ABA MODEL RULE 1.1

COMPETENCE
Rule 1.1: Competence

Client-Lawyer Relationship

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

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ABA MODEL RULE 1.7

CONFLICT OF INTEREST: CURRENT CLIENTS
Rule 1.7: Conflict of Interest: Current Clients

Client-Lawyer Relationship

(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.

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ABA MODEL RULE 3.1

MERITORIOUS CLAIMS & CONTENTIONS
Rule 3.1: Meritorious Claims & Contentions

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.
ABA MODEL RULE 4.1

TRUTHFULNESS IN STATEMENTS TO OTHERS
August 16, 2018

Rule 4.1: Truthfulness in Statements to Others

Transactions With Persons Other Than Clients

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.
AICPA SSTS NO. 1(5)(a)

TAX RETURN POSITIONS
Statement on Standards for Tax Services No. 1, Tax Return Positions

Introduction

1. This statement sets forth the applicable standards for members when recommending tax return positions, or preparing or signing tax returns (including amended returns, claims for refund, and information returns) filed with any taxing authority. For purposes of these standards

   a. a tax return position is (i) a position reflected on a tax return on which a member has specifically advised a taxpayer or (ii) a position about which a member has knowledge of all material facts and, on the basis of those facts, has concluded whether the position is appropriate.

   b. a taxpayer is a client, a member's employer, or any other third-party recipient of tax services.

2. This statement also addresses a member's obligation to advise a taxpayer of relevant tax return disclosure responsibilities and potential penalties.

3. In addition to the AICPA, various taxing authorities, at the federal, state, and local levels, may impose specific reporting and disclosure standards with regard to recommending tax return positions or preparing or signing tax returns. These standards can vary between taxing authorities and by type of tax.

1. A member should refer to the current version of Internal Revenue Code Section 6694, Understatement of taxpayer's liability by tax return preparer, and other relevant federal, state, and jurisdictional authorities to determine the reporting and disclosure standards that are applicable to preparers of tax returns.
Statement

4. A member should determine and comply with the standards, if any, that are imposed by the applicable taxing authority with respect to recommending a tax return position, or preparing or signing a tax return.

5. If the applicable taxing authority has no written standards with respect to recommending a tax return position or preparing or signing a tax return, or if its standards are lower than the standards set forth in this paragraph, the following standards will apply:
   a. A member should not recommend a tax return position or prepare or sign a tax return taking a position unless the member has a good-faith belief that the position has at least a realistic possibility of being sustained administratively or judicially on its merits if challenged.
   b. Notwithstanding paragraph 5(a), a member may recommend a tax return position if the member (i) concludes that there is a reasonable basis for the position and (ii) advises the taxpayer to appropriately disclose that position. Notwithstanding paragraph 5(a), a member may prepare or sign a tax return that reflects a position if (i) the member concludes there is a reasonable basis for the position and (ii) the position is appropriately disclosed.

6. When recommending a tax return position or when preparing or signing a tax return on which a position is taken, a member should, when relevant, advise the taxpayer regarding potential penalty consequences of such tax return position and the opportunity, if any, to avoid such penalties through disclosure.

7. A member should not recommend a tax return position or prepare or sign a tax return reflecting a position that the member knows:
   a. exploits the audit selection process of a taxing authority, or
   b. serves as a mere arguing position advanced solely to obtain leverage in a negotiation with a taxing authority.

8. When recommending a tax return position, a member has both the right and the responsibility to be an advocate for the taxpayer with respect to any position satisfying the aforementioned standards.

Explanation

9. The AICPA and various taxing authorities impose specific reporting and disclosure standards with respect to tax return positions and preparing or signing tax returns. In a given situation, the standards, if any, imposed by the applicable taxing authority may be higher or lower than the standards set forth in paragraph 5. A member is to comply with the standards, if any, of the applicable taxing authority; if the applicable taxing authority has no standards or if its standards are lower than the standards set forth in paragraph 5, the standards set forth in paragraph 5 will apply.

10. Our self-assessment tax system can function effectively only if taxpayers file tax returns that are true, correct, and complete. A tax return is prepared based on a taxpayer’s representation of facts, and the taxpayer has the final responsibility for positions taken on the return. The standards that apply to a taxpayer may differ from those that apply to a member.
AICPA SSTs NO. 7

FORM AND CONTENT OF ADVICE TO TAXPAYERS
Statement on Standards for Tax Services No. 7, Form and Content of Advice to Taxpayers

Introduction

1. This statement sets forth the applicable standards for members concerning certain aspects of providing advice to a taxpayer and considers the circumstances in which a member has a responsibility to communicate with a taxpayer when subsequent developments affect advice previously provided. The statement does not, however, cover a member’s responsibilities when the expectation is that the advice rendered is likely to be relied on by parties other than the taxpayer.

