

LEGAL ETHICS

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STUDY HINTS FOR LEGAL ETHICS

Legal Ethics (formerly known as Professional Responsibility) was added as a separate section of the admission exam in 1996. The Court tests the ABA *Model Rules of Professional Conduct* and a copy of the *Model Rules* is provided during the exam. This is not the same thing as Circular 230 ethics that tax professionals must know as enrolled agents and certified public accountants, which is why there is no Ethics CE provided in this course.

As the smallest area of the total exam (24 minutes or 10% of the 2021 exam) the temptation may be to short-change study in this area. These questions tend to repeat, and in some respect, it is the easiest section to study for; just don't lose sight that you must also pass this section with 70% competency. For the 2021 remote exam, Legal Ethics was paired with Federal Taxation as the first exam segment, and many who didn't pass overall, didn't pass Legal Ethics most likely because they ran out of time. Previously it was rare for someone to not pass Legal Ethics.

The most crucial Legal Ethics study areas include conflicts of interest, settlement offers, Golsen rule, your duty to the court and to the client. Imputation isn't tested as frequently as that once was, but you should still understand how that affects clients and who can represent them.

Think about these questions as you study: when can you represent both husband and wife in Tax Court, and when can you not? What if you are a witness in the case – may you also represent? What if you designed the transaction that led your client to Tax Court? What if you know the client will testify falsely? What if you learn later the client testified falsely? Must you disclose court cases you find that are contrary to your client's positions if the IRS does not mention them in their documents? What are the rules regarding prior clients and imputed disqualification to you or other members of a law firm?

More recent exams emphasized the duties to the court as these examples show:

2021/LE-2 (3 minutes) Aubrey Palmer has received notices of deficiency with respect to his 2018 and 2019 federal income tax returns, disallowing expenses claimed on Palmer's Schedule C. Among the items at issue are depreciation deductions for Palmer's pickup truck, which Palmer reported was used 100% for business purposes. B drafted Palmer's petition, which stated that the truck had been used 100% for business purposes, and represents Palmer in Tax Court. The two agree to meet over dinner to discuss the case. Palmer arrives at the designated restaurant in his pickup truck, which B notices is in pristine condition. When B asks Palmer how he keeps the truck in such good shape, Palmer replies, "This truck is my baby! I never take it to work." What action, if any, should B take? Briefly explain your answer.

SUGGESTED ANSWER: B should inform Palmer that he needs to correct the false statements in the petition or he is bound to inform the Court if Palmer refuse to correct the false statements.
(6/6)

2018/LE-1 (2 minutes) Gilbert Dunn has received a notice of deficiency with respect to his 2015 federal income tax return on which he claimed to have no gross income and no income tax liability. Dunn is a self-employed van driver, who advertises his hauling services on various websites and apps. He received several Forms 1099-MISC from corporate customers who used his services on multiple occasions during 2015. Dunn would like to engage A, a lawyer, to represent him in a Tax Court proceeding with respect to the deficiency. Dunn claims that the Internal Revenue Code is not binding law outside the District of Columbia, that he is not a "United States person" or an "individual" or "taxpayer" subject to income tax liability, and that he is a citizen of California rather than the United States. Can A file a petition in Tax Court challenging the deficiency on the basis of Dunn's claims? Briefly explain your answer.

SUGGESTED ANSWER: No. A practitioner cannot advance a frivolous argument and if A does, A is subject to sanction or penalty. (4/4)

2018/LE-2 (3 minutes) B, an attorney, represents Brendan Henderson in Tax Court litigation. Henderson had supplied B with factual information, which B used in preparing stipulated facts. Henderson saw the stipulated facts before they were submitted to the court. During a discussion of other matters in which B represents Henderson, at a time when the Tax Court proceeding is ongoing, Henderson confesses to B that some of the information and some of the stipulated facts are false. What action, if any, should B take? May B reveal the true facts to the court? Briefly explain your answer.

SUGGESTED ANSWER: B must have Henderson correct the stipulations. If Henderson refuses, B as an officer of the Court must take remedial action, including notifying the Court of the falsehood. (6/6)

2018/LE-3 (2 minutes) C, an attorney, is preparing her client, Lucy Wilkerson, to testify at her Tax Court trial. Wilkerson states that she intends to lie. If Wilkerson insists on testifying, must C call her as a witness? Briefly explain your answer.

SUGGESTED ANSWER: C may not call Wilkerson to the stand if C knows her testimony will be false. (4/4)

INTRODUCTION TO LEGAL ETHICS

The legal profession has long been subject to regulation. As long ago as 1836 a professor of law at the University of Maryland named David Hoffman published fifty *Resolutions in Regard to Professional Deportment* for his students. In 1908 the American Bar Association (ABA), a nationwide voluntary bar association, approved 32 *Canons of Professional Ethics*. Eventually these became the canons of the 1969 *Model Code of Professional Responsibility* (see Appendix A), which was adopted formally by the supreme courts of a majority of states. In 1983 the ABA promulgated the *Model Rules of Professional Conduct* (referred to here as *Model Rules* - see Appendix B for selected rules).

The *Model Rules* prescribe baseline standards of legal ethics and professional responsibility for lawyers. They are not legally binding of themselves, but as of 2009 forty-nine states have adopted them in whole or in part which makes them binding on attorneys practicing in those states. Tax Court practitioners are bound by the Model Rules.

In 1997 the ABA established the Ethics 2000 Commission to review and evaluate the *Model Rules*. On 2/5/02 the ABA House of Delegates approved substantial changes in the *Model Rules* which were adopted in 2003. Appendix A provides the table of contents of the Model Rules, which can easily be found online. One theme runs throughout them: informed consent, in writing and signed by the client.

Tax Court Rule 201

This rule states that attorneys and non-attorneys appearing before the United States Tax Court are expected to adhere to the “letter and to the spirit” of the *Model Rules*. Additionally, the Court can require any practitioner appearing before it to furnish a statement, under oath, of the terms and circumstances of his or her employment in any case.

Tax Court Rule 202

Under this rule any member of the Bar of the Tax Court may be disciplined as a result of 1) conviction in any court of the US of any felony, or of any lesser crime involving false swearing, misrepresentation, fraud, criminal violation of any provision of the Internal Revenue Code (IRC), bribery, extortion, misappropriation, theft or moral turpitude or 2) imposition of discipline by any other court of whose bar an attorney is a member, 3) conduct that violates the letter and spirit of the *Model Rules of Professional Conduct*, the Rules of the Court, or orders or instructions of the Court, or 4) any other conduct unbecoming a member of the Bar of this Court.

Discipline may consist of disbarment, suspension from practice before the Court, reprimand, admonition or any other sanction the Court may deem appropriate. A practitioner may be immediately suspended from practice until further order of the Court.

No one may be suspended for more than 60 days or disbarred until that person is afforded the opportunity to be heard. A Tax Court judge may immediately suspend any person for not more than 60 days for contempt or misconduct during trial or hearing.

When allegations of misconduct are brought to the attention of the Court, the Court will issue an order to show cause why the practitioner should be disciplined – that order will direct that a written response be filed within the period of time the Court directs and will set a prompt hearing before one or more judges of the Court. If the disciplinary action results from a complaint by a Tax Court judge, the hearing will be conducted before a panel of three other Tax Court judges.

A practitioner suspended for 60 days or less is automatically reinstated at the end of that period. If a practitioner is suspended for more than 60 days, or is disbarred, he or she may not

resume practice until reinstated by order of the Tax Court. In order to be reinstated the practitioner must demonstrate by clear and convincing evidence that the practitioner's reinstatement will not be detrimental to the integrity and standing of the Court's bar or to the administration of justice or subversion of the public interest. No petition for reinstatement can be filed within 1 year following an adverse decision. The practitioner is entitled to representation by counsel in all proceedings. The Tax Court may appoint counsel to assist it with respect to any disciplinary matters.

The Court has powers as are necessary for the Court to maintain control over proceedings conducted before it including proceedings for contempt under §7456 or for costs under §6673(a)(2).

CLIENT-LAWYER RELATIONSHIP

COMPETENCE - MODEL RULE 1.1

An attorney or Tax Court Practitioner must represent clients competently. This includes having the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A practitioner may be disciplined for neglecting a legal matter, for failing to prepare, or for taking on a matter the practitioner knows he or she is not competent to handle. Tax Court Rule 202 (see previous section) sets forth the procedure for disqualification, suspension or disbarment of a practitioner.

