ABA Section of Taxation
New Orleans, LA
January 17-19, 2019

Ethics for SALT Practitioners
Wheel of Ethics:
Take a Spin and See What Ethical Dilemma Awaits

David A. Hughes
Horwood Marcus & Berk Chartered
T: (312) 606-3212
E: dhughes@hmblaw.com

Debra Silverman Herman
Hodgson Russ LLP
T: (646) 218-7532
E: dherman@hodgsonruss.com
What is Ethics?

• Some definitions:
  o A set of moral principles; a theory or system of moral values
  o The principles of conduct governing an individual or a group
  o A principle of right or good behavior or system of moral principles or values; the rules or standards of conduct governing the members of a profession
Purpose and Function of Ethics Codes

- Reflect organizational values
- Articulate principles and standards
- Advise members of accepted conduct - and conduct that is not acceptable
  - Behavior may be branded unethical even though it is not unlawful.
- Aspiration to members and, through enforcement measures, protects integrity of the organization
- Assist members in identifying ethical issues and provide framework for resolution
Societal Considerations?

- Disincentive of Public Disclosure
- “What-would-your-mother-say” test
- “Wall Street Journal” Test
- “The Red Face Test”
- “What do you do when no one is watching?”
Issues for Attorneys

- Conflicts of interest
- Revealing confidential information
- Unwarranted appeals
- False or misleading advertising
- Fee issues:
  - Fees Must Be Reasonable
Ethics Standards – ABA

- Standards of the American Bar Association
  - Model Rules of Professional Conduct
    - Section of Taxation -
      - Lawyers may advise their clients in reporting a position and/or filing methodology on a return favorable to the client as long as they believe, in good faith, that the position is warranted within existing law or can be supported in a good faith argument against existing law.
“Good faith” is defined as believing there is at least a 33% possibility of success if the matter is litigated.

A lawyer has a duty not to mislead the IRS deliberately by misstatements or silence or permit a client to mislead the IRS.
Select ABA Model Rules Provisions

- Rule 1.1: Competence
- Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer
- Rule 1.4: Communication
- Rule 1.6: Confidentiality of Information
- Rule 1.7: Conflict of Interest: Current Clients
Ethics Standards – AICPA

- Professional Standards for Ethics
  - American Institute of Certified Public Accountants (AICPA)
  - Statement on Standards for Tax Services (SSTS or “Standards”)
    - SSTS and interpretations issued thereunder reflect the AICPA’s standards of tax practice and delineate members’ responsibilities to taxpayers, the public, the government, and the profession.
    - Ongoing process to articulate standards.
    - Promulgated by the Tax Executive Committee.
Select Ethics Standards – AICPA

- Statement on Standards for Tax Services (SSTS)
  - No. 1: Return Positions – Realistic Possibility Standard
  - No. 2: Answers to Questions on Returns
  - No. 3: Certain Procedural Aspects of Preparing Returns
  - No. 4: Use of Estimates
  - No. 5: Departure from a Position Previously Concluded in an Administrative Hearing or Court Decision
  - No. 6: Knowledge of Error, Return Preparation and Administrative Proceedings
  - No. 7: Form and Content of Advice to Taxpayers
Circular 230

- Publication of certain U.S. Treasury regulations which include the rules governing practice before the IRS.
- Rules require certain standards from attorneys, CPAs, Enrolled Agents, and other persons who prepare tax returns and provide tax advice.
- The rules in Circular 230 also prohibit certain conduct.
- Penalties may be imposed for noncompliance.
Illinois State Officials and Employees Ethics Act – 5 ILCS 430

S 1-5. Definitions. As used in this Act:

“Gift” means any gratuity, discount, entertainment, hospitality, loan, forbearance, or other tangible or intangible item having monetary value including, but not limited to, cash, food and drink, and honoraria for speaking engagements related to or attributable to government employment or the official position of an employee, member, or officer.

S 10-10. Gift ban.

Except as otherwise provided in this Article, no officer, member, or State employee shall intentionally solicit or accept any gift from any prohibited source or in violation of any federal or State statute, rule, or regulation. This ban applies to and includes the spouse of and immediate family living with the officer, member, or State employee. No prohibited source shall intentionally offer or make a gift that violates this Section.
Illinois State Officials and Employees Ethics Act – 5 ILCS 430

- ARTICLE 3. CODE OF CONDUCT
  - PART 1. RULES OF CONDUCT FOR LEGISLATORS

- S 3-104. No legislator in order to further his own economic interest, or those of any other person, may disclose or use confidential information acquired in the course of his official duties.

