

# Ethical Obligations and COVID-19:

## What Tax Practitioners Need to Know

Thursday, June 4, 2020 | 1:00 pm Eastern

# The Panel

- **Hon. Ronald L. Buch**, Judge, United States Tax Court
- **Kathy Enstrom**, Special Agent in Charge, IRS-CI
- **Pamela Fuller**, Senior Technician Reviewer, IRS Office of Chief Counsel
- **Guinevere Moore**, Managing Member, Moore Tax Law Group
- **Matt Cooper**, Managing Director, Tax Controversy Services, Deloitte Tax LLP
- **Nicholas Bahnsen**, Associate, Kostelanetz & Fink LLP (Moderator)

# Objectives

- At end of this program, participants should have a better understanding of the ethical obligations that apply when working from home.
- Participants will also learn practical and ethical solutions to resolving COVID-19 related problems, including:
  - What should practitioners be on the lookout for to ensure we are not helping our clients participate in or become the victim of fraud considering the CARES Act?
  - How should practitioners ensure we are meeting both IRS and court deadlines?
  - How should practitioners ensure we are meeting our ethical obligations to communicate with our clients?

# Tax Court Update

- General Announcements on Tax Court Website
  - Tax Court building remains closed and court proceedings being held remotely – See Administrative Order No. 2020-02.
  - Trial sessions canceled through June 30
  - Notice 2020-23: Petition filing deadlines extended to July 15, 2020, if the deadline falls on or after April 1, 2020 and before July 15, 2020

# Tax Court Update

- Mail and Petition Handling
  - Mail sent by USPS being held until Court reopens
  - Mail sent by private delivery may be returned as undeliverable
- Retain postmark date
  - *Guralnik v. Commissioner*, 146 T.C. No. 15 (2016)
    - timely mailed = timely filed
    - Inaccessibility of Clerk's Office?

# Tax Court Update

- Fall Trial Calendar – What to Expect
  - There *will* be one
  - Travel limitations
  - Remote hearings/trials
    - Tax Court Administrative Order 2020-02
    - Use of Zoomgov
    - Modified calendar call?
  - Copy requests

# Tax Court Update

- New Case Management System
  - Electronic case initiation
    - Goodbye *Guralnik*?
  - Update on rollout
  - Open to everyone?

# IRS CI Update - CARES Act Fraud

- Economic Interest Payments
  - Process for returning erroneous payments?
  - Scams involving economic interest payments
    - IRS never sends unsolicited email communications
  - Enforcement efforts



# IRS CI Update - CARES Act Fraud

- PPP Fraud
  - Criminal Prosecutions (so far)
    - D.R.I. – (\$500,000)
    - N.D. Ga. – (\$3.725 million)
    - E.D. Tex. – (\$5 million)
    - E.D. Tex. – (\$10 million)
    - S.D.N.Y. – (\$1 million)
    - C.D. Cal. – (\$1.7 million)
    - W.D. Wash. – (\$1.5 million)
- Challenges to enforcement

# Chief Counsel Update

- IRS.gov provides latest updated information and guidance on COVID-19 tax relief and economic impact payments – located at:  
<https://www.irs.gov/coronavirus-tax-relief-and-economic-impact-payments>
- Includes:
  - Published Guidance
  - Frequently Asked Questions
  - News Releases
  - IRS Statements

# Chief Counsel Update

- Current State of Counsel operations
- Meetings, mailings, and conferences
- Rev. Proc. 2020-29 – electronic submission of letter rulings
- IRS Use of Electronic Signatures
  - Dep. Comm'r Memo. – NHQ-01-0320-0001
    - *Expires 07/15/2020*

# Sources of Law

- ABA Model Rules of Professional Conduct
  - ABA does not possess disciplinary authority
- State analogues
- Commentary on Model Rules
- ABA and state ethics opinions
- ABA Tax Section Standards of Tax Practice Statements
- Circular 230 for tax practitioners
- Provisions of the Internal Revenue Code
- Tax Court Rules of Practice and Procedure
- AICPA rules for accountants

