Ethics: What Your General Counsels Worry About

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Topics

- Sources of Law
- Common Issues
  - Conflicts
  - Scope of engagement
  - Privilege
  - Return positions
  - Penalties and penalty defenses
  - Malpractice Exposure
- What to do when a problem arises
Sources of Law

- Lawyers
- Accountants
- All tax practitioners – incl. enrolled agents and actuaries
- Return preparers
Sources of Law - Lawyers

- ABA Model Rules of Professional Conduct
  - ABA does not possess disciplinary authority
- State analogues
  - See Pennsylvania Rules of Professional Conduct (available at www.padisciplinaryboard.org)
- Commentary on Model Rules
- ABA and state ethics opinions
- ABA Tax Section Standards of Tax Practice Statements
Sources of Law - Accountants

- AICPA Code of Professional Conduct
  - Applies to all members
  - AICPA possesses disciplinary authority

- AICPA Statements on Standards for Tax Services (SSTS), which have been adopted by some states

- State Board of Accountancy rules (look to where you are licensed and employed)
Sources of Law – Tax practitioners

- “Circular 230,” 31 C.F.R. Part 10
  - Incorporates many rules similar to ABA Model Rules of Professional Conduct and AICPA SSTs
  - BUT, the differences can matter

- The applicability of Circular 230 is very much in flux as a result of cases and uncertainty regarding the IRS’s authority to regulate practice
Sources of Law – Return preparers

- Provisions of the Internal Revenue Code, *e.g.*, §§ 6694, 6695, 7216
  - Remember how broad the definition of “return preparer” is in § 7701(a)(36) and Treas. Reg. § 301.7701-15. It’s not just signers...
- Circular 230 (?)
Suppose you’re trained as a lawyer, working in an accounting firm?

- You may also be providing “law related services.” See Model Rule 5.8 and comments (which specifically enumerate services such as accounting, trust services, lobbying, and “tax preparation”)
Suppose you’re a tax lawyer who is not actively “representing” a client before the IRS (i.e., not in Exam, Appeals, seeking a ruling, etc.), but just advising them on transactions and return positions?

– If you’re in legal practice, obviously the rules applicable to lawyers apply to you
– And again, you may be providing “law-related services”
– If not – and irrespective what your professional credentials are – this is a variation of the Ridgely issue
Follow the “most restrictive” rule

Example: conflicts that can be “waived” (i.e., consented to by the clients)

– ABA Model Rule 1.7(b) requires “informed consent, confirmed in writing” – with no temporal restrictions
– Most states follow that
– Some jurisdictions (e.g., D.C.) don’t even technically require a writing (BUT it’s always a good practice anyway)
– But Circular 230, § 10.29(b) and (c) have some additional requirements, including both a writing and some temporal rules
Other examples:

- Levels of authority: what’s “ethical” v. what the Code and Circular 230 require
  - ABA Formal Op. 85-352, still outstanding, says “realistic possibility of success on the merits” is ethical
  - Cir. 230, § 10.34 and IRC § 6694 generally require “substantial authority”

- Fees, especially contingent fees post-Ridgely
  - Rule 1.5 of the Model Rules permits contingent fees in most matters except domestic disputes and criminal cases
  - Cir. 230, § 10.27 restricts contingent fees in many tax engagements
Other examples:

- Knowledge of client’s error or omission
  - *Compare* Cir. 230, § 10.21 ("advise" re: consequences) *and* SSTS 6, para. 4 ("recommend" corrective measures)
- Competence standards
  - *Compare* Model Rule 1.1 ("shall provide competent representation") *with* Cir. 230, § 10.35 (more detailed)
- Many issues in one source are not even discussed elsewhere (*e.g.*, PTINs, notarizing taxpayer documents or endorsing taxpayer checks, lawyer advertising, trial publicity, etc.)
Common Issues - Conflicts

- Probably the most common issue a firm GC sees
- The Model Rules distinguish between current client conflicts (Model Rule 1.7) and duties to former clients (Model Rule 1.9)
- There are also a number of “specific rules” (Model Rule 1.8), generally related to lawyer-client relationships that could give rise to conflicts
Model Rule 1.7(a) states:

(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.
Rule 1.7 thus distinguishes between two main types of current client conflicts
- “Direct” adversity in a single matter. The classic example is opposing litigants with adverse positions in the same case
- Situations where duties to one client might create a “material limitation” on the lawyer’s ability to serve another client

Circular 230, § 10.29(a) follows the Model Rule nearly verbatim

But differences matter
In tax, the “opponent” is usually the taxing authority. This simplifies your GC’s life considerably! (Unless you also represent that same agency....)

