

Ethics for the Tax Lawyer: Test Your Knowledge of the ABA's Model Rules of Professional Responsibility

By Pat Derdenger,* Andrew F. Halaby†, and Janette M. Lohman‡

The American Bar Association's ("ABA") Model Rules of Professional Responsibility (the "Model Rules") have been adopted, with some modification, in the vast majority of states and, therefore, provide useful baseline guidance to all attorneys, including tax attorneys working for both private clients (inside or outside) and the government. Although some states may have rules or codes of conduct that differ from the ABA's Model Rules, the focus of this presentation is based primarily on the ABA's Model Rules, as interpreted by the ABA's Formal Opinions that have been issued over the past twenty years and that are in full force and effect.

The following twenty-nine (29) questions are provided to you as "homework" necessary to prepare for the Tax Section's Annual Tax Link Live member benefit teleconference (of the same name), to be given on Tuesday, June 3, 2008, from 1:00 p.m. until 2:30 p.m., Eastern Time. The authors will discuss these questions and the answers to them at that time, in an effort for all participants to better understand how the Model Rules can be applied to all types of tax practitioners. Audience participation will be widely encouraged. For details on registering and obtaining CLE ethics credit, please see the Tax Link Live announcement immediately following this article.

- In settlement negotiations with the Internal Revenue Service's ("IRS") attorney over the fair market value of an interest in a family partnership, the taxpayer's lawyer states that the bottom line is a twenty-five percent (25%) concession by the taxpayer, but the taxpayer told her attorney that she would accept a fifty-fifty (50-50) split as the real bottom line. Is such a misrepresentation okay under the Model Rules?
 - Yes, as long as the settlement is for twenty-five percent (25%).
 - Yes, it is only negotiating "puffing."
 - Yes, the taxpayer's lawyer can say anything (even if it is false) in settlement negotiations.
 - No, the taxpayer's lawyer must be totally honest and disclose that the bottom line is a fifty-fifty (50-50) split.
- The taxpayer's lawyer receives a cover letter from the IRS lawyer enclosing a copy of a document filed with IRS Appeals but the envelope also enclosed a memo from the IRS lawyer to his clients, the IRS agent and her manager, with an analysis of the weak points of the IRS's case (marked "attorney client privilege"). What should the taxpayer's lawyer do?
 - Shred it.
 - Notify the sender.
 - Use it to beef up the taxpayer's response to the document.
 - Celebrate his client's good fortune.
- The taxpayer's lawyer e-mails his client a memo concluding that the client is not entitled to an IRC section 41 research and development tax credit for certain activities. The memo was marked "attorney-client privilege." May such a document be sent to the client by e-mail, or must it be encrypted?
 - Unencrypted e-mails are fine.
 - Such a sensitive document, if sent by e-mail, must be encrypted.
 - If sent by e-mail, the sender must get a read receipt.
 - Attorneys cannot send any client confidential information by e-mail.
- The taxpayer's lawyer wants to call the IRS National Office to talk about settling an ongoing income tax case of first impression. The IRS is represented by a Department of Justice ("DOJ") tax division trial attorney. May the taxpayer's lawyer make such a call?
 - Not even at gun point.
 - Yes, but the attorney must give the DOJ attorney a head's up first and only if the sole purpose of the contact is to address a policy issue.
 - Always.
 - Only if the taxpayer's lawyer is personal friends with the DOJ Attorney.

*Steptoe & Johnson LLP, Phoenix, AZ.

†Snell & Wilmer L.L.P., Phoenix, AZ.

‡Thompson Coburn LLP, St. Louis, MO.

