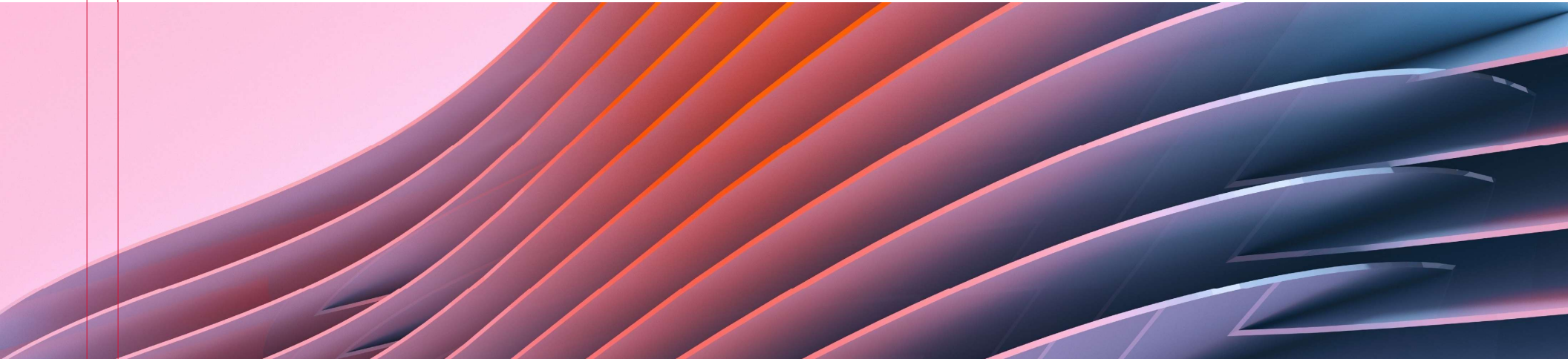




TFI State & Local Tax Conference
Rolling Meadows, IL
October 17, 2024

ETHICS FOR TAX PROFESSIONALS – PRACTICAL APPLICATION

David A. Hughes
Kylan S. J. Memminger



DON'T GET CAUGHT IN THE ETHICS WEB

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- You (and your employees, representatives, or agents) may disclose to any and all persons, without limitation, the tax treatment or tax structure, or both, of any transaction described in the associated materials provided to you, including, but not limited to, any tax opinions, memoranda, or other tax analyses contained in the materials.
- The information in this document is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.



AGENDA

- Review professional ethics standards and requirements
- Analyze common ethical issues within that framework
- Apply professional ethics standards to real-life problems



APPENDIX

- Professional Requirements
 - State Bar Associations (Mandatory and Elective)
 - State Boards of Accountancy
- Professional Standards
 - ABA Model Rules
 - AICPA
 - Statements on Standards for Tax Services (SSTS)
 - Circular 230
- Company Policies and Standards



LEGAL STANDARDS

- Treasury Circular 230
- Foreign Corrupt Practices Act (FCPA)
- State Statutes, Regulations and Rules
- Civil Penalties
- Criminal Sanctions



SELECT ABA MODEL RULES

Rule	Topic
• 1.3	Due Diligence
• 1.6	Confidentiality of Information
• 1.8	Conflict of Interest: Current Clients Specific Rules
• 3.3	Candor toward the tribunal
• 4.1	Truthfulness in Statements to Others
• 7.2	Advertising



STATEMENTS ON STANDARDS FOR TAX SERVICES

- SSTS No. 1: General Standards for Members Providing Tax Services
- SSTS No. 2: Standards for Members Providing Tax Compliance Services, Including Tax Return Positions
- SSTS No. 3: Standards for Members Providing Tax Consulting Services
- SSTS No. 4: Standards for Members Providing Tax Representation Services



PERSONAL CONSIDERATIONS

Vary across:

- Cultural environment
- Economic strata
- Religious affiliations
- Family structure
- Community groups, and,
- Societal accepted norms



OVERARCHING THOUGHTS

“The fact is that all sorts of things go awry in the electronic universe in which we now live, and lawyers are obliged to protect their clients’ interests even if that requires something more than blind reliance on the proper and timely transmission, receipt and filing of computer-generated electronic mail.”

And.....

Describing one lawyer’s efforts to blame his email system as the cause for delay as “the digital age equivalent of **‘the dog ate my homework.’”**

See: Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC, 227 So. 3d 752 (Fla. 1st DCA 2017)(collecting ‘excusable neglect’ cases involving lawyer email glitches)



WHEN IN DOUBT: USE THE ETHICS CHECKLIST

When making decisions or following a directive, ask yourself:

- Does my action comply with the spirit and letter of the law?
- Is my behavior consistent with my organization's core values and ethical and professional standards?
- Does my decision reflect the right thing to do?
- Is my decision being driven by responsible professional judgment?
- Am I confident that I could explain my decision if it were made public?



