

# Current Ethics Issues

Federal Bar Association  
Annual Tax Law Conference  
March 7 and 8, 2019

# Current Ethics Issues

“The lawyer assumes high duties, and has imposed upon him grave responsibilities. He may be the means of much good or much mischief. Interests of vast magnitude are entrusted to him; confidence is reposed in him; life, liberty, character and property should be protected by him. He should guard, with jealous watchfulness, his own reputation, as well as that of his profession.”

*People ex rel. Cutler v. Ford*, 54 Ill. 520, 522 (1870)

# Current Ethics Issues

“The first thing we do, let’s kill all the lawyers.”

William Shakespeare

*King Henry the Sixth, Part II*

*act IV, sc. ii, l. 86*

# Outline

- Panelists
- Use of Social Media and Blogging
- Use, Protection, and Distribution of Tax Return Information
- Parent-Subsidiary Issues
- Lawyer's Material Errors
- Selected ABA Model Rules of Professional Conduct
- Statutes and Regulations

# Panelists

- Anita Soucy, Deloitte Tax LLP
- Thomas J. Kane, Internal Revenue Service
- Guinevere Moore, Johnson Moore
- Fred F. Murray, UF Levin College of Law
- Jennifer Breen, Morgan, Lewis & Bockius LLP
- Jeremiah Coder, OECD
- Lawrence Mack, KPMG LLP
- Shamik Trivedi, Grant Thornton LLP

# The Universe of Social Media

- A platform through which people communicate or interact in a public, semi-private or private way. Through blogs and private chat rooms, listservs, other online locations, social networks and websites such as Facebook, LinkedIn, Instagram, Twitter, Yelp, Angie's List, Avvo, and Lawyers.com. (DC Bar Ethics Opinion 370 (November 2016)).

# Use of Social Media and Blogging

- ABA Formal Opinion 480 (March 6, 2018)
- Confidentiality Obligations for Lawyer Blogging and Other Public Commentary
- Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.

# Lawyer's Use of Social Media

- Rule 3.5: Impartiality and Decorum of a Tribunal
  - 3.5(a): A lawyer shall not seek to influence a judge, juror prospective juror or other official by means prohibited by law.
    - Is this prohibited by law?
  - 3.5(d): A lawyer shall not engage in conduct intended to disrupt a tribunal.
- Rule 3.6: Trial Publicity
  - 3.6(a): A lawyer who is participating or has participated in the investigation or litigation of a matter **shall not make an extrajudicial statement** that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

# The Lawyer Twitter Account

- Lawyers must understand the functionality of the social networking site, including its privacy policies. Rule 1.1 (Competence)
- Duty of confidentiality.
  - Consider broad application of Rule 1.6 and requirement of informed consent to reveal information.
  - Information contained in public record still insufficient to waive duty without informed consent (Rule 1.6; ABA Formal Op. 479 (2017))
- Trial publicity and other statements (Rule 3.5)
- Conflicts of interest (Rule 1.7 and 1.9 for current and former clients)
- Duties to prospective clients: Rule 1.18 (Inadvertent attorney-client relationships)?

# The Lawyer Twitter Account

- Your firm has been urging you to be more active in social media. You start a Twitter account, @TaxLawyerGuy, and decide to follow all the well-known reporters, professors, tax professionals and think tanks, often re-tweeting or commenting on various tweets focusing on Congress and tax policy, financial accounting, and tax controversy. You enjoy weighing in on thorny tax issues through an interactive medium like Twitter.
- What ethical issues do you need to consider?