5. You represent an individual and are counsel of record in a pending Tax Court case. Your client has just called to let you know that the IRS's lawyer in the case called her directly to ask for copies of back tax returns. Can the IRS lawyer do this?
- Yes, if the contact was only to ask for returns.
 - Yes, as long as the IRS's lawyer identified himself as the attorney for the IRS.
 - No, no contact may be made unless the consent of taxpayer's lawyer was first obtained.
 - The IRS is omnipotent and can do anything it wants.
6. A taxpayer's lawyer filed a claim for a refund of federal income tax for his client. The IRS requested a meeting to discuss the merits of the claim. The taxpayer's lawyer knows that the claim is barred by the statute of limitations. At the meeting, it appears that the IRS does not know that the statute of limitations has run and appears ready to grant the refund. Must the taxpayer's lawyer disclose to the IRS that the claim is barred?
- No.
 - No, but only if the taxpayer has a colorable defense to the assertion of the statute of limitations by the IRS.
 - Yes.
 - This is one lucky taxpayer!
7. A taxpayer's lawyer finds out that the taxpayer lied in answering interrogatories from the Government in litigation involving a personal income tax refund pending in federal district court. What must the taxpayer's lawyer do?
- Notify the Court immediately, but do not tell the client.
 - Nothing. The lawyer is precluded by her duty of confidentiality to the client under Rule 1.6.
 - First, try to persuade the client to rectify the situation.
 - Withdraw from representation immediately.
8. A new client asks his lawyer if she will represent the client in defending a one million dollar (\$1,000,000.00) income tax assessment made against the client on a contingency fee basis. The lawyer and the client agree in writing that the contingency fee will be thirty percent (30%) of the savings. The lawyer takes the matter on and after a few meetings with the IRS is successful in getting a settlement for a five hundred thousand dollar (\$500,000.00) payment by the client. The lawyer now submits a bill for one hundred fifty thousand dollars (\$500,000 x 30%). Is such a "reverse" contingent fee agreement okay?
- No, reverse contingency fees are not permitted.
 - Yes, if the fee is reasonable and the client is fully informed.
 - Tax lawyers always earn every penny of their fee.
 - The contingency amount should have been fifty percent (50%).
9. You submitted a settlement offer to the DOJ Tax Division attorney representing the Government in your corporate income tax refund case more than three months ago and have not heard back. You think that the DOJ attorney has not sent your settlement offer on to his client, the IRS, for review. You are good friends with the IRS employee who has the settlement review function for your case and you pick up the phone and call her to inquire if she has received your offer and what she thinks about it. Is this okay?
- Yes.
 - No way!
 - This is okay only if you reasonably believe that the offer has not been communicated to the IRS.
 - You are friends with the DOJ attorney and he does not mind your calling his client with questions about the cases you work on together.
10. Your corporate client has asked you as its tax lawyer to advise it as to whether it may take a particular reporting position on its consolidated corporate income tax return. You may provide the advice provided that:
- The position is not frivolous.
 - It is more likely than not that the position will be sustained on the merits.
 - There is some realistic possibility of success if the matter is litigated.
 - If it saves taxes, it's a good position, regardless of support for it.
11. You want to hire a particular tax lawyer for just one specific tax issue. The tax lawyer asks you to sign an advance waiver for future conflicts of interest, as long as the conflicts do not involve the tax issue. Is this ethical?
- No, and it is highly unreasonable for him to ask you for this.
 - Yes, as long as your consent is informed.
 - No, because each future conflict must be separately analyzed.
 - It does not matter, because you would sign anything as long as you get him to represent your company.
12. You discover that an IRS audit supervisor (who is a licensed attorney but is not practicing as an attorney) is taking kickbacks from taxpayers for dropping cases at the audit level. Do you have to report her misconduct to the Bar?
- Heck no, particularly not if you can get your client a really good deal from her.
 - Yes.
 - No, the Model Rules do not force lawyers to rat out licensed lawyers unless they are actually practicing law when they commit the misconduct.
 - The Model Rules leave it up to the individual lawyer to decide what to do in all situations of other lawyers' misconduct.