WHEN IN DOUBT: USE THE ETHICS CHECKLIST

If the answer to any of these questions is “no,” or if you are not sure, then you need to get help. This includes situations where:

- You are uncertain about the rules you are required to follow
- Differences of opinion make the course of action unclear
- Potential actions (or inaction) or decisions make you uncomfortable.



ETHICAL SCENARIO #1

Chris, an attorney, wants to let his clients and others know that the MTC recently proposed a new (and ridiculous) interpretation of PL 86-272. But Chris has decided to only communicate with his clients through Snapchat, an instant messaging service that after a period of time automatically deletes messages.

Is this:

- A. Ethical; or
- B. Unethical



ETHICAL SCENARIO #1

Answer: B, Unethical

- NY Social Media Ethics Guideline No. 3.C: Retention of Social Media Communications with Clients
- If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper. See NYRPC 1.1, 1.15.
- Comment: A lawyer's file relating to client representation includes both paper and electronic documents. The ABA Model Rules of Professional Conduct defines a "writing" as "a tangible or electronic record of a communication or representation..." Rule 1.0(n), Terminology. The NYRPC "does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation". The only NYRPC provision requiring maintenance of client documents is NYRPC 1.15(i). The NYRPC, however, implicitly imposes on lawyers an obligation to retain documents. For example, NYRPC 1.1 requires that "A lawyer should provide competent representation to a client." NYRPC 1.1(a) requires "skill, thoroughness and preparation."



ETHICAL SCENARIO #2

Marilyn (CPA and lawyer) states on her Facebook page that she and her firm, a medium-sized consulting firm, have authority to represent clients in all state issues, including unclaimed property. In reality, the vast majority of her cases involve sales and use tax. But Marilyn is quite smart and experienced and can certainly read and interpret state laws, regulations and case law on any state and local obligations. Is her Facebook page ethical?

- A. Ethical
- B. Unethical



ETHICAL SCENARIO #2

Answer: A, Ethical

ABA Rules:

- ABA Rule 7.1 prohibits “false or misleading communication about the lawyer or the lawyer's services.”
- ABA Rule 4.1 also forbids a lawyer to “make a false statement of material fact or law to a third person.”
- ABA Formal Opinion 10-457 (8/5/10): lawyer website marketing must comply with ethics rules prohibiting false or misleading statements

AICPA Code:

- AICPA Code Section 1.100.001 requires professionals to maintain “objectivity and integrity” and prohibits a misrepresentation of facts.



ETHICAL SCENARIO #2

Answer: A, Ethical

IL Supreme Court Rules of Professional Conduct:

- Rule 7.1 prohibits “false or misleading communication about the lawyer or the lawyer's services.”
- Rule 7.4 allows a lawyer to communicate the fact that the lawyer does or does not practice in particular fields of law, but the reference must be “truthful and verifiable and may not be misleading.”



ETHICAL SCENARIO #3

The Taxpayer is disputing an audit by the IL DOR for using the wrong local rates for sales within Illinois. Evan, taxpayer's counsel, has been trading emails with the DOR about the audit. However, Evan receives an email from the DOR with information dealing with another case that was meant to be sent to a different Evan. The email contains information related to taxpayers not represented by Evan. What should the Evan do with the email?

- A. Immediately delete it.
- B. Notify the sender.
- C. Give the other taxpayer a head's up about receiving the incorrect email.
- D. Share it with the other taxpayers mentioned in hopes of representing them.



ETHICAL SCENARIO #3

Answer: B

- ABA Model Rule 4.4(b): A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.
- The AICPA does not have a specific rule for this situation, but AICPA Code of Professional Conduct 0.300.020.01 requires members to "exercise sensitive professional and moral judgments in all their activities." Further, Section 0.300.040.01 requires members to perform all professional responsibilities with the highest sense of integrity: Integrity is measured in terms of what is right and just. In the absence of specific rules, standards, or guidance or in the face of conflicting opinions, a member should test decisions and deeds by asking: "Am I doing the right thing?"



ETHICAL SCENARIO #4

Samantha owns an Illinois based online retailer named GoCubsGo that specializes in minor league baseball apparel. On its website GoCubsGo advertises that it sells goods into all 50 states. The website also says it will collect state tax where applicable. After seeing a speech by Jason, a famed Illinois SALT attorney, Samantha gets concerned about not collecting tax at the local level in Colorado. After consulting with and getting advice from Jason, Samantha changes her website to remove all references to having customers in all 50 states and her statement about taxes. Was Jason's advice ethical?

