with any matter before the Internal Revenue Service.
(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.
(c) Definitions. For purposes of this section--

(1) Contingent fee is any fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge by the Internal Revenue Service or is sustained either by the Internal Revenue Service or in litigation. A contingent fee includes a fee that is based on a percentage of the refund reported on a return, that is based on a percentage of the taxes saved, or

that otherwise depends on the specific result attained. A contingent fee also includes any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client's fee in the event that a position taken on a tax return or other filing is challenged by the Internal Revenue Service or is not sustained, whether pursuant to an indemnity agreement, a guarantee, rescission rights, or any other arrangement with a similar effect.

(2) Matter before the Internal Revenue Service includes tax planning and advice, preparing or filing or assisting in preparing or filing returns or claims for refund or credit, and all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, rendering written advice with respect to any entity, transaction, plan or arrangement, and representing a client at conferences, hearings, and meetings.

Circular 230 §10.28 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 allows or permits the retention of a client's records by a practitioner in the case of a dispute over fees for services rendered, the practitioner need only return those records that must be attached to the taxpayer's return. The practitioner, however, must provide the client with reasonable access to review and copy any additional records of the client retained by the practitioner under state law that are necessary for the client to comply with his or her Federal tax obligations.

(b) For purposes of this section, records of the client include all documents or written or electronic materials provided to the practitioner, or obtained by the practitioner in the course of the practitioner's representation of the client, that preexisted the retention of the practitioner by the client. The term also includes materials that were prepared by the client or a third party (not including an employee or agent of the practitioner) at any time and provided to the practitioner with respect to the subject matter of the representation. The term also includes any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the practitioner, or his or her employee or agent, that was presented to the client with respect to a prior representation if such document is necessary for the taxpayer to comply with his or her current 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.

Circular 230 §10.29 (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.

(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 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.

Circular 230 §10.30(a) Advertising and solicitation restrictions.

(1) A practitioner may not, with respect to any Internal Revenue Service matter, in any way use or participate in the use of any form or public communication or private solicitation containing a false, fraudulent, or coercive statement or claim; or a misleading or deceptive statement or claim. Enrolled agents or enrolled retirement plan agents, in describing their professional designation, may not utilize the term of art “certified” or imply an employer/employee relationship with the Internal Revenue Service. Examples of acceptable descriptions for enrolled agents are “enrolled to represent taxpayers before the Internal Revenue Service,” “enrolled to practice before the Internal Revenue Service,” and “admitted to practice before the Internal Revenue Service.” Similarly, examples of acceptable descriptions for enrolled retirement plan agents are “enrolled to represent taxpayers before the Internal Revenue Service as a retirement plan agent” and “enrolled to practice before the Internal Revenue Service as a retirement plan agent.”

(2) A practitioner may not make, directly or indirectly, an uninvited written or oral solicitation of employment in matters related to the Internal Revenue Service if the solicitation violates Federal or State law or other applicable rule, e.g., attorneys are precluded from making a solicitation that is prohibited by conduct rules applicable to all attorneys in their State(s) of licensure. Any lawful solicitation made by or on behalf of practitioner eligible to

practice before the Internal Revenue Service must, nevertheless, clearly identify the solicitation as such and, if applicable, identify the source of the information used in choosing the recipient.

(b) Fee information.

(1)

(i) A practitioner may publish the availability of a written schedule of fees and disseminate the following fee information—

(A) Fixed fees for specific routine services.

(B) Hourly rates.

(C) Range of fees for particular services.

(D) Fee charged for an initial consultation.

(ii) Any statement of fee information concerning matters in which costs may be incurred must include a statement disclosing whether clients will be responsible for such costs.

(2) A practitioner may charge no more than the rate(s) published under paragraph (b)(1) of this section for at least 30 calendar days after the last date on which the schedule of fees was published.

(c) Communication of fee information. Fee information may be communicated in professional lists, telephone directories, print media, mailings, electronic mail, facsimile, hand delivered flyers, radio, television, and any other method. The method chosen, however, must not cause the communication to become untruthful, deceptive, or otherwise in violation of this part. A practitioner may not persist in attempting to contact a prospective client if the prospective client has made it known to the practitioner that he or she does not desire to be solicited. In the case of radio and television broadcasting, the broadcast must be recorded and the practitioner must retain a recording of the actual transmission. In the case of direct mail and e-commerce communications, the practitioner must retain a copy of the actual communication, along with a list or other description of persons to whom the communication was mailed or otherwise distributed. The copy must be retained by the practitioner for a period of at least 36 months from the date of the last transmission or use.

(d) Improper associations. A practitioner may not, in matters related to the Internal Revenue Service, assist, or accept assistance from, any person or entity who, to the knowledge of the practitioner, obtains clients or otherwise practices in a manner forbidden under this section.

Circular 230 §10.33(a)… Tax advisors [not a defined term] should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service. In addition to compliance with the standards of practice provided elsewhere in this part, best practices include the following: …

(2) Establishing the facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating the applicable law

(including potentially applicable judicial doctrines) to the relevant facts, and arriving at a conclusion supported by the law and the facts. …

Circular 230 §10.33(a) … In addition to compliance with the standards of practice provided elsewhere in this part, best practices include the following: (1) Communicating clearly with the client regarding the terms of the engagement. For example, the advisor should determine the client's expected purpose for and use of the advice and should have a clear understanding with the client regarding the form and scope of the advice or assistance to be rendered. ….

[Sample email boilerplate: This communication has not been written as a formal opinion of counsel. Accordingly, IRS regulations require us to advise you that any tax advice contained herein was not intended or written to be used and cannot be used for the purpose of avoiding federal tax penalties.

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS and other taxing authorities, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed on any taxpayer or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.]

Circular 230 §10.33(a)(3) … In addition to compliance with the standards of practice provided elsewhere in this part, best practices include the following: … Advising the client regarding the import of the conclusions reached, including, for example, whether a taxpayer may avoid accuracy- related penalties under the Internal Revenue Code if a taxpayer acts in reliance on the advice. …

Circular 230 §10.34. …(b) Documents, affidavits and other papers. (1) A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous. (2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service-- (i) The purpose of which is to delay or impede the administration of the Federal tax laws; (ii) That is frivolous; or (iii) That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.
(c) Advising clients on potential penalties. (1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to-- (i) A position taken on a tax return if-- (A) The practitioner advised the client with respect to the position; or (B) The practitioner prepared or signed the tax return; and (ii) Any document, affidavit or other paper submitted to the Internal Revenue Service. (2) The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure. (3) This paragraph (c) applies even if the

practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.
(d) Relying on information furnished by clients. A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

Prior §10.34. "Realistic possibility" of success (1:3); or not frivolous and client advised of opportunity to avoid penalty by disclosure.

Proposed §10.34. Standards with respect to tax returns and documents, affidavits and other papers.
(a) Tax returns. A practitioner may not sign a tax return as a preparer unless the practitioner has a reasonable belief that the tax treatment of each position on the return would more likely than not be sustained on its merits (the more likely than not standard), or there is a reasonable basis for each position and each position is adequately disclosed to the Internal Revenue Service. A practitioner may not advise a client to take a position on a tax return, or prepare the portion of a tax return on which a position is taken, unless—(1) The practitioner has a reasonable belief that the position satisfies the more likely than not standard; or (2) The position has a reasonable basis and is adequately disclosed to the Internal Revenue Service.

*****

(e) Definitions. For purposes of this section— (1) More likely than not. A practitioner is considered to have a reasonable belief that the tax treatment of a position is more likely than not the proper tax treatment if the practitioner analyzes the pertinent facts and authorities, and based on that analysis reasonably concludes, in good faith, that there is a greater than fifty-percent likelihood that the tax treatment will be upheld if the IRS challenges it. The authorities described in 26 CFR 1.6662-4(d)(3)(iii), or any successor provision, of the substantial understatement penalty regulations may be taken into account for purposes of this analysis.

(2) Reasonable basis. A position is considered to have a reasonable basis if it is reasonably based on one or more of the authorities described in 26 CFR 1.6662-4(d)(3)(iii), or any successor provision, of the substantial understatement penalty regulations. Reasonable basis is a relatively high standard of tax reporting, that is, significantly higher than not frivolous or not patently improper. The reasonable basis standard is not satisfied by a return position that is merely arguable or that is

merely a colorable claim. The possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

(3) Frivolous. A position is frivolous if it is patently improper.

