Ethics

Ethical Considerations for Limited Scope Engagements

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The Panel

Panelists:

The Honorable Peter J. Panuthos, Chief Special Trial Judge
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Moderator:

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Objectives

• By the conclusion of this presentation:
  • You will have the tools to be able to limit the scope of representation while avoiding liability when taking on a pro bono case in accordance with ABA Model Rule 1.0(e).”
  • When representing a pro bono client, you will be to define the scope of ‘reasonable representation’ in accordance with ABA Model Rule 1.0(h).”
  • In line with Circular 230 § 10.33, even though it’s aspirational, you will be able to identify best practices with representation of a pro bono client.
Limited Representation of Clients

- Long history of this practice. Full-service attorney’s use to do discrete transactions for individual clients.

- State Bar Associations and Legal Services Community Pushed for Limited Representation

- In 2002 ABA Included limited representation in Model Rule 1.2
ABA Model Rule 1.2(c)

• “A lawyer may limit the scope of the representation if the limitation reasonable under the circumstances and the client gives informed consent.”

• For Legal Aid Organizations, this allows greater volume of clients to be served.

• For pro bono clients specifically, 1.2(c) promotes efficiency as clients who are out of comfort zone with tax issues can receive effective representation without their case taking up a large portion of an attorney’s time.
Rule 1.2(c) Continued:

• Comment [7] to the rule lists an important caveat:
  • Limited representation does not exempt a lawyer from the requirement of competent representation or preserving client confidences.

• What is reasonable representation?
  • ABA Model Rule 1.0(h)
    • “’Reasonable’ or ‘reasonably’ when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.”
Limiting Scope While Avoiding Liability

• Informed Consent
  • ABA Model Rule 1.0 (e) “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

• In writing
  • Must be clear as possible. Ensure client understands the consequences of what they are signing, or you could risk having “informed consent”
Other Guidance:
Circular 230 §10.33 (a)(1)

• Only unenforceable provision in the regs and is aspirational only but provides guidance in the following circumstances

• Provides that tax advisors should clearly communicate the terms of engagement and determine the client’s expected purpose and use of advice.

• Attorneys should provide a “clear understanding regarding the form and scope of the advice or assistance to be rendered.”
Low Income Tax Client Concerns

• Low income tax clients typically do not have just one single issue, so limiting representation to tax issues alone can interfere with client’s objectives/representation.

• Low income tax clients also have difficulty understanding their tax issues → substantial faith and reliance is put into the attorney.

• Scholars have suggested this results in almost an increased “fiduciary” duty from that of paying clients.
IRS Perspectives on Limited Representation

• ABA Model Rule 4.2 mandates that attorneys cannot speak directly to individuals about a matter who they know are represented by counsel.

• But what about limited representation? Can you speak to the individual about some matters outside of the scope of representation?
  • Technically yes, but the IRS advises caution in this situation. Always ask if the Petitioner is represented, if yes but the scope is not clear, contact the attorney.
  • Settlement agreements require signatures of all petitioners, not just the limited representative.
  • The IRS does require a valid Form 2848 before they will communicate with a petitioner’s attorney.
Competency & Frivolous Claims Under Circular 230

• § 10.33 (a): aspirational set of due diligence provisions
  • Is only unenforceable provision in the regs and is aspirational only
• Circular 230 § 10.34(a) - When Advising a Client/Preparing a Return:
  • Lacks reasonable basis
  • Unreasonable position under IRC § 6694(a)(2)
  • Understates liability or reckless disregard for IRS Rules and Regulations
  • Circular 230 § 10.34(a) patterns of behavior: A single violation of the Circular should not result in sanctions under the Circular. Instead, the IRS is looking for a pattern of violations or repeated violations by a particular practitioner before imposing sanctions.
• Circular 230 § 10.34(b) - Submitting Documents and Affidavits
  • Frivolous Standard
  • Delays or impedes administration of Internal Revenue Code
  • Contains or omits information which demonstrates intentional disregard of the rules and regulations UNLESS good faith challenge to the rules.
• Circular 230 § 10.34(d) – When relying on info furnished by clients, you can generally rely in good faith without verification upon information furnished by the client, however, you must make reasonable inquiries if the information appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.
Practitioner Mistakes

• The Law does not impose upon attorneys the obligation to always be correct or to achieve a desired result.

• However, if an issue is unsettled or unclear on how a course of conduct will turn out, you must advise your client on other alternatives and inform them of their risks. Williams v. Ely, 668 N.E.2d 799 (Mass. 1996).
Circular 230 § 10.33 Best Practices

- Clear communication with client
- Requisite knowledge and skill
- Inform client the consequences of actions
- Acting fairly and with integrity
Duty

- Tax attorneys have a duty to Tax Administration meaning a duty to uphold the provisions of the IRC and accuracy and competency of their clients’ claims.
- If an attorney discovers that a client has misled or defrauded the government, the attorney MUST advise the client of the “noncompliance, error, or omission” and the consequences of failing to correct (Circular 230 § 10.21).
- If client ultimately intends to pursue the fraudulent conduct using the attorney’s services to do so, then the attorney must withdraw from representation.
Malpractice Cases: Limited Scope

- **AmBase Corp v. Davis Polk & Wardwell:**
  - Facts: Law firm successfully litigated an IRS tax dispute but was subsequently sued by the client for malpractice on the basis that the firm failed to question whether an agreement entered into between the client and related company may have relieved the plaintiff of the tax liability.
  - Holding: Law firm was retained to litigate the amount of the tax liability with the IRS and not issue of whether the client owed underlying liability.
**Malpractice Cases: Limited Scope**

- **Nichols v. Keller**: attorney representing client in workers comp. claim was found negligent for failing to advise a client about a potential third party tort action and the attendant statute of limitations.

- In that case, the scope of representation was limited to the workers comp claim, however, the court found that:
  1. Attorney needed to disclose that there may be other remedies the attorney is not looking into
  2. Disclose any apparent legal problems pertaining to the limited scope of service
  3. Advise the client to find different counsel for the other issue. (Make a note of it too)
Summary

Today we have discussed various ethical considerations in pro bono representation, whether practicing before the IRS or before the Tax Court. Panelists discussed dilemmas attorneys face when representing tax clients at settlement days, calendar calls, and via direct representation outside of the courtroom. Discussions included how the limited representation rules came about, how to spot and handle competency issues in limited representations, and conflicts of interest issues that arise in limited scope and limited time representation. Panelists also provided advice on how to avoid the perils related to pro bono representation of taxpayer clients. This panel is the first part of a two-part series co-sponsored with the Pro Bono Committee. The second part will be presented tomorrow.
Questions?

All attendees can submit questions via the Q&A feature on the webinar interface.