Thus, most conflicts are of the “material limitation” variety. And per Model Rule 1.7(b) (or Cir. 230, § 10.29(b)) those conflicts may be “waived” (or “consented to”)

Common Issues - Conflicts
Common Issues - Conflicts

Model Rule 1.7(b) states:

(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.
Cir. 230, § 10.29(b) adds some wrinkles, however:

- It not only requires that consent be done “at the time” the conflict becomes known, but that it be confirmed in writing “within a reasonable time” and “in no event later than 30 days” after the conflict is identified
- And, §10.29(c) requires that the consent be maintained 3 years after the representation is concluded
Common Issues - Conflicts

- Model Rule 1.8 re: “specific circumstances” covers:
  - Business transactions with clients
  - Gifts from clients
  - Media rights to client stories
  - Financial assistance to client
  - Payment by persons other than the client
  - Aggregate settlements
  - Limitations of liability
  - Sexual relationships with clients
But there’s nothing really like this in Circular 230
Per Model Rule 1.10 (but oddly not Cir. 230), one attorney’s conflict is imputed/attributed to all attorneys practicing together in a firm
  - There are special exceptions and rules in situations of lawyers moving between firms
Typical situations

- Representing two parties simultaneously (e.g., husband and wife taxpayers, two shareholders of a company, the company and an employee, two criminal defendants, etc.)
- Representing two people negotiating a business deal
- Representing an elderly person and the person’s child or other potential beneficiary in a gift or estate planning situation
- Representing both the taxpayer and the attorney, accountant, or other advisor who put the taxpayer in the transaction, or gave an opinion, or did the return, etc.
- Being the advisor who put the taxpayer in the transaction or gave an opinion, and now representing the taxpayer before the IRS or the courts
More typical situations

- Representing two taxpayers simultaneously, who are (or start) suing each other over something else
- “Hot potato” situations
- Hiring a lawyer who has (and may be bringing) clients that are adverse to your firm’s clients
- Trying to limit your liability to a client prospectively
Common Issues - Conflicts

- Why does this matter?
  - Potential disciplinary action
    - IRS routinely asks for conflict waivers in multiple representation situations, and Cir. 230, § 10.29(c) says they must be produced to the IRS upon request. It’s a separate violation not to provide them.
  - Defense to attempts to collect unpaid fees
  - Malpractice “standard of care”
  - Insurers, plaintiffs’ lawyers, and jury consultants all know that showing that a lawyer has a conflict is the surest way to explain why the lawyer did shoddy work and should be held liable for negligence
Hints

– Consult your GC and/or develop someone in your firm who has expertise in these issues
– Run thorough conflict checks
– Update the conflict check midstream as you learn about new parties, witnesses, etc.
  • Watch out for “thrust-upon” conflicts
– Draft comprehensive conflict waivers so that consent to waive is truly “informed”
  • The question of the “advance waiver”
– Draft narrow engagement letters
Common Issues – Scope of Engagement

- Sloppy engagement letters are a common problem
  - Who is the client?
  - What is the engagement about?
  - Who is going to do what?
  - What are the fee arrangement and billing terms?
  - How will the engagement terminate?
There isn’t much in the rules about this

- Model Rule 1.2 discusses the “Scope of Representation and Allocation of Authority between Client and Lawyer.” But it is pretty permissive.
- Fee arrangements often have to be set forth in writing. Model Rule 1.5(b) says the fee arrangement “preferably” should be in writing
Some bad examples:

- “We will provide you with tax advice” [About what? On which issues? In which jurisdiction(s)? What years?]
- “We will prepare a contract/tax return/letter for you” [Same questions.]
- “We charge by the hour” [How much? In what increments? Do the rates ever change? What are the billing terms?]
- “We require a retainer of $10,000” [Who gets the earnings? Is this subject to the state IOLTA rules? Does it have to be “refreshed” with every bill? Who gets the balance when the engagement ends?]
Some better ones:

- “We will represent you before the IRS and, if necessary, any courts regarding potential adjustments to your 2015 federal tax liabilities”
- “We will assist you in negotiating a new employment contract with [Employer]”
- “We will represent you in litigation with [Opponent] regarding [describe this tort or that contract]”
Common Issues – Scope of Engagement

Why does this matter?

