THE CALIFORNIA TAX LAWYER, THE NEW CALIFORNIA RULES OF PROFESSIONAL CONDUCT, AND IRS CIRCULAR 230

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ABOUT THE PRESENTERS

Karen L. Hawkins served as the Director, Office of Professional Responsibility at the IRS from April, 2009 until July, 2015 where she oversaw all aspects of the administration of the Regulations Governing Practice Before the Internal Revenue Service (Circular 230), including amendments to existing regulations, interpretation and implementation of new regulations, and discipline for tax professionals in violation of the regulations. Prior to that, Ms. Hawkins spent 30 years in private practice as a member of the Law Offices of Taggart & Hawkins, PC. Now, Ms. Hawkins has returned to the law primarily as an educator, expert witness and tax ethics consultant.

Ms. Hawkins is a past chair of the ABA Section of Taxation; a past Chair of the Taxation Section of the State Bar of California, past chair of the ABA Taxation Subcommittee on Civil Penalties, and the IRS Liaison Meetings Committee. She served as a Director on the Council of the ABA Taxation Section and as the Section's Vice-Chair Professional Services. Ms. Hawkins is also a Fellow of the American College of Tax Counsel and she sits on the Board of Directors of Tax Analysts.

Ms. Hawkins is the founder of the San Francisco Pro Se/Pro Bono Tax Court project, and she played a key role in the successful efforts to reform the innocent spouse statutes in both federal and California law. Her honors include the V. Judson Klein and Joanne Garvey Awards from the State Bar of California Section of Taxation in 2002 and 2012, respectively; the National Pro Bono Award from the American Bar Association Tax Section, and the Judith McKelvey Distinguished Alumna Award from Golden Gate University, both in 2004; the Jules Ritholz Memorial Merit Award from the ABA Taxation Section Civil & Criminal Tax Penalties Committee in 2008. In 2012, Golden Gate University School of Law named its Tax Law Library Collection in Ms. Hawkins’ name and in May, 2015 the school awarded Ms. Hawkins a Doctor of Laws (honorary) degree.

Ms. Hawkins earned her J.D. and M.B.A. degrees from Golden Gate University in San Francisco. She received an honorary Doctor of Laws from GGU in 2015. Ms. Hawkins also holds an M.Ed from the University of California, Davis. Her B.A. is from the University of Massachusetts. Ms. Hawkins consults, speaks and writes extensively on all aspects ethics.

Dan Eaton is a partner in the litigation department of Seltzer Caplan McMahon Vitek in San Diego where he advises and represents employers. He received his undergraduate degree from Georgetown University and his law degree, cum laude, from Harvard. In July of 2018, Dan began a two-year term as president of the Harvard Law School Association, the worldwide association of Harvard Law alumni.

Dan served as a voting member of the 19-member State Bar Second Rules Revision Commission, whose recommendations to the California Supreme Court resulted in the first overhaul of the state’s ethics rules in about 30 years.

A former chair of the San Diego County Bar Association Legal Ethics Committee, for ten years Dan edited Ethics Quarterly, a publication abstracting California state and federal legal ethics cases. He also has served for many years on the Disciplinary Committee for the U.S. District Court for the Southern District of California. Dan teaches business ethics and employment law at SDSU’s College of Business.

Dan has given numerous seminars, and authored numerous articles, on legal ethics, employment law, and other issues, including publishing a biweekly Law at Work column in the San Diego Union-Tribune. He has presented legal ethics programs to both the State Bar and the ABA Tax Sections. Dan also has appeared as a legal analyst for most of his nearly 30-year career on San Diego radio and television stations, including KPBS and KNSD.
IT’S COMPLICATED:  JOINT REPRESENTATION OF SPOUSES

Tax Lawyer (“TL”) has been advising Husband (H) and Wife (W) off and on for years, including on their current estate plan. One day, H calls TL in a panic and says: “I’ve been keeping a bank account in Israel for the past ten years and using it to bankroll my mistress who lives in Jerusalem. My wife does not know and cannot know. The bank has instructions to release the account to my mistress when I die so the money will never come back into the US. I’ve been procrastinating about signing up for the various voluntary disclosure programs the IRS has advertised for foreign bank account holders like me, but I understand the opportunities for disclosure are shrinking and more criminal cases are being initiated. I’m scared to death. I want to come clean with the IRS, but not with my wife. It will be the end of our marriage. I want to hire you to negotiate my disclosure to the IRS, but my wife must never know.”