- A. Yes, this is ethical as long as the statements are accurate and not misleading.
- B. Yes, this is ethical as long as the change was not strictly for state and local tax reasons
- C. No, it is unethical to remove the references and declaration that Sam collects tax where applicable because the intent is to hide from the 60+ self collecting home rule municipalities in Colorado.
- D. No, lawyers cannot advise their clients on the propriety of social media postings under recent ABA Formal Opinions.



ETHICAL SCENARIO #4

Answer: A

- Social Media Ethics Guideline No. 5.A: Removing Existing Social Media Information
- A lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be “taken down” or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media information or data is preserved, a party or nonparty, when appropriate, may not delete information from a social media profile that is subject to a duty to preserve.
- Social Media Ethics Guideline No. 5.B: Adding New Social Media Content
- A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not “direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim.”
- See NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.



ETHICAL SCENARIO #5

Jack is a SALT partner in a nationwide law firm. Jack's firm utilizes a well-vetted third-party cloud computing service provider to store confidential client information – technology that Jack utilizes on a daily basis and has a basic knowledge of the technology. The firm's cloud storage is hacked and the confidential information of some of Jack's clients is accessed. Jack promptly notifies the affected clients regarding the breach. Has Jack satisfied his ethical obligations?

- A. Yes, because Jack's firm used a well-vetted cloud storage service provider and Jack promptly notified the affected clients.
- B. Yes, because Jack is entitled to rely on his firm's IT department and CIO to protect clients' confidential information.
- C. No, because Jack merely has a basic understanding of the relevant technology.
- D. No, because Jack has a duty to not only notify affected clients about the breach but also has a continuing duty to keep the affected clients informed and must include material developments in post-breach investigations affecting the client's confidential information.



ETHICAL SCENARIO #5

Answer: D

ABA Rules:

- ABA Rule 1.1 provides that “[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 [8] to Rule 1.1 was modified in 2012 to emphasize that this duty of competency includes a responsibility to understand the technology used in providing that representation:
- To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)
- In Formal Opinion 483 (10/17/18), the ABA Standing Committee on Ethics and Professional Responsibility stated that this duty necessarily requires both an understanding of the basic features of the relevant technology and deployment of that technology in a manner that will reasonably safeguard confidential client information.



ETHICAL SCENARIO #5

- Formal Opinion 483 also concluded that, once a breach has occurred and client information has been accessed, the duty to notify affected clients includes “a continuing duty to keep clients reasonably apprised of material developments in post-breach investigations affecting the clients’ information. *See also*, State Bar of Mich. Op. RI-09 (1991)

AICPA Code:

- AICPA Code Section 1.700.001: A member in public practice shall not disclose any confidential client information without the specific consent of the client.
- AICPA Code Section 1.700.005: A member would be considered in violation of the “Confidential Client Information Rule” [1.700.001] if the member cannot demonstrate that safeguards were applied that eliminated or reduced significant threats to an acceptable level.



ETHICAL SCENARIO #5

- AICPA Code Section 0.400 (Definitions): Confidential client information. Any information obtained from the client that is not available to the public. Information that *is available to the public includes*, but is not limited to, information . . . in a client document that has been released by the client to the public or that has otherwise become a matter of public knowledge; . . . on publicly accessible websites, databases, online discussion forums, or other electronic media by which members of the public can access the information;. . . maintained by, or filed with, regulatory or governmental bodies that is available to the public; . . . or obtained from other public sources. Unless the particular client information is available to the public, such information should be considered confidential client information.



ETHICAL SCENARIO #6

Glenn is both a CPA and a lawyer, and a sole practitioner. Most of Glenn's clients are a bit shady and not always compliant with state and local tax laws. Because of this, Glenn determines to store client information only on his local PC and in paper files stored in his office. Has Glenn complied with his ethical obligations to secure his clients' information?

- A. Yes, because Glenn avoided subjecting his clients' sensitive information to a data breach thereby protecting their information.
- B. Yes, because paper files are always an acceptable method for storing client information.
- C. No, because Glenn should not be hiding sensitive information.
- D. No, because Glenn did not maintain either a paper copy or an electronic copy of client files in a secure, off-site location.



ETHICAL SCENARIO #6

Answer: D

ABA Rule:

- ABA Formal Opinion 482 (9/19/18): Lawyers have an ethical obligation to implement reasonable measures to safeguard property and information they hold for clients and prepare for business interruption. Lawyers must take reasonable steps to prepare for a disaster before one strikes the communities in which they practice. Rule 1.15 requires that lawyers take reasonable steps to preserve documents and property of clients when a lawyer has notice of an impending disaster. Lawyers may not be able to gain access to paper files following a disaster. Consequently, **lawyers must evaluate in advance storing files electronically so that they will have access to those files via the Internet if they have access to a working computer or smart device after a disaster.**
- Some lawyers located in an area affected by a disaster may have their files destroyed. Lawyers who maintain only paper files or maintain electronic files solely on a local computer or local server are at **higher risk of losing those records in a disaster.**
- To prevent the loss of files and other important records, including client files, lawyers should **maintain an electronic copy of important documents in an off-site location that is updated regularly.** Although not required, lawyers may maintain these files solely as electronic files, except in instances where law, court order, or agreement require maintenance of paper copies, and as long as the files are readily accessible and not subject to inadvertent disclosure.