# Lawyer's Use of Social Media

- You've been working on this refund issue for a long time, and it's been a stressful time. While preparing for trial for your client's refund suit, you learn of an ongoing trial involving similar facts. You're a savvy lawyer who has long dealt with the media, and know the advantages that can come with a well-crafted media message. You decide to bolster your case through some social media campaigns but don't want to get on the wrong side of the judge.
  - On "Procedurally Taxing," you comment under the user name "Mrs. Gregory" that "Taxpayer should also sue for legal fees. This refund should have been granted the moment anyone with half a brain at the IRS read the 843."
  - Using your pseudonym, @TaxLawyerGuy on Twitter, you tweet comments about the other case.
    - "Can't believe DOJ is wasting its money on this trial. This is easy summary judgment for the taxpayer. Sad!"
    - "If TP wins #IRS needs to acquiesce, issue AOD, get back to work, and stop wasting everyone's time!"
- Have you violated any ethical duties?

# Lawyer's Use of Social Media

- You traveled to Cityville to meet with a new client, Widgets Inc. Cityville is best known for being the headquarters of Widgets Inc. As a specialist in complex international tax planning, Widgets Inc. has retained you to help them with a new structuring project. Arriving at their headquarters, you see an impressive art installation depicting the company's widgets in the lobby. You snap a picture, tag the location, and post to Instagram and Facebook. Later that day, as you sit in the airport, you take a moment to invite the members of the Widgets Inc. tax department to connect with you on LinkedIn. Finally as you board the flight, you shoot off a tweet "Happy to head home after spending time in beautiful Cityville #taxgeek #roadwarrior".

# Lawyer's Use of Social Media

- In re Salvador R. Perricone, No. 2018-B-1233 (S.Ct. LA, December 5, 2018) – Former Federal prosecutor was disbarred for posting anonymous online comments about matters he or his office handled.
  - Claimed that he was "venting" and that blogging helped him deal with his stress at work.
  - Rule 1.7(a)(2): A lawyer shall not represent a client if the representation involves a concurrent conflict of interest, which exists if "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."
    - Lawyer's need to vent put his interests ahead of his client.

# Client's Use of Social Media

- *Lenz v. Universal Music Corp.*, No. 07-3783 (N.D. Cal. 2010) (unpublished opinion):
  - Lenz's social media communications caused a subject-matter waiver.
  - Lenz ordered to produce documents previously withheld due to attorney-client privilege AND submit to an additional deposition.
- Explain to your clients the importance of their secrecy in addition to your own.
- A professional duty to your clients: See ABA Model Rules of Professional Conduct 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." Today this requires extra diligence as people post what they had for lunch online.
- On social media, decisions about what to say take place at lightning speed, without deliberation, vetting or care about inadvertent disclosures. **Recommend to your clients that they refrain from talking about their case online or in email in any way.**
- Any sentence that contains the phrase "my lawyer says" or "my lawyer thinks" is risking privilege waiver.
- Urge them to treat social media the way they would if asked to do a traditional-media television interview about their pending case—just don't do it!

# Client's Use of Social Media

- **Your client engaged you to represent her in her tax refund case. You advised her that the attorney-client privilege protects communications between an attorney and her client from discovery by the IRS.**
- Then...
  - Your client sends e-mails to her mother about why she is suing the government, saying, “my lawyer says I should be able to get a lot of my money back.”
  - Your client blogs about conversations she had with you involving the legal strategies she is pursuing, and says “We think the IRS didn’t get the right approval to assess these penalties against me, so they are going to have to pay me back!”
  - Your client responds to a reporter in a chat room about the lawsuit, and says that while she thinks they may not be able to get all of the money back they are claiming in the lawsuit, she and her lawyer are confident they will get at least 75% of it back.
- **Has your client waived privilege?**
- **Have you violated your ethical duties to your client?**

# Use, Protection and Distribution of Tax Return Information

- Current environment focusing attention on obligations related to taxpayer data
- ABA Formal Opinions 483 and 477R
- IRC §§ 7216 and 6713
- The EU General Data Protection Regulation
- State requirements
  - California Consumer Privacy Act of 2018
  - All 50 states/DC have business data security and/or data breach notification laws
  - 11 states either adopted or expanded their laws in 2018