- “Engagement creep”
  - Doing something that client didn’t initially expect you to do – and now doesn’t want to pay you for
  - Not doing something that you didn’t think you were supposed to, but now the client wants to hold you responsible for
- Malpractice risk
- Clear billing per matter for each client reduces billing disputes (with client or internally)
- Not dealing with retainer funds properly is one of the most common subjects of disciplinary proceedings
Hints

- Consult your GC and/or develop someone in your firm who has expertise in these issues
- Have standard language engagement letters and follow them
- Make sure the client understands their obligations, the scope of engagement, how billing works, etc.
- Do your due diligence at the outset
GCs get asked about this all the time
- Sometime clients ask their advisors
- Good advisors recognize the issue first and seek guidance

This is an area where there are multiple sources of law, not all of which are very clear
- What privilege (if any) applies depends very much on what kind of practitioner you are, what kind of work you are doing, and what you are attempting to protect
There are essentially three potential privileges for communications with taxpayers:
- Attorney Client Privilege
- IRC § 7525 (“Federally Authorized Tax Practitioner” Privilege)
- Work Product Doctrine (not technically a “privilege” but a “protection” from disclosure)

Also: Fifth Amendment privilege against self-incrimination – hopefully not necessary in most tax cases!
The classic formulation of the attorney-client privilege is from Wigmore:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 Wigmore on Evidence §2292 (McNaughton rev. 1961)

United States v. Kovel, 296 F.2d 918 (2nd Cir. 1961): attorney client privilege can apply to non-attorney work prepared under direction of attorney to render legal advice.
IRC § 7525 seeks to extend basically the same attorney client privilege to Federally Authorized Tax Practitioners ("FATPs")

Applies in any Federal administrative or judicial tax proceeding

Many exceptions, e.g., does not apply to:
- State tax proceedings
- Criminal proceedings
- Non-tax federal proceedings
- Written advice related to the promotion of a tax shelter. (Note: advice related to post-transaction defense of a tax shelter should not be excepted and ergo should be privileged.)
Work product doctrine derives from Hickman v. Taylor, 329 U.S. 495 (1947), and Fed. R. Civ. Pro. 26(b)(3), which reads:

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
Note that work product protection is not grounded on confidentiality, but on fairness to the parties.

Not required that materials be prepared by an attorney.

What is “anticipation of litigation”?  
- Majority Rule: “on account of” or “because of” rule: work product applies to “dual” use documents—those partly “in anticipation of litigation” but also for other purposes.
- 5th Circuit Rule: “primary purpose” test—anticipation of litigation must be “primary motivating purpose” for creation of the document - if necessary for financial statement purposes, work product protection does not apply.
Common Issues - Privilege

- Waiver
  - Privileges protect confidential communications—so privilege disappears if there is disclosure outside of the privileged relationship
  - Waiver is generally limited to the specific communication that has been disclosed
  - Note that in some circumstances even that communication can be “clawed back.” E.g., Fed. R. Civ. P. 26(b)(5)(B)
    - But remember, clawbacks impose conditions on the recipient of the otherwise privileged information, not just the sender
    - And there may be discipline issues for not treating it properly
Subject matter waiver
- “Affirmative use” doctrine: can’t use the privilege as both “a sword and a shield”
- So, the result can be a waiver with respect to all communications on that subject matter
- Classic example: asserting “reasonable cause” defense to penalties based on advice of tax professional per Treas. Reg. §1.6664-4(c). Or maybe just on the totality of circumstances...
Tax accrual work papers are generally shown to accountants who are not within the client’s “circle of confidentiality”—so attorney client privilege (if it applied in the first place) is waived. See United States v. Textron, 577 F.3d 21 (1st Cir. 2009) (en banc).

Work papers (or other communications) can still retain work product protection if not shown to an “adverse” party.