May TL represent H during his bank account disclosure to the IRS?

Green: Yes Red: No

Authority

Circular 230, § 10.29 (Conflicting interests): Without written consent confirmed in writing by each client and reasonable belief the practitioner can provide competent and diligent representation to each client, a practitioner may not: (1) represent clients whose interests are directly adverse to each other; or (2) represent one or more clients where there is a significant risk the representation will be materially limited by the practitioner’s responsibilities to another client.

Cal Rule of Prof. Conduct 1.6(a) (Confidential Information of a Client): A lawyer may not reveal a client’s confidential information without the client’s informed consent.

Cal. Rule of Prof. Conduct 1.7 (Conflict of Interest: Current Clients): Without the informed written consent of each client and reasonable belief the lawyer can provide competent and diligent representation to each client, a lawyer may not: (1) represent clients whose interests are directly adverse to each other; or (2) represent one or more clients where there is a significant risk the representation will be materially limited by the practitioner’s responsibilities to another client, a former client, or a third person.

Cal. Rule of Prof. Conduct 1.8.2 (Use of Current Client’s Information): A lawyer may not use a client’s confidential information to the client’s disadvantage without the client’s informed consent.

Cal. Rule of Prof. Conduct 1.9(a) (Duties to Former Clients): A lawyer may not represent a client against a former client in the same or substantially related matter without the former client’s informed written consent.

Business and Professions Code section 6068(e)(1): An attorney must maintain the confidences, and preserve the secrets, of a client at every peril to the attorney.
SILENCE ISN’T ALWAYS GOLDEN: POTENTIAL CONFLICT BETWEEN CURRENT AND FORMER CLIENT

Tax Lawyer (‘‘TL’’) is retained by Current Client (‘‘CC’’) to assist with the implementation of the terms of a settlement between Client and a former business partner (‘‘FBP’’). TL did not represent either party during their dispute or the settlement negotiations. FBP had engaged TL at earlier times to perform tax services but has no current client relationship with TL. FBP is unrepresented in this transaction.

TL did not obtain a waiver of actual or potential conflicts from CC or FBP in connection with the representation of CC in this representation.

The settlement between CC and FBP requires a transfer of funds from CC to FBP which TL will facilitate through his client trust account. CC has made it clear to TL that the current tax deductibility of his settlement payment to FBP is the only reason he has settled the dispute. TL places CC’s settlement funds in his attorney trust account.

TL makes contact with FBP to arrange for delivery of the settlement funds. FBP goes to TL’s office. During their conversation, FBP states that it is his intention that the funds he is receiving are a non-taxable return of capital. Practitioner neither confirms nor denies this assumption by FBP when he hands FBP the check without another word.

Did TL engage in ethical misconduct?

Green: Yes  Red: No

Authority

Cir. 230, § 10.29(a)(2) (Conflicting interests): Without written consent confirmed in writing by each client and reasonable belief the practitioner can provide competent and diligent representation to each client, a practitioner may not represent one or more clients where there is a significant risk the representation will be materially limited by the practitioner’s responsibilities to another client, a former client or a third person.

Cal Rule of Prof. Conduct 1.6(a) (Confidential Information of a Client): A lawyer may not reveal a client’s confidential information without the client’s informed consent.

Cal. Rule of Prof. Conduct 1.7 (Conflict of Interest: Current Clients): Without the informed written consent of each client and reasonable belief the lawyer can provide competent and diligent representation to each client, a lawyer may not: (1) represent clients whose interests are directly adverse to each other; or (2) represent one or more clients where there is a significant risk the representation will be materially limited by the practitioner’s responsibilities to another client, a former client, or a third person.

Cal. Rule of Prof. Conduct 1.7, Comment [1]: “The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed written consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. (See Platt v. Superior Court (1994) 9 Cal.4th 275.)”