# Use, Protection, and Distribution of Tax Return Information – IRC §§ 7216 and 6713

- IRC § 7216: Any person who is **engaged in the business of preparing, or providing services in connection with the preparation** of, returns of the tax imposed by **chapter 1**, or any person who for compensation prepares any such return for any other person, and who knowingly or recklessly—
  - **Discloses** any information furnished to him for, or in connection with, the preparation of any such return, or
  - **Uses** such information for any purpose **other than to prepare, or assist in preparing**, any such return
- Shall be guilty of a misdemeanor...
  - Up to \$1,000 fine or/and up to 1 year in prison, plus prosecution costs
- Are exceptions—4 in Code, 18 in Treas. Reg. § 301.7216-2
- Regulations in 3 parts: -1 general rule and definitions, -2 exceptions, and -3, procedural requirements
- IRC § 6713 prescribes a civil penalty for conduct covered described in IRC § 7216

# Use, Protection, and Distribution of Tax Return Information – General Data Protection Regulation (GDPR)

- Most significant change in EU data protection law in 20 years
- GDPR replaced EU Data Protection Directive on May 25, 2018
- Applies to all companies across all industry sectors – in and outside the EU
- “Demonstration of compliance” will be key from a management perspective
- Penalties for breach of GDPR – up to higher of 4% “global turnover” (revenues) or €20,000,000
- GDPR applies to:
  - EU established entities where personal data processed “*in the context of its activities*”
  - Other entities where:
    - An EU resident’s personal data is processed in connection with **goods or services offered** to such EU resident; or
    - The **behavior** of individuals within the EU is **monitored**.

# Use, Protection, and Distribution of Tax Return Information – Who is covered by GDPR?

- Common misconception that GDPR protects all EU citizens, regardless of physical location.
  - ❖ Not so. GDPR Protects individuals located within the EU at the time data is collected and processed.
- Applies to controllers and processors based outside the EU territory where the processing of personal data regarding EU data subjects relates to:
  - ❖ The offering of goods or services (regardless of payment)
  - ❖ The monitoring of data subjects' behavior within the EU
- Personal data must be processed fairly and lawfully, with legitimate purpose
- Controllers and processors will be directly liable under GDPR

# Use, Protection, and Distribution of Tax Return Information – What is covered by GDPR?

- “Personal Data” means any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person
- Updated private notices
- **Data protection impact assessment:** prior to processing if high risk for individuals
- **Data Protection Officer:** for controllers/processors processing substantial sensitive personal data or who have core activity of monitoring individuals on a large scale or public body
- Notify data breach to DPA without undue delay/within 72 hours and to individuals without undue delay if there is likely to be risk to individuals
- Consent standard higher: explicit, freely given, fully informed
  - ❖ Consent given in the context of employment is **not** considered “freely given.”

# Use, Protection, and Distribution of Tax Return Information

- ABA Formal Opinion 477R\* (May 11, 2017, Revised May 22, 2017)
- Securing Communication of Protected Client Information
- A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

# Use, Protection, and Distribution of Tax Return Information

- Formal Opinion 483 October 17, 2018
- Lawyers' Obligations After an Electronic Data Breach or Cyberattack
- Model Rule 1.4 requires lawyers to keep clients “reasonably informed” about the status of a matter and to explain matters “to the extent reasonably necessary to permit a client to make an informed decision regarding the representation.” Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.

# Data Privacy, Section 7216, and the GDPR

- Law Firm L provides a variety of domestic and international legal services for corporate and individual clients. These clients are headquartered or otherwise reside in the U.S. and the European Union (E.U.). Law Firm L is in the business of advising its clients regarding tax planning and also performs tax return preparation and filing services. Firm L judiciously maintains several “on prem” internally hosted servers to store all of its client data.

# Data Privacy, Section 7216, and the GDPR

a. Firm L has determined that it would significantly reduce its expenses and improve its cyber security posture by utilizing the services of a well-regarded third party hosted cloud storage provider to host its clients data. Firm L has contracted with the hosted provider specifically requiring that only Firm L personnel have a private encryption key and the hosted provider, along with the private cloud server, must be in the US. May Firm L utilize the services of the third party hosted provider, and, if so, what issues should it consider?