ETHICAL SCENARIO #7

Matthew is both a CPA and a lawyer, and a sole SALT practitioner. Matthew wants to expand his client base and distributes a coupon that gives two hours of legal work for the price of one. Jessica is the owner of Throwback, Inc. and comes into possession of one of the coupons. Jessica contacts Matthew to seek advice about her company's upcoming Chicago Lease Transaction Tax audit and they set up a time to discuss the audit. Is either Jessica or her company a prospective or current client of Matthew's?

- A. Yes, Jessica is because she set up the call, but her company is not.
- B. Yes, her company is because the matter to be discussed is the audit, but Jessica is not.
- C. No, because Matthew does not owe any duty to Jessica or her company until he has first determined conflicts of interest and that he can competently handle the matter.
- D. No, because attorneys and CPAs cannot ethically use coupons for their services.



ETHICAL SCENARIO #7

Answer: C

ABA Rules:

- ABA Formal Opinion 465 (10/21/13): Mere purchase of a deal for legal services does not make the buyer either a prospective client or a current client, entitled to the attendant duties owed by the lawyer. Prior to establishing a client-lawyer relationship, it is incumbent upon the lawyer to first determine whether conflicts of interest exist and whether the lawyer can competently handle the particular matter based on the expected scope of representation and the buyer's needs. Therefore, the lawyer's advertisement and communications should explain that until a consultation takes place with the lawyer, no client-lawyer relationship exists and that such a relationship may never be formed if the lawyer determines there is a conflict of interest, the lawyer is unable to provide the required representation, or the lawyer declines representation for some other reason.
- Participation in deal-of-the-day and group-coupon marketing programs is not *per se* unethical for lawyers, but is fraught with many potential ethical perils, including limitations imposed by rules governing fee sharing, advertising, diligence, and the proper handling of legal fees, in addition to conflicts of interest and competence.



ETHICAL SCENARIO #7

Answer: C

AICPA Code:

- The AICPA Code does not have a provision specifically on point. However, one can infer that similar considerations as those for lawyers would be appropriate. AICPA Code of Professional Conduct 1.110.010 governs conflicts of interest. Section 1.520.001 governs commissions and referral fees. Section 1.600.001 governs advertising and other forms of solicitation. Section 0.300.060.02 incorporates a duty of diligence into the required standard of due care.

IL Supreme Court Rules of Professional Conduct:

- Rule 1.2 a lawyer is required to consult with a client as to the means by which they are to be pursued.
- Rule 7.2 recognizes a lawyers need to advertise services and specifically allows a lawyer to advertise prices for specific services and payment and credit arrangements.



ETHICAL SCENARIO #8

Bill is a tax practitioner (CPA & Attorney) in Ohio who maintains a website that includes a forum that allows visitors to pose SALT questions. The website contains bold font language disclaiming any confidentiality obligations or attorney/client relationship created by communications through the forum. One day, a visitor sends a vague question about whether her company would be required to pay the Ohio CAT. Bill responds, asking for more detailed facts to be able to determine if she can help. The visitor replies and proceeds to explain that she is the tax director for Bubbles Corp., a remote seller based out of Florida, and that the Ohio DOR has taken the position that Bubbles Corp.'s gross receipts from online sales of soap into Ohio are not protected from the Ohio CAT by P.L. 86-272. She would like to retain Bill to help with the settlement and file the appropriate dismissal pleadings. Unfortunately, Bill's firm has a conflict of interest and cannot represent Bubbles Corp. Bill is not too disappointed because he knows that P.L. 86-272 only provides protection for taxes based on net income, and this is a losing argument. Bill informs the visitor that she must decline the representation. However, Bill immediately calls his contact at Ohio DOT to get in his good graces. Is Bill's conduct in sharing the good news with his contact ethical?

- A. Yes, Bill does not owe any confidentiality obligations to Bubbles Corp. because there was no attorney/client relationship created.
- B. Yes, Bill's website disclaimed any confidentiality obligations owed to Bubbles Corp.
- C. Yes, both A and B apply.
- D. No, Bill owes a duty of confidentiality to Bubbles Corp. even though no attorney/client relationship was created.