- Outside auditors are “independent but not “adverse,” so work product protection may be retained
- But compare Textron with United States v. Deloitte, LLP, 610 F.3d 137 (D.C. Cir. 2010)
Common Issues - Privilege

- Typical situations
  - Taxpayer wants an opinion on a transaction
    - Watch for affirmative use: all communications may be discoverable by the IRS
    - This should be taken into account from the very outset of the engagement
  - Taxpayer wants advice with respect to a return position
    - IRS takes the position that communications with respect to return preparation are not privileged. But that position has serious theoretical flaws
    - And who’s giving the advice – an attorney, accountant, or non-regulated return preparer?
Typical situations

- Taxpayer wants to give the CPAs auditing their tax reserves a “limited peek” at the opinion they have
  - This is the classic Textron-Deloitte question
  - May blow attorney-client privilege, but work product may continue to apply
- Taxpayer wants you to share information with other parties who are in the same situation during examinations (shareholders, employees, participants in a transaction, etc.)
  - May have a “common interest” and/or be able to enter into a “joint defense agreement”
Hints

- Consult your GC and/or develop someone in your firm who has expertise in these issues
- Follow the advice scrupulously and make sure your client is aware of it. Footfaults can cause problems – not just waivers, but potential malpractice claims
- Use headers (“privileged and confidential” etc.) sparingly and correctly
- Segregate privileged materials from non-privileged aspects of the engagement or other work for the client
- Warn your client about inadvertent waivers
Obviously this issue is fairly unique to tax practice. Thus, there’s really no general ethics law (e.g. in the ABA Model Rules) about it. There is law in the Code and in Circular 230 that governs this issue, as well as the AICPA’s SSTs. Again, exactly what governs is determined by what kind of practitioner you are and what you are doing. But the good new is that Congress, the IRS, and AICPA have gotten the standards more or less aligned now.
Common Issues – Return positions

- Start with IRC §7701(a)(36) and Treas. Reg. §301.7701-15(b)(2)
  - The term “tax return preparer” means any person who prepares for compensation, or employs one or more people to prepare for compensation, any return of tax
  - The regulations provide that someone who just gives written or oral advice on a tax issue can be a preparer if
    • The advice pertains to a “substantial portion” of a return
    • The advice is given with respect to events which have occurred at the time the advice is rendered
    • The advice is directly relevant to a determination of the existence, characterization or amount of an entry on a return
    • The time spent on the advice given after the events have occurred is not less than 5 percent of the total time incurred by the person with respect to the position.
If you are a “return preparer,” you are potentially subject to penalty under IRC §6694 – Return Preparer Penalty

- For understatements due to an unreasonable position or willful or reckless conduct
  - Position is unreasonable unless it is supported by substantial authority, or has a reasonable basis and is disclosed
  - For “tax shelters” and “reportable transactions,” must reasonably believe the position is “more likely than not”
Substantial authority is defined in Treas. Reg. §1.6662-4(d).

Objective standard involving application of the law to the relevant facts.

The standard is lower than the more likely than not standard but higher than the reasonable basis standard (i.e., more than a 1/3 chance and <50%).

- A return position that is arguable but fairly unlikely to prevail in court satisfies the reasonable basis standard but not the substantial authority standard.
There is substantial authority only if the weight of authority supporting the position is substantial in relation to the weight of authority supporting contrary treatment. The weight accorded to an authority depends on its relevance and persuasiveness and the type of document providing the authority. Only the authorities listed in Treas. Reg. §1.6662-4(d)(3)(iii) may be considered.

- Includes things such as the Code, temporary and final regulations, revenue rulings and procedures, treaties, cases, congressional intent as reflected in congressional history, private letter rulings, technical advice memoranda, action on decisions and general counsel memos, IRS notices, announcements and press releases.
- Conclusions reached in treatises, legal periodicals, and legal opinions rendered by tax professionals are not authority, but the authorities underlying such expressions of opinion may give rise to substantial authority.
“Reasonable basis” is defined in Treas. Reg. §1.6662-3(b)(3)
- Reasonable basis is a relatively high standard of tax reporting that is significantly higher than not frivolous or not patently improper
  - Most practitioners thus put this below 1/3 but above 1/10 – so roughly a 20% +/- chance of prevailing
- The reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim
- If a return position is reasonably based on one or more of the authorities used for the substantial authority standard, then the position has a reasonable basis
Common Issues – Return positions

- Adequate disclosure is defined in Treas. Reg. §1.6662-4(f) and Cir. 230, §10.34(c)
  - Form 8275 or 8275-R
  - Special rules via Revenue Procedures
  - Schedule UTP