Statement

2. A member should use professional judgment to ensure that tax advice provided to a taxpayer reflects competence and appropriately serves the taxpayer’s needs. When communicating tax advice to a taxpayer in writing, a member should comply with relevant taxing authorities’ standards, if any, applicable to written tax advice. A member should use professional judgment about any need to document oral advice. A member is not required to follow a standard format when communicating or documenting oral advice.

3. A member should assume that tax advice provided to a taxpayer will affect the manner in which the matters or transactions considered would be reported or disclosed on the taxpayer’s tax returns. Therefore, for tax advice given to a taxpayer, a member should consider, when relevant (a) return reporting and disclosure standards applicable to the related tax return position and (b) the potential penalty consequences of the return position. In ascertaining applicable return reporting and disclosure standards, a member should follow the standards in Statement on Standards for Tax Services No. 1, Tax Return Positions.

4. A member has no obligation to communicate with a taxpayer when subsequent developments affect advice previously provided with respect to significant matters, except while assisting a taxpayer in implementing procedures or plans associated with the advice provided or when a member undertakes this obligation by specific agreement.
Explanation

5. Tax advice is recognized as a valuable service provided by members. The form of advice may be oral or written and the subject matter may range from routine to complex. Because the range of advice is so extensive and because advice should meet the specific needs of a taxpayer, neither a standard format nor guidelines for communicating or documenting advice to the taxpayer can be established to cover all situations.

6. Although oral advice may serve a taxpayer’s needs appropriately in routine matters or in well-defined areas, written communications are recommended in important, unusual, substantial dollar value, or complicated transactions. The member may use professional judgment about whether, subsequently, to document oral advice.

7. In deciding on the form of advice provided to a taxpayer, a member should exercise professional judgment and consider such factors as the following:
   a. The importance of the transaction and amounts involved
   b. The specific or general nature of the taxpayer’s inquiry
   c. The time available for development and submission of the advice
   d. The technical complexity involved
   e. The existence of authorities and precedents
   f. The tax sophistication of the taxpayer
   g. The need to seek other professional advice
   h. The type of transaction and whether it is subject to heightened reporting or disclosure requirements
   i. The potential penalty consequences of the tax return position for which the advice is rendered
   j. Whether any potential applicable penalties can be avoided through disclosure
   k. Whether the member intends for the taxpayer to rely upon the advice to avoid potential penalties

8. A member may assist a taxpayer in implementing procedures or plans associated with the advice offered. When providing such assistance, the member should review and revise such advice as warranted by new developments and factors affecting the transaction.

9. Sometimes a member is requested to provide tax advice but does not assist in implementing the plans adopted. Although such developments as legislative or administrative changes or future judicial interpretations may affect the advice previously provided, a member cannot be expected to communicate subsequent developments that affect such advice unless the member undertakes this obligation by specific agreement with the taxpayer.

10. Taxpayers should be informed that (a) the advice reflects professional judgment based upon the member’s understanding of the facts, and the law existing as of the date the advice is rendered and (b) subsequent developments could affect previously rendered professional advice. Members may use precautionary language to the effect that their advice is based on facts as stated and authorities that are subject to change.

11. In providing tax advice, a member should be cognizant of applicable confidentiality privileges.
TREASURY CIRCULAR NO. 230
SECTION 10.34

STANDARDS WITH RESPECT TO TAX RETURNS
AND DOCUMENTS, AFFIDAVITS AND OTHER PAPERS
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.

(e) Effective/applicability date. This section is applicable beginning August 2, 2011.

(Approved by the Office of Management and Budget under Control No. 1545-1726)

§ 10.31 Negotiation of taxpayer checks.

(a) A practitioner may not endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated) issued to a client by the government in respect of a Federal tax liability.

(b) Effective/applicability date. This section is applicable beginning June 12, 2014.

§ 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.

§ 10.33 Best practices for tax advisors.

(a) Best practices. Tax advisors 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:

(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.

(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.

(3) 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.

(4) Acting fairly and with integrity in practice before the Internal Revenue Service.