SCOPE OF REPRESENTATION/AUTHORITY ... – MODEL RULE 1.2

The attorney is the agent of a client. The lawyer will abide by the client's decision concerning the objectives of representation and will consult with the client as to the means by which they are to be pursued. The client is responsible for making key decisions affecting his or her substantial legal rights, including final say on expenses. All settlement offers must be communicated to the client, even if the practitioner believes the offer to be without merit, and the practitioner must abide by the client's decision whether to settle a matter. The only exception to this rule is if the client already made it clear that such an offer will be unacceptable.

***All settlement offers must be communicated to the client,
even if the practitioner thinks it's a bad idea,
unless the client already made it clear that such an offer will be unacceptable.***

Example: Client Shirley tells Practitioner Phil to "use your judgment as to whether to accept any IRS offer to settle that involves \$30,000 or less in tax, penalties and interest." The IRS makes an offer to settle for \$75,000. Phil is not obligated to communicate the settlement offer to Shirley as she already indicated that amount was not within her 'acceptable settlement' parameters.

The practitioner, after consulting with the client, is responsible for making technical decisions on legal strategy and procedure. She or he decides what motions are appropriate, the scope of discovery, what witnesses to call, how to handle direct and cross-examination, and what evidence is introduced in what order.

A practitioner may not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent. A practitioner may discuss the legal consequences of any proposed course of conduct and can make a good faith effort to determine the validity, scope, meaning or application of the law.

DILIGENCE - MODEL RULE 1.3

A practitioner must act with reasonable diligence and promptness. The practitioner must act as a zealous advocate for the client, taking all lawful and ethical steps to vindicate the client's cause, and must carry on matters through to conclusion. If a practitioner terminates services with a client, it should be done in writing.

COMMUNICATION - MODEL RULE 1.4

A practitioner must 1) keep a client reasonably informed and promptly comply with reasonable requests for information. The practitioner must promptly inform the client of any decision or circumstances in which the client's informed consent is required by the Rules. The practitioner must explain matters reasonably necessary to permit the client to make informed decisions. How much information is adequate? That depends upon the decision that must be made, what advice is being given, and how much assistance the client requires to understand the issue. The practitioner must act in the client's best interest and with knowledge of the client's overall requirements.

The definition of "informed consent" found within the ABA's Center for Professional Responsibility web site is:

Informed consent 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 reasonable available alternatives to the proposed course of conduct.

The discussion of the term "confirmed in writing" reveals:

"Confirmed in writing," when used in reference to the informed consent of a person denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (informed consent above) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

The practitioner must also 2) reasonably consult with the client about the means by which those objectives are to be accomplished, 3) keep the client reasonably informed about the matter's status, 4) promptly comply with reasonable requests for information, and 5) consult with the client about any relevant limitation on the practitioner's conduct

when the attorney knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.

FEES – MODEL RULE 1.5

The practitioner and client should agree on the fees early in the relationship, preferably in writing. Charging unreasonably high fees can subject an attorney to discipline. Whether a fee is reasonable depends upon the time and effort required, how difficult the legal questions are, the amount at stake, time limitations, and the attorney's experience, reputation and ability.

The attorney must disclose the basis for all fees and charges. Ordinary overhead expenses are not chargeable to the client, although the attorney may charge the actual cost of special computer research or employee overtime. The attorney should not make a fee arrangement that means services will stop in the middle of the relationship, leaving the client at a disadvantage. The parties may agree how the client will pay the fee; it can be by credit card, bank loan, or the client can make arrangements to pay the attorney with an interest-bearing promissory note.

An attorney may require that a fee be paid in advance. The practitioner must refund any unearned amount of the advance if he or she is fired or otherwise withdraws. A retainer, paid solely to ensure the attorney remains available to the client, does not need to be refunded unless the retainer was unreasonable or the fee arrangement was violated.

Property may be exchanged for attorney services, as long as the property is not the subject of litigation. Special scrutiny may occur to ensure the client's rights are protected if payment is made with property.

Fee splits may be allowed between attorneys of different firms if:

- the client knows that two attorneys will split the fee and does not object,
- the total fee is reasonable, **and**
- the split is proportionate to the amount of work done and responsibility assumed by each attorney. It is possible for the fee split to be disproportionate if the client consents and if both attorneys assume joint responsibility for the case.

A fee may be contingent upon the outcome of the matter except if prohibited by law or the Model Rules. Contingent fees must:

- be in writing,
- state how the fee is calculated,
- indicate what litigation and other costs are deducted from the recovery, **and**
- state whether expenses are deducted before or after the fee is calculated.

Whenever a contingent fee matter is concluded, the attorney must give the client a written statement that shows the outcome of the matter. If there is a recovery, this written statement must also show how the remittance to the client is determined.

CONFIDENTIALITY OF INFORMATION - MODEL RULES 1.6

Generally without a client's informed consent a practitioner is not permitted to disclose information relating to the client's representation unless the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted to 1) prevent reasonably certain death or substantial bodily harm, 2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, 3) to prevent/mitigate or rectify substantial injury to the financial interest or property of another, 4) to secure legal advice about the lawyer's compliance with these rules, 5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, 6) to comply with other law or a court order, 7) to detect and resolve conflicts of interest arising from the lawyer's change in employment or in ownership composition, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. There are two components of maintaining a client's confidences: privilege and the duty of confidentiality.

Privilege

Privilege applies to all communication between a legal advisor and a client or prospective client that is protected against government-compelled testimony. Communication is information that is transmitted either orally or in writing, between the attorney and the client, and their respective agents. Generally, privilege cannot protect the client's identity or the fee arrangement between the parties, unless disclosing those facts necessarily reveals a substantive confidential communication.

To be protected by privilege the communication must take place without strangers and be for the purpose of obtaining legal advice.

***Privileged communication must take place without strangers,
for the purpose of obtaining legal advice. Privilege does not exist if the consultation's
purpose is to commit a future crime or fraud.***

For these purposes, the practitioner's employees or a client's agent are not considered strangers. Privilege does not exist if the purpose of the consultation is to commit a crime or fraud.

Privilege belongs to the client; unless the client waives it, the attorney must claim privilege whenever an inquiry is made into a privileged matter in the client's absence. Waiving privilege means the client fails to claim privilege when there is an opportunity to do so. Privilege can also be intentionally waived when the client reveals a significant part of the privileged communication. The client may also inadvertently waive privilege by disclosing protected information in front of third parties. Privilege is not waived if the attorney reveals confidential information without the client's consent, but the attorney should do all that is possible to protect the client's confidence as much as possible.

***Privilege belongs to the client; it protects communication, not physical facts or objects.
Work product privilege does not protect documents created
before the privileged relationship began.***

If another party eavesdrops on the confidential conversation, they can be stopped from testifying about any privileged communication overheard.

Giving an attorney documents that exist before the client-attorney relationship is established does not make those documents privileged. If the document is subject to discovery while in the client's hands, it is also discoverable in the attorney's possession.

Privilege applies to communication not facts: physical evidence is not protected by privilege and must be turned over to the appropriate authorities. The client's communications about the evidence and acts relating to the evidence are privileged (so location of evidence is privileged). Any evidence in the practitioner's possession must be turned over. For additional detailed discussion about privilege, see the appropriate section of the Evidence text.

If the client is a corporation, the privilege covers communications between the practitioner and a high-ranking corporate official. It also covers communications between the attorney and other corporate employees if these conditions are met:

- the employee is directed by his or her supervisor to communicate with the attorney,
- the employee knows the purpose of the communication is to obtain legal advice for the corporation, **and**
- the communication concerns a subject within the employee's scope of duties for the corporation.

If an attorney acts for two or more clients who share a common interest (such as business partners or a husband and wife) neither party can claim privilege in a subsequent controversy with the other party. Privilege still applies to the jointly retained attorney and his or her clients against non-clients.

Exceptions to Privilege

Privilege does not apply in these situations:

- the client seeks the attorney's services to aid or enable anyone to commit a **future crime or fraud**,
- the communication is relevant to an issue of breach of duties arising out of the attorney-client relationship,
- civil litigation arises between two parties who were **formerly joint clients** of the attorney, **and**
- the attorney is asked for evidence about either a **client's competency or his intent** relating to property disposition through a will or inter vivos transfer.

Work Product Privilege

The work product privilege protects the practitioner's work prepared in anticipation of a trial and does not depend upon the presence or communication by the client.