(f) Effective/applicability date. Section 10.34(a) and (e) is applicable for returns filed or advice provided on or after the date that final regulations are published in the Federal Register, but no earlier than January 1, 2008. (proposed 9/6/07)

Circular 230 §10.35. Requirements for covered opinions.

(a) A practitioner who provides a covered opinion shall comply with the standards of practice in this section.

(b) Definitions. For purposes of this subpart—

(1) A practitioner includes any individual described in §10.2(a)(5).

(2) Covered opinion.

(i) In general. A covered opinion is written advice (including electronic communications) by a practitioner concerning one or more Federal tax issues arising from—

(A) A transaction that is the same as or substantially similar to a transaction that, at the time the advice is rendered, the Internal Revenue Service has determined to be a tax avoidance transaction and identified by published guidance as a listed transaction under 26 CFR 1.6011-4(b)(2);

(B) Any partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, the principal purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code; or

(C) Any partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code if the written advice—

(1) Is a reliance opinion;

(2) Is a marketed opinion;

(3) Is subject to conditions of confidentiality; or

(4) Is subject to contractual protection.

(ii) Excluded advice. A covered opinion does not include—

(A) Written advice provided to a client during the course of an engagement if a practitioner is reasonably expected to provide subsequent written advice to the client that satisfies the requirements of this section;

(B) Written advice, other than advice described in paragraph (b)(2)(i)(A) of this section (concerning listed transactions) or paragraph (b)(2)(ii)(B) [sic (i)] of this section (concerning the principal purpose of avoidance or evasion) that—

(1) Concerns the qualification of a qualified plan;

(2) Is a State or local bond opinion; or

(3) Is included in documents required to be filed with the Securities and Exchange Commission;

(C) Written advice prepared for and provided to a taxpayer, solely for use by that taxpayer, after the taxpayer has filed a tax return with the Internal Revenue Service reflecting the tax benefits of the transaction. The preceding sentence does not apply if the practitioner knows or has reason to know that the written advice will be relied upon by the taxpayer to take a position on a tax return (including for these purposes an amended return that claims tax benefits not reported on a previously filed return) filed after the date on which the advice is provided to the taxpayer;

(D) Written advice provided to an employer by a practitioner in that practitioner's capacity as an employee of that employer solely for purposes of determining the tax liability of the employer; or

(E) Written advice that does not resolve a Federal tax issue in the taxpayer's favor, unless the advice reaches a conclusion favorable to the taxpayer at any confidence level (e.g., not frivolous, realistic possibility of success, reasonable basis or substantial authority) with respect to that issue. If written advice concerns more than one Federal tax issue, the advice must comply with the requirements of paragraph (c) of this section with respect to any Federal tax issue not described in the preceding sentence.

(3) A Federal tax issue is a question concerning the Federal tax treatment of an item of income, gain, loss, deduction, or credit, the existence or absence of a taxable transfer of property, or the value of property for Federal tax purposes. For purposes of this subpart, a Federal tax issue is significant if the Internal Revenue Service has a reasonable basis for a successful challenge and its resolution could have a significant impact, whether beneficial or adverse and under any reasonably foreseeable circumstance, on the overall Federal tax treatment of the transaction(s) or matter(s) addressed in the opinion.

(4) Reliance opinion.

(i) Written advice is a reliance opinion if the advice concludes at a confidence level of at least more likely than not (a greater than 50 percent likelihood) that one or more significant Federal tax issues would be resolved in the taxpayer's favor.

(ii) For purposes of this section, written advice, other than advice described in paragraph (b)(2)(i)(A) of this section (concerning listed transactions) or paragraph (b)(2)(i)(B) of this section (concerning the principal purpose of avoidance or evasion), is not treated as a reliance opinion if the practitioner prominently discloses in the written advice that it was not intended or written by the practitioner to be used, and that it cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer.

(5) Marketed opinion.

(i) Written advice is a marketed opinion if the practitioner knows or has reason to know that the written advice will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to one or more taxpayer(s).

(ii) For purposes of this section, written advice, other than advice described in paragraph (b)(2)(i)(A) of this section (concerning listed transactions) or paragraph (b)(2)(i)(B) of this section (concerning the principal purpose of avoidance or evasion), is not treated as a marketed opinion if the practitioner prominently discloses in the written advice that—

(A) The advice was not intended or written by the practitioner to be used, and that it cannot be used by any taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer;

(B) The advice was written to support the promotion or marketing of the transaction(s) or matter(s) addressed by the written advice; and

(C) The taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

(6) Conditions of confidentiality. Written advice is subject to conditions of confidentiality if the practitioner imposes on one or more recipients of the written advice a limitation on disclosure of the tax treatment or tax structure of the transaction and the limitation on disclosure protects the confidentiality of that practitioner's tax strategies, regardless of whether the limitation on disclosure is legally binding. A claim that a transaction is proprietary or exclusive is not a limitation on disclosure if the practitioner confirms to all recipients of the written

advice that there is no limitation on disclosure of the tax treatment or tax structure of the transaction that is the subject of the written advice.

(7) Contractual protection. Written advice is subject to contractual protection if the taxpayer has the right to a full or partial refund of fees paid to the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) if all or a part of the intended tax consequences from the matters addressed in the written advice are not sustained, or if the fees paid to the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) are contingent on the taxpayer's realization of tax benefits from the transaction. All the facts and circumstances relating to the matters addressed in the written advice will be considered when determining whether a fee is refundable or contingent, including the right to reimbursements of amounts that the parties to a transaction have not designated as fees or any agreement to provide services without reasonable compensation.

(8) Prominently disclosed. An item is prominently disclosed if it is readily apparent to a reader of the written advice. Whether an item is readily apparent will depend on the facts and circumstances surrounding the written advice including, but not limited to, the sophistication of the taxpayer and the length of the written advice. At a minimum, to be prominently disclosed an item must be set forth in a separate section (and not in a footnote) in a typeface that is the same size or larger than the typeface of any discussion of the facts or law in the written advice.

(9) State or local bond opinion. State or local bond opinion is written advice with respect to a Federal tax issue included in any materials delivered to a purchaser of a State or local bond in connection with the issuance of the bond in a public or private offering, including an official statement (if one is prepared), that concerns only the excludability of interest on a State or local bond from gross income under section 103 of the Internal Revenue Code, the application of section 55 of the Internal Revenue Code to a State or local bond, the status of a State or local bond as a qualified tax- exempt obligation under section 265(b)(3) of the Internal Revenue Code, the status of a State or local bond as a qualified zone academy bond under section 1397E of the Internal Revenue Code, or any combination of the above.

(10) The principal purpose. For purposes of this section, the principal purpose of a partnership or other entity, investment plan or arrangement, or other plan or arrangement is the avoidance or evasion of any tax imposed by the Internal Revenue Code if that purpose exceeds any other purpose. The principal purpose of a partnership or other entity, investment plan or arrangement, or other plan or arrangement is not to avoid or evade Federal tax if that partnership, entity, plan or arrangement has as its purpose the claiming of tax benefits in a manner consistent with the statute and Congressional purpose. A partnership, entity, plan or arrangement may have a significant purpose of avoidance or evasion even though

it does not have the principal purpose of avoidance or evasion under this paragraph (b)(10).

(c) Requirements for covered opinions. A practitioner providing a covered opinion must comply with each of the following requirements.

(1) Factual matters.

(i) The practitioner must use reasonable efforts to identify and ascertain the facts, which may relate to future events if a transaction is prospective or proposed, and to determine which facts are relevant. The opinion must identify and consider all facts that the practitioner determines to be relevant.

(ii) The practitioner must not base the opinion on any unreasonable factual assumptions (including assumptions as to future events). An unreasonable factual assumption includes a factual assumption that the practitioner knows or should know is incorrect or incomplete. For example, it is unreasonable to assume that a transaction has a business purpose or that a transaction is potentially profitable apart from tax benefits. A factual assumption includes reliance on a projection, financial forecast or appraisal. It is unreasonable for a practitioner to rely on a projection, financial forecast or appraisal if the practitioner knows or should know that the projection, financial forecast or appraisal is incorrect or incomplete or was prepared by a person lacking the skills or qualifications necessary to prepare such projection, financial forecast or appraisal. The opinion must identify in a separate section all factual assumptions relied upon by the practitioner.