- S 3-107. No legislator may engage in other conduct which is unbecoming to a legislator or which constitutes a breach of public trust.
Illinois State Officials and Employees Ethics Act – 5 ILCS 430

• S 5-10. Ethics training.

  (a) Each officer, member, and employee must complete, at least annually beginning in 2004, an ethics training program conducted by the appropriate State agency. Each ultimate jurisdictional authority must implement an ethics training program for its officers, members, and employees. These ethics training programs shall be overseen by the appropriate Ethics Commission and Inspector General appointed pursuant to this Act in consultation with the Office of the Attorney General.
Wheel of Ethics!!!
Examples: Ethical Scenarios

• Unless otherwise stated, the following scenarios will be analyzed under:
  o the ABA Model Rules of Professional Conduct
  o the AICPA Code of Ethics
  o state Rules of Professional Conduct

• Some scenarios are based on actual facts as reflected in case law; others are completely made up! Any likeness or similarities to the scenarios and identities is unintentional.
Question One

• I am referred a matter by the local legal clinic to represent a man on an appeal before the 7th Circuit Court of Appeals, who lost his District Court jury trial on drug charges.

• I am tasked with reviewing the trial court record, filing a written brief, and then arguing my first oral argument before the 7th Circuit Court of Appeals.

• Written briefs are filed by both sides and oral argument is scheduled for the morning of August 14, 2017.
Question One – (Continued)

• In the event I wake up one morning and decide that I no longer want to represent my client in the appeal, which of the following steps should I take?
  o Find a replacement lawyer and file a motion for substitution well in advance of the oral argument.
  o Suck it up and continue to provide competent representation to the best of my ability.
  o Call the court’s Clerk 40 minutes before the oral argument, lie about being too sick to appear in court, and go back to bed.
Question One - Rules

• ABA Model Rules – Illinois Rules of Professional Conduct

• RULE 1.1: COMPETENCE
  o A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

• RULE 1.3: DILIGENCE
  o A lawyer shall act with reasonable diligence and promptness in representing a client.
Question Two

- You are in settlement negotiations with the DOR over proposed tax assessment against your client.
- Your client has authorized you to settle the case for up to 50% of the proposed assessment in order to avoid litigation.
- Is it ethical for you, as the taxpayer’s attorney, to represent to the DOR that your settlement authority is no more than 25% of the disputed assessment?

A. No, unless you believe that there is a reasonable chance to settle at that amount.
B. No, unless you first explain the probability of the Department accepting that settlement percentage.
C. Yes, because it is just a negotiation and you are a negotiator.
D. Yes, because lawyers are ethically permitted to always stretch the truth a bit if it helps their client.
Question Three

You stood your ground and did not sign a waiver extension. And Great News – the auditor forgot about your audit until AFTER one year of the statute expired! You have been awarded 500 points!
Question Four

Which of these is NOT a common nickname of New Orleans?

A. The Big Easy
B. The City That Care Forgot
C. The Crescent City
D. Jazz Capital of the World
E. Paris of the South
Question Five

What major New Orleans street historically served as the dividing line, or “neutral zone”, between the French/Spanish Catholics and the Americans? (Hint: if you’ve ever been a tourist in New Orleans, you’ve likely walked on it.)
Question Six

- You are an attorney arguing a tax case before an ALJ.
- The morning of your argument, you receive notice of a decision from that state’s Supreme Court that is directly contrary to one of the positions you intend to argue later in the day.

True or False:

- You have an obligation to advise the ALJ of the contrary decision.
**Question Seven**

- You are a CPA and you prepare state returns for ABC Corp.
- The DOR has undertaken an audit of ABC.
- During the audit, you learn there was an error in the returns during the first year of the audit cycle, but the DOR has failed to discover it.
- Correcting the error would create additional tax liability for ABC Corp.

**True or False:**

- You must inform the auditor about the errors you discovered before the audit is completed.
Question Eight

Which of these is the best step that can be taken in an effort to speak directly to a decision-maker at the DOR?

A. Call up the Director of Revenue and tell her that you have a protest pending in Circuit Court and your client wants to make a settlement offer she cannot refuse; let’s schedule a meeting.

B. Call up the AAG assigned to the case and ask her if you can contact the Director to discuss settlement of the case, because you know she just wants to harass your client with discovery.

C. Call up Director of Revenue, after giving notice to the AAG, and tell her that you have a policy concern that needs to be addressed and it relates to an issue that is currently pending in your Circuit Court matter.

D. Tell your client to send an email to the Director, copying you and the AAG assigned to the case, seeking a meeting with the Director to resolve this issue immediately.
Question Nine

- After a hard-fought battle in Circuit Court, you prevail and your client is ecstatic about the decision.
- You decide to update a legal blog with a post telling about your victory and how you were able to prove your client’s economic substance through various records.