Confidentiality

The duty of confidentiality is more broadly defined than the work product or attorney-client privilege and this ethical duty applies to every part of the attorney-client relationship that is not already protected by privilege. It also refers to information that is secret. Secret information includes any that could prove embarrassing or detrimental to the client as well as any information the client requests be kept secret. A practitioner is prohibited from revealing or using information subject to this duty under any context, even after the attorney-client relationship ends.

Under Rule 1.6 all information that relates to the representation is protected. This not only applies to a client's confidential communications but also to information provided by third parties and information discovered by the practitioner. Rule 1.6 applies to prospective clients even if no client relationship ultimately arises from the contact.

Exceptions to the Duty of Confidentiality

There are limited instances in which the duty of confidentiality may be breached:

Client consent, which can be express or implied. Clients may always waive their rights to confidentiality. A client may expressly request the attorney to reveal information to a specific party for a specific person. It is implied that the client consents to the practitioner's disclosure to other practitioners within a single firm, unless the client specifically withholds this consent.

Legal compulsion to reveal. When the law requires disclosure, including court orders, a practitioner must comply. Remember that disclosure of privileged information is not required and cannot be compelled. A practitioner may in good faith challenge any court order that demands he or she provide testimony that violates the attorney-client privilege.

Legitimate self-interest, which includes collecting a fee or defending or responding to a charge of wrongdoing. Obviously, threatening to disclose information if not paid amounts to blackmail and is inappropriate. A practitioner may reveal information when necessary to establish a defense against a client or against a criminal charge or civil claim, or in response to allegations

made in any proceeding concerning the client representation. The practitioner may make a response as soon as an assertion of complicity is made; there is no requirement that a formal proceeding is commenced. The practitioner may defend against allegations made by any party, not just the client.

Client's intent to engage in wrongdoing. The Model Rules permit, but do not require, a practitioner to reveal information if he or she reasonably believes it is necessary to prevent the client from committing a criminal act that is likely to result in imminent death or substantial bodily harm, or one that is criminally fraudulent. Modifications to the model rules by various states results in differing standards in different states – since this primarily applies to criminal law these differences will not be discussed in this text.

CONFLICT OF INTEREST: CURRENT CLIENTS - MODEL RULE 1.7

A practitioner may not represent a client if the representation involves a concurrent conflict of interest. That exists if:

- the representation of one client will be directly adverse to another client, **or**
- 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.

Conflicts of interest exist if representing one client is directly adverse to another, or a practitioner's duties will be materially limited by duties to another client, a former client, a third party, or their self-interest.

For example, 'direct adversity' prohibits a lawyer from acting as an advocate in one matter against a person the lawyer represents in some other matter, even when they are wholly unrelated.

Simultaneously representing clients in unrelated matters when the client's interests are only economically adverse, such as representing competing economic enterprises in unrelated litigation, does not generally constitute a conflict of interest and may not require consent of the respective clients.

In *Clark Gebman and Rebecca Gebman* (TC Memo 2017-184 (9/18/17)) volunteer counsel met with P-H while P-W was parking the car. At the recall of the case for trial that afternoon, P-H conceded all adjustments and penalties and P-W, represented at trial by volunteer counsel, moved to continue the case to give P-W time to file a motion for leave to amend petition to raise an innocent spouse defense. The motion was granted. Subsequently P-H moved to withdraw his concession. The court issued an order to show cause why volunteer counsel, appearing in this case as a representative of P-W, whose interests appeared materially adverse to those of P-H, did not have a conflict of interest. The court held that volunteer counsel is now representing P-W in a matter in which he previously represented P-H, whose interests are

materially adverse to those of P-W, without having obtained P-H's informed consent in writing. To obviate a conflict of interest, volunteer counsel must either withdraw as P-W's counsel or take other steps to obviate that conflict or the court would take appropriate steps.

An example of 'materially limiting' is if a lawyer is asked to represent several individuals seeking to form a joint venture; the duty of loyalty to the others is likely to materially limit the lawyer's ability to advocate or recommend all possible positions. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical question is in the event a difference in interests arises, will it materially interfere with the lawyer's independent professional judgment in considering alternatives or shut down courses of action that should reasonably be pursued on a client's behalf?

Even if there is a concurrent conflict of interest, the attorney may represent a client if:

- the practitioner reasonably believes the lawyer can provide competent and diligent representation to each affected client;
- the representation is not prohibited by law;
- the representation does not involve an assertion of a claim by one client against another client represented by the attorney in the same litigation or other proceeding before a tribunal, **and**
- each affected client gives informed consent, confirmed in writing.

Clients may revoke their consent and can terminate the lawyer's representation at any time.

CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES – RULE 1.8

Attorneys may not enter into business transactions with clients or knowingly acquire an ownership or other pecuniary interest adverse to a client unless:

- the transaction and terms are fair and reasonable to the client, and are fully disclosed and transmitted in writing, in a manner that can be reasonably understood by the client,
- the client is advised in writing the advisability of seeking independent legal counsel on the transaction and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction, **and**
- the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Attorneys may not use information relating to representation of a client to the disadvantage of the client, unless the client gives informed consent, unless permitted or required by these rules. Further:

- Practitioners may not solicit a substantial gift from the client;
- Before client representation is ended may not make or negotiate an agreement for literary or media rights,

- May not provide financial assistance to the client, except an attorney may advance court costs and litigation expenses when repayment is contingent upon the outcome, and a lawyer representing an indigent client may pay court costs and litigation expenses;
- A lawyer may not accept compensation for representing a client from someone other than the client unless the client gives informed consent, and there is no interference with the lawyer's independence of professional judgment, and information is protected as required under Rule 1.6; **and**
- While associated in a firm, a prohibition that applies to any attorney applies to all of them.

DUTIES TO FORMER CLIENTS – RULE 1.9

A former client is entitled to nearly the same protections afforded a current client and attorney-client privilege survives even the client's death. A lawyer who formerly represented a client cannot represent any other client in the same or a substantially related matter if that person's interests are materially adverse to the former client's interests unless the former client gives informed consent, confirmed in writing.

***Former clients receive nearly the same protections as current clients.
A practitioner can't represent another client in the same or a substantially related matter
if that person's interests are materially adverse,
unless the former client gives informed consent, confirmed in writing.***

A practitioner is specifically not permitted to reveal information relating to the representation of a former client, except when the information has become generally known or the rules otherwise permit. The rules relating to conflict of interest are in part intended to provide protections for former clients to prevent confidential information from being misused; these will be discussed in a later section. A 'substantially related matter' involves the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information that normally would have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

IMPUTATION OF CONFLICTS OF INTEREST, GENERAL RULE - RULE 1.10

When lawyers who were associated within a firm end that association, the question of whether a lawyer should undertake representation is complicated by competing considerations. The client previously represented by the former firm must be reasonably assured the principal of client loyalty is not compromised. Neither should the rule be so broadly cast as to preclude other persons from having reasonable choice of legal counsel, nor should the rule unreasonably hamper lawyers from forming new associations and taking on clients after they leave a previous association. Lawyers are only disqualified when the lawyer involved has actual knowledge of protected information.

While attorneys are associated in a firm, none can knowingly represent a client when any one practicing alone would be prohibited from doing so by Rules 1.7 or 1.9. In essence the firm of lawyers is treated as one lawyer for purposes of these rules; attorneys are vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. The exception is when the prohibition is based on the prohibited lawyer's personal interest that does not present a significant risk of materially limited representation by any remaining lawyers in the firm.

When a practitioner terminates an association with the firm, the firm is not prohibited from representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

- the matter is the same or substantially related, **and**
- Any lawyer remaining in the firm has information protected under Rules 1.6 and 1.9(c) that is material.

EXAM ALERT!

Consider the above when answering questions dealing with whether or not an attorney can represent a client.

Disqualification under these rules may be waived by the client providing informed consent, confirmed in writing.

FIGURE 1

FIRM 1

Andrew is a partner, representing March Inc.



FIGURE 1: While Andrew is a partner in Firm 1, no one in the firm is permitted to represent a client whose interest is directly adverse to March Inc.

When Andrew leaves Firm 1, the remaining members of Firm 1 are permitted to represent a client with a directly adverse position to March Inc. in a substantially related matter, as long as no remaining lawyer in the firm has obtained material protected information. If they have materially protected information, they cannot represent a client adverse to March Inc.