(iii) The practitioner must not base the opinion on any unreasonable factual representations, statements or findings of the taxpayer or any other person. An unreasonable factual representation includes a factual representation that the practitioner knows or should know is incorrect or incomplete. For example, a practitioner may not rely on a factual representation that a transaction has a business purpose if the representation does not include a specific description of the business purpose or the practitioner knows or should know that the representation is incorrect or incomplete. The opinion must identify in a separate section all factual representations, statements or findings of the taxpayer relied upon by the practitioner.

(2) Relate law to facts.

(i) The opinion must relate the applicable law (including potentially applicable judicial doctrines) to the relevant facts.

(ii) The practitioner must not assume the favorable resolution of any significant Federal tax issue except as provided in paragraphs (c)(3)(v) and (d) of this section, or otherwise base an opinion on any unreasonable legal assumptions, representations, or conclusions.

(iii) The opinion must not contain internally inconsistent legal analyses or conclusions.

(3) Evaluation of significant Federal tax issues.

(i) In general. The opinion must consider all significant Federal tax issues except as provided in paragraphs (c)(3)(v) and (d) of this section.

(ii) Conclusion as to each significant Federal tax issue. The opinion must provide the practitioner's conclusion as to the likelihood that the taxpayer will prevail on the merits with respect to each significant Federal tax issue considered in the opinion. If the practitioner is unable to reach a conclusion with respect to one or more of those issues, the opinion must state that the practitioner is unable to reach a conclusion with respect to those issues. The opinion must describe the reasons for the conclusions, including the facts and analysis supporting the conclusions, or describe the reasons that the practitioner is unable to reach a conclusion as to one or more issues. If the practitioner fails to reach a conclusion at a confidence level of at least more likely than not with respect to one or more significant Federal tax issues considered, the opinion must include the appropriate disclosure(s) required under paragraph (e) of this section.

(iii) Evaluation based on chances of success on the merits. In evaluating the significant Federal tax issues addressed in the opinion, the practitioner must not take into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised.

(iv) Marketed opinions. In the case of a marketed opinion, the opinion must provide the practitioner's conclusion that the taxpayer will prevail on the merits at a confidence level of at least more likely than not with respect to each significant Federal tax issue. If the practitioner is unable to reach a more likely than not conclusion with respect to each significant Federal tax issue, the practitioner must not provide the marketed opinion, but may provide written advice that satisfies the requirements in paragraph (b)(5)(ii) of this section.

(v) Limited scope opinions.

(A) The practitioner may provide an opinion that considers less than all of the significant Federal tax issues if—

(1) The practitioner and the taxpayer agree that the scope of the opinion and the taxpayer's potential reliance on the opinion for purposes of avoiding penalties that may be imposed on the taxpayer are limited to the Federal tax issue(s) addressed in the opinion;

(2) The opinion is not advice described in paragraph (b)(2)(i)(A) of this section (concerning listed transactions), paragraph (b)(2)(i)(B) of this section (concerning the principal purpose of avoidance or evasion) or paragraph (b)(5) of this section (a marketed opinion); and

(3) The opinion includes the appropriate disclosure(s) required under paragraph (e) of this section.

(B) A practitioner may make reasonable assumptions regarding the favorable resolution of a Federal tax issue (an assumed issue) for purposes of providing an opinion on less than all of the significant Federal tax issues as provided in this paragraph (c)(3)(v). The opinion must identify in a separate section all issues for which the practitioner assumed a favorable resolution.

(4) Overall conclusion.

(i) The opinion must provide the practitioner's overall conclusion as to the likelihood that the Federal tax treatment of the transaction or matter that is the subject of the opinion is the proper treatment and the reasons for that conclusion. If the practitioner is unable to reach an overall conclusion, the opinion must state that the practitioner is unable to reach an overall conclusion and describe the reasons for the practitioner's inability to reach a conclusion.

(ii) In the case of a marketed opinion, the opinion must provide the practitioner's overall conclusion that the Federal tax treatment of the transaction or matter that is the subject of the opinion is the proper treatment at a confidence level of at least more likely than not.

(d) Competence to provide opinion; reliance on opinions of others.

(1) The practitioner must be knowledgeable in all of the aspects of Federal tax law relevant to the opinion being rendered, except that the practitioner may rely on the opinion of another practitioner with respect to one or more significant Federal tax issues, unless the practitioner knows or should know that the opinion of the other practitioner should not be relied on. If a practitioner relies on the opinion of another practitioner, the relying practitioner's opinion must identify the other opinion and set forth the conclusions reached in the other opinion.

(2) The practitioner must be satisfied that the combined analysis of the opinions, taken as a whole, and the overall conclusion, if any, satisfy the requirements of this section.

(e) Required disclosures. A covered opinion must contain all of the following disclosures that apply—

(1) Relationship between promoter and practitioner. An opinion must prominently disclose the existence of—

(i) Any compensation arrangement, such as a referral fee or a fee- sharing arrangement, between the practitioner (or the practitioner's firm or any person who is a member of, associated with, or employed by the practitioner's firm) and any person (other than the client for whom the opinion is prepared) with respect to promoting, marketing or recommending the entity, plan, or arrangement (or a substantially similar arrangement) that is the subject of the opinion; or

(ii) Any referral agreement between the practitioner (or the practitioner's firm or any person who is a member of, associated with, or employed by the practitioner's firm) and a person (other than the client for whom the opinion is prepared) engaged in promoting, marketing or recommending the entity, plan, or arrangement (or a substantially similar arrangement) that is the subject of the opinion.

(2) Marketed opinions. A marketed opinion must prominently disclose that—

(i) The opinion was written to support the promotion or marketing of the transaction(s) or matter(s) addressed in the opinion; and

(ii) The taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

(3) Limited scope opinions. A limited scope opinion must prominently disclose that—

(i) The opinion is limited to the one or more Federal tax issues addressed in the opinion;

(ii) Additional issues may exist that could affect the Federal tax treatment of the transaction or matter that is the subject of the opinion and the opinion does not consider or provide a conclusion with respect to any additional issues; and

(iii) With respect to any significant Federal tax issues outside the limited scope of the opinion, the opinion was not written, and cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer.

(4) Opinions that fail to reach a more likely than not conclusion. An opinion that does not reach a conclusion at a confidence level of at least more likely than not with respect to a significant Federal tax issue must prominently disclose that—

(i) The opinion does not reach a conclusion at a confidence level of at least more likely than not with respect to one or more significant Federal tax issues addressed by the opinion; and

(ii) With respect to those significant Federal tax issues, the opinion was not written, and cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer.

(5) Advice regarding required disclosures. In the case of any disclosure required under this section, the practitioner may not provide advice to any person that is contrary to or inconsistent with the required disclosure.

(f) Effect of opinion that meets these standards.

(1) In general. An opinion that meets the requirements of this section satisfies the practitioner's responsibilities under this section, but the persuasiveness of the opinion with regard to the tax issues in question and the taxpayer's good faith reliance on the opinion will be determined separately under applicable provisions of the law and regulations.

(2) Standards for other written advice. A practitioner who provides written advice that is not a covered opinion for purposes of this section is subject to the requirements of §10.37.

Circular 230 §10.36 (a) Requirements for covered opinions. Any practitioner who has (or practitioners who have or share) principal authority and responsibility for overseeing a firm's practice of providing advice concerning Federal tax issues must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with §10.35. Any such practitioner will be subject to discipline for failing to comply with the requirements of this paragraph if—

(1) The practitioner through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that the firm has adequate procedures to comply with §10.35, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with §10.35; or

(2) The practitioner knows or should know that one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, that does not comply with §10.35 and the practitioner, through willfulness, recklessness, or gross incompetence, fails to take prompt action to correct the noncompliance.

Circular 230 §10.37. Requirements for other written advice. (a) Requirements. A practitioner must not give written advice (including electronic communications) concerning one or more Federal tax issues if the practitioner bases the written advice on unreasonable factual or legal assumptions (including assumptions as to future events), unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person, does not consider all relevant facts that the practitioner knows or should know, or, in evaluating a Federal tax

issue, takes into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised. All facts and circumstances, including the scope of the engagement and the type and specificity of the advice sought by the client will be considered in determining whether a practitioner has failed to comply with this section. In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the determination of whether a practitioner has failed to comply with this section will be made on the basis of a heightened standard of care because of the greater risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances.