(b) Procedures to ensure best practices for tax advisors. Tax advisors with responsibility for overseeing a firm’s practice of providing advice concerning Federal tax issues or of preparing or assisting in the preparation of submissions to the Internal Revenue Service should take reasonable steps to ensure that the firm’s procedures for all members, associates, and employees are consistent with the best practices set forth in paragraph (a) of this section.

(c) Applicability date. This section is effective after June 20, 2005.

§ 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 —

(i) 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); or
(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).

(ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that —

(A) Lacks a reasonable basis;

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

(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).

(2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence.

(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.

(e) Effective/applicability date. Paragraph (a) of this section is applicable for returns or claims for refund filed, or advice provided, beginning August 2, 2011. Paragraphs (b) through (d) of this section are applicable to tax returns, documents, affidavits, and other papers filed on or after September 26, 2007.

§ 10.35 Competence.

(a) 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
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SECTION 10.37

REQUIREMENTS FOR WRITTEN ADVICE
as consulting with experts in the relevant area or
studying the relevant law.

(b) Effective/applicability date. This section is
applicable beginning June 12, 2014.

§ 10.36 Procedures to ensure compliance.

(a) Any individual subject to the provisions of this
part who has (or individuals who have or share)
principal authority and responsibility for overseeing
a firm’s practice governed by this part, including the
provision of advice concerning Federal tax matters
and preparation of tax returns, claims for refund,
or other documents for submission to the Internal
Revenue Service, 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 subparts A, B, and
C of this part, as applicable. In the absence of a
person or persons identified by the firm as having
the principal authority and responsibility described
in this paragraph, the Internal Revenue Service
may identify one or more individuals subject to the
provisions of this part responsible for compliance
with the requirements of this section.

(b) Any such individual who has (or such
individuals who have or share) principal authority
as described in paragraph (a) of this section will be
subject to discipline for failing to comply with the
requirements of this section if—

(1) The individual through willfulness,
recklessness, or gross incompetence does not take
reasonable steps to ensure that the firm has adequate
procedures to comply with this part, as applicable,
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 this part, as applicable; or

(3) The individual 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
this part, as applicable, and the individual, through
willfulness, recklessness, or gross incompetence fails
to take prompt action to correct the noncompliance.

(c) Effective/applicability date. This section is
applicable beginning June 12, 2014.

§ 10.37 Requirements for written advice.

(a) Requirements.

(1) A practitioner may give written advice
(including by means of electronic communication)
concerning one or more Federal tax matters subject to
the requirements in paragraph (a)(2) of this section.
Government submissions on matters of general
policy are not considered written advice on a Federal
tax matter for purposes of this section. Continuing
education presentations provided to an audience
solely for the purpose of enhancing practitioners’
professional knowledge on Federal tax matters
are not considered written advice on a Federal tax
matter for purposes of this section. The preceding
sentence does not apply to presentations marketing
or promoting transactions.

(2) The practitioner must—

(i) Base the written advice on reasonable factual
and legal assumptions (including assumptions as to
future events);

(ii) Reasonably consider all relevant facts
and circumstances that the practitioner knows or
reasonably should know;

(iii) Use reasonable efforts to identify and
ascertain the facts relevant to written advice on each
Federal tax matter;

(iv) Not rely upon representations, statements,
findings, or agreements (including projections,
financial forecasts, or appraisals) of the taxpayer
or any other person if reliance on them would be
unreasonable;

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(v) Relate applicable law and authorities to facts; and

(vi) Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

(3) Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent.

(b) Reliance on advice of others. A practitioner may only rely on the advice of another person if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances. Reliance is not reasonable when—

(1) The practitioner knows or reasonably should know that the opinion of the other person should not be relied on;

(2) The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice; or

(3) The practitioner knows or reasonably should know that the other person has a conflict of interest in violation of the rules described in this part.

(c) Standard of review.

(1) In evaluating whether a practitioner giving written advice concerning one or more Federal tax matters complied with the requirements of this section, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.

(2) 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 Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, with emphasis given to the additional risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances, when determining whether a practitioner has failed to comply with this section.

(d) Federal tax matter. A Federal tax matter, as used in this section, is any matter concerning the application or interpretation of—

(1) A revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code;

(2) Any provision of law impacting a person's obligations under the internal revenue laws and regulations, including but not limited to the person's liability to pay tax or obligation to file returns; or

(3) Any other law or regulation administered by the Internal Revenue Service.

(e) Effective/applicability date. This section is applicable to written advice rendered after June 12, 2014.

§ 10.38 Establishment of advisory committees.