ETHICAL SCENARIO #8

Answer: D

ABA Rules:

- ABA Formal Opinion 10-457 (August 5, 2010): “Websites have become a common means by which lawyers communicate with the public. Lawyers must not include misleading information on websites, must be mindful of the expectations created by the website, and must carefully manage inquiries invited through the website. Websites that invite inquiries may create a prospective client-lawyer relationship under Rule 1.18. Lawyers who respond to website-initiated inquiries about legal services should consider the possibility that Rule 1.18 may apply.”
- ABA Model Rule 1.18 (a): “A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.” (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
- Comment [2]: “A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response. See also Comment [4].”



ETHICAL SCENARIO #8

Answer: D

AICPA Code:

- AICPA Code Section 1.700.001: A member in public practice shall not disclose any confidential client information without the specific consent of the client.
- AICPA Code Section 1.700.005: A member would be considered in violation of the “Confidential Client Information Rule” [1.700.001] if the member cannot demonstrate that safeguards were applied that eliminated or reduced significant threats to an acceptable level.
- AICPA Code Section 0.400 (Definitions): **Confidential client information.** Any information obtained from the client that is **not available to the public**. Information that *is available to the public includes*, but is not limited to, information . . . in a client document that has been released by the client to the public or that has otherwise become a matter of public knowledge; . . . on **publicly accessible websites**, databases, **online discussion forums**, or other electronic media by which members of the public can access the information; . . . maintained by, or filed with, regulatory or governmental bodies that is available to the public; . . . or obtained from other public sources. Unless the particular client information is available to the public, such information should be considered confidential client information.



ETHICAL SCENARIO #9

Jeff has been retained by Overnight Trucking to advise it on whether unclaimed balances in the transportation company's accounts payable are escheatable to the state. After months of reviewing case law concerning federal preemption rules, Jeff finishes his memo, marks it as "Attorney-Client Privileged Communication," and emails it to Overnight Trucking. Must it be encrypted or sent in some manner other than by email?

- A. Encryption is not required unless the email includes trade secrets.
- B. Attorneys are not permitted to communicate on any privileged matter by email.
- C. Encryption is not required but Jeff must secure a read receipt.
- D. Unencrypted emails are an acceptable means of communicating such conclusions, provided that the lawyer undertakes reasonable efforts to prevent inadvertent or unauthorized disclosure.



ETHICAL SCENARIO #9

Answer: D

ABA Rules:

- ABA Formal Opinion 99-413 (March 10, 1999) concludes, under Rule 1.6, that attorneys have a reasonable expectation of privacy with unencrypted emails, but does urge advance discussion with the client of communications concerning highly sensitive matters.
- ABA Formal Opinion 477R (follow up to 99-413) (May 22, 2017) suggests that lawyers understand the nature of the threat to sensitive information, take a pro-active role in ensuring electronic communications are protected, and ensuring the lawyer and nonlawyer colleagues are trained in technology and information security. Also, recommends that the lawyer fully inform the client of the “risks involved” in the transmission of sensitive information
- 2012 Technology Amendments to the Model Rules
- ABA Model Rule 1.1, Comment [8] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.....
- ABA Model Rule 1.6, Comment [17] says that 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.



ETHICAL SCENARIO #10

Carolyn is an attorney licensed in the State of Illinois. She has been practicing in SALT for 30 years and has attended many SALT conferences around the country for the past 28 years. On her LinkedIn profile, she lists herself as a "Specialist in State Taxation?" Is this ethical?

- A. Yes
- B. No



ETHICAL SCENARIO #10

Answer: B, Unethical

ABA Rules:

- ABA Model Rule 7.4, Comment [1] “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. Comment [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.



ETHICAL SCENARIO #10

AICPA Code:

- AICPA Code Section 1.600.001: A member in public practice shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false, misleading, or deceptive.
- AICPA Code Section 1.600.010: A member would be in violation of the “Advertising and Other Forms of Solicitation Rule” [1.600.001] if the member’s promotional efforts are false, misleading, or deceptive. Promotional efforts would be considered false, misleading, or deceptive if they: (a) create false or unjustified expectations of favorable results; (b) imply the ability to influence any court, tribunal, regulatory agency, or similar body or official; (c) contain a representation that the member will perform specific professional services in current or future periods for a stated fee, estimated fee, or fee range when it was likely at the time of the representation that such fees would be substantially increased and the member failed to advise the prospective client of that likelihood; (d) contain any other representations that would be likely to cause a reasonable person to misunderstand or be deceived.



ETHICAL SCENARIO #11

Jordan is a state and local tax attorney who sends out a weekly email entitled Hump Day Humor that contains an explanation of an English idiom, some humorous memes and a short post on “goings on” at Jordan’s firm. Jordan recently won an administrative decision against the Department of Revenue on a hotly contested SUT refund claim. Jordan is hoping the win will take his practice to the next level, so he decides, without asking his client, to include a write-up in his HDH about the decision. In the article, Jordan lists the name of the case, the docket number, and a brief description of the issues – all matters of public record.