Circular 230 §10.50-.82 Sanctions for Violations of the Rules of Practice Before the Treasury

Circular 230 §10.51(a)(13) Incompetence and disreputable conduct. Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to— ...(13) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph (a)(13) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading. For purposes of this paragraph (a)(13), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client. (14) Willfully failing to sign a tax return prepared by the practitioner when the practitioner's signature is required by the Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

ABA ETHICS OPINIONS

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
Formal Opinion 314

April 27, 1965

In practice before the Internal Revenue Service, which is itself an adversary party rather than a judicial tribunal, the lawyer is under a duty not to mislead the Service, either by misstatement, silence, or through his client, but is under no duty to disclose the weaknesses of his client's case. He must be candid and fair, and his defense of his client must be exercised within the bounds of the law and without resort to any manner of fraud or chicane.

CANONS INTERPRETED: PROFESSIONAL ETHICS 15, 22, 26, 29, 37, 41

The Committee has received a number of specific inquiries regarding the ethical relationship between the Internal Revenue Service and lawyers practicing before it. Rather than answer each of these separately, the Committee believing this to be a matter of general interest, has formulated the following general principles governing this relationship.

Canon 1 says: "It is the duty of the lawyer to maintain towards the Courts a respectful attitude." *Canon 15* says that the lawyer owes "warm zeal" to his client and that "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane." *Canon 16* says: "A lawyer should use his best efforts to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts..." *Canon 22* says: "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness."

All of these canons are pertinent to the subject here under consideration, for *Canon 26* provides: "A lawyer openly, and in his true character, may render professional services... in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts...".

Certainly a lawyer's advocacy before the Internal Revenue Service must be governed by "the same principles of ethics which justify his appearance before the Courts". But since the service, however fair and impartial it may try to be, is the representative of one of the parties, does the lawyer owe it the same duty of disclosure which is owed to the courts? Or is his duty to it more nearly analogous to that which he owes his brother attorneys in the conduct of cases which should be conducted in an atmosphere of candor and fairness but are admittedly adversary in nature? An analysis of the nature of the Internal Revenue Service will serve to throw some light upon the answer to these questions.

The Internal Revenue Service is neither a true tribunal, nor even a quasijudicial institution. It has no machinery or procedure for adversary proceedings before impartial judges or arbiters, involving the weighing of conflicting testimony of witnesses examined and cross-examined by opposing counsel and the consideration of arguments of counsel for both sides of a dispute. While its procedures provide for "fresh looks" through departmental reviews and informal and formal conferences procedures, few will contend that the service provides any truly dispassionate and unbiased consideration to the taxpayer. Although willing to listen to taxpayers and their representatives and obviously intending to be fair, the service is not designed and does not purport to be unprejudiced and unbiased in the judicial sense.

It by no means follows that a lawyer is relieved of all ethical responsibility when he practices before this agency. There are certain things which he clearly cannot do, and they are set forth explicitly in the canons of ethics.

Canon 15 scorns the false claim that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause no matter how unscrupulous, and after making it clear that the lawyer owes entire devotion to the interest of his client, *Canon 15* concludes as follows:

... But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney *does not permit,* much less does it *demand* of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client [emphasis supplied]. *Cannon 22* relating to candor and fairness, state that …It is unprofessional and dishonorable to deal other than candidly with the facts... in the presentation of causes.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

Canon 29 provides in part that a lawyer should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

Canon 32 states that …No client... is entitled to receive nor should any lawyer render... any advice involving disloyalty to the law whose ministers we are...

[He] advances the honor of his profession and the best interests of his client when he... gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law... [A] lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

In addition, the preamble to the canons concludes as follows:

No code or set of rules can be framed which will particularize all the duties of the

lawyer... in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

The problem arises when, in the course of his professional employment, the attorney acquires information bearing upon the strength of his client's claim. Although a number of canons have general bearing on the problem *(Canons 15, 16, 22* and *26), Canon 37* regarding client confidences and *Canons 29, 41* and *44* regarding perjury, fraud and deception and the withdrawal of an attorney are most relevant.

For example, what is the duty of a lawyer in regard to disclosure of the weaknesses in his client's case in the course of negotiations for the settlement of a tax case?

Negotiation and settlement procedures of the **tax** system do not carry with them the guarantee that a correct **tax** result necessarily occurs. The later happens, if at all, solely by reason of chance in settlement of **tax** controversies just as it might happen with regard to other civil disputes. In the absence of either judicial determination or of a hypothetical exchange of files by adversaries, counsel will always urge in aid of settlement of a controversy the strong points of his case and minimize the weak; this is in keeping with *Canon 15,* which does require "warm zeal" on behalf of the client. Nor does the absolute duty not to make false assertions of fact require the disclosure of weaknesses in the client's case and in no event does it require the disclosure of his confidences, unless the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed. A wrong, or indeed sometimes an unjust, **tax** result in the settlement of a controversy is not a crime.

Similarly, a lawyer who is asked to advise his client in the course of the preparation of the client's **tax** returns may freely urge the statement of positions most favorable to the client just as long as there is reasonable basis for those positions. Thus where the lawyer believes there is a reasonable basis for a position that a particular transaction does not result in taxable income, or that certain expenditures are properly deductible as expenses, the lawyer has no duty to advise that riders be attached to the client's **tax** return explaining the circumstances surrounding the transaction or the expenditures.

The foregoing principle necessarily relates to the lawyer's ethical obligations - what he is *required* to do. Prudence may recommend procedures not required by ethical considerations. Thus, even where the lawyer believes that there is no obligation to reflect a transaction in or with his client's return, nevertheless he *may,* as a tactical matter, advise his client to disclose the transaction in reasonable detail by way of a rider to the return. This occurs when it is to the client's advantage to be free from either a *claim* of fraud (albeit unfounded) or to have the protection of a shorter statute of limitations (which might be available by the full disclosure of such a transaction in detail by way of a rider to the return).

In all cases, with regard both to the preparation of returns and negotiating administrative

settlements, the lawyer is under a duty not to mislead the Internal Revenue Service deliberately and affirmatively, either by misstatements or by silence or by permitting his client to mislead. The difficult problem arises where the client has in fact misled but without the lawyer's knowledge or participation. In that situation, upon discovery of the misrepresentation, the lawyer must advise the client to correct the statement; if the client refuses, the lawyer's obligation depends on all the circumstances.

Fundamentally, subject to the restrictions of the attorney-client privilege imposed by *Canon 37,* the lawyer may have the duty to withdraw from the matter. If for example, under all the circumstances, the lawyer believes that the service relies on him as corroborating statements of his client which he knows to be false, then he is under a duty to disassociate himself from any such reliance unless it is obvious that the very act of disassociation would have the effect of violating *Canon 37.* Even then, however, if a direct question is put to the lawyer, he must at least advise the service that he is not in a position to answer.

But as an advocate before a service which itself represents the adversary point of view, where his client's case is fairly arguable, a lawyer is under no duty to disclose its weaknesses, any more than he would be to make such a disclosure to a brother lawyer. The limitations within which he must operate are best expressed in *Canon 22:*

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

So long as a lawyer remains within these limitations, and so long as his duty is "performed within and not without the bounds of the law", he "owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability', to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied" in his practice before the Internal Revenue Service, as elsewhere (Canon 15).

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
Formal Opinion 346 (Revised)*
Tax Law Opinions in **Tax** Shelter Investment Offerings
* This Opinion supersedes Formal Opinion 346 (June 1, 1981), which is withdrawn.