- 13.** You represent a corporate client in a huge sales tax case involving a new tax loophole. The IRS's lawyer tells you that she will agree to a very favorable settlement for your client, provided that you agree never to bring a similar case involving the same tax loophole against the IRS representing someone else. Is this agreement unethical?
- No, and if your client accepts these terms, you must abide by them.
 - Yes. It is unethical to force a lawyer to forego representation of future clients as part of a settlement agreement.
 - No, because the new technique is something your client owns and it is not your place to object.
 - No, because otherwise you would make a fortune trafficking in tax loopholes, which is patently unethical.
- 14.** Your company is looking to hire a new SALT lawyer. One candidate is currently with the Department of Revenue but has not been actively involved in your company's huge state income tax dispute. If you hire him, can he assist in this case?
- Yes, an exception to the general conflicts rule is carved out for attorneys who leave the government and go in house, rather than to a law firm.
 - No, because attorneys are always precluded from ever suing their former employers for any reason.
 - No, because attorneys are precluded for a reasonable period of time from suing their former employers for any reason.
 - Yes, as long as he has no personal involvement and/or knowledge about the case, it is okay for him to help you fight his former employer.
- 15.** An attorney has a particular expertise in local sales tax law and routinely represents local governments against private taxpayers, including current cases pending against your client. Your client wants to hire him to defend a local sales tax lawsuit against a municipality that he is not currently representing. May the attorney accept this engagement?
- Yes. Because the engagement would not involve a direct conflict, the attorney may accept the engagement.
 - No. The rules require attorneys to represent either governments or private clients, but never both.
 - Yes, because attorneys always have the right to take both sides of a case representing different taxpayers.
 - That depends upon whether his representation of your client would compromise his representation of his existing local government clients or vice versa.
- 16.** The Honorable I. M. Sovain, who had been a federal Tax Court judge for many years, recently retired and has gone into private practice. His business cards now read "Judge I. M. Sovain (Ret.) – Attorney at Law." Is this ethical conduct on the part of the judge?
- No. Once he is no longer a judge, he may no longer use the title nor encourage others to call him by either "Judge" or "Honorable."
 - Yes. One of the privileges of holding a judicial position is that you are entitled forever to be known as a member of the judiciary.
 - Yes. The title is honorific and no one will hire him thinking that he will have special influence just because he served as a federal Tax Court judge for the past thirty years.
 - Maybe. He may not use his former title professionally, but he can use it socially, for instance, in making restaurant reservations in order to get a better table and seated more quickly.
- 17.** Court X in State A issues unpublished tax opinions. Court X's rules prohibit specifically any reference to any tax opinion that has been designated as "not for publication." Are you permitted to cite Court X's tax opinions in your case against State B?
- Yes. State A's rules are not binding on proceedings taking place in State B.
 - No. All of the other states will honor State A's procedural rules.
 - Yes. The designation "not for publication" is meaningless, just like most states' rules against citing private letter rulings as precedent for other cases.
 - No. It would only be ethical to cite an unpublished opinion from a jurisdiction that has no specific ban on citing such unpublished opinions.
- 18.** You want to hire outside counsel on a specific tax matter, but you want this lawyer to agree that if she accepts this engagement, neither she nor her law firm will ever accept a case against your company in the future. Is this ethical?
- No. Such an agreement would impermissibly limit that attorney's right to practice law.
 - Yes. It is perfectly ethical to require outside counsel to be loyal to your company even after her representation of your company has ended, and even if the adverse future matter has nothing to do with her original representation of your company.
 - Yes, but only if you limit the restriction to the specific lawyer and not include her entire law firm.
 - No. After her representation of your company has ended, neither she nor her law firm owes you any duty of loyalty on any future matters.

- 19.** You engage outside counsel to represent your company on a tax matter. You and the outside counsel are both single and start dating secretly. Is there anything wrong with this?
- No. You and your outside counsel are both on the same side and this enhanced relationship might improve your ability to work closely together to represent your mutual client.
 - No. You are both single, both consenting adults and the company should keep its nose out of your business.
 - Yes. You and your lover are both the same sex and same sex marriages are not condoned in your state.
 - Yes. This relationship could exploit the outside counsel's fiduciary relationship with the company and may impair the outside counsel's ability to represent the company.
- 20.** You have been in-house tax counsel for X corporation for ten years, but then get an exciting offer to become a partner in a large law firm. The new firm wants to accept a case against your former employer, but you have no official knowledge about the particular matter other than gossip that was discussed at the company's last Christmas party. Can your new firm accept this case against your former employer?
- Yes. Your firm can accept the case as long as your former company gives informed consent to your adverse representation.
 - Yes. Your firm can accept the case, as long as the firm erects an ethical wall to prevent your involvement in that case.
 - No. Both you and your new firm are disqualified against accepting this case against your former employer.
 - No. You are forever precluded from ever taking a matter adverse to your former employer.
- 21.** In ongoing settlement discussions, the Department of Revenue's lawyer attempts to reach you to convey the Department's latest offer to your client, but finds you persistently unavailable. May the lawyer contact your in-house counterpart directly?
- No, unless the reason for your absence is a good one.
 - Yes, as long as your in-house counterpart is a lawyer.
 - No, because your client has every right to use you to play "hardball" in the negotiations.
 - Yes, because the Department has the right to expect the taxpayer's outside counsel always to be available.
- 22.** An IRS attorney e-mails to you a draft settlement agreement in MS Word. Using the "Final Showing Markup" mode, you can see IRS's most recent round of internal redlines to the document. May you review them?
- Yes, because IRS's lawyer should have known better.
 - No, because IRS's lawyer may not have known better.
 - Yes, as long as you promptly tell IRS's lawyer that you have them.
 - No, unless you tell IRS's lawyer and give her a reasonable chance to take corrective measures.
- 23.** You and some law school classmates are considering going into practice together on your own. May you use the "limited liability partnership" form of doing business?
- No, because a lawyer may not limit personal liability for his own malpractice.
 - Yes, as long as you each remain personally liable for your own malpractice.
 - No, unless you properly disclose this as your form of business in your communications.
 - Yes, because limiting your liability is a smart thing to do whenever possible.
- 24.** While representing a taxpayer in negotiations with the state Department of Revenue, you become aware of an opportunity to "switch teams" and join the state's Attorney General's team, litigating tax disputes for the Department of Revenue. When must you inform your client that you are exploring this opportunity?
- When you first learn the salary the Attorney General's position will be paying.
 - When you first discuss the prospect with the Attorney General's office.
 - When you first seriously consider taking the Attorney General's position.
 - When you tell your current employer you are leaving.
- 25.** You represent Taxpayer X in proceedings adverse to State A's Department of Revenue. State B's Department of Revenue becomes aware of your expertise and seeks to engage you as special counsel in a similar matter adverse to Taxpayer Y. May you accept the representation?
- No, if there is a significant risk that the representation of one client will be materially limited by your responsibilities to the other.
 - Yes, as long as you reasonably believe you may fully represent each client's interests and each client consents.
 - No, because as a practical matter, you can't ever adequately represent both the government and taxpayers.
 - Yes, because your ultimate responsibility is to get as much business as possible.