Andrew leaves

The imputed disqualification rules will be discussed at greater length later in the text.

TERMINATING THE ATTORNEY-CLIENT RELATIONSHIP

The relationship may be terminated in these ways:

- The client can fire the attorney at any time, with or without cause. The client then owes the practitioner for the reasonable value of work done.
- The Court can grant permission to substitute attorneys. The Court can deny this permission if the substitution would cause undue delay or disruption. Permission can be denied even if the attorney has good cause for the request.

The attorney **must** withdraw if:

- the attorney's mental or physical condition makes it unreasonable for him or her to continue representing the client, **or**
- the continued representation requires the attorney to violate a law or disciplinary rule.

The attorney **may** withdraw if:

- there is no harm to the client,
- the client persists in criminal or fraudulent activity (although if the conduct requires the attorney's assistance he or she is mandated to withdraw),
- the client previously used the attorney's services to commit a past crime or fraud,
- the client's objective is repugnant or imprudent,
- the client breaks a promise to the attorney,
- the representation imposes an unreasonable financial burden on the attorney, or the client refuses to cooperate in the representation, **or**
- other good cause for withdrawal exists.

Before withdrawing, an attorney must give the client reasonable notice and an opportunity to obtain other counsel. If an attorney withdraws or is fired, all advanced fees not yet earned must be refunded. The attorney must also return all papers and property to which the client is entitled.

Withdrawal or Change of Counsel under Tax Court Rule 24

Under 24(c), counsel of record must file a motion with the Court requesting leave to withdraw. The motion must show that prior notice of the motion was given to the counsel's client and to each of the other parties to the case, or their counsel, and must state whether there is any objection to the motion.

In a case not calendared for trial or hearing, Rule 24(d) permits a party's counsel of record to withdraw and a new counsel to enter an appearance by filing a substitution of counsel. This must show that notice was given to the client's counsel and to each of the other parties to the case, or their counsel, and must state whether there is any objection to the motion. Under Rule 24(e) death of a counsel permits new counsel to enter an appearance, and 24(f) permits changes to counsel when there are changes in fiduciary or authorized representative of a party.

The conflict of interest rules in 24(g) may require that an attorney withdraw from representation. If any counsel of record was 1) **involved in the planning or promoting** a transaction or operating an entity that is connected to any issue in a case, or 2) **represents more than one person with differing interests** with respect to any issue in a case, **then the counsel must** a) either **withdraw** or b) **obtain informed consent** of the client for continued representation, or c) **take any other steps necessary** to obviate a conflict of interest.

If counsel of record is a potential witness, counsel must withdraw from the representation. Informed client consent cannot waive this requirement. See the Conflict of Interest section of this text for more discussion on the ABA Model Rules' position.

CLIENT WITH DIMINISHED CAPACITY - RULE 1.14

Even if the client's capacity to make decisions is diminished, either by minority, mental impairment, or for other reason, the attorney must maintain a normal client-lawyer relationship. If the lawyer believes the client is at risk of substantial physical, financial or other harm unless action is taken, and the attorney cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. This may include seeking an appointment of a guardian or conservator.

SAFEKEEPING PROPERTY - RULE 1.15

Any property a lawyer maintains for a client or third persons must be separate from the lawyer's own property. Funds must be kept in a separate account that is maintained in the same state as where the lawyer's office is situated. Complete records of such account funds and other property must be kept by the lawyer and must be retained for 5 years after the representation is terminated. The lawyer may maintain own funds in the account sufficient to pay bank service charges, but only for that purpose.

The attorney has a duty to identify money or property belonging to a client, and to put it in a safe place. Similarly, the attorney must keep good records of the property or money received and must render periodic accountings to the client, including prompt notification when money is received on the client's behalf. A practitioner must promptly pay money or property when it is due to the client.

A practitioner is subject to discipline for misappropriating or borrowing a client's money, or for commingling it with the practitioner's money or property. Any money received on behalf of a client must be placed promptly into a client trust fund account, regardless of its purpose.

DECLINING OR TERMINATING REPRESENTATION - RULE 1.16

As previously discussed, the lawyer cannot represent a client, and must withdraw from representation that already has commenced, if

- the representation will result in violation of the rules of professional conduct or other law,
- the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, **or**

- the lawyer is discharged.

The lawyer must comply with the tribunal's law requiring notice or permission to terminate the representation. When ordered to do so by a tribunal, the lawyer will continue representing the client even though there is good cause to terminate the representation.

DUTIES TO PROSPECTIVE CLIENT - RULE 1.18

Any person who discusses the possibility of forming a client-lawyer relationship is a prospective client. Even if there is no client-lawyer relationship, the lawyer cannot reveal information about the prospective client (except to the extent permitted for former clients). No attorney can represent a client with materially adverse interests to the prospective client – in other words, conflict of interest and imputation rules apply to the prospective client.

Prospective clients are protected by conflict of interest and imputation rules, even if the attorney is never engaged to represent.

If an attorney is disqualified from representation under this paragraph no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation unless 1) both the affected client and the prospective client give informed consent, confirmed in writing, or 2) the attorney who received the information took reasonable measures to avoid exposure to more disqualifying information that was reasonably necessary to determine whether to represent the prospective client, and the disqualified lawyer is timely screened from participating in the matter and receives no part of the fee, and written notice is promptly given to the prospective client.

COUNSELOR

Advisor - Rule 2.1

When representing a client, the lawyer must exercise independent professional judgment and render candid advice. The lawyer may refer not just to the law, but also moral, economic, social and political factors that may apply to the client's situation.

ADVOCATE

MERITORIOUS CLAIMS AND CONTENTIONS – RULE 3.1

An attorney is prohibited from bringing or defending a proceeding unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Under Circular 230, §10.34 provides the standards for advising with respect to tax return positions and for preparing or signing returns. Those standards of conduct currently require that a practitioner may not sign a return as a preparer or submit a document, affidavit or other

paper to the IRS if the purpose is to delay/impede the administration of federal tax laws that is frivolous, 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.

Additionally, the practitioner must inform a client of any penalties that are reasonably likely to apply to a position taken on a tax return if the practitioner advised the client on the position, or the practitioner prepared or signed the tax return and on positions taken on any document, affidavit or other paper submitted to the IRS. The practitioner must also inform the client of the opportunity to avoid any penalties by disclosure, if relevant, and of the requirements for adequate disclosure.

The Model Rules generally make asserting frivolous positions a punishable offense. Under Rule 3.1 an attorney cannot bring or defend a proceeding, or assert or controvert an issue within, unless there is a non-frivolous basis for doing so. A frivolous position is one that cannot be supported by a good faith argument under existing law and cannot be supported by a good faith argument for modifying existing law.

The practitioner is required to question or otherwise evaluate the client's claim and cannot merely accept a client's assertions on blind faith. The practitioner cannot guess what current law is but is required to see if the relevant statute was amended. However, if a practitioner knows the statute was amended, but believes in good faith that the amendment is not grounded in law, he or she is not subject to sanctions for filing a claim based on this belief.

Under the comments associated with Rule 3.1, an action is frivolous if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person. The action is not considered frivolous just because a fact has not been fully substantiated, or when an attorney expects to develop vital evidence during the discovery process.

Federal Rules of Civil Procedure – Rule 11

Attorneys litigating in federal courts are obligated to follow the Federal Rules of Civil Procedure. Rule 11(a) requires that an attorney, when representing a client, must sign every pleading, written motion or other paper. Further, Rule 11(b) provides that by signing, filing, submitting, or advocating any paper, the attorney is deemed to make the following certification that ... “to all the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances:

- the paper is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless cost increases, **and**
- any claims, defenses and other legal contentions made are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law.”

Sound familiar? Compare with the language specified in Tax Court Rule 33 which provides that signature of counsel or a party constitutes a certificate by the signer:

- that the signer has read the pleading, **and**
- to the best of the signer's knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, **and**
- that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, **and**
- counsel's signature also constitutes a representation that counsel is authorized to represent the party or parties on whose behalf the pleading is filed.

Sanctions can be imposed upon counsel who ignores this duty. At its discretion the Court may order the offending party to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable counsel's fees (Tax Court Rule 33(b)).

EXPEDITING LITIGATION - RULE 3.2

The lawyer must make reasonable efforts to expedite litigation consistent with the client's interests.