January 29, 1982

An opinion by a lawyer analyzing the **tax** effects of a **tax** shelter investment is frequently of substantial importance in a **tax** shelter Offering. n1 The promoter of the offering may depend upon the recommendations of the lawyer in structuring the venture and often publishes the opinion with the offering materials or uses the lawyer's name in connection with sales promotion efforts. The offerees may be expected to rely upon the **tax** shelter opinion in determining whether to invest in the venture. It is often uneconomic for the individual offeree to pay for a separate **tax** analysis of the offering because of the relatively small sum each offeree may invest.n1 A "**tax** shelter," as the term is used in this Opinion, is an investment which has as a significant feature for federal income or excise **tax** purposes either or both of the following attributes: (1) deductions in excess of income from the investment being available in any year to reduce income from other sources in that year, and (2) credits in excess of the **tax** attributable to the income from the investment being available in any year to offset **taxes** on income from other sources in that year. Excluded from the term are investments such as, but not limited to, the following: municipal bonds; annuities; family trusts; qualified retirement plans; individual retirement accounts; stock option plans; securities issued in a corporate reorganization; mineral development ventures, if the only **tax** benefit would be percentage depletion; and real estate where it is anticipated that deductions are unlikely to exceed gross income from the investment in any year, and that any **tax** credits are unlikely to exceed the **tax** on the income from that source in any year.
Because the successful marketing of **tax** shelters frequently involves **tax** opinions issued by lawyers, concerns have been expressed by the organized bar, regulatory agencies and others over the need to articulate ethical standards applicable to a lawyer who issues an opinion which the lawyer knows will be included among the **tax** shelter offering materials and relied upon by offerees. n2

n2 The U.S. Treasury Department proposed a rule which would require lawyers who provide **tax** opinions to comply with standards of due diligence, disclosure and judgmental determinations. Proposed Rule adding to 31 C.F.R., Subtitle A, Part 10, a new Section 10.33 and amending Sections 10.51 and 10.52, relating to standards for providing opinions regarding **tax** shelters, 45 Fed. Reg. 58,594 (1980). *See also Sax, Lawyer Responsibility in **Tax** Shelter Opinions,* 34 **TAX** LAW. 5 (1980); Lewis, *Lawyers' Ethical Responsibilities in Rendering Opinions on **Tax** Shelter Promotions,* **TAX** NOTES (April 13, 1981) at 795. For general discussions of the legal and ethical responsibilities of lawyers who write **tax** shelter opinions, *see* Sax, *supra;* Lewis, *supra;* Kennedy, *Problems Faced by the **Tax** Adviser in Registration of **Tax** Shelter Securities with the SEC,* 33 N.Y.U. **TAX** INST. 1365, 1389-1395 (1975); Watts, *Professional Standards in **Tax** Practice: Conflicts of Interest, Disclosure Problems under Regulatory Agency Rules, Potential Liabilities,* 33 N.Y.U. **TAX.** INST. 649 (1975).

A responsibility of the Committee is to express its opinion on proper professional conduct of lawyers and to do so by a formal opinion where the subject is of widespread interest. ABA Bylaws, Art. 30.7; Rules of Procedure of Standing Committee on Ethics and Professional Responsibility, Rules 1 and 3 (Aug. 1980). Accordingly, the Committee

expresses its opinion as to the standards applicable to lawyers who issue **tax** shelter opinions.

A "**tax** shelter opinion," as the term is used in this Opinion, is advice by a lawyer concerning the federal **tax** law applicable to a **tax** shelter if the advice is referred to either in offering materials or in connection with sales promotion efforts directed to persons other than the client who engages the lawyer to give the advice. The term includes the **tax** aspects or **tax** risks portion of the offering materials prepared by the lawyer whether or not a separate opinion letter is issued. The term does not, however, include rendering advice solely to the offeror or reviewing parts of the offering materials, so long as neither the name of the lawyer nor the fact that a lawyer has rendered advice concerning the **tax** aspects is referred to at all in the offering materials or in connection with sales promotion efforts. In this case the lawyer has the ethical responsibility of assuring that in the offering materials and in connection with sales promotion efforts there is no reference to the lawyer's name name or to the fact that a lawyer has rendered **tax** advice. The term also does not include the case where a small group of investors negotiate the terms of the arrangement directly with the offeror of securities and depend for **tax** advice concerning the investment entirely upon advisors other than the lawyer engaged to represent the offeror.

Disciplinary Standards
A false opinion is one which ignores or minimizes serious legal risks or misstates the facts or the law, knowingly or through gross incompetence. The lawyer who give a false opinion, including one which is intentionally or recklessly misleading, violates the Disciplinary Rules of the Model Code of Professional Responsibility. Quite clearly, the lawyer exceeds the duty to represent the client zealously within the bounds of the law. *See* DR 7-101; EC 7-10. Knowingly misstating facts or law violates DR 7-102(A)(5) and is "conduct involving dishonesty, fraud, deceit, or misrepresentation," a violation of DR 1-102(A)(4). The lawyer also violates DR 7-102(A)(7) by counseling or assisting the offeror "in conduct that the lawyer knows to be illegal or fraudulent." In addition, the lawyer's conduct may involve the concealment or knowing nondisclosure of matters which the lawyer is required by law to reveal, a violation of DR 7-102(A)(3).
The lawyer who accepts as true the facts which the promoter tells him, when the lawyer should know that a further inquiry would disclose that these facts are untrue, also gives a false opinion. It has been said that lawyers cannot "escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen." *United States v. Benjamin,* 328 F.2d 854, 863 (2d Cir. 1964). Recklessly and consciously disregarding information strongly indicating that material facts expressed in the **tax** shelter opinion are false or misleading involves dishonesty as does assisting the offeror in conduct the lawyer knows to be fraudulent. Such conduct violates DR 1-102(A)(4) and DR 7-102(A). We equate the minimum extent of the knowledge required for the lawyer's conduct to have violated these Disciplinary Rules with the knowledge required to sustain a Rule 10b-5 recovery, *see Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976), rather than the lesser negligence standard. *Compare SEC v. Coven,* 581 F.2d 1020, 1025 (2d Cir. 1978) *cert. denied,* 440 U.S. 950, *rehearing denied,* 441 U.S. 928 (1979); *Rolf v. Blyth, Easteman Dillon & Co.,* 570 F.2d 38, 44-47 (2d Cir.) *cert. denied,* 439 U.S. 1039 (1978);

Sharp v. Coopers & Lybrand, 457 F. Supp. 879 (E.D. Pa. 1978).

But even if the lawyer lacks the knowledge required to sustain a recovery under the *Hochfelder* standard, the lawyer's conduct nevertheless may involve gross incompetence, or indifference, inadequate preparation under the circumstances and consistent failure to perform obligations to the client. If so, the lawyer will have violated DR 6-101(A). ABA Informal Opinion 1273 (1973).

Ethical Considerations

Beyond the requirements of the Disciplinary Rules, the lawyer who issues a **tax** shelter opinion should follow the Canons and the Ethical Considerations of the Model Code. n3 Although not constituting absolute requirements, the violation of which may result in sanctions, these Canons and Ethical Considerations constitute a body of principles which provide guidance in the application of the lawyer's professional responsibility to specific situations, such as the rendering of **tax** shelter opinions. The guidelines developed here are to be applied to each specific situation reasonably and in a practical fashion.
n3 Canon 1 says "[a] lawyer should assist in maintaining the integrity and competence of the legal profession." Canon 6 says "[a] lawyer should represent a client competently." The Ethical Considerations used to establish the guidelines in this Opinion are EC 1-5, EC 6-1, EC 6-4, EC 6-5, EC 7-1, EC 7-3, EC 7-5, EC 7-6, EC 7-8, EC 7-10, EC 7-22, EC 7-25. *See also* Model Rules of Professional Conduct (ABA Commission on Evaluation of Professional Standards, Proposed Final Draft, May 30, 1981), Rule 2.3 at 116.

LAWYER AS ADVISOR
EC 7-22 says "a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal." *See also* EC 7-25. Principles similar to these are applied where the lawyer represents a client in adversarial proceedings before the Internal Revenue Service. In that case the lawyer has duties not to mislead the Service by any misstatement, not to further any misrepresentations made by the client, and to deal candidly and fairly. ABA Formal Opinion 314 (1965); *see also* Watts, *supra* note 2 at 651-653.

The lawyer rendering a **tax** shelter opinion which he knows will be relied upon by third persons, however, functions more as an advisor than as an advocate. *See* EC 7-3, distinguishing these roles. Since the Model Code was adopted in 1969, the differing functions of the advisor and advocate have become more widely recognized. n4
n4 *See* Watts, *supra* note 2 at 655-658; Wolfman & Holden, ETHICAL PROBLEMS IN FEDERAL **TAX** PRACTICE (Michie, Bobbs-Merrill 1981) at 1-2, 100-121, *see also* Proposed Model Rules, *supra* note 3, Preamble at 1:

As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer assets the client's position under the rules of the adversary system.

The Proposed Model Rules specifically recognize the ethical considerations applicable

where a lawyer undertakes an evaluation for the use of third persons other than a client. These third persons have an interest in the integrity of the evaluation. The legal duty of the lawyer therefore "goes beyond the obligations a lawyer normally has to third persons." Proposed Model Rules, *supra* note 3 at 117; *see also* ABA Formal Opinion 335 (1974). Because third persons may rely on the advice of the lawyer who gives a **tax** shelter opinion, the principles announced in ABA Formal Opinion 314 have little, if any, applicability.