# Hypo 1

- Practitioner, an associate at large law firm, is a single parent with two kids, ages 8 and 11. Because of COVID-19, school has been canceled for the rest of the year and the kids are attending school virtually from home. Practitioner's mother, afflicted with Alzheimer's, also lives in the house. The home care assistant who previously managed the daytime care of petitioner's mother has not been available since the start of quarantine. After several weeks managing both work and the situation at home, practitioner misses a critical filing deadline. Practitioner doesn't realize the mistake until three days later when he hastily files the document without first redacting the client's SSN. The practitioner is set to call the client but is interrupted by the sound of his mother falling in the upstairs bedroom. Three more weeks pass before the client calls to inquire about a separate matter on which practitioner represents the client. The practitioner does not mention the late filing. How bad is it?

# Hypo 1 Ethical Considerations

- Rule 1.1 – Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- Rule 1.3 – Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.
  - Rule 1.3, Comment [2] A lawyer's work load must be controlled so that each matter can be handled competently

# Hypo 1 Ethical Considerations

- Rule 1.4(a) – A lawyer shall:
  - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
  - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter

# Hypo 1 Ethical Considerations

- Rule 1.6(c) - A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
- Rule 5.1 - Responsibilities of a Partner or Supervisory Lawyer - (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.



# Hypo 2

- Working from home during quarantine, practitioner lacked reliable access to his firm's secure document management system. As a workaround, practitioner began saving things locally to his personal computer's hard drive with the intention of synchronizing and deleting everything when access to the firm system is restored. Thanks to practitioner's younger, more tech-savvy children, all of the family's computers are set up to automatically backup to the cloud on a nightly basis. The cloud account is shared by and accessible to the entire family. One day, practitioner walks into his son's room to find him reading a draft memorandum of interview in a sensitive client matter. What should practitioner do?

# Hypo 2 Ethical Considerations

- Rule 1.6(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
- ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 477R - a lawyer's ethical obligations to protect confidential client information when transmitting information relating to the representation over the internet.
- ABA Formal Opinion 483 (2018) – duties following electronic data breach or cyberattack
  - Rule 1.4 – duty to inform client

# Hypo 2 Ethical Considerations

- Rule 5.3, Comment [3] – A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations.

# Hypo 2 Ethical Considerations

- Opinions related to virtual law offices / responsibilities in implementing third-party technology services
  - PA Formal Opinion 2020-300
  - CA Formal Opinion No. 2012-184
  - Ohio Bd. Prof. Conduct Opinion 2017-05 – “[A] lawyer who chooses to maintain a virtual office must competently manage and maintain the technology used to run the practice and ‘keep abreast of . . . the benefits and risks associated with relevant technology.’” (quoting Model Rule 1.1).
- Applicable substantive notification requirements? E.g., HIPAA, Gramm-Leach-Bliley, etc.

# Hypo 3

- Tax practitioner owns a small apartment building. One of her tenants worked at a local restaurant but was recently laid off as a result of COVID-19. It is unclear whether the restaurant will survive the economic downturn and reopen. Before the pandemic, tenant was audited by the IRS on two distinct issues, and assessed tax and penalties. Tenant has approached practitioner for help. The time to petition Tax Court has passed, but the practitioner believes a refund suit would likely be successful on one issue although the other position may have been fraudulent. Tenant has indicated that he cannot pay the tax in order to file a refund suit unless he misses the next month's rent payment. How can the practitioner assist?

# Hypo 3 Ethical Considerations

- Rule 1.8(e) Conflict of Interest; Current Clients - A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
  - a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
  - a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

# Hypo 3 Ethical Considerations

- Rule 1.8, Comment [10] - Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence.

# Hypo 3 Ethical Considerations

- Rule 3.1 Meritorious Claims & Contentions - A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.
- Circular 230 section 10.34 and IRC section 6694 – tax return positions
  - Generally need substantial authority or reasonable basis plus disclosure
- Circular 230 section 10.22 – must exercise due diligence



# Summary

- Practitioners need to be very focused on ethical obligations during these challenging times.
- Practitioners must be particularly cognizant of how they and their staff work remotely.
- Communication is key!
- Practitioners working remotely must consider security and confidentiality of their procedures/systems, and ensure the confidentiality of client information

# Questions?

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

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