(a) Advisory committees. To promote and maintain the public's confidence in tax advisors, the Internal Revenue Service is authorized to establish one or more advisory committees composed of at least six individuals authorized to practice before the Internal Revenue Service. Membership of an advisory committee must be balanced among those who practice as attorneys, accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and registered tax return preparers. Under procedures prescribed by the Internal Revenue Service, an advisory committee may review and make general recommendations regarding the practices, procedures, and policies of the offices described in §10.1.

(b) Effective date. This section is applicable beginning August 2, 2011.
ABA FORMAL OPINION NO. 314

RELATIONSHIP OF LAWYER TO TAX SYSTEM
It speaks eloquently of the role of the Tax Section that it provided the answers to these questions, then worked to have those answers adopted and become widely accepted and universally acknowledged.

I. Formal Opinion 314: Relationship of Lawyer to the Tax System

Although now known mostly for the “reasonable basis” tax position standard that had to be restated two decades later, Formal Opinion 314\(^1\) remains the principal document addressing the relationship of tax lawyers to their government. It asks whether the lawyer’s duty is more akin to dealing with a court or more like dealing with an adversary. It concludes that the Service is not even a quasi-judicial tribunal but nonetheless provides that a lawyer may assert in a tax return only those tax positions meeting a minimum substantive standard.

The details of the Section and Committee deliberations may be lost, but the essence of the dialogue is a rich part of the Section’s oral history. There were two camps, those advocating a higher standard and those in favor of a lower one. Fred Corneel, recipient of the Section’s Distinguished Service Award for his work in the field, historically championed the view that reasonable basis meant a relatively high standard, a basis that was truly reasonable. Boris Kostelanetz, for decades dean of the criminal tax defense bar, supported the view that any colorable claim was enough to be reasonable. Agreement was reached on the words, “reasonable basis,” but not the standard. For this reason it is said that Opinion 314 was a “patch but not a fix.”

Despite the failure of the reasonable basis term to stand the test of time, Opinion 314 remains as the guideline for lawyer conduct in dealing with the Service. Its characterization of the blended duty to both clients and to the tax system leads to answers to fundamental questions. It purports to shed light on those questions and does just that. We are told forthrightly that there is a duty not to mislead the Service deliberately and affirmatively, either by misstatements or by silence or by permitting the client to mislead. At the same time, we learn that there is no duty to reveal weaknesses in our client’s cases any more than to opposing counsel. This guidance is used in practice daily and underlies the familiar “20 Questions” commonly employed by Section leaders and local bars to familiarize practitioners with knotty issues such as what to do upon learning that the client has lied or that the agent is unaware that the statute of limitations is about to expire.

II. Formal Opinion 346: Requirements of an “Honest” Tax Opinion

Formal Opinion 346 (Revised)\(^2\) describes what needs to be included in an “honest” tax opinion. Literally it applies only to tax shelter opinions provided


OUTLINE
PRESENTED BY
TOM MASON
Conflicts of Interest under ABA Model Rules 1.7, 1.9, 1.10, 1.11
1.12 and 1.18

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Summary

I. Conflicts of Interests - Theory and Practice

A. Policies and Interests Underlying the Conflicts Rules
B. The Basic Conflict Rules
C. How to Analyze a Conflict of Interest Scenario

II. Conflict and Other Ethics Issues for Lawyers for Lawyers in Private Practice/In-House

A. Policies and Interests Underlying the Conflicts Rules

1. Loyalty. Being adverse to a client is disloyal. ABA Model Rules 1.7(a)(1), 1.10.

2. Effectiveness. Having divided interests or multiple loyalties diminishes effectiveness. ABA Model Rules 1.7(a)(2), 1.7(b)(3).

3. Unfair advantage. Knowledge about a client or the client’s case while being adverse to that client gives the lawyer an unfair advantage and compromises confidentiality. ABA Model Rules 1.6, 1.9(a) & (c).

4. Choice of lawyers. The ethics rules aim to give clients the widest choice of lawyers to select from. If a lawyer who serves a client once is thereafter forever prohibited from being adverse to that client then other potential clients may have fewer lawyers to choose from. ABA Model Rules 1.9(a), 1.18.