ESTABLISHING LAWYER'S RELATIONSHIP

The lawyer should establish the terms of the relationship with the offeror-client at the time the lawyer is engaged to work on the **tax** shelter offering. *See* Proposed Model Rules, *supra* note 3, Rule 2.3, and discussion at 116-120. This includes making it clear that the lawyer requires from the client a full disclosure of the structure and intended operations of the venture and complete access to all relevant information.

MAKING FACTUAL INQUIRY

ABA Formal Opinion 335 (1974) establishes guidelines which a lawyer should follow when furnishing an assumed facts opinion in connection with the sale of unregistered securities. The same guidelines describe the extent to which a lawyer should verify the facts presented to him as the basis for a **tax** shelter opinion:

[T]he lawyer should, in the first instance, make inquiry of his client as to the relevant facts and receive answers. If any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect; or are suspect; or are inconsistent; or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry. The extent of this inquiry will depend in each case upon the circumstances; for example, it would be less where the lawyer's past relationship with the client is sufficient to give him a basis for trusting the client's probity than where the client has recently engaged the lawyer, and less where the lawyer's inquiries are answered fully than when there appears a reluctance to disclose information.

Where the lawyer concludes that further inquiry of a reasonable nature would not give him sufficient confidence as to all the relevant facts, or for any other reason he does not make the appropriate further inquiries, he should refuse to give an opinion. However, assuming that the alleged facts are not incomplete in a material respect, or suspect, or in any way inherently inconsistent, or on their face or on the basis of other known facts open to question, the lawyer may properly assume that the facts as related to him by his client, and checked by him by reviewing such appropriate documents as are available, are accurate.

The essence of this opinion... is that, while a lawyer should make adequate preparation including inquiry into the relevant facts that is consistent with the above guidelines, and while he 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 his client or to assume,

without reasonable cause, that a client's statement of the facts cannot be relied upon. ABA Formal Opinion 335 at 3, 5-6.

For instance, where essential underlying information, such as an appraisal or financial projection, makes little common sense, or where the reputation or expertise of the person who has prepared the appraisal or projection is dubious, further inquiry clearly is required. Indeed, failure to make further inquiry may result in a false opinion. *See supra*, Disciplinary Standards. If further inquiry reveals that the appraisal or projection is reasonably well supported and complete, the lawyer is justified in relying upon the material facts which the underlying information supports.

RELATING LAW TO FACTS

In discussing the legal issues in a **tax** shelter opinion, the lawyer should relate the law to the actual facts to the extent the facts are ascertainable when the offering materials are being circulated. A lawyer should not issue a **tax** shelter opinion which disclaims responsibility for inquiring as to the accuracy of the facts, fails to analyze the critical facts or discusses purely hypothetical facts. It is proper, however, to assume facts which are not currently ascertainable, such as the method of conducting future operations of the venture, so long as the factual assumptions are clearly identified as such in the offering materials, and are reasonable and complete.

NON-**TAX** LEGAL ISSUES

Although the lawyer rendering the **tax** shelter opinion may not be asked to address the non-**tax** legal issues, the lawyer should make reasonable inquiries to ascertain that a good faith effort has been expended to comply with laws other than **tax** laws. **Tax** counsel need not reexamine the conclusions of other counsel rendering opinions in other specialized areas of law, such as the exemption of the transaction or securities from registration or the validity of a patent. **Tax** counsel, nevertheless, should be satisfied that competent professional advice on these and similar matters has been obtained where relevant to the offering.

MATERIAL **TAX** ISSUES

A "material" **tax** issue for purposes of this Opinion is any income or excise **tax** issue relating to the **tax** shelter that would have a significant effect in sheltering from federal **taxes** income from other sources by providing deductions in excess of the income from the **tax** shelter investment in any year or **tax** credits which will offset **tax** liabilities in excess of the **tax** attributable to the **tax** shelter investment in any year. *See* definition of "**tax** shelter," *supra* note 1. The determination of what is material is to be made in good faith by the lawyer based on the information which is available at the time the offering materials are being circulated.

The lawyer should satisfy himself that either he or another competent professional has considered all material **tax** issues. In addition, the **tax** shelter opinion should fully and

fairly address each material **tax** issue respecting which there is a reasonable possibility that the Internal Revenue Service will challenge the **tax** effect proposed in the offering materials. n5

n5 It is not necessary that these material **tax** issues be discussed in a separate opinion letter, so long as the issues are fully and fairly addressed in the offering materials in accordance with the standards expressed in this Opinion.

Where some material **tax** issues are being considered by other competent professionals, the lawyer should review their written advice and make inquiries of the client and the other professionals to assure that the division of responsibility is clear and to reasonably assure that all material **tax** issues will be considered, either by the lawyer or by the other **tax** professional, in accordance with the standards developed in this Opinion. If, as a result of review of the written advice of another professional or otherwise, the lawyer believes that there is a reasonable possibility that the Internal Revenue Service will challenge the proposed **tax** effect respecting any material **tax** issue considered by the other professional, and the issue is not fully addressed in the offering materials, the lawyer has ethical responsibilities to so advise the client and the other professional and to refuse to provide an opinion unless the matter is addressed adequately in the offering materials. The lawyer also should assure that his own opinion identifies clearly its limited nature, if the lawyer is not retained to consider all of the material **tax** issues.

OPINION AS TO OUTCOME -- MATERIAL **TAX** ISSUES

Since the term "opinion" connotes a lawyer's conclusion as to the likely outcome of an issue if challenged and litigated, the lawyer should, if possible, state the lawyer's opinion of the probable outcome on the merits of each material **tax** issue. n6 However, if the lawyer determines in good faith that it is not possible to make a judgment as to the outcome of a material **tax** issue, the lawyer should so state and give the reasons for this conclusion.

n6 *See* EC 7-3; Sax, *supra* note 2 at 34, 35; *see also* Kennedy, *supra* note 2 at 1383.

A **tax** shelter opinion may question the validity of a Revenue Ruling or the reasoning in a lower court opinion which the lawyer believes is wrong. But there must also be a complete explanation to the offerees, including what position the Service is likely to take on the issue and a summary of why this position is considered to be wrong. The opinion also should set forth the risks of an adversarial proceeding if one is likely to occur.

OVERALL EVALUATION OF REALIZATION OF **TAX** BENEFITS

The clear disclosure of the **tax** risks in the offering materials should include an opinion by the lawyer or by another professional providing an overall evaluation of the extent to which the **tax** benefits, in the aggregate, which are a significant feature of the investment to the typical investor are likely to be realized as contemplated by the offering materials. In making this evaluation, the lawyer should state that the significant **tax** benefits, in the aggregate, probably will be realized or probably will not be realized, or that the

probabilities of realization and nonrealization of the significant **tax** benefits are evenly divided.

In rare instances the lawyer may conclude in good faith that it is not possible to make a judgment of the extent to which the significant **tax** benefits are likely to be realized. This impossibility may occur where, for example, the most significant **tax** benefits are predicated upon a newly enacted Code provision when there are no regulations and the legislative history is obscure. In these circumstances, the lawyer should fully explain why the judgment cannot be made and assure full disclosure in the offering materials of the assumptions and risks which the investors must evaluate.

The Committee does not accept the view that it is always ethically improper to issue an opinion which concludes that the significant **tax** benefits in the aggregate probably will not be realized. However, full disclosure requires that the negative conclusion be clearly stated and prominently noted in the offering materials.

If another professional is providing the overall evaluation, the lawyer should nonetheless satisfy himself that the evaluation meets the standards set forth above.

ACCURACY OF OFFERING MATERIALS

In all cases, the lawyer who issues a **tax** shelter opinion, especially an opinion which does not contain a prediction of a favorable outcome, should assure that the offerees will not be misled as a result of mischaracterizations of the extent of the opinion in the offering materials or in connection with sales promotion efforts. In addition, the lawyer always should review the offering materials to assure that the standards set forth in this Opinion are met and that the offering materials, taken as a whole, make it clear that the lawyer's opinion is not a prediction of a favorable outcome of the **tax** issues concerning which no favorable prediction is made. The risks and uncertainties of the **tax** issues should be referred to in a summary statement at the very outset of the opinion or the **tax** aspects or **tax** risks section of the offering materials.