Cal. Rule of Prof. Conduct 1.7, Comment [2]: The rule applies to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders.
Cal. Rule of Prof. Conduct 1.7, Comment [4]: Even absent direct adversity, a lawyer must obtain informed written consent from each client if there is “a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer’s obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the other clients. . . .”

Cal. Rule of Prof. Conduct 1.9(a): “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed written consent.”

Cal. Rule of Prof. Conduct Rule 1.9, Comment [1]: “After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. (See Oasis West Realty, LLC v. Goldman (2011) 51 Cal.4th 811; Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564.) For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. . . .”

IR-2018-154 (7/25/18) “IRS censures tax practitioner for willfully mishandling conflicts of interest”: “The practitioner was retained by a client to take specific actions as required by a settlement agreement executed between the client and a third party. The settlement agreement directed transfers from the client to the third party. The practitioner was aware of the terms of the agreement. The practitioner knowingly provided misleading information to the third party, upon which the third party relied. Such reliance and resulting harm to the third party was foreseeable. By knowingly providing misleading information, the practitioner breached a duty of care owed to the third party.”
AIDING AND ABETTING: THE DISHONEST CLIENT

Client hires Tax Lawyer (“TL”) to represent her during the examination of her 2017 return personal tax return. She is concerned because she has been underreporting her income and reducing her expenses Schedule C business in an effort to evade tax. In preparation for the examination, Client creates false invoices to support the reduced expenses reported on the return and makes corresponding adjusting journal entries in her QuickBooks. Client provides these false records to TL, who, without knowledge of the false invoices, produces them to the IRS in response to an Information Document Request.

Months later, the revenue agent issues administrative summonses to all of Client’s vendors for their records supporting Client’s income and expense numbers.

Client panics and tells TL that the records produced to the IRS are false.

May TL continue to represent Client?

Green: Yes    Red: No

Authority

Cir. 230, § 10.20(a)(1) (Information to be furnished): A practitioner must promptly provide records or information requested by an authorized employee or officer of the IRS in connection with a matter pending before the IRS unless the practitioner reasonably and in good faith believes the requested records or information are privileged.

Cir. 230, § 10.21 (Knowledge of client’s omission): A practitioner retained to represent a client in a matter pending before the IRS who knows the client has not complied with federal tax laws or has made an error or omission in any return or other document submitted or executed under the federal tax laws must advise the client promptly of such noncompliance and its legal consequences.

Cir. 230, § 10.34(b) (Standards with respect to tax returns and documents, affidavits and other papers): A practitioner may not advise a client to take a frivolous position on any affidavit or other document submitted to the IRS. A practitioner may not advise a client to submit an affidavit or other document to the IRS for the purpose of delaying or impeding the administration of federal tax laws or one that is frivolous or presents information in a way 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, § 10.34(c)(1)(ii), (Advising clients on potential penalties): A practitioner must inform a client of any penalties to which a client is reasonably likely to be subject as the result of the submission of any affidavit or other document to the IRS.

Cal. Rule of Prof. Conduct 1.2.1 (Advising or Assisting in Violation of Law): “(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal. (b) [A] lawyer may: (1) discuss the legal consequences of any proposed course of conduct with a client; and (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal."

Cal. Rule of Prof. Conduct 1.2.1, Comment [2]: “Paragraphs (a) and (b) apply whether or not the client’s conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer’s duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068,
subdivision (e)(1) and rule 1.6. In some cases, the lawyer’s response is limited to the lawyer’s right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.”

**Cal. Rule of Prof. Conduct 1.2.1, Comment [5]:** “If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client’s instructions, the lawyer must advise the client regarding the limitations on the lawyer’s conduct. (See rule 1.4(a)(4)).”

**Cal Rule of Prof. Conduct 1.6(a) (Confidential Information of a Client):** A lawyer may not reveal a client’s confidential information without the client’s informed consent.

**Cal. Rule of Prof. Conduct 1.6, Comment [2]:** “The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; Goldstein v. Lees (1975) 46 Cal.App.3d 614, 621.) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer’s ethical duty of confidentiality is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client’s information even when not subjected to such compulsion. Thus, a lawyer may not reveal such information except with the informed consent of the client or as authorized or required by the State Bar Act, these rules, or other law.”