# Data Privacy, Section 7216, and the GDPR

b. Firm L's in-house electronic data bases become the subject of a cyber-attack in which the data of several current and former individual clients is accessed by a third party intruder. At least one of these individual clients resides in the E.U. With respect to the E.U. GDPR and ABA ethical standards, does Firm L have any notification requirements?

# Data Privacy, Section 7216, and the GDPR

c. Individual X, a French citizen, has approached Law Firm L to obtain estate planning services. In order to provide the requested services, Law Firm L will require that Individual X provide Law Firm L with certain information such as:

Family Information (e.g., marital status and number of children)

Trust Documents

Last Will & Testament

Gift Tax Returns

Power of Attorneys

Advance Health Care Directive or Living Will

In drafting the client's engagement letter, what issues should Law Firm L consider with respect to the E.U. GDPR?

# Data Privacy, Section 7216, and the GDPR

d. You represent a large multinational company, Widgets Inc., in an ongoing audit. The IRS is examining Widgets Inc.'s acquisition of a French company and has issued IDRs seeking information about acquisition costs. Ignoring any treaty constraints on the collection and distribution of French records, you were able to obtain records, including e-mails, involving the French company, a Mexican manufacturing subsidiary, and widgets. Several emails contain a French employee's personal cell phone number. Others include, in addition to responsive information, a back and forth conversation about a French employee's recent surgery and return to work. Finally, there is a spreadsheet that has helpful information, but also has a tab that contains a listing of all employees, their salaries, and their date of birth in France and Mexico. You'd like to provide this information, it is not privileged, and it is responsive to the IDR.

# Data Privacy, Section 7216, and the GDPR

e. From time to time, Firm L management uses separate statistical compilations of data to manage the operations of the firm (resource allocation, etc.) and to support its tax return preparation activities. These compilations contain client and taxpayer identity and show a variety of Federal and state tax return data points (due dates, types of schedules necessary for completion as part of the returns, etc.). Firm L management believes that the data compiled, if summarized effectively, would significantly advance its eminence in certain segments of its client population, and would now like to compile statistical compilations that can assist it in advertising or marketing its services, including its tax return preparation services, in ways not previously considered. Discuss the implications of Firm L's marketing strategy under IRC section 7216 in the following situations:

# Data Privacy, Section 7216, and the GDPR

i. Firm L intends to anonymize its management compilation and then disclose such compilations of data regarding client profiles from its non-tax return preparation services database to all current and prospective clients in order to market certain non-tax return preparation services to its tax return preparation clients.

# Data Privacy, Section 7216, and the GDPR

ii. Firm L intends to disclose three of its statistical compilations (not involving dollar amounts of refund/credits/deductions) from its tax return preparation services database to non-tax return preparation clients and potential clients for the purpose of engaging these clients for tax return preparation services.

# Data Privacy, Section 7216, and the GDPR

iii. Firm L intends to disclose summary level information from one of its statistical compilations (not involving dollar amounts of refund/credits/deductions) from its tax return preparation services database to both its tax and non-tax services clients, and to prospective clients, in order to compare the compilation's "benchmarks" of effective tax rates as computed to these clients' and prospective clients' data for the purpose of engaging them for Advance Pricing Agreement and international tax planning services.

# Data Privacy, Section 7216, and the GDPR

iv. Firm L intends to create multiple databases that contain the effective tax rates (ETR) of similarly situated clients. Without disclosing the names of clients, Firm L would like to use these the information contained in the databases when approaching new clients to determine whether the client's ETR is above other similarly situated taxpayers.

# Parent-Subsidiary Issues

- Illinois State Bar Association Professional Conduct Advisory Opinion No. 17-05 (May 2017)
- Corporate and In-house Counsel
- An in-house corporate lawyer may provide legal services to multiple subsidiaries of the same corporate parent, but nevertheless must be mindful of the application of the Rules of Professional Conduct, particularly those addressing conflict of interest and confidentiality.

