

## Ethics in the Digital Age

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PRESENTED BY ERIC G. PEARSON

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## Learning Objectives

- Review ABA Rules of Professional Conduct (RPC), AICPA Statements on Standards of Tax Services (SSTS), key Circular 230 provisions, and other ethical standards applicable to tax professionals
- Review key rules relating to the use of technology by tax professionals
- Learn how to navigate ethical dilemmas that have arisen due to the use of social media and other technology tools
- Apply professional ethics standards to cutting-edge scenarios

## Tax Ethics Rules for CPAs and Lawyers

- AICPA Code of Professional Conduct

<https://us.aicpa.org/research/standards/codeofconduct>

- ABA Model Rules of Professional Conduct

[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/)

## Select Ethics Rules

	ABA	AICPA Equivalent
<b>Client</b>		
Competence	R. 1.1	0.300.060 Due Care
Scope of Representation and Allocation of Authority	R. 1.2	0.300.070 Scope and Nature of Services
Diligence	R. 1.3	0.300.060 Due Care
Communications	R. 1.4	0.300.060.05 Due Care
Confidentiality of Information	R. 1.6	1.700.001
Conflict of Interest	R. 1.7 to 1.12	0.300.050 Objectivity and Independence
Organization as Client	R. 1.13	0.300.020.02 Responsibilities
<b>Advisor / Counselor</b>	R. 2.1	0.300.050.01 Objectivity

## Select Ethics Rules continued

	ABA	AICPA Equivalent
<b>Advocate</b>		
Meritorious Claims & Contentions	R. 3.1	0.300.040.04 Integrity
Expediting Litigation	R. 3.2	0.300.060.05 Due Care
Candor toward the Tribunal	R. 3.3	0.300.040.03 Integrity
Fairness to Opposing Parties and Counsel	R. 3.4	0.300.040.03 Integrity
<b>Truthfulness in Statements</b>	R. 4.1	0.300.040.03 Integrity
<b>Supervisors and Subordinates</b>	R. 5.1 to 5.3	0.200.020.04
<b>Unauthorized Practice</b>	R. 5.5	
<b>Advertising</b>	R. 7.1 to 7.3	1.400.090; 1.600

## Other Ethics Rules

- State Bar Associations
- State CPA society\*
- State board(s) of accountancy\*
- Federal, state and local taxing authorities\*
  - IRS Circular 230
  - Taxpayers' Bills of Rights
- Other government agencies and regulators:
  - Securities and Exchange Commission (SEC)\*
  - Public Company Accounting Oversight Board (PCAOB)\*
  - Government Accountability Office (GAO)\*
  - Department of Labor (DOL)\*

## Potential Consequences of Ethical Failures

- Corporate
  - Reputation risk
  - Shareholder suits
  - Fines and penalties
  - Criminal liability
- Personal
  - Disbarment
  - Loss of CPA license
  - Reputational risk
  - Termination
  - Criminal liability
  - Fines and penalties

## Question 1

- You are a tax attorney and CPA, and your firm has started implementing AI to assist with tax research.
- Your client, a small business owner, seeks advice on a complex tax matter on a tight budget.
- You use ChatGPT to assist with your research but don't tell the client.

## Answer 1

### Unethical

- ABA Rule 1.4. Duty to Communicate: A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished
- ABA Resolution 112, August 2019:
  - A lawyer should obtain approval from the client before using AI, and this consent must be informed. The discussion should include the risks and limitations of the AI tool. In certain circumstances, a lawyer's decision *not* to use AI also may need to be communicated to the client if using AI would benefit the client. Indeed, the lawyer's failure to use AI could implicate ABA Model Rule 1.5, which requires lawyer's fees to be reasonable. Failing to use AI technology that materially reduces the costs of providing legal services arguably could result in a lawyer charging an unreasonable fee to a client.

## Question 2

- ChatGPT finished the research in a few seconds.
- The research looks good, but you are unsure of how the information was generated or all the sources it used.
- Do you have a duty to supervise an algorithm?

## Answer 2

Yes

- ABA Rule 5.1. Duty to Supervise: 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...[and] a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.
- In 2012, the ABA amended the title of Model Rule 5.3 from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance."
  - the change clarified that the scope of Rule 5.3 encompasses non-lawyers, whether human or not.
- ABA Resolution 112, August 2019:
  - There are some tasks that should not be handled by today's AI technology, and a lawyer must know where to draw the line. At the same time, lawyers should avoid underutilizing AI, which could cause them to serve their clients less efficiently. Ultimately, it's a balancing act. Given that many lawyers are focused on detail and control over their matter, it is easy to see why "the greater danger might very well be underutilization of, rather than overreliance upon, artificial intelligence."