**Cal. Rule of Prof. Conduct 1.16 (Declining or Terminating Representation):** “(b) . . . [A] lawyer may withdraw from representing a client if: (2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer’s services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud; (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent; (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively. . . .”
Client owes $800,000 in federal personal income tax liabilities and his account has been certified as seriously delinquent, subjecting his passport to revocation by the State Department. Client hires Tax Lawyer (“TL”) to help him resolve his tax debts. After reviewing Client’s financial data, TL recommends submitting an Offer in Compromise (“OIC”) supported by a Form 433A. Client agrees, and TL prepares the necessary forms.

After review of the financial information an OIC specialist proposes an alternative amount that will be accepted in compromise of the liabilities. Client will be able to meet the terms of the compromise and pay the alternative amount proposed by borrowing from friends.

After receiving but before accepting the IRS alternate proposal, Client receives an unexpected inheritance that could fully satisfy the entire outstanding liability. The Client does not want to disclose the inheritance to the IRS, and the Revenue Agent has not asked for an updated Form 433A.

**Must TL notify the IRS of the inheritance even if Client instructs him not to?**

Green: Yes  Red: No

**Authority**

*Cir. 230, § 10.21:* “A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.”

*Cir. 230, § 10.22(a)(2):* A practitioner must exercise due diligence “[i]n determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury.”

*Cir. 230, § 10.34(b)(2)(iii):* “(2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service — (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.”

*Cal. Rule of Prof. Conduct 1.2(a) (Scope of Representation and Allocation of Authority):* “Subject to rule 1.2.1, a lawyer shall abide by a client’s decisions concerning the objectives of representation. . . .”

*Cal. Rule of Prof. Conduct 1.2.1 (Advising or Assisting in Violation of Law):* “(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal. (b) [A] lawyer may: (1) discuss the legal consequences of any proposed course of conduct with a client; and (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.”

*Cal Rule of Prof. Conduct 1.6(a) (Confidential Information of a Client):* A lawyer may not reveal a client’s confidential information without the client’s informed consent.
Cal. Rule of Prof. Conduct 1.16 (Declining or Terminating Representation): “(b) . . . [A] lawyer may withdraw from representing a client if: (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent; (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively. . . .”

Cal. Rule of Prof. Conduct 2.1 (Advisor): “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”

Cal. Rule of Prof. Conduct 1.0.1 (Terminology): “(m) ‘Tribunal’ means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved. . . .”

Cal. Rule of Prof. Conduct 3.3(a)(3) (Candor Toward the Tribunal): “A lawyer shall not offer evidence the lawyer knows to be false” in proceedings of a tribunal.

Cal. Rule of Prof. Conduct 3.4 (Fairness to Opposing Party and Counsel): A lawyer shall not (a) unlawfully obstruct another party’s access to evidence or unlawfully conceal a document having potential evidentiary value or counsel or assist another person to do so; (b) suppress any evidence that the lawyer or the lawyer’s client has a legal obligation to reveal or to produce.

ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 314 (1965): THE IRS IS NOT A TRIBUNAL. Given that the IRS is not a court (or even quasi-judicial), the Opinion concludes that the IRS must be nothing other than a “brother lawyer” to the tax lawyer and, as such, not owed any special duties. The tax lawyer is simply his/her client’s advocate against an adversary. Negotiations with the IRS are not ethically different than the negotiation of any civil dispute. So long as “the client’s case is fairly arguable, a lawyer is under no duty to disclose its weaknesses, any more than he would be to make such a disclosure to a brother (sic) lawyer.”
EXECUTIVE DECISION: JOINT REPRESENTATION OF BUSINESS AND OFFICERS

Tax Lawyer (“TL”) is asked to represent USA, Inc. (“INC”) in connection with IRS collection efforts involving the company’s delinquent employment tax returns and payments. An engagement letter is drafted accordingly and signed by COO. TL’s primary contact at INC is its CFO, who is also an officer, director and shareholder. The COO and CIO are also officers, directors and shareholders of INC. INC has 25 employees.