CANDOR TOWARD THE TRIBUNAL – RULE 3.3

An attorney must not knowingly misrepresent the law to the Court, which does not mean the attorney is unable to argue how the law should be interpreted and applied.

A lawyer will not knowingly:

- make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer,
- fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse in the client's position and not disclosed by opposing counsel, or
- offer evidence the lawyer knows to be false. If the lawyer (or client or a witness called by the lawyer) offers material evidence and the lawyer comes to know it is false, the lawyer must make reasonable remedial measures including disclosure to the Court.

***A practitioner may not make false statements in fact or law to the court,
fail to disclose legal authority in the controlling jurisdiction,
or offer evidence the practitioner knows is false.
The practitioner's duty to the court is higher than the duty to the client.***

One of the areas the client is least likely to understand is the practitioner's obligation to make certain the Court does not render uninformed opinions. The practitioner's duty to the Court overrides the practitioner's duty to the client. Under this provision the attorney has an affirmative duty of disclosure until the end of the proceeding. The attorney cannot knowingly

fail to inform a Court of legal authority in the controlling jurisdiction known to the attorney to be directly adverse and not disclosed by opposing counsel.

What defines ‘directly adverse’? The test considered appropriate by the ABA is whether the Court would benefit by having information about the decision before rendering their decision. Under the so-called *Golsen* rule (*Golsen v Comm’r*, 54 TC 742 (1970)) the attorney is obligated to disclose applicable case law in the controlling jurisdiction. Since Tax Court decisions are appealed to the Circuit Court of Appeals, the controlling jurisdiction is the Circuit that hears appeals from the taxpayer’s residence when the petition was filed. For example, the 9th Circuit hears appeals for California residents. Counsel is obligated to disclose all case law on point, even if adverse to the client, which arises from the 9th Circuit. Counsel is not obligated to disclose case law adverse to the client arising from any other circuit.

FAIRNESS TO OPPOSING PARTY AND COUNSEL – RULE 3.4

This rule provides a list of six things the attorney will not do, including:

- unlawfully obstruct another party’s access to evidence (or unlawfully alter, destroy or conceal a document or other material having evidentiary value), nor can the attorney counsel or assist another person in doing such an act,
- falsify evidence, or assist or counsel another to testify falsely, or offer an inducement that is prohibited by law,
- knowingly disobey an obligation under the rules of the tribunal (except for an open refusal based on the assertion that no valid obligation exists),
- during pretrial procedure make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request made by the opposing party,
- in trial allude to any matter the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, or state a personal opinion about the justness of a cause, the credibility of a witness, or
- Request a person other than the client to refrain from voluntarily giving relevant information to another party unless the person is a relative or employee (or agent) of the client, and the lawyer reasonably believes that person’s interest will not be adversely affected by refraining from giving such information.

IMPARTIALITY AND DECORUM OF THE TRIBUNAL – RULE 3.5

Lawyers cannot seek to influence a judge by means prohibited by law and cannot communicate ex parte with a judge during the proceeding unless authorized to do so by law or court order. Nor can they engage in conduct that is intended to disrupt a tribunal.

TRANSACTIONS WITH OTHER PERSONS

An attorney owes a duty of fairness to third parties, including the opposing counsel and any party to the litigation (Rule 3.4). Under Rule 3.7 lawyers are not permitted to act as advocate at a trial in which they will be a witness unless 1) the testimony relates to an uncontested issue, 2)

the testimony relates to the nature and value of legal services rendered in the case, or 3) the disqualification of the lawyer would work substantial hardship on the client.

TRUTHFULNESS IN STATEMENTS TO OTHERS – RULE 4.1

A practitioner has an affirmative duty to avoid making any false statement of fact or law. A practitioner cannot assist a client in conduct the attorney knows to be fraudulent or illegal. Inherent within these duties are possible conflicts with the attorney's duty of confidentiality to the client.

Once an attorney decides to speak about a matter, all statements must be truthful and complete enough to avoid misleading the hearer. If an attorney must breach confidentiality in order to speak the whole truth, the attorney should not tell a partial truth. Obvious exceptions exist when there is a legal compulsion to speak.

If an attorney knows an opposing party believes something that is not true, what duty must he or she follow? It depends on who created the misapprehension. If the attorney or client did not create it, there is no duty to speak. An attorney can create a misapprehension when he or she incorporates or affirms a statement known to be false or by a failure to act.

If the client creates a third party's misapprehension, the attorney's obligations are the same as when faced with a client who commits a fraud or a crime.

Attorneys cannot knowingly misrepresent facts or offer evidence known to be false. Further, there is a required affirmative disclosure of facts much as there is a required affirmative disclosure of law (as discussed in a separate section). Remember, an attorney who offers material evidence and later comes to know it is false must make reasonable remedial measures under Rule 3.3.

Blowing the whistle on a client can appear a valid way to avoid assisting a client in a crime or fraud, yet such behavior is generally not allowed. Under Rule 4.1 a lawyer must make disclosures necessary to avoid assisting a client's criminal or fraudulent act, unless the disclosure is prohibited by Rule 1.6. Generally, if an attorney cannot disclose a client's fraud in order to avoid assisting it, the attorney's only alternative may be to withdraw from representation. This, of course, may well give the appearance to outside parties that something is wrong, thus threatening the duty of confidentiality. Often if withdrawal is required by relevant disciplinary standards there is no violation of the duty of confidentiality.

Attorneys are similarly to avoid counseling a client to undertake illegal acts. Rule 1.2(d) does permit an attorney to discuss with the client all legal consequences of any proposed course of conduct. This assures the attorney can assist the client in understanding the meaning or application of any law.

Ex parte communications are those that occur without presence of the opposing counsel. Generally, an attorney is prohibited from meeting with the judge alone. If an ex parte

proceeding must occur, the attorney present is obligated to inform the Court of all known material facts that enable the Court to make an informed decision, regardless of whether the facts are adverse.

RESPECT FOR RIGHTS OF THIRD PARTIES – RULE 4.4

Attorneys must not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. Similarly, they cannot use methods to obtain evidence that violate such a person's legal rights. If an attorney receives a document he or she knows (or should reasonably know) was inadvertently sent, he or she must promptly notify the sender. This rule applies to electronically stored information also.

OTHER PROVISIONS OF THE MODEL RULES

The Law Firms and Associations portion (Rules 5.1-5.7) establishes that attorneys in a firm are to make reasonable efforts that all lawyers in a firm conform to the rules of Professional Conduct. Similarly, a lawyer is bound by these rules even when acting at the direction of another person. Even nonlawyers or those retained by or associated with attorneys are to act in ways compatible with the professional obligations of the lawyer.

The Public Service section (Rules 6.1-6.5) relates to pro bono legal services each attorney is to strive to provide, and the Information about Legal Services section (Portion 7.1-7.6) addresses concerns about communications and advertising. The Maintaining the Integrity of the Profession section (Rules 8.1-8.5) addresses professional misconduct and disciplinary matters. Again, see Appendix B for text of selected Model Rules as found in the ABA Center for Professional Responsibility.

CONFLICTS OF INTEREST

A conflict of interest exists whenever there is tension between the attorney's need to protect client confidences and/or secrets and the attorney's duty of client loyalty and zealous representation. The attorney's duty to protect secret or confidential client information may be in direct conflict with that same attorney's duty of loyalty to another client. Whenever such a conflict or potential conflict exists, the attorney generally has three choices:

- inform all interested parties of the real or potential conflict and inform them of all possible and probable consequences should the attorney continue to represent both parties, and continue dual representation once all parties provide informed consent (generally under current Model Rules this must be confirmed in writing), **or**
- withdraw from representation of one party after informing all parties of the conflict, **or**
- withdraw from representation of both parties.

Whenever an attorney continues to represent interested parties in the face of a potential conflict, the attorney has the burden to establish that:

- either no conflict existed, **or**
- the voluntary, informed consent of all affected parties was obtained, **or**

- any action in which the attorney had a personal interest was fair and the client gave informed consent.

GENERAL CONFLICT OF INTEREST

Under Rule 1.7 an attorney cannot represent a client if the representation of that client will be directly adverse to another client unless:

- the attorney reasonably believes the representation will not adversely affect the relationship with the client, **and**
- each client consents after consultation (informed consent).

As a fiduciary, an attorney must avoid acting in a manner conflicting with the client's interests. The attorney must not allow his or her personal interests, those of another client, or the interests of a third person to interfere with his or her loyalty to the client. Attorneys must avoid certain actions either because they can harm a client, or because there is too high a risk of client harm. Some actions can be taken if a client gives informed consent; others are prohibited even if the client does provide informed consent.