- A. Jordan’s inclusion of the case description is ethical.
- B. Jordan’s inclusion of the case description is ethical if he removes the reference to his client’s name.
- C. Jordan’s inclusion of the case description is ethical so long as he limits it to information found in the administrative decision which is publicly available.
- D. Jordan’s inclusion of the case description is unethical.



ETHICAL SCENARIO #11

Answer: D

ABA Rules:

- ABA Formal Opinion 18-480 (March 6, 2018) states that “Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.”
- “ABA Model Rule 1.6(a) provides that 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).” Comment [2] emphasizes “[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.” Comment [3] clarifies that this rule “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, **whatever its source.**”
- “In other words, the scope of protection afforded by Rule 1.6 is far broader than attorney-client privileged information.”



ETHICAL SCENARIO #11

- “Unless one of the exceptions to Rule 1.6(a) is applicable, a lawyer is prohibited from commenting publicly about any information related to a representation. Even client identity is protected under Model Rule 1.6.”
- “The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a). **Rule 1.6 does not provide an exception for information that is “generally known” or contained in a “public record.”** Accordingly, if a lawyer wants to publicly reveal client information, the lawyer must comply with Rule 1.6(a).
- **AICPA Code:**
- AICPA Code Section 1.700.001: A member in public practice shall not disclose any confidential client information without the specific consent of the client.
- AICPA Code Section 1.700.005: A member would be considered in violation of the “Confidential Client Information Rule” [1.700.001] if the member cannot demonstrate that safeguards were applied that eliminated or reduced significant threats to an acceptable level.



ETHICAL SCENARIO #11

- AICPA Code Section 0.400 (Definitions): **Confidential client information.** Any information obtained from the client that is not available to the public. Information that *is available to the public includes*, but is not limited to, information . . . in a client document that has been released by the client to the public or that has otherwise become a matter of public knowledge; . . . on publicly accessible websites, databases, online discussion forums, or other electronic media by which members of the public can access the information;. . . maintained by, or filed with, regulatory or governmental bodies that is available to the public; . . . or obtained from other public sources. Unless the particular client information is available to the public, such information should be considered confidential client information.



ETHICAL SCENARIO #12

You are an attorney and recently purchased a smart home assistant that you use to listen to music, set your calendar, receive news and check the weather. While working at home recently, you participated in a conference call where the status of the sales and use tax audit and taxpayer return information was discussed. In the middle of the call, your smart assistant unexpectedly said, "I'm sorry, I didn't catch that." Should you be concerned?

- A. No, you have not violated any ethics rules, because your smart assistant didn't understand your conversation.
- B. No, you can't be expected to worry about new technology.
- C. Yes, you have exposed confidential information.



ETHICAL SCENARIO #12

- Answer: C.
- ABA Model Rule 1.6 – Confidentiality
 - Protects the confidentiality of information relating to the representation of a client.
 - Reasonable efforts to prevent inadvertent or unauthorized disclosure or access must be taken.
- ABA Model Rule 1.1, Comment 8
 - Must keep abreast of change in law and it practice, including benefits and risks associated with relevant technology.





Ethics Standards - ABA

Kilpatrick

ETHICS STANDARDS - ABA

Standards of the American Bar Association

Model Rules of Professional Conduct. Scope, Section 14 provides:

- The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline.
- Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.
- Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should."
- Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.



ETHICS STANDARDS - ABA

Standards of the American Bar Association

Model Rules of Professional Conduct. Scope, Sections 16 & 21 provide:

- Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.
- The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.
- The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.
- The Preamble and the note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.



SELECT ABA MODEL RULES APPLICABLE TO TAX PROFESSIONALS

ABA Topic

- Rule 1.1 Competence
- Rule 1.2 Scope of Representation and Allocation of Authority between Client and
Lawyer
- Rule 1.3 Due Diligence
- Rule 1.4 Communication
- Rule 1.6 Confidentiality of Information
- Rule 1.7 Conflict of Interest: Current Clients
- Rule 1.8 Conflict of Interest: Current Clients Specific Rules
- Rule 3.3 Candor toward the tribunal
- Rule 4.1 Truthfulness in Statements to Others
- Rule 7.2 Advertising
- Rule 8.4 Misconduct





Ethics Standards - AICPA

Kilpatrick

ETHICS STANDARDS - AICPA

AICPA Code of Professional Conduct Structure

- Introduction
 - Section 50 – Principles of Professional Conduct
 - Section 90 – Rules: Applicability and Definitions
 - Section 100 – Independence, Integrity, and Objectivity
 - Section 200 – General Standards Accounting Principles
 - Section 300 – Responsibilities to Clients
 - Section 400 – Responsibilities to Colleagues
 - Section 500 – Other Responsibilities and Practices