CFO tells TL that INC got behind in its quarterly tax payments because the withheld funds were needed to keep a major project afloat. Once the tax payments couldn’t be made, CFO says she stopped filing returns, hoping to stay under the IRS’ radar. She advised COO of what she was doing but CIO is unaware of the problem. CFO expects the project to complete within 60 days at which time a large completion payment plus negotiated bonus will be due from the customer. The project has taken longer than anticipated and the customer has been difficult, including not making periodic payments to INC pursuant to the contract. CFO “hopes” customer is not having financial difficulties but does not know. CFO is hoping TL can “buy some time” from the IRS until the project completes and the funds are paid.

TL submits a power of attorney for INC, signed by COO, to the IRS revenue officer (“RO”) and discusses the situation over the phone. RO says INC is a recidivist with respect to employment tax filings and payments and is unwilling to discuss any collection activity relief unless all delinquent returns are filed within 10 days and all the officers and directors submit to an interview to determine who the responsible officers are for purposes of assessing the trust fund recovery penalty (“TFRP”). TL relays this demand to CFO who says she will have her in-house accountant prepare the returns right away. She says she wants TL to represent her during the RO interview and expects, once she relays the demand to the others, that COO and CIO will want TL to represent them as well.

Can TL continue to represent INC and represent CFO, COO and CIO during their interviews with the RO?

Green: Yes  Red: No

Authority

Cir. 230, § 10.23: “A practitioner may not unreasonably delay the prompt disposition of any matter before the Internal Revenue Service.”

Cir. 230, § 10.29 (Conflicting interests): Without written consent confirmed in writing by each client and reasonable belief the practitioner can provide competent and diligent representation to each client, a practitioner may not: (1) represent clients whose interests are directly adverse to each other; or (2) represent one or more clients where there is a significant risk the representation will be materially limited by the practitioner’s responsibilities to another client.

Internal Rev. Code § 6672(a): “General rule.—Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. . . .”
Cal. Rule of Prof. Conduct 1.4(a)(4) (Communication with Clients): A lawyer must advise a client about limits on the lawyer’s conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Cal Rule of Prof. Conduct 1.6(a) (Confidential Information of a Client): A lawyer may not reveal a client’s confidential information without the client’s informed consent.

Cal. Rule of Prof. Conduct 1.7 (Conflict of Interest: Current Clients): Without the informed written consent of each client and reasonable belief the lawyer can provide competent and diligent representation to each client, a lawyer may not: (1) represent clients whose interests are directly adverse to each other; or (2) represent one or more clients where there is a significant risk the representation will be materially limited by the practitioner’s responsibilities to another client, a former client, or a third person.

Cal. Rule of Prof. Conduct 1.8.2 (Use of Current Client’s Information): A lawyer may not use a client’s confidential information to the client’s disadvantage without the client’s informed consent.

Cal. Rule of Prof. Conduct 1.13(a): “A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.”
FAITHFUL HEART: DUTIES TO NON-CLIENTS

RL, Inc., was a partner in a medical partnership named Heart Partners. Cardiologist Doctor RL was RL, Inc.’s officer, employee, and only shareholder.

Tax Lawyer (“TL”) was retained to provide tax advice to Heart Partners, including the calculation of each partner’s share of the partnership’s profits and the amount of each partner’s capital account in accordance with Heart Partners’s partnership agreement. Dr. RL died in 1995 and Mrs. L became RL, Inc.’s sole shareholder and president.

After Dr. RL’s death, Heart Partners’s chief executive officer informed TL that the partners had agreed to change the method of allocating the partners’ income and decided to allocate $250,000 to RL, Inc. for 1995. TL was not engaged to determine how to allocate partnership profits following Dr. L’s death, whether according to the terms of the original partnership agreement or this modified agreement. TL followed the CEO’s instructions and directed an associate at his firm to prepare a worksheet reflecting the new allocation. TL sent Heart Partners’s CEO a letter confirming the instructions and CEO countersigned the letter in due course. RL, Inc.’s 1995 Schedule K-1, prepared by TL, reflected a profit allocation of $250,000.