If the conflict is apparent from the beginning, the attorney must not undertake the representation. If the conflict becomes clear later in the representation, the lawyer must withdraw. In either event, the attorney has the primary responsibility for avoiding conflicts of interest.

CURRENT CLIENTS CONFLICT

A practitioner may not represent a client if the representation is either directly adverse to another client or is materially limited by representation of another client.

Example: Husband and Wife are divorcing. Attorney cannot represent W in the divorce at the same time he is representing H in another matter, even if it is a completely unrelated matter.

Watch for possible §6015 issues when representing both husband wife (on the exam too!).

Example: Company F and G are competitors in the real estate industries. Attorney may represent F on a securities matter and may also represent G in a different, unrelated matter. While they have 'generally adverse' interests because they are both in the same industry, the matters are not related sufficiently for the clients to have 'directly adverse' interests.

In many instances informed client consent of all those affected can overcome the conflict. If the conflict is apparent when the attorney is offered the representation, he or she must decline. If it becomes clear later that a conflict exists, the attorney must either withdraw from all representations implicated in the conflict or select one of them to pursue.

Informed Consent

An attorney must make the client aware of all relevant facts before consent can be obtained to waive any conflict of interest. Informing a client means giving the client adequate advice about the risks and other implications of the apparent conflict of interest for the client to make a decision about offering consent. Informed consent requires all necessary facts, legal implications, possible effects and other circumstances related to the proposed representation. Even after disclosure of relevant facts, a client should not be asked to consent to this waiver if a disinterested lawyer would conclude the attorney should not agree to the representation.

As soon as an attorney contemplates accepting a representation that might have a direct adverse effect on another client, client consent may be properly sought. The consent must be informed and must be obtained from all affected clients **before** commencing the representation that creates the conflict.

***Informed consent means providing each client with enough info
for the client to give consent – the necessary facts, legal implications and ramifications.
This must be confirmed in writing ...***

Naturally this poses potential problems with the practitioner's duty of client confidentiality. The amount of information required for a client to give informed consent may breach that confidentiality requirement; if so, the practitioner must obtain the affected client's waiver before that occurs. Only if disclosure is authorized can the attorney provide sufficient information for a client to give informed consent. Be wary.

Representing Both Sides in Litigation

Clearly an attorney may not represent both parties in litigation, nor can different attorneys in the same firm represent opposing parties in a civil case. This conflict is so huge that it cannot be waived. Similarly, an attorney may not represent both sides in a negotiation if the parties' interests are materially adverse, or 'fundamentally antagonistic', as Rule 1.7 describes it.

It is possible that informed consent can permit representation of both parties if they are 'generally aligned.'

Example: a shareholder brings suit against a corporation it appears that the interests of the corporate officers and directors are generally aligned.

Example: the most obvious example in Tax Court is representing a husband and wife jointly on matters in their income tax return. Remember that a joint petition can be filed even if the husband and wife are no longer currently married. The practitioner is advised to use caution in ascertaining actual facts and circumstances, especially if the couple are now separated or divorced; claims of innocent spouse clearly result in parties

with possibly differing interests even if they initially appeared aligned. Attorneys are prohibited from taking actions that are directly adverse to an existing client.

Example: Attorney represents client Smith for a contract negotiation. Attorney may not accept representation from client Jones who wishes to sue client Smith for a slip and fall at his restaurant. Although it is not likely that information from the contract negotiations will be useful to the personal injury suit as the matters are unrelated, clearly the intended representation is adverse to Smith's interest. Client's feelings of trust in their attorneys can be destroyed by such actions, which is why they are simply prohibited by the Model Rules.

Attorney Withdrawal to Avoid Conflict

The attorney may need to withdraw from representation to avoid conflict of interest with another client. The practitioner may withdraw from a current representation to accept a new client, but generally must receive consent of the appropriate court prior to withdrawal. As discussed previously, Tax Court Rule 24(c) requires that Counsel file a motion to withdraw as counsel. At the Court's discretion the motion can be denied or accepted. Once a case is calendared for trial or a hearing, the Tax Court may deny substitution of counsel entirely. Withdrawal from one or more ongoing representations may be required when the attorney finds an inadvertent conflict of interest occurred. The protections afforded former clients always remain valid, and the practitioner may need to obtain informed consent from both the former and current client to continue a current client representation. Once again, the Court may accept or deny motion to withdraw or substitute other counsel.

For purposes of ethical considerations, a partnership is considered to be an entity. Under this ABA position, unless an attorney gives an individual partner a reason to believe that he or she is also being represented, the attorney may assert a position on behalf of the partnership that is clearly adverse to the individual partner's interest. Tax Court proceedings as related to partnerships are generally conducted at the partnership level.

FORMER CLIENT CONFLICTS

The attorney's duty of confidentiality to a client continues even after representation ends. Attorneys may not represent a new client in a matter adverse to a former client if to do so results in a breach of loyalty or confidence to the former client. In other words: an attorney cannot accept a representation that is materially adverse to the interests of a former client in a matter that was the same or substantially related as the earlier representation without the former client's informed consent. Material adversity need not be direct, although use of the term 'material' indicates it is relevant and important.

How is 'substantially related' representation tested? It is designed to avoid situations where the unauthorized use or disclosure of a client's confidence is most likely.

Example: An attorney who drafts a landlord's contract cannot represent a tenant who seeks to rescind the contract. An attorney is not permitted to 'switch sides' on the same matter.

Example: For years Attorney Chuck represented banks in his locale. Two years ago, he switched law firms. At that time Chuck resigned from all representation of banks, and has not represented any in the past 2 years. Chuck may now accept a new collection matter where he defends a debtor. He has no current banker clients, and this is a new matter that is not 'substantially related' to his former clients. No consent is required.

It is important to also note that this duty of confidentiality to a former client continues without regard to any certain time period. The prohibition of using information to the disadvantage of a former client ends when the information becomes generally known, or when the former client consents to use or disclosure of confidential information.

THIRD PARTIES CONFLICTS

This rule avoids potential conflicts of interest between a current client and third party by placing limits on who may pay an attorney's compensation. In order to accept a third party's payment:

- the client must provide informed consent of the fee arrangement,
- the third party cannot interfere with the practitioner's professional judgment, **and**
- the client's confidences must remain protected even against the party who is paying the bill.

PROHIBITED BY CONFLICTS OF INTEREST

The Model Rules generally prohibit a practitioner from accepting or continuing representation that is materially limited by the attorney's own interests. The client can provide informed consent to allow the representation, but the attorney must also reasonably believe the representation is not adversely affected by the attorney's interest.

Business Transactions

An attorney is prohibited from entering into a business transaction with a client unless strict conditions are satisfied. For example:

- the transaction terms must be fair and reasonable to the client,
- the client must receive written, understandable disclosure,
- the client must be given a reasonable opportunity to seek the counsel of an independent attorney, **and**
- the client must provide written consent to the transaction.

There is no problem if the lawyer is simply an ordinary customer to a client's routine business dealings.

Financial Assistance

Generally, an attorney is forbidden from providing financial assistance to a client in connection with pending or contemplated litigation. Attorneys can advance court costs and the expenses of litigation, and repayment can be contingent on the outcome of the litigation. An attorney may pay court costs and expenses of litigation on behalf of indigent clients. An attorney can contract for a reasonable contingent fee in a case where such compensation arrangement is permissible.

Married to IRS Counsel?

Under Rule 1.8(i) an attorney is prohibited from accepting a representation directly adverse to a person the attorney knows is represented by the lawyer's own parent, child, sibling or spouse. Informed client consent can remove the prohibition.

CLIENT GIFTS

An attorney may accept gifts from a client. However, the attorney may not prepare a legal instrument that gives the attorney or his relatives a substantial gift, unless the client is also a relative of the attorney.

ATTORNEY AS WITNESS CONFLICTS

Generally, under Rule 3.7 an attorney must avoid a situation where he or she will both be a witness and client advocate at trial. There are exceptions: if the testimony relates to an uncontested issue, or if only questions are posed as to the value and nature of legal services rendered in the case. Other situations permit the attorney to play both roles when disqualification creates a substantial hardship to the client.