## Answer 2 continued

- ABA Rule 1.1.1. Duty of 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.
- Comment [8] to Rule 1.1 was modified in 2012 to emphasize that this duty of competency includes a responsibility to understand the technology used in providing that representation:
  - To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)
- In Formal Opinion 483 (10/17/18), the ABA Standing Committee on Ethics and Professional Responsibility stated that this duty necessarily requires both an understanding of the basic features of the relevant technology and deployment of that technology in a manner that will reasonably safeguard confidential client information.
- AICPA Rule 1.300.001.01(a): Undertake only those professional services that the member or the member's firm can reasonably expect to be completed with professional competence.

## Answer 2 continued

- AICPA Rule 1.300.001.01(b): Exercise due professional care in the performance of professional services.
- ABA Rule 1.3. Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.
  - ABA Formal Opinion 498: recommends reviewing the platform’s terms of service to ensure use of the platform is consistent with the lawyer’s ethical obligations.
- Circular 230 Section 10.51(a)(13): Sanctionable conduct includes “an extreme departure from standards of ordinary care.”
- Section 6662 Negligence Penalty

## Answer 2 continued

- *People v. Zachariah C. Crabill*, 23 PDJ 067 (Nov. 22, 2023)
  - 90-day suspension, with the remainder of his 366-day suspension to be stayed upon completion of a 2-year probation period
- D. Mont. has banned use of AI to draft briefs.
- E.D. Wis. has considered requiring disclosure of the use of AI – both in briefs and in discovery.
  - For now the judges have decided to table creating any rule and are monitoring the situation.

## Question 2 follow up question

Is legal research considered the practice of law? What about reviewing a Voluntary Disclosure Agreement (VDA) or other document – that is, things that can be done by machine?

- **ABA Rule 5.5. Unauthorized Practice of Law:** A lawyer who is not admitted to practice in this jurisdiction shall not, except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- ***Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, No. 14-3845 (2d Cir. 2015)*:** Distinguishing between tasks performed by machines and tasks performed by lawyers
  - The Second Circuit found that tasks that could otherwise be performed entirely by a machine could not be said to fall under the practice of law. Consequently, *Lola* raises the possibility that machines can reclassify tasks that were traditionally considered the practice of law as now falling outside of the scope of the practice of law.

## Question 3

- Sam works remotely as an attorney and CPA and mostly conducts her work over Zoom.
- Sam's husband also works remotely, and their three sons are distance learning and are home all day.
- Because of the limited space in their house, Sam has no choice but to use the family kitchen to conduct her client work.
- Throughout the day, her children and husband come in and out of the kitchen to grab snacks.
- Clients on Zoom can see and hear them, and they can see and hear the clients.
- When they come in the kitchen, Sam makes it a point to not discuss private information with clients; otherwise, her work resumes as usual.



## Question 3 continued

Should Sam do anything differently?

- A. Work with her family to designate break times when they are allowed to enter the kitchen
- B. Position her computer so that her family members cannot see clients
- C. Use a headset
- D. Tell her employer she cannot work from home unless the employer pays the construction costs associated with a home renovation to add a private office.

## Answer 3

A, B, and C

- ABA Model Rule 1.6. Confidentiality: 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.
  - Comment 16 to this Rule further specifies that these reasonable efforts should safeguard against (1) inadvertent or unauthorized disclosure by the attorney or other persons participating in the representation or otherwise subject to the attorney's supervision, and (2) unauthorized access by third parties.
  - Attorneys working from home must consider the above factors and make reasonable efforts to ensure that any unauthorized persons, such as family members or social visitors, do not access confidential documents stored in a home office or overhear confidential communications.

## Question 4

- Ariel is a SALT attorney who maintains a blog.
- Ariel recently won an administrative decision against the DOR on a hotly contested use tax refund claim.
- Ariel decides, without asking her client, to write a blog about the decision.
- In the article, Ariel lists the name of her client, the name of the case, the amount of the refund, the docket number, and a brief description of the issues – all matters of public record.
- Because the DOR was so difficult, Ariel mentions that the DOR rejected her client's last settlement offer of 70% of the refund claim.

## Question 4 continued

Ariel's article is :

- A. Ethical.
- B. Ethical if she removes the reference to his client's settlement offer.
- C. Ethical so long as she limits it to information found in the administrative decision which is publicly available.
- D. Unethical.