In February 1996, Heart Partners paid RL, Inc. $80,000 to buy out RL, Inc.’s partnership interest. The payment was accepted under protest. RL, Inc.’s lawyer wrote a letter to Heart Partners claiming that additional amounts were owed under the partnership agreement.

In October, 1996, Heart Partners advised TL that RL, Inc.’s partnership interest had been bought out and that RL, Inc.’s rights in the partnership had been extinguished with RL’s death the previous year. In February, 1997, Heart Partners instructed TL to prepare the 1996 partnership tax return and the partners’ K-1 statements to reflect the redemption of RL, Inc.’s partnership interest with a resultant zero balance in RL, Inc.’s capital account. There had been no contact between RL, Inc. and TL over the years TL did work for Heart Partners.

After a lawyer hired by RL, Inc. made repeated unsuccessful efforts to obtain partnership financial information and further payments from Heart Partners for RL Inc.’s partnership interest, RL, Inc. sued TL for professional negligence on the theory that TL owed RL, Inc. an implied duty of care based on TL’s representation of Heart Partners.

Was TL liable for breach of duty to RL, Inc. for the manner in which TL handled Heart Partners’s partnership allocations after Dr. RL’s death?

Green: Yes    Yellow: Maybe    Red: No

Authority

Cir. 230, § 10.29 (Conflicting interests): An attorney (a) “shall not represent a client before the Internal Revenue Service if the representation involves a conflict of interest. A conflict of interest exists if -- (1) The representation of one client will be directly adverse to another client; or (2) There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner. (b) Notwithstanding the existence of a conflict of interest under paragraph (a) of this section, the practitioner may represent a client if - (1) The practitioner reasonably believes that the practitioner will be able to provide competent and diligent representation to each affected client; (2) The representation is not prohibited by law; and (3) Each affected client waives the conflict of interest and gives informed consent, confirmed in writing by each affected client, at the time the existence of the conflict of interest is
known by the practitioner. The confirmation may be made within a reasonable period after the informed consent, but in no event later than 30 days.”

**Biakanja v. Irving**, 49 Cal.2d 647 (1958): Holding that factors a court must consider in determining whether professional owed a non-contractual implied duty to third party include: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to plaintiff from the alleged breach of duty; and (3) the degree of certainty that plaintiff suffered harm from the professional’s alleged breach of duty.

**Goodman v. Kennedy**, 18 Cal.3d 335 (1976): Applying *Biakanja* factors to hold that lawyer could not be liable for harm to third party caused by lawyer’s bad advice to his own client.

**Responsible Citizens v. Superior Court**, 16 Cal.App.4th 1717 (1993): “[A]n attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying the conflict of interest rules. Whether such a relationship exists turns on finding an agreement, express or implied, that the attorney also represents the partner.” *(Id. at p. 1721.)* “*[T]he rule prohibiting simultaneous representation of adverse interests is said to be an outgrowth of the confidential nature of an attorney-client relationship. Because a client reposes confidence in his or her attorney, the attorney owes the client a duty of undivided loyalty. [Citations.] For that reason, we believe that in determining whether an attorney-client relationship exists in cases like this, primary attention should be given to whether the totality of the circumstances, including the parties' conduct, implies an agreement by the partnership attorney not to accept other representations adverse to the individual partner's personal interests.” *(Id. at p. 1733.)*

**Johnson v. Superior Court**, 38 Cal.App.4th 463 (1995): “[T]he cases which impose a duty in favor of a third party are those in which the purpose of retention of the attorney was for the specific objective of creating . . . a benefit.” *(Id. at p. 471.)* “[A] duty to the third party beneficiary of legal services [is imposed] because that was the intention of the purchaser of the legal services – the party in privity. Thus, imposition of the duty carries out the prime purpose of the contract for services.” *(Id. at p. 472.)*

**Richard B. Levine, Inc. v. Higashi**, 131 Cal.App.4th 566, 584 (2005): “At bottom, the accountant-client relationship must be founded upon an agreement which, if not expressed, must at least be implied in fact.”

26 U.S.C. § 704: “A partner's distributive share of income, gain, loss, deduction, or credit shall, except as otherwise provided in this chapter, be determined by the partnership agreement.”