If the lawyer disagrees with the client over the extent of disclosure made in the offering materials or over other matters necessary to satisfy the lawyer's ethical responsibilities as expressed in this Opinion, and the disagreement cannot be resolved, the lawyer should withdraw from the employment and not issue an opinion. *See* EC 7-8; ABA Formal Opinion 335, *supra.*

Summary of Ethical Considerations

The general ethical guidelines to be followed by the lawyer who issues a **tax** shelter opinion are briefly summarized below. However, *reference to this summary must not be substituted for a review of the more complete statement of ethical standards contained in this Opinion.*

1. Establish in the beginning the lawyer's relationship with the offeror-client, making

clear that in order to issue the opinion, the lawyer requires from that client a full disclosure of the structure and intended operations of the venture and complete access to all relevant information.

2. Make inquiry as to the relevant facts and, consistent with the standards developed in ABA Formal Opinion 335, be satisfied that the material facts are accurately and completely stated in the offering materials, and that the representations as to intended future activities are clearly identified, reasonable and complete.

3. Relate the law to the actual facts to the extent ascertainable and, when addressing issues based on future activities, clearly identify what facts are assumed.

4. Make inquiries to ascertain that a good faith effort has been made to address legal issues other than those to be addressed in the **tax** shelter opinion.

5. Take reasonable steps to assure that all material federal income and excise **tax** issues have been considered and that all of those issues which involve the reasonable possibility of a challenge by the Internal Revenue Service have been fully and fairly addressed in the offering materials.

6. Where possible, provide an opinion as to the likely outcome on the merits of the material **tax** issues addressed in the offering materials.

7. Where possible, provide an overall evaluation of the extent to which the **tax** benefits in the aggregate are likely to be realized.

8. Assure that the offering materials correctly represent the nature and extent of the **tax** shelter opinion.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
Formal Opinion 85-352
Tax Return Advice; Reconsideration of Formal Opinion 314
July 7, 1985

A lawyer may advise reporting a position on a tax return so long as the lawyer believes in good faith that the position is warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law and there is some realistic possibility of success if the matter is litigated.

The Committee has been requested by the Section of Taxation of the American Bar Association to reconsider the "reasonable basis" standard in the Committee's Formal Opinion 314 governing the position a lawyer may advise a client to take on a tax return. Opinion 314 (April 27, 1965) was issued in response to a number of specific inquiries regarding the ethical relationship between the Internal Revenue Service and lawyers

practicing before it. The opinion formulated general principles governing this relationship, including the following:

[A] lawyer who is asked to advise his client in the course of the preparation of the client's tax returns may freely urge the statement of positions most favorable to the client just as long as there is a *reasonable basis* for this position. (Emphasis supplied).

The Committee is informed that the standard of "reasonable basis" has been construed by many lawyers to support the use of any colorable claim on a tax return to justify exploitation of the lottery of the tax return audit selection process. n1 This view is not universally held, and the Committee does not believe that the reasonable basis standard, properly interpreted and applied, permits this construction.

> n1 This criticism has been expressed by the Section of Taxation and also by the U.S. Department of the Treasury and some legal writers. *See, e.g.*, Robert H. Mundheim, Speech as General Counsel to Treasury Department, reprinted in How To Prepare and Defend Tax Shelter Opinions: Risks and Realities for Lawyers and Accountants (Law and Business, Inc. 1981); Rowen, *When May a Lawyer Advise a Client That He May Take a Position on a Tax Return?* 29 TAX LAWYER 237 (1976).

However, the Committee is persuaded that as a result of serious controversy over this standard and its persistent criticism by distinguished members of the tax bar, IRS officials and members of Congress, sufficient doubt has been created regarding the validity of the standard so as to erode its effectiveness as an ethical guideline. For this reason, the Committee has concluded that it should be restated. Another reason for restating the standard is that since publication of Opinion 314, the ABA has adopted in succession the Model Code of Professional Responsibility (1969, revised 1980) and the Model Rules of Professional Conduct (1983). Both the Model Code and the Model Rules directly address the duty of a lawyer in presenting or arguing positions for a client in language that does not refer to "reasonable basis." It is therefore appropriate to conform the standard of Opinion 314 to the language of the new rules.

This opinion reconsiders and revises only that part of Opinion 314 that relates to the lawyer's duty in advising a client of positions that can be taken on a tax return. It does not deal with a lawyer's opinion on tax shelter investment offerings, which is specifically addressed by this Committee's Formal Opinion 346 (Revised), and which involves very different considerations, including third party reliance.

The ethical standards governing the conduct of a lawyer in advising a client on positions that can be taken in a tax return are no different from those governing a lawyer's conduct in advising or taking positions for a client in other civil matters. Although the Model Rules distinguish between the roles of advisor and advocate, n2 both roles are involved here, and the ethical standards applicable to them provide relevant guidance. In many cases a lawyer must realistically anticipate that the filing of the tax return may be the first step in a process that may result in an adversary relationship between the client and the IRS. This normally occurs in situations when a lawyer advises an aggressive position on

a tax return, not when the position taken is a safe or conservative one that is unlikely to be challenged by the IRS.

n2 *See e.g.*, Model Rules 2.1 and 3.1.

Rule 3.1 of the Model Rules, which is in essence a restatement of DR 7-102(A)(2) of the Model Code, n3 states in pertinent part:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.
Rule 1.2(d), which applies to representation generally, states:
A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

> n3 DR 7-102(A)(2) states:
> In his representation of a client, a lawyer shall not:
> (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

On the basis of these rules and analogous provisions of the Model Code, a lawyer, in representing a client in the course of the preparation of the client's tax return, may advise the statement of positions most favorable to the client if the lawyer has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law. A lawyer can have a good faith belief in this context even if the lawyer believes the client's position probably will not prevail. n4 However, good faith requires that there be some realistic possibility of success if the matter is litigated.

> n4 Comment to Rule 3.11; *see also* Model Code EC 7-4.

This formulation of the lawyer's duty in the situation addressed by this opinion is consistent with the basic duty of the lawyer to a client, recognized in ethical standards since the ABA Canons of Professional Ethics, and in the opinions of this Committee: zealously and loyally to represent the interests of the client within the bounds of the law. Thus, where a lawyer has a good faith belief in the validity of a position in accordance with the standard stated above that a particular transaction does not result in taxable income or that certain expenditures are properly deductible as expenses, the lawyer has no duty to require as a condition of his or her continued representation that riders be attached to the client's tax return explaining the circumstances surrounding the transaction or the expenditures.

In the role of advisor, the lawyer should counsel the client as to whether the position is

likely to be sustained by a court if challenged by the IRS, as well as of the potential penalty consequences to the client if the position is taken on the tax return without disclosure. Section 6661 of the Internal Revenue Code imposes a penalty for substantial understatement of tax liability which can be avoided if the facts are adequately disclosed or if there is or was substantial authority for the position taken by the taxpayer. Competent representation of the client would require the lawyer to advise the client fully as to whether there is or was substantial authority for the position taken in the tax return. If the lawyer is unable to conclude that the position is supported by substantial authority, the lawyer should advise the client of the penalty the client may suffer and of the opportunity to avoid such penalty by adequately disclosing the facts in the return or in a statement attached to the return. If after receiving such advice the client decides to risk the penalty by making no disclosure and to take the position initially advised by the lawyer in accordance with the standard stated above, the lawyer has met his or her ethical responsibility with respect to the advice.

In all cases, however, with regard both to the preparation of returns and negotiating administrative settlements, the lawyer is under a duty not to mislead the Internal Revenue Service deliberately, either by misstatements or by silence or by permitting the client to mislead. Rules 4.1 and 8.4(c); DRs 1-102(A)(4), 7-102(A)(3) and (5).

In summary, a lawyer may advise reporting a position on a return even where the lawyer believes the position probably will not prevail, there is no "substantial authority" in support of the position, and there will be no disclosure of the position in the return. However, the position to be asserted must be one which the lawyer in good faith believes is warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law. This requires that there is some realistic possibility of success if the matter is litigated. In addition, in his role as advisor, the lawyer should refer to potential penalties and other legal consequences should the client take the position advised.

ABA Formal Opinion 92-362: You submit settlement offer to Tax Division attorney in District Court refund case and get no response; you cannot directly contact the IRS without that attorney’s permission.

ABA Formal Opinion 93-373: A “reverse” contingency fee is permissible, based on amount of money saved.

ABA Formal Opinion 93-376: No ethical duty to inform IRS that statute of limitations has run on a claim for refund you filed for your client.

ABA Formal Opinion 94-381: Client cannot require you not to accept any matters against it as precondition to hiring you for specific work (like tax advice).