- Non-signing preparers should give “the speech” in Treas. Reg. §1.6694-2(d)(3)(ii)
  - Adequate disclosure can be a speech to the taxpayer, documented in writing, about potential penalties, penalty standards, and the ability to avoid penalties through adequate disclosure
If you are a “practitioner,” Circular 230, §10.34 also addresses return positions

§10.34(a): May not sign a tax return or advise a position on a tax return, willfully, recklessly, or through gross incompetence if:

- The position lacks reasonable basis
- The position is an unreasonable position (under §6694(a)(2))
- The position is a willful attempt to understate liability (per §6694(b)(2)(A))
- The position reflects a reckless or intentional disregard of rules and regulations (per §6694(b)(2)(B))
§10.34(b):
- May not advise taxpayer to take (non-return) positions that are frivolous
- May not advise taxpayer to make other submissions:
  • to delay or impede tax administration
  • that are frivolous
  • containing or omitting information that demonstrates an intentional disregard of rules or regulations
§10.34(c): Must advise client of potential penalties and the opportunity to avoid them through disclosure

Other provisions of Cir. 230 can apply

§10.35, Competence:

- Must possess the necessary competence to engage in practice before the IRS
- Competent practice requires the knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged
- As noted previously, this is one of the very few places the Model Rules also have an applicable provision, Rule 1.1, which uses very similar language to the above 2 sentences
§10.22, Diligence:

- Must exercise due diligence in
  - preparing or assisting in the preparation of returns or other documents
  - determining the correctness of oral or written representations made by the practitioner to the Treasury
  - determining the correctness of oral or written representations made by the practitioner to clients regarding any IRS matter
- May rely on the work product of another person, provided used reasonable care to engage, train, supervise and evaluate the other person
§10.34(d), Reliance on client or others

- Reliance on client information in good faith, without verification, is OK, but...
  - Cannot ignore implications of other information furnished
  - Cannot ignore actual knowledge
  - Must make reasonable inquiries for incorrect, inconsistent information
- No Willful Blindness
- No “Don’t ask, don’t tell”
§10.36, Procedures to ensure compliance:

- Any practitioner who has (or practitioners who have or share) principal authority and responsibility for overseeing a firm’s practice of preparing tax returns, claims for refunds, or other documents for submission to the IRS 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 Circular 230.

- Any practitioner who has (or practitioners who have or share) this principal authority will be subject to discipline for failing to comply with the requirements of this paragraph if (see subparts in regs)
Finally, if you’re an accountant, there are even more applicable standards.

The most important is SSTS No. 1, Tax return positions, which states:

- In recommending a return position, a CPA must comply with the standards of the applicable taxing authority.
- Must advise of potential penalties and possibility to avoid through disclosure.
- Must advocate for the client with respect to any position that satisfied the foregoing standards.
Also, SSTS 3, Certain procedural aspects of preparing returns, states:

- In preparing or signing a return, a member may in good faith rely, without verification, on information furnished by the taxpayer or by third parties.
- However, a member should not ignore the implications of information furnished and should make reasonable inquiries if the information furnished appears to be incorrect, incomplete, or inconsistent either on its face or on the basis of other facts known to the member.
Common Issues – Return positions

- Typical situations
  - Taxpayer hasn’t exactly told you everything (“What Cyprus bank account?!“)
  - Taxpayer’s story doesn’t match up with the documentation provided
  - Taxpayer has already taken a position in a prior year’s return on the same issue/facts
  - Taxpayer seems to switch attorneys and accountants a lot...
  - Taxpayer wants advice at a certain level (“should” or “will” or “way higher than more likely than not”)
Common Issues – Return positions

Hints

- Consult your GC and/or develop someone in your firm who has expertise in these issues
- Train your people so they know these rules
- Work in teams when things gets sticky
- Best defense to problems is at the front door
- Do your due diligence
- Document what you’ve done and why
- Document the advice given to the taxpayer
Penalties under the Code come in two varieties:

- Penalties against the taxpayers themselves
- Penalties against third party advisors, return preparers, etc.

The first aren’t assessed directly against advisors, but may create malpractice risk your GC should know about.

The second are obviously of more direct concern.