Yes or No:
- Is this in violation of any ethical rule?
Question Ten

- You are outside legal counsel for Let’s Make a Deal, LLC (“Deal”), which is selling the stock of one of its subsidiaries.

- Deal’s business team makes it clear to you that they want to get the deal done ASAP.

- While negotiating the stock sale agreement with opposing counsel, you realize that representations and warranties related to the subsidiary’s state tax liabilities fail to disclose material state income tax liabilities.

True or False:

- It is ethical for you, as an attorney, to advise the CEO of Deal to execute the stock sale agreement.
Question Eleven

• Under ABA Rule 1.5 – Fees, there are eight (8) separate factors to consider in determining the “reasonableness” of a fee charged by a lawyer...

• Name 3 of the factors in determining whether a fee is reasonable under Rule 1.5.
Question Twelve

Waaaaa Waaaaa… You Lose 500 Points! You are a CPA and a new client comes to you and after six years of operating under the radar tells you they want to do the right thing and start filing sales tax returns. On the application, a question is asked “what year did you start doing business in the State?” You leave this answer blank knowing it will be disadvantageous to disclose the date the client began doing business.
Question Thirteen - Fees

An attorney and a CPA can enter into a non-exclusive referral agreement, where they refer state income tax matters for planning and dispute resolution to each other, and share the fees, under which of the following scenarios:

a. As long as they share office space and put both names on their letterhead.

b. As long as the referral sharing fee is reasonable and it does not affect the client’s fees for the services.

c. As long as they get written consent from each client.

d. None of the above.
Question Fourteen

What date was the original “Tax Day”?  
A. January 1  
B. March 1  
C. March 15  
D. April 15
Question Fifteen

Great News! You were victorious at the US Supreme Court in the *Wayfair* matter addressing South Dakota’s legislation aimed to kill *Quill*. You will forever be hailed as a State and Local Tax legend and have been rewarded with 1,000 points!
Question Sixteen

In the early 1980s, when the New Orleans football team was not very good, their fans affectionately referred to them as the:

1)  Atriots
2)  Olphins
3)  Aints
4)  Owboys
Question Seventeen – Contingency Fees

- A retailer engages you as counsel to seek a reduction in a $1 million state income tax assessment on a contingency fee basis, agreeing to pay you 25% of the tax “savings” realized.

- Are you, an attorney, ethically permitted to accept such an engagement?
Question Seventeen - Possible Answers

A. Reverse contingency fees are banned by the ABA and AICPA ethics codes.

B. Sophisticated companies may engage in fee arrangements they deem appropriate.

C. Reverse contingency fees are always permitted by the ABA as long as the attorney is willing to accept it.

D. Attorneys may use reverse contingency fee arrangements if the client is fully informed, the arrangement is in writing, and the fee is reasonable.
Question Eighteen

• You are in-house tax counsel for Corp ABC. In 2007, your outside tax counsel drafted a memorandum on Massachusetts’ addback statute.

• You relied on this memo to develop your filing position. **BUT** in 2010, to turn a help turn a dry conversation at Thanksgiving dinner with your Uncle Charlie, you shared the memo with him. Now its 2017, and the Attorney General is requesting memorandums relied upon for filing positions.

• You have ruined your attorney-client privilege and must disclose this memo. You lose 750 points!
Question Nineteen

• You are an attorney representing a Taxpayer, and you receive a letter from the DOR scheduling an appeals conference.

• With the letter is a memo from DOR counsel to her client which includes an analysis of the weaknesses in their case, and it is marked “Attorney-Client Privileged Communication.”

• What should you do?

A. Shred it and disregard it.
B. Notify opposing counsel that you have it.
C. Ask your client what they want you to do with it.
D. Start using it’s contents in preparation of your case.
Question Twenty

- A client comes to you with a new planning idea that is frowned upon by most states.
- The client is willing to spend big bucks in defending its controversial position.
- After analyzing the state statutes, regulations and applicable case law, you believe that the Browns have a better chance of winning the Super Bowl than this planning idea will have to be accepted by any state tax administrator, ALJ, or court.

Yes or No:
- Can you, as legal counsel, accept that engagement?
Questions?

Thank you!

David A. Hughes
Direct: (312) 606-3212
Email: dhughes@saltlawyers.com
Horwood Marcus & Berk Chartered
500 W. Madison Street, Suite 3700
Chicago, IL 60661

Debra Silverman Herman
Direct: (646) 218-7532
Email: dherman@hodgsonruss.com
Hodgson Russ LLP
605 Third Avenue, Suite 2300
New York City, NY 10158