ABA Formal Opinion 94-387: If you find out your client lied in answering IDRs from IRS agent you must try to get client to correct the answers, and if not “take whatever steps are necessary to ensure fraud is not perpetrated on the court.”

ABA Formal Opinion 95-390: A corporate affiliate of your corporate client is not the client as to which you cannot have a conflict so long as the other matter is unrelated. However, the circumstances of the particular matter, the agreement with the current client, or any potential for adverse effect of conflicting representation against the affiliate can impose a duty not to take such representation.

ABA Formal Opinion 95-396: Your client has pending Tax Court case. IRS lawyer cannot contact your client to obtain information relevant to case without your consent.

ABA Formal Opinion 97-408: Rule 4.2 generally applies to government agency represented by counsel. There is an exception protecting the constitutional right to petition government to address a "policy issue" including settlement of a controversy. Must give government counsel reasonable advance notice to afford opportunity for lawyer to consult with government official. This exception is said to be narrow.

ABA Formal Opinion 99-413: Lawyer may transmit information related to representation of client to client by unencrypted e-mail because e-mail affords a reasonable expectation of privacy, such as U.S. and commercial mail, land-line telephone and faxes.

ABA Formal Opinion 05-436: The standards for waivers above apply to advance waiver of future conflicts of interest.

ABA Formal Opinion 06-439: Statements by attorney to IRS in context of settlement negotiations about taxpayer's goals or willingness to compromise, and statements characterized as "puffing" are not ordinarily considered false statements (for ethics purposes).

ABA Formal Opinion 06-443: Opponent (IRS) may contact in house attorney of taxpayer, your client, directly; this assumes the in house attorney is functioning as an attorney.

US CODE SECTIONS

5 USC 500(b) An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts. [This is accomplished by supplying IRS Form 2848, Power of Attorney.] [see Regs. 601.501 et seq.]

31 USC § 330(b) (b) After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department, or censure, a representative who—
(1) is incompetent;

(2) is disreputable;
(3) violates regulations prescribed under this section; or
(4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.
The Secretary may impose a monetary penalty on any representative described in the preceding sentence. If the representative was acting on behalf of an employer or any firm or other entity in connection with the conduct giving rise to such penalty, the Secretary may impose a monetary penalty on such employer, firm, or entity if it knew, or reasonably should have known, of such conduct. Such penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty and may be in addition to, or in lieu of, any suspension, disbarment, or censure of the representative.

IRC § 6662 Imposition of accuracy-related penalty on underpayments.

(a) Imposition of penalty. If this section applies to any portion of an underpayment of tax required to be shown on a return, there shall be added to the tax an amount equal to 20 percent of the portion of the underpayment to which this section applies.

(b) Portion of underpayment to which section applies. This section shall apply to the portion of any underpayment which is attributable to 1 or more of the following: (1) Negligence or disregard of rules or regulations. (2) Any substantial understatement of income tax. (3) Any substantial valuation misstatement under chapter 1. (4) Any substantial overstatement of pension liabilities. (5) Any substantial estate or gift tax valuation understatement. ...

(c) Negligence. For purposes of this section , the term “negligence” includes any failure to make a reasonable attempt to comply with the provisions of this title, and the term “disregard” includes any careless, reckless, or intentional disregard.
…

IRC §6694 (a) Understatement due to unreasonable positions.

(1) In general. Any tax return preparer who prepares any return or claim for refund with respect to which any part of an understatement of liability is due to a position described in paragraph (2) shall pay a penalty with respect to each such return or claim in an amount equal to the greater of— (A) $1,000, or (B) 50 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.

(2) Unreasonable position. A position is described in this paragraph if— (A) the tax return preparer knew (or reasonably should have known) of the position, (B) there was not a reasonable belief that the position would more likely than not be sustained on its merits, and (C) (i) the position was not disclosed as provided in section 6662(d)(2)(B)(ii) , or (ii) there was no reasonable basis for the position.

(3) Reasonable cause exception. No penalty shall be imposed under this subsection if it is shown that there is reasonable cause for the understatement and the tax return preparer acted in good faith.

(b) Understatement due to willful or reckless conduct.

(1) In general. Any tax return preparer who prepares any return or claim for refund with respect to which any part of an understatement of liability is due to a conduct described in paragraph (2) shall pay a penalty with respect to each such return or claim in an amount equal to the greater of— (A) $5,000, or (B) 50 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim. (2) Willful or reckless conduct. Conduct described in this paragraph is conduct by the tax return preparer which is— (A) a willful attempt in any manner to understate the liability for tax on the return or claim, or (B) a reckless or intentional disregard of rules or regulations. (3) Reduction in penalty. The amount of any penalty payable by any person by reason of this subsection for any return or claim for refund shall be reduced by the amount of the penalty paid by such person by reason of subsection (a) .

(c) Extension of period of collection where preparer pays 15 percent of penalty. (1) In general. If, within 30 days after the day on which notice and demand of any penalty under subsection (a) or (b) is made against any person who is a tax return preparer, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2) . Notwithstanding the provisions of section 7421(a) , the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2) . (2) Preparer must bring suit in district court to determine his liability for penalty. If, within 30 days after the day on which his claim for refund of any partial payment of any penalty under subsection (a) or (b) is denied (or, if earlier, within 30 days after the expiration of 6 months after the day on which he filed the claim for refund), the tax return preparer fails to begin a proceeding in the appropriate United States district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph . (3) Suspension of running of period of limitations on collection. The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(d) Abatement of penalty where taxpayer's liability not understated. If at any time there is a final administrative determination or a final judicial decision that there was no understatement of liability in the case of any return or claim for refund with respect to which a penalty under subsection (a) or (b) has been assessed, such assessment shall be abated, and if any portion of such penalty has been paid the amount so paid shall be refunded to the person who made such payment as an overpayment of tax without regard to any period of limitations which, but for this subsection, would apply to the making of such refund.

(e) Understatement of liability defined. For purposes of this section , the term "understatement of liability" means any understatement of the net amount payable with respect to any tax imposed by this title or any overstatement of the net amount creditable or refundable with respect to any such tax. Except as otherwise provided in subsection (d) , the determination of whether or not there is an understatement of liability shall be made without regard to any administrative or judicial action involving the taxpayer.

(f) Cross reference. For definition of tax return preparer, see section 7701(a)(36) .

§ 7201 Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§ 7206 Fraud and false statements. Any person who—

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries. Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud. Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331 , with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements. In connection with any compromise under section 7122 , or offer of such compromise, or in connection with any closing agreement under section 7121 , or offer to enter into any such agreement, willfully— (A) Concealment of property. Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or (B) Withholding, falsifying, and destroying records. Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax; shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation) , or imprisoned not more than 3 years, or both, together with the costs of prosecution.

IRC §7216. Disclosure or use of information by preparers of returns.

(a) General rule.
Any person who is engaged in the business of preparing, or providing services in connection with the preparation of, returns of the tax imposed by chapter 1, or any person who for compensation prepares any such return for any other person, and who knowingly or recklessly—
(1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or
(2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return,
shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both together with the costs of prosecution.
(b) Exceptions.
(1) Disclosure.
Subsection (a) shall not apply to a disclosure of information if such disclosure is made—
(A) pursuant to any other provision of this title, or
(B) pursuant to an order of a court.
(2) Use. Subsection (a) shall not apply to the use of information in the preparation of, or in connection with the preparation of, State and local tax returns and declarations of estimated tax of the person to whom the information relates.
(3) Regulations.
Subsection (a) shall not apply to a disclosure or use of information which is permitted by regulations prescribed by the Secretary under this section . Such

regulations shall permit (subject to such conditions as such regulations shall provide) the disclosure or use of information for quality or peer reviews.

IRC §7701(a) (36) Tax return preparer. (A) In general. The term " tax return preparer" means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this title or any claim for refund of tax imposed by this title. For purposes of the preceding sentence, the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund. (B) Exceptions. A person shall not be an " tax return preparer" merely because such person— (i) furnishes typing, reproducing, or other mechanical assistance, (ii) prepares a return or claim for refund of the employer (or of an officer or employee of the employer) by whom he is regularly and continuously employed, (iii) prepares as a fiduciary a return or claim for refund for any person, or (iv) prepares a claim for refund for a taxpayer in response to any notice of deficiency issued to such taxpayer or in response to any waiver of restriction after the commencement of an audit of such taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or indirectly affects the tax liability of such taxpayer.

END