26. You represent Taxpayer X in proceedings adverse to State A's Department of Revenue. State B's Department of Revenue becomes aware of your expertise and seeks to engage you as special counsel in a similar matter adverse to Taxpayer Y, a corporate affiliate of Taxpayer X. You have correctly concluded there is no significant risk that the representation of Taxpayer X will be materially limited by your responsibilities to State B's Department of Revenue, and vice versa, but Taxpayer Y disagrees with your assessment. May you ethically accept the new representation nonetheless?
- No, because of Taxpayer Y's position.
 - Yes, as long as you reasonably believe you may fully represent each client's interests.
 - No, because Taxpayer X is your client.
 - Yes, because Taxpayer Y is **not** your client.
27. A new client asks his lawyer if she will represent the client in defending a one million dollar (\$1,000,000.00) income tax assessment made against the client on a contingency fee basis. The lawyer and the client agree in writing that the fee will be thirty percent (30%) of the savings or the lawyer's normal hourly rate of five hundred dollars (\$500.00) multiplied by her hours worked, whichever is greater. After spending four hundred (400) hours on the matter, the lawyer succeeds in getting a settlement for a five hundred thousand dollars (\$500,000.00) payment by the client. The lawyer now submits a bill for one hundred eighty thousand dollars (\$180,000.00) – less than the amount earned on an hourly basis. Did she do so ethically?
- Yes, because that was the parties' agreement.
 - No, because the lawyer had no downside risk.
 - Yes, unless five hundred dollars (\$500.00) is an unreasonably high hourly rate to charge.
 - No, unless the lawyer fully explains the basis of the one hundred eighty thousand dollar (\$180,000.00) charge to the client.
28. You represent a trade association of taxpayers, and are approached by State X to serve as special counsel in litigating a tax matter against one of them. May you ethically accept that representation?
- No, because by representing the trade association you represent each of the taxpayers individually.
 - Yes, as long as you conclude you may adequately represent each affected client and you obtain any necessary consents.
 - No, because the taxpayers' sense of your loyalty to them would be severely undermined.
 - Yes, unless you would be revealing the trade association's confidences in the course of representing State X.
29. You represent a corporation in a federal income tax dispute with the IRS. Unbeknownst to you, one of the corporation's officers has improperly reported the corporation's finances and has discussed those activities with one of your partners in seeking individual representation. Assuming your partner did not accept the officer's representation, may you use the confidential information shared with your partner in representing the corporation?
- No, unless the officer unilaterally shared the information with your partner.
 - Yes, because of the imputed knowledge principle.
 - No, because the officer expected that he was sharing the information in confidence.
 - Yes, because no attorney-client relationship was formed.



Ethics for Tax Lawyers: Test Your Knowledge of the ABA Model Rules

Panelists:

Pat Derdenger, Steptoe & Johnson LLP, Phoenix, AZ
 Andrew F. Halaby, Snell & Wilmer L.L.P., Phoenix, AZ
 Janette M. Lohman, Thompson Coburn LLP, St. Louis, MO

Tuesday, June 3, 2008, 1:00 – 2:30 p.m. Eastern Time

REGISTER TODAY

[HTTP://MEETINGS.ABANET.ORG/MEETING/TAX/TX0608S/](http://meetings.abanet.org/meeting/tax/tx0608s/)

Tuition

\$50 Tax Section Members
\$125 Non-Section Members
\$150 Non-ABA Members
\$30 Add'l Participants using
 same phone line

Cosponsored by the ABA Tax Section and the ABA Center for CLE