5. Encouraging government lawyers to focus on the government’s interests and their post-government career. A government lawyer cannot, absent a waiver, work on a matter that they handled in government even if they are not adverse to the government. A government lawyer cannot start a matter in government and then work on the same or a substantially related matter later in private practice even where the former government lawyer is advocating on behalf of a client that is aligned with the government or the government’s position. ABA Model Rule 1.10(a).
6. Encouraging lawyers to go into government service and to serve as arbitrators and mediators. That being said, interpreting the conflict rules to mean that a government lawyer could not go to a firm or entity which has or had a matter that the lawyer worked on would make it harder for government lawyers to pursue later careers in private practice. This would discourage lawyers from entering government service in the first place. ABA Model Rules 1.11, 1.12.

7. Allowing lawyers to move freely from job to job. The ABA and many states allow for lateral screening when moving between firms. The ethics rules have long forbidden non-compete provisions for lawyers. ABA Model Rules 1.10(a)(2), 5.6(a).

B. The Basic Conflicts Rules

1. Rule 1.7 – Conflicts Involving Current Clients.

A lawyer cannot be directly adverse to a current client even on an unrelated matter, absent a waiver. This is the basic loyalty rule. Conflicts involving representing adverse parties before a tribunal are per se non-waivable.

In addition, a lawyer cannot take a matter where there is a significant risk that the lawyer’s zealousness and diligence would be materially limited by the lawyer’s duties to other clients, third parties or the lawyer’s own personal interests. This is the basic effectiveness rule.

2. Rule 1.9 – Conflicts Involving Former Clients.

This rule governs conflicts involving (a) a current representation that is (b) adverse to (c) a former client. This rule is more permissive than the rule governing current clients. A lawyer can be adverse to a former client on an unrelated matter. A lawyer is prohibited, absent a waiver, from being adverse to a former client only with respect to new matters that are substantially related to the matter that the lawyer handled for the former client. This is the basic rule that prevents lawyers from having an unfair advantage in a representation.


Subject to various exceptions and waiver, a conflict that prevents one lawyer in a firm or in-house law department from handling a matter prevents all other lawyers in that firm or in-house law department from handling such matter.


Former government officials moving to private practice cannot take a representation in connection with a matter in which they participated personally and substantially while in government. Note that this rule does not require adversity to the government in the new
matter. The conflict is not imputed to the firm or in-house law department as a whole, though, if the former government official is timely screened. The rule is subject to waiver under the ABA Model Rules but not under the D.C. Rules of Professional Conduct. Compare ABA Model Rule 1.11 (a)(2) with Comment [3] to D.C. Rule 1.11. This rule encourages lawyers to go into government service by allowing screening for conflicts created by government service. Otherwise, imputation would discourage firms from hiring government lawyers. The term “matter” is defined so as not to apply to rulemakings, or promulgating policies of general applicability.

A lawyer in government service cannot negotiate for employment with a lawyer, law firm or other entity where the potential employer has a current matter before the government in which the government lawyer is participating personally and substantially. Note that the Rules will also cover a lawyer who hires or attempts to hire a government lawyer under these circumstances. ABA Model Rule 8.4(a) prohibits lawyers (here, the hiring lawyer) from knowingly assisting or inducing another lawyer (the government lawyer) to violate any ethics rule.

5. Rule 1.12—Special Rule for Former Judges, Mediators and Arbitrators.

A lawyer who has served as a judge, arbitrator or mediator in a matter cannot thereafter represent a party in that matter absent consent. The firm that employs the former judge, arbitrator or neutral can handle the matter with a screen. Judges, mediators and arbitrators cannot negotiate for employment with any lawyer or entity which has a current matter before them. ABA Model Rule 8.4(a) subjects the hiring lawyer to ethical sanction.

6. Rule 1.18—Duties to Prospective Client.

A prospective client is a client who interviews a lawyer for a matter but does not hire the lawyer. The lawyer cannot thereafter represent an adverse party in the same matter but the lawyer’s firm can do so provided that the all those who participated in the interview process are screened. This rule could be very useful in the government contracting area but only if prospective client interviews are handled carefully – by limiting participants and not disseminating information from the interview process beyond the participants.

C. How to Analyze a Conflict of Interest Scenario

1. Who is the client or clients? Is there a client?

In every engagement, a lawyer should always know who the lawyer’s client is and what entities or individuals involved in the matter are not clients. The lawyer must take care not to provide a basis for non-clients to claim that the lawyer was acting on their behalf. The requisites for the formation of an attorney-client relationship are outside of the purview of the ethics rules and are instead governed by contract principles. However, the reasonable belief of the individual or
entity asserting the existence of an attorney-client relationship will usually control. “A majority of state courts [addressing the issue] have held that the existence of an attorney-client relationship does not depend upon the execution of an express contract between the parties, but may, instead, be implied from the facts and circumstances, or from the parties’ words or conduct. Many federal courts . . . have arrived at the same conclusion.” Richard Flamm, *Conflicts of Interest in the Practice of Law* § 14.3 at 310-311 (Banks & Jordan 2015) (footnotes omitted). It is up to the lawyer to disclaim the existence of such a relationship in ambiguous situations and act accordingly.