However, as discussed previously, Tax Court Rule 24(g) specifically states "... if any counsel of record:

- was involved in planning or promoting a transaction or operating an entity that is connected to any issue in a case, **or**
- represents more than one person with differing interests with respect to any issue in a case, **or**
- is a potential witness in a case, **then**

such counsel must either secure the informed consent of the client (but only as to items 1) and 2)); withdraw from the case; or take whatever other steps are necessary to obviate a conflict of interest or other violation of the ABA Model Rules of Professional Conduct and particularly Rules 1.7, 1.8 and 3.7 thereof."

In other words, being a witness in a Tax Court case precludes an attorney from representing a client on the same matter. The informed consent of the client cannot waive this prohibition.

IMPUTATION RULES – LAW FIRMS AND ASSOCIATIONS

To ‘impute’ means to “attribute vicariously the knowledge or actions of one person to another, simply by virtue of their relationship.” The imputation rules are relevant to determine when the disqualification of one attorney, due to a conflict of interest, prevents another associated practitioner from accepting or continuing a representation. The first attorney must determine if he or she is disqualified from representation before deciding if another attorney is also disqualified by their association. If the first attorney is not disqualified, the imputation rules are irrelevant.

Imputation rules determine when the disqualification of one attorney, due to conflict of attorney, prevents another associated practitioner from accepting or continuing a representation. If the first attorney is not disqualified, the imputation rules are irrelevant.

In law these imputed relationships can affect current or former law firm members. They can also affect entire law firms, including lawyers in private law firms, as well as those employed in an organization’s legal department or in a legal services organization. Even if lawyers are not formally affiliated with one another, imputation rules can apply if they have mutual access to information concerning the clients they serve.

Example: Co-counsel representing the same party, who are not members of the same firm, may be treated as part of the same firm for purposes of the imputation rules if they exchanged confidential information.

A ‘matter’ refers to a specific dispute that involves specific facts and parties.

CURRENT LAW FIRM ASSOCIATES

While attorneys are associated in a firm, no member of a firm can knowingly represent a client when any other member in the firm is precluded under any of the following:

Rule 1.7 - general conflict of interest: in other words, the prohibition of representation if it is directly adverse to another client applies to every member of the firm.

Example: Attorney Javier represents client Walters in a lawsuit (Walters v Garrett). No other attorney in Javier’s firm can represent Garrett in any legal matter.

Rule 1.8 - former client conflict of interest: if a representation is materially adverse to a former client, all members of the firm are disqualified.

Rule 1.8(c) - attorneys may not draft documents that bestow gifts upon themselves or their relatives: no member of an attorney’s firm can draft them either.

In all instances, the affected client may give informed consent that waives the imputed disqualification rules.

FIGURE 2

FIRM 2



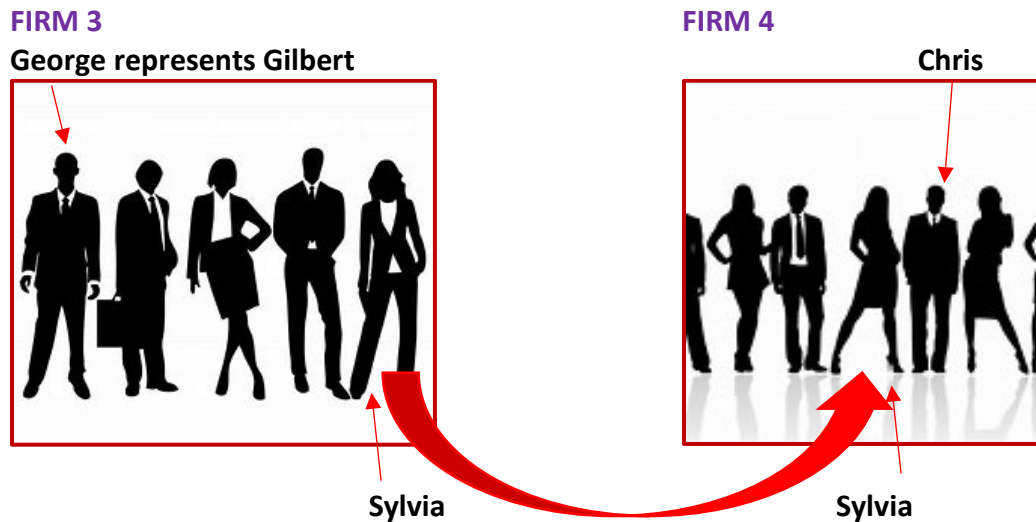
Can Jamie represent Field in any other legal matter?

FIGURE 2: Jamie and Sandra are partners in Firm 2. Sandra represents Taylor in litigation against Field. Jamie, her partner, cannot represent Field in any other legal matter.

SWITCHING FIRMS - ARRIVING ASSOCIATE

If a practitioner switches from one firm to another, the new firm must not knowingly represent a person in the same or a substantially related matter in which the switching practitioner, or his prior firm, previously represented a client whose interests are materially adverse to that person, and about whom the switching practitioner acquired confidential information material to the matter.

FIGURE 3



Can Chris represent against Gilbert?

FIGURE 3: George and Sylvia are partners in Firm 3. George represents client Gilbert for litigation purposes. After Sylvia leaves Firm 3 and joins Firm 4, Chris, another partner in Firm 4, is asked to represent a client against Gilbert. Can Chris accept the engagement?

That depends upon whether:

- 1) the new client's interests are materially adverse to Gilbert, and**
- 2) if Sylvia acquired any confidential information that would be material to the litigation.**

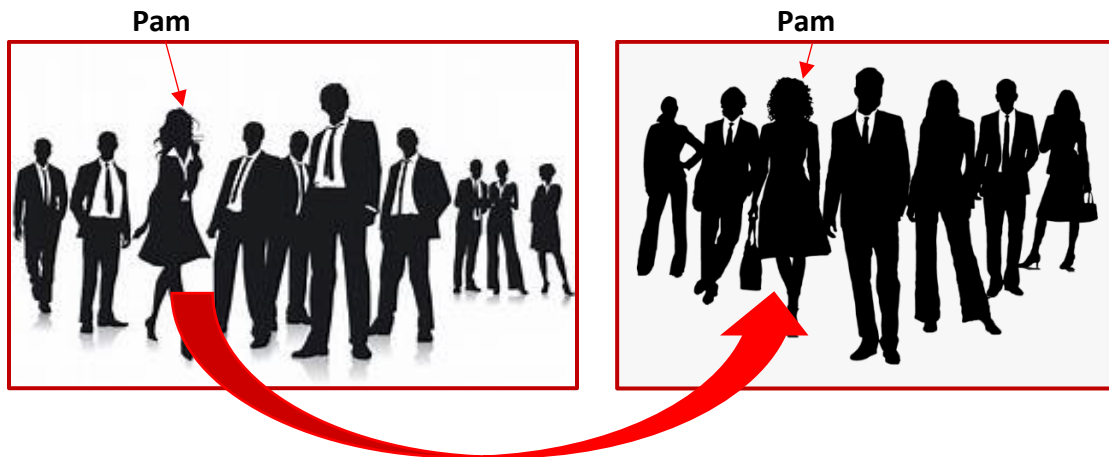
If both conditions are met, no one in Firm 4 may represent the new client.

However, if the arriving associate did not personally represent the client AND she did not acquire any material secrets or confidences from the client, then neither the arriving associate nor the new firm is disqualified.

FIGURE 4

FIRM 5 represents TruCo (v CoolCorp)

FIRM 6 represents CoolCorp (v TruCo)



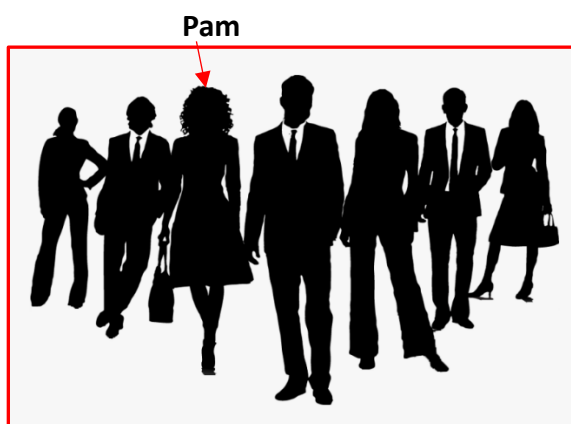
Can Pam represent CoolCorp?