- ET Appendixes
- ET Topical Index

- <http://www.aicpa.org/about/code/index.htm>



ETHICS STANDARDS - AICPA

AICPA Code of Professional Conduct Framework

- Maintain the good reputation of the profession.
- Serve the public interest.
- Perform services with:
 - Integrity
 - Due care
 - Professional competence
 - Independence & Objectivity
 - Confidentiality
 - Dissociate from others who behave unethically



ETHICS STANDARDS - AICPA

AICPA Code of Professional Conduct Principles

The Principles guide members in the performance of their professional responsibilities:

- Article I – Responsibilities
- Article II – The Public Interest
- Article III – Integrity
- Article IV – Objectivity and Independence
- Article V – Due Care
- Article VI – Scope and Nature of Services



ETHICS STANDARDS - AICPA

AICPA Code of Professional Conduct

- Article III: Integrity
 - Integrity is an element of character fundamental to professional recognition.
 - Integrity is the quality from which the public trust derives and the benchmark against which a member must ultimately test all decisions.
 - Integrity requires a member to be, among other things, honest and candid within the constraints of client confidentiality. Service and the public trust should not be subordinated to personal gain and advantage.
 - Integrity also requires a member to observe the principles of objectivity and independence and of due care.



ETHICS STANDARDS - AICPA

AICPA Code of Professional Conduct:

- Article III: What Is Meant by Integrity?
 - Courage to stand by principles even in face of pressure
 - Act out of moral principle, not expediency
 - Never let loyalty cloud good judgment and ethical decision-making
 - Attributes of a person with Integrity:
 - ❖ Truthfulness
 - ❖ Courage
 - ❖ Sincerity
 - ❖ Honesty



ETHICS STANDARDS - AICPA

Professional Standards for Ethics – AICPA

- Statement on Standards for Tax Services
 - (“SSTS” or “Standards”)
 - ❖ **SSTS and interpretations issued thereunder reflect the AICPA’s standards of tax practice and delineate members’ responsibilities to taxpayers, the public, the government, and the profession.**
 - ❖ **Ongoing process to articulate standards.**
 - ❖ **Promulgated by the Tax Executive Committee.**



STATEMENTS ON STANDARDS FOR TAX SERVICES (SSTS)

- These statements apply to all members providing tax services regardless of the jurisdictions in which they practice. Interpretations of these statements may be issued as guidance to assist in understanding and applying the statements
- The SSTSs and their interpretations are intended to complement other standards of tax practice, such as Treasury Department Circular No. 230, *Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, Enrolled Retirement Plan Agents, and Appraisers before the Internal Revenue Service*; penalty provisions of the Internal Revenue Code; and state boards of accountancy rules.
- ...enforcement of these rules, as part of the AICPA's Code of Professional Conduct Rule 201, *General Standards*, and Rule 202, *Compliance With Standards* (AICPA, *Professional Standards*, vol. 2, ET sec. 201 par..01 and ET sec. 202 par..01), will be undertaken on a case-by-case basis. Members are expected to comply with them.



STATEMENTS ON STANDARDS FOR TAX SERVICES

SSTS No. 1: Tax Return Positions

SSTS No. 2: Answers to Questions on Returns

SSTS No. 3: Certain Procedural Aspects of Preparing Returns

SSTS No. 4: Use of Estimates

SSTS No. 5: Departure From a Position Previously Concluded in an Administrative Proceeding or Court Decision

SSTS No. 6: Knowledge of Error: Return Preparation and Administrative Proceedings

SSTS No. 7: Form and Content of Advice to Taxpayers





Ethics Standards – Circular 230

Kilpatrick

ETHICS STANDARDS - CIRCULAR 230

- The rules in Circular 230 are codified as Title 31 of the Code of Federal Regulations, Subtitle A, Part 10 (31 C.F.R. Part 10).
- Circular 230 contains “standards of practice” to promote ethical practice before the IRS.
 - Imposes affirmative duties.
 - Prohibits certain types of conduct.
 - Establishes a legal process for disciplining tax professionals for violation.
 - Disciplinary action includes censure, suspension, disbarment, fines & injunctive relief.



WHO IS SUBJECT TO CIRCULAR 230 JURISDICTION?

- State licensed Attorneys and Certified Public Accountants authorized and in good standing with their state licensing authority who interact with tax administrative at any level and in any capacity.
- Persons enrolled to practice before the IRS – Enrolled Agents, Enrolled Retirement Plan Agents, and Enrolled Actuaries.
- Persons providing appraisals used in connection with tax matters (e.g., charitable contributions; estate and gift assets; fair market value for sales gain, etc.).
- Unlicensed individuals who represent taxpayers before the examination, customer service and the Taxpayer Advocate Service in connection with returns they prepared and signed.