Almost all of the conflict rules hinge upon the existence of a client representation. ABA Model Rule 1.7(a)(1) provides that a conflict exists if the representation of one client is adverse to the representation of another client. ABA Model Rule 1.7(b)(2) prohibits accepting a representation when that new representation will be adversely effected by an existing representation. ABA Model Rule 1.9(a) prohibits a lawyer from representation a client adverse to a former client when the two matters are substantially related.

The identity of the client is not always clear. If the client is a corporation, does the lawyer also represent the corporation’s directors, officers and employees? Representation of an entity typically does not also mean that the lawyer represents the directors, officers and employees. ABA Model Rule 1.13; see also D.C. Bar Legal Ethics Opinion 269 *Obligation of Lawyer for Corporation to Clarify Role in Internal Corporate Investigation*. If the corporation is a client, does the lawyer also represent the corporation’s affiliates, subsidiaries, parents, etc.? There is no clear answer in the ethics rules. ABA Formal Ethics Opinion 95-390; see also Ronald D. Rotunda, *Conflicts Problems When Representing Members of Corporate Families*, 72 Notre Dame L. Rev. 655 (1997); Comments [21] to [27] to D.C. Rule 1.7; Restatement of the Law (Third), The Law Governing Lawyers § 121 cmt. d (ALI 2000).

For government lawyers, the lawyer may represent the particular department or agency or may represent the Executive Branch, depending on the circumstances. ABA Model Rule 1.13, Comment [9]. The issue is not primarily a question of legal ethics but is more a question to be addressed and decided between the lawyer and the lawyer’s government client. See ABA Formal Op. 97-405; D.C. Legal Ethics Opinion 268.

The issue of who is the client can often be resolved by agreement. A corporation can agree that a lawyer represents only the corporation and none of its affiliates, subsidiaries, joint ventures or parents. Such an agreement may not be binding, however, if the lawyer gives legal advice or otherwise acts as a lawyer for an entity. In that case, that entity is a client regardless of earlier agreements. A lawyer can also acquire “de facto” clients outside of the corporate family context by giving individuals or entities legal advice or acting for them in a representative capacity. Statements disclaiming an attorney-client relationship must be accompanied by conduct consistent with that disclaimer.

Engagement letters and outside counsel billing guidelines often conflict on the issue of whether the lawyer represents other members of a client’s corporate family. Unless those conflicts are
explicitly resolved, the statements in the engagement letter limiting the client to one entity and not related entities may be ineffective.

2. Is there adversity?

Most of the conflict rules require that a lawyer be adverse to a client for a conflict to exist. ABA Model Rules 1.7(a)(1), 1.9(a). Absent adversity, there is no conflict under these rules. Note that the conflict rules that apply to former government officials do not require the presence of adversity. A lawyer now in private practice may still violate the conflict rules involving former government officials even if the government is not a party to the matter and even if the position being taken by the lawyer is consistent with the position taken by in the matter by the government.

3. Is the client to whom the lawyer is now adverse a current client or a former client?

The rules regarding current client conflicts (ABA Model Rule 1.7(a)(1)) prohibit a lawyer from taking a position adverse to a current client even if the lawyer does so in a matter entirely unrelated to the work that the lawyer is doing for that client. The rule for former client is more permissive allowing the lawyer to be adverse to a former client except on matters which are the same or substantially related to the work done by the lawyer for the former client.

If a lawyer handles one matter for a client and completes that matter, the client is typically considered a former client once the matter is finished. If the lawyer handles multiple matters for a client, the client may be considered a current client even if the lawyer has no pending assignment. Comment [9] to D.C. Rule 1.3. These are “sleeper clients.” The only way to avoid “sleeper clients” is for the lawyer to tell clients (preferably in writing) when a matter is complete that the most recent engagement is concluded and that the attorney-client relationship has ended.

In addition, the court will often reject attempts by a lawyer to convert a current client into a former client by abruptly terminating a representation. Under the “hot potato” doctrine, a court will disregard the termination and view the now-abandoned client as if it were still a current client. See generally Richard E. Flamm, Lawyer Disqualification § 23.4 (2d. ed. 2014).