FIGURE 4: Attorney Pam is a member of Firm 5, which represents client TruCo in a lawsuit against CoolCorp. Pam was not involved in any of CoolCorp's representation and acquired no confidential information from TruCo that is relevant to CoolCorp.

Pam leaves Firm 5 for Firm 6, who represents CoolCorp. Although TruCo and CoolCorp's interests are materially adverse, and this is the same or substantially related matter, Pam may properly represent CoolCorp against TruCo.

FIGURE 5

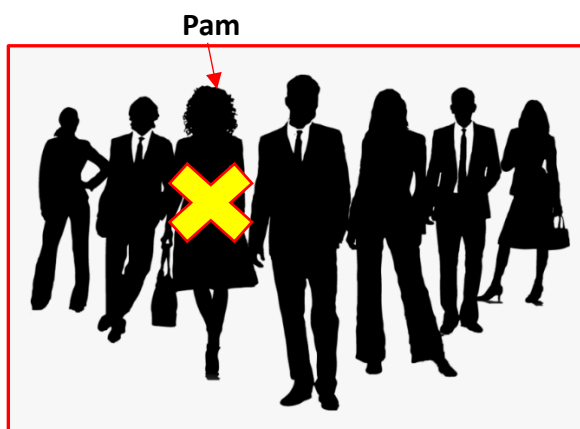
FIRM 6



Can Pam represent CoolCorp?

FIGURE 5: Same facts from Figure 4, except that while a member of Firm 5, Pam made a court appearance for client TruCo in a lawsuit against CoolCorp. Pam was not involved in any of TruCo's other representation and acquired no confidential information from TruCo that is relevant to CoolCorp.

FIRM 6

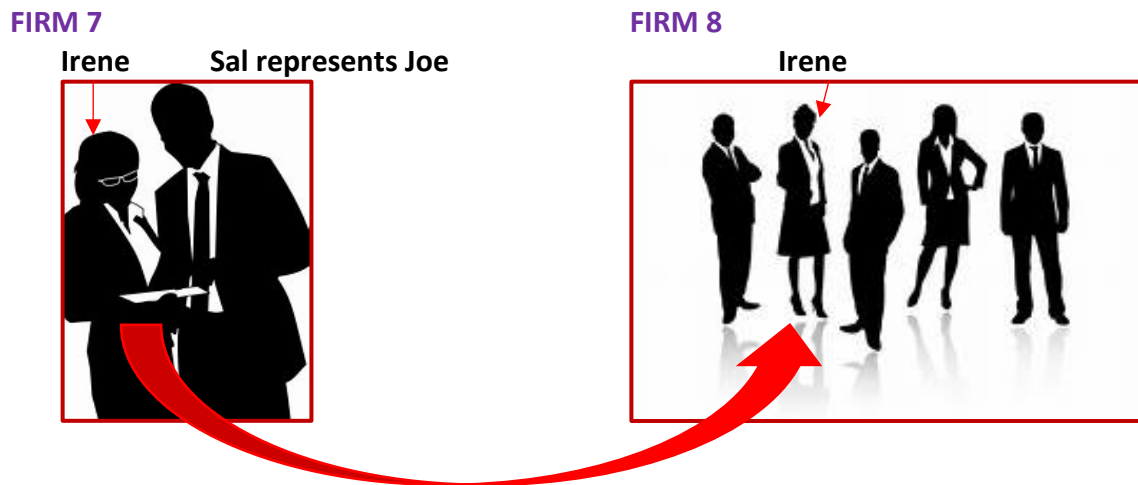


At Firm 6 Pam is personally disqualified from representing CoolCorp against TruCo because she personally represented TruCo. This disqualification does NOT apply to other members of Firm 6.

SWITCHING FIRMS - DEPARTING ASSOCIATE

An attorney cannot knowingly accept a representation materially adverse to a client of a firm from which the attorney departed if he or she acquired information relating to that client's representation that is material to the new representation.

FIGURE 6



Can Irene represent a new client against Joe?

FIGURE 6: Sal and Irene are partners in Firm 7. Sal represents client Joe in civil litigation. After Irene joins Firm 8, she is asked to represent a new client against Joe.

Can Irene accept the engagement?

That depends upon whether she acquired any confidential information that would be material to the litigation.

If she did, she may not represent the new client.

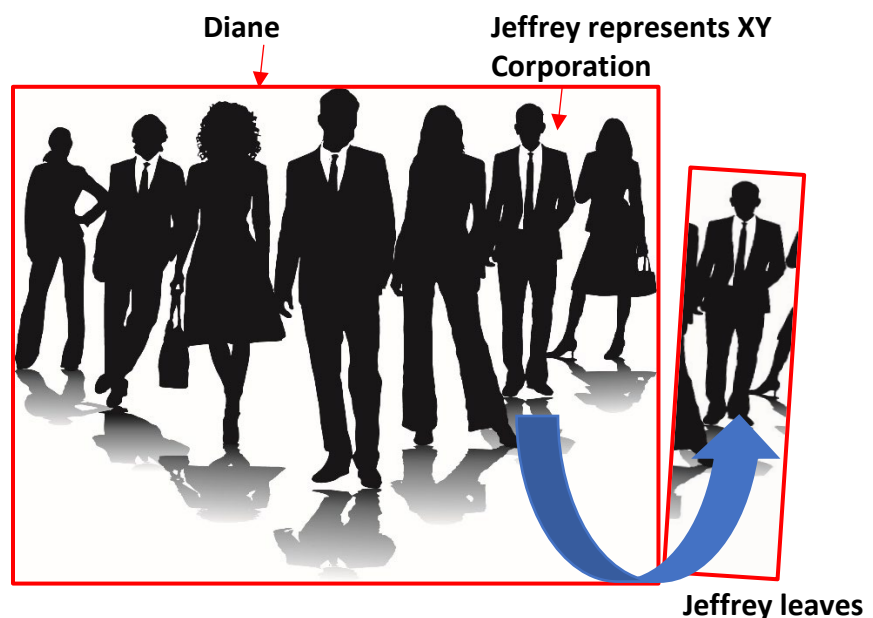
REMAINING FIRM OF DEPARTING ASSOCIATE

A member of a firm from which another attorney left is not prohibited from accepting a representation materially adverse to a client of the departed lawyer unless:

- the subject matter of the new representation is substantially related to that in which the departed lawyer acted, **and**
- any lawyer remaining in the firm has information relating to representation of the departing lawyer's client that would be material to the new matter.

FIGURE 7

FIRM 9



Can Diane bring suit against XY Corporation?

FIGURE 7: Jeffrey and Diane are partners in a large law practice, Firm 9. Jeffrey handles various business matters for the XY Corporation. After Jeffrey leaves Firm 9, Diane is asked to bring suit against XY Corporation on a matter based on one of the business matters Jeffrey handled while a member of the firm. Diane has no knowledge relating to the representation.

Can Diane accept the representation?

Only if no other member of the firm has information relating to Jeffrey's representation that is material to the new matter.

WITNESS-ADVOCATE CONFLICT

Under Model Rule 3.7(b) a disqualification created by the rule against acting as a witness-advocate is not imputed to other firm members. If the attorney's situation is such that he or she would also be disqualified under either Rule 1.7 or 1.9, the disqualification under those rules would be imputed. Rule 1.7 proscribes that the attorney must not represent if directly adverse to another client and Rule 1.9 proscribes against opposing former clients.

Example: Melissa, a USTCP in a private firm, designed a tax transaction utilized by Sandra. Upon audit, the IRS disallowed the deduction, and Sandra filed a timely petition to the Tax Court as a result of the Notice of Deficiency. Melissa, as a potential witness, cannot represent Sandra before the Tax Court under Rule 24(g). Any other member of Melissa's firm can handle Sandra's representation because there is no imputed disqualification under these circumstances.

APPENDIX A – MODEL RULES TABLE OF CONTENTS

SOURCE: Model Rules Table of Contents, available online 1/8/23 at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ where you can locate the actual model rules as needed.

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Rule 1.3 Diligence

Rule 1.4 Communications

Rule 1.5 Fees

Rule 1.6 Confidentiality of Information

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Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

Rule 1.9 Duties to Former Clients

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Rule 1.13 Organization as Client

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of Law

- [Rule 5.6](#) Restrictions on Rights to Practice
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- Rule 7.5 (Deleted)
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- [Rule 8.3](#) Reporting Professional Misconduct
- [Rule 8.4](#) Misconduct
- [Rule 8.5](#) Disciplinary Authority; Choice of Law

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