Both varieties may create conflict-type issues:
- Varying standards
- Privilege
- “Prior work” issues
Fortunately, the penalty standards for taxpayers (mostly under IRC §6662) now generally match the standards for return preparers under IRC §6694, and for practitioners under Circular 230, §§10.37 and 10.34 (which cross-reference §6694, which in turn cross-references §6662)

– “Substantial authority” for most positions
– “Reasonable basis” for disclosed positions
– Special rules for “tax shelters,” “reportable transactions,” and “non-disclosed, non-economic substance transactions” – with much more severe penalties and penalty standards
– The defense of “reasonable cause” is generally available to both taxpayers and practitioners, but that in itself creates issues
Opinions/advice

- Reliance on professional advice may be a factor in “reasonable cause” defense for taxpayers under Treas. Reg. §1.6664-4(c) – a so-called “penalty protection” opinion
- May provide the analysis/authorities for why the reporting of a transaction meets the applicable penalty standard(s)
- May be needed to satisfy counterparties in a transaction
- May be needed to satisfy auditors looking at the adequacy of tax reserves
Common Issues – Penalties and penalty defenses

- Risks for practitioners from advice/opinions
  - You may become a non-signing return preparer potentially subject to §6694 penalties
    - Is the item substantial?
    - Do you meet the compensation/timing requirements in the regs?
    - Are the applicable authority level standards met?
    - Did you give “the speech” re: penalty issues?
  - Circular 230 for return positions and written advice
  - Malpractice risk
    - If the IRS disagrees, will the taxpayer treat the opinion as a “guarantee”?  

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Common Issues – Penalties and penalty defenses

- Common problems (similar to return positions)
  - Taxpayer doesn’t give you all the facts
  - Taxpayer wants you to make assumptions – are they reasonable?
    - Do not “assume a business purpose”!
  - Taxpayer wants to limit the opinion to one issue only rather than have you review the full transaction
  - Taxpayer wants advice at a certain level
  - Taxpayer wants to convey advice (or show written advice) to an auditor, counterparty, bank, etc.
Common Issues – Penalties and penalty defenses

- Privilege and waiver (discussed above)
  - Who’s giving the advice – an attorney, accountant, or non-regulated return preparer?
  - Which privileges might apply and be waived
  - With whom will the advice/opinion be shared
  - Communications re return preparation may not be privileged
  - Affirmative use may waive with respect to all communications on the same subject matter
“Prior work” conflicts

- A variety of “material limitation” conflict under Model Rule 1.7(b) and Circular 230, §10.29(b)
  - The Tax Court even has a rule just on this, Rule 24(g)
  - Beware also of the rule against “lawyer as witness” (Model Rule 3.7, Tax Court Rule 24(g))
- Basic idea is that you may be more concerned with defending your own work/advice/opinion than helping the taxpayer
  - E.g., blame the taxpayer for not giving you the facts
- The conflict may be “waived” (consented to) but do this very carefully
Hints

- Consult your GC and/or develop someone in your firm who has expertise in these issues
- “Two partner review” on written advice
- Follow the due diligence rules (in Treas. Reg. §§1.6664-4(c), 1.6694-2, and Circular 230, §§10.22, 10.34, 10.37)
- Document what you’ve done and why
  - Especially the advice given to the taxpayer and “the speech”
- Consider the prior work issue before taking on an IRS examination if you gave advice on the return/transaction
If you follow the hints above, flat-out, obvious negligence is pretty unlikely.

But occasionally mistakes happen.

The mistake is frequently recognized:
- When you’re reviewing old work (prior year returns, for instance)
- When a new person joins the engagement
- When the taxpayer is audited and the IRS finds something that you should have seen (a documentary gap, incorrect legal analysis, etc.)
Common Issues – Malpractice Exposure

Hints:
- Don’t sit on the issue and hope it goes away - deal with it
- Talk to your GC immediately. Do NOT email; talk
- Carefully research your options
- Do NOT immediately explain the problem to the client. That’s a conversation your GC should be part of, after the scope of the problem and options for dealing with it are researched.
- Work with your insurer
What to do?

- Designate a firm GC
  - Experienced point person to handle these issues
  - Helps with in-house privilege

- Set the right “tone” to help ensure compliance
  - Make clear that everyone must understand and satisfy obligations under the rules (ABA, AICPA, Circular 230, Code)
  - Require regular ethics training
  - Encourage seasoned professionals to mentor others
  - Foster a “culture of compliance”
  - Encourage practitioners to ask questions and raise issues
  - Have an “open door” policy to discuss ethics and compliance questions
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