# Parent – Subsidiary Issues

- Lawyer works in-house in the legal department of insurance company A. The legal department provides representation to insurance company A's insureds pursuant to company A's insurance policy obligations. The legal department also represents insurance company A when it is a named party in litigation. Insurance company A is a subsidiary of insurance company B which, in turn, is a subsidiary of Holding Company. Holding Company is itself a subsidiary of Parent Company. Parent Company has recently acquired company X, whose business is unrelated to insurance. Lawyer has been asked by Parent Company management to provide legal services to company X. The contemplated legal services are wholly unrelated to Company A.

# Parent – Subsidiary Issues

- Company X is about to borrow significant money from a lender for a Company X project. Insurance Company A is involved in a dispute with an insured that also involves significant amounts of possible damages to the insured, and has denied coverage. The insured is thinking about, and has threatened suit against Insurance Company A. The amount in question is material to its financial condition. Lawyer does not want (and may not be able to without waiving privilege or at least divulging confidential information gained from the situation) to tell X of the possible problem because it may have the effect of causing X's lender to back away from the loan transaction. On the other hand, Lawyer feels he must tell X Management.

Can Lawyer provide legal services to Company X? What issues do you see in that representation?

# Lawyer's Material Errors

- Formal Opinion 481 (April 17, 2018)
- A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error
- Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the Model Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.

# Lawyer's Material Errors

Larry Lawyer, a sole practitioner, has represented a closely held mid-size Corporation regarding tax and corporate issues for over a decade. Larry's representation is provided under an annual retainer agreement he has with Corporation. As part of its growth strategy leading up to a possible initial public offering, Corporation has made several acquisitions over the last several years, including a stock-for-stock acquisition in 2018 that was intended to be a tax-free B reorganization. Larry gave Corporation a clean legal opinion on the tax-free nature of the B reorganization.

# Lawyer's Material Errors

- Scenario 1: As part of his retainer agreement with Corporation that was renewed for 2019, Larry reviewed Corporation's tax positions for 2018 in February 2019 in connection with Corporation's preparation of its 2018 tax returns. Larry realizes for the first time that there was a small amount of boot associated with the B reorganization that he mistakenly did not take into account when he issued his legal opinion to Corporation.
- Scenario 2: Corporation terminated its relationship with Larry on December 31, 2018 when it engaged Big Law Firm to advise it on tax and corporate issues in advance of a planned IPO in mid-2019. In February 2019, in drafting a legal opinion for another client that is planning a tax-free B reorganization, Larry reviews the legal opinion he provided to Corporation in 2018 and realizes for the first time that there was a small amount of boot associated with the B reorganization that he mistakenly did not take into account when he issued his legal opinion to Corporation.

# Selected ABA Model Rules of Professional Conduct

- 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.

# Selected ABA Model Rules of Professional Conduct

- Rule 1.4: Communications
- (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;
  - (4) promptly comply with reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary for the client to make informed decisions regarding the representation.

# Selected ABA Model Rules of Professional Conduct

- Rule 1.6: Confidentiality of Information
- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

....

- (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.

# Selected ABA Model Rules of Professional Conduct

- Rule 1.16: Declining or Terminating Representation

.....

- d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

# Selected ABA Model Rules of Professional Conduct

- Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer
- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (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.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
  - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

# Selected ABA Model Rules of Professional Conduct

- Rule 5.3: Responsibilities Regarding Nonlawyer Assistance
- With respect to a nonlawyer employed or retained by or associated with a lawyer:
- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
  - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

# Statutes and Regulations

- IRC 6713, Disclosure or Use of Information by Preparers of Returns [Civil]
- IRC 7216, Disclosure or Use of Information by Preparers of Returns [Criminal]
- Circular 230, Regulations Governing Practice Before the Internal Revenue Service
- The EU General Data Protection Regulation

Questions?