WHO IS SUBJECT TO CIRCULAR 230 JURISDICTION?

- Licensed and unlicensed individuals who give written advice with respect to any entity, transaction, plan or arrangement; or other plan or arrangement, which is of a type the IRS determines as having a potential for tax avoidance or evasion. For this purposes “written advice” contemplates all forms of written material, including the content of an email, given in connection with any law or regulation administered by the IRS.
- Any person submitting a power of attorney in connection with limited representation or special authorization to represent before the IRS with respect to a specific matter before the Agency.



WHAT DOES “PRACTICE BEFORE THE IRS” ENTAIL?

- “Practice before the IRS” comprehends all matters connected with a presentation to the IRS, or any of its officers or employees, relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations administered by the IRS. Such presentations include, but are not limited to, preparing documents; filing documents; corresponding and communicating with the IRS; rendering oral and 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.v



NON STANDARDIZATION OF RULES

- While the various rules of ethical tax conduct are all, in general, designed to prohibit “bad conduct” and, in general, address similar issues that tend to overlap, they are not uniform by any means. As a result, the action taken to resolve a conflict may differ depending on the governing authority. Consequently, the tax practitioner should determine which ethical rules are applicable and in what particular capacity the tax practitioner is acting.
- Example: A, an attorney, determines that an ethical conflict may require his withdrawal from a client matter. A’s conduct will be dictated by his particular state bar association rules of conduct and Circular 230. Contrast this with B, a tax return preparer, who is asked by a client to take a potentially unreasonable tax position. B’s conduct will be governed by Circular 230 and IRC§ 6694.



CIRCULAR 230 SELECT PROVISIONS

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



CIRCULAR 230 SELECT PROVISIONS

- § 10.22 Diligence as to accuracy.
 - (a) In general. A practitioner must exercise due diligence –
 - 1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;
 - 2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and
 - 3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.



CIRCULAR 230 SELECT PROVISIONS (CONT.)

- § 10.22 Diligence as to accuracy.
 - b) Reliance on others. Except as modified by §§10.34 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 SELECT PROVISIONS (CONT.)

§ 10.23 Prompt disposition of pending matters. A practitioner may not unreasonably delay the prompt disposition of any matter before the Internal Revenue Service.

§ 10.29 Conflicting interests.

- a) Except as provided by paragraph (b) of this section, a practitioner shall not represent a client before the Internal Revenue Service if the representation involves a conflict of interest. A conflict of interest exists if –
 - 1) The representation of one client will be directly adverse to another client; or
 - 2) There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner.



CIRCULAR 230 SELECT PROVISIONS (CONT.)

§ 10.29 Conflicting interests.

- b) Notwithstanding the existence of a conflict of interest under paragraph (a) of this section, the practitioner may represent a client if –
 - 1) The practitioner reasonably believes that the practitioner will be able to provide competent and diligent representation to each affected client;
 - 2) The representation is not prohibited by law; and
 - 3) Each affected client waives the conflict of interest and gives informed consent, confirmed in writing by each affected client, at the time the existence of the conflict of interest is known by the practitioner. The confirmation may be made within a reasonable period of time after the informed consent, but in no event later than 30 days.
- c) Copies of the written consents must be retained by the practitioner for at least 36 months from the date of the conclusion of the representation of the affected clients, and the written consents must be provided to any officer or employee of the Internal Revenue Service on request.



CIRCULAR 230 SELECT PROVISIONS (CONT.)

§ 10.32 Practice of law. Nothing in the regulations in this part may be construed as authorizing persons not members of the bar to practice law.

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(a) Tax returns

1) A practitioner may not willfully, recklessly, or through gross incompetence –

2) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that –

A. Lacks a reasonable basis;

B. Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance);

C. Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).



CIRCULAR 230 SELECT PROVISIONS (CONT.)

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

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.



CIRCULAR 230 SELECT PROVISIONS (CONT.)

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(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.



CIRCULAR 230 SELECT PROVISIONS (CONT.)

- § 10.34 Standards with respect to tax returns and documents, affidavits and other papers.
- 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.



CIRCULAR 230 SELECT PROVISIONS (CONT.)

- § 10.35 Competence.
- A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law.



Questions?



David A. Hughes

Partner
Chicago

312 606 3212
dhughes@ktslaw.com

[Full bio](#)



Kylan S. J. Memminger

Associate
Chicago

312 606 3240
kmemminger@ktslaw.com

[Full bio](#)

**KILPATRICK TOWNSEND
STOCKTON LLP**
500 W. Madison Street
Suite 3700
Chicago, IL 60661





Evaluations

Kilpatrick

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