## Answer 4

### Unethical

- ABA Formal Opinion 18-480 (March 6, 2018)
  - “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.”
- ABA Model Rule 1.6(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).”
  - Comment 2 emphasizes “[a] fundamental principle in the client-lawyer relationship is that in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”
  - Comment 3 clarifies that this rule “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”
- “In other words, the scope of protection afforded by Rule 1.6 is far broader than attorney-client privileged information.”

## Answer 4 continued

- “Unless one of the exceptions to Rule 1.6(a) is applicable, a lawyer is prohibited from commenting publicly about any information related to a representation. Even client identity is protected under Model Rule 1.6.”
- The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client’s informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a).
- Rule 1.6 does not provide an exception for information that is “generally known” or contained in a “public record.” Accordingly, if a lawyer wants to publicly reveal client information, the lawyer must comply with Rule 1.6(a).
- DC Ethics Opinion 370(II)(B)
  - With client consent, lawyer may blog about own cases

## Question 5

You have negotiated a settlement to resolve a large and highly contentious audit issue. The IRS prepares a draft closing agreement memorializing the terms of the settlement and asks for your review and signature. While reviewing the draft closing agreement, you notice an incorrect representation of a material fact that has been disclosed to the IRS previously during audit. The misrepresentation is beneficial to taxpayer.

**What must you do?**

- a) Correct the factual misrepresentation in the draft.
- b) Nothing, the IRS is at fault for its own mistake.

## Answer 5

**What must you do?**

- a) **Correct the factual misrepresentation in the draft.**
- b) Nothing, the IRS is at fault for its own mistake.

ABA Model Rule 4.1 provides that an attorney “shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client...”

## Question 6

In a draft settlement agreement, the government has identified an IP licensing arrangement covered by the agreement. However, the government has failed to identify a similar agreement with several other related entities due to a failure to develop facts with respect to those entities. The settlement agreement would close the tax obligations for all of the related entities.

**Can you sign the agreement?**

- a) Yes, because a lawyer can lie when dealing with others on a client's behalf.
- b) Yes, because a lawyer generally has no affirmative duty to inform an opposing party of relevant facts.
- c) No, because a lawyer is required to be truthful when dealing with others on a client's behalf.
- d) No, because a lawyer must disclose all relevant facts to the opposing party.

## Answer 6

**b) Yes, because a lawyer generally has no affirmative duty to inform an opposing party of relevant facts.**

- Comment on ABA Model Rule 4.1:
  - A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.
  - A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

## Question 7

You are a CPA. Your client, NoWhere, Inc., has realized that after operating “under the radar” in Alabama for six years, it needs to start filing tax returns in Alabama. You are preparing and will sign the initial tax return for the current tax year. The initial return asks: “What was the first date the company began doing business in Alabama?” You want to leave the answer blank because you know it would be disadvantageous to your client if you respond that the client began doing business in Alabama six years ago.

**Should you sign the return with the omitted answer?**

## Answer 7

No. You cannot sign the Alabama return.

AICPA SSTS No. 2, Answers to questions on Returns, paragraph 5, provides that a CPA “should not omit an answer merely because it might prove disadvantageous to a taxpayer.”

## Question 8

The IRS issues an IDR request that asks for copies of all presentations or other documents addressing an IP restructuring. You are able to locate a copy of a key presentation but are unable to locate the original. The copy includes extensive notes from the VP of Tax that highlight potential exposures and sensitivities associated with the IP restructuring. You conclude that none of the handwritten notes are protected from disclosure by attorney-client privilege or attorney work product.

## Question 8 continued

**What is an appropriate IDR response?**

- a) A response explaining that no copies of any presentations could be located.
- b) A copy of the presentation that removes the handwritten notes but does not identify the removal/redactions.
- c) A copy of the presentation that removes the handwritten notes but identifies the redactions.
- d) An unredacted copy of the presentation.

## Answer 8

### d) An unredacted copy of the presentation.

ABA Model Rule 3.4 provides in part that a lawyer shall not: Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Comment to Rule 3.4: Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.

## Question 9

Upon review of Company ABC's past tax returns in connection with a forthcoming transaction, you realize that Company ABC took a clearly erroneous position by currently deducting expenses that should have been capitalized, which resulted in an understatement of millions of dollars over the past few returns. You inform the VP of Tax, who brushes you off and decides to maintain the erroneous position on ABC's upcoming return.

**What must you do?**



## Question 9 continued

You inform the VP of Tax, who brushes you off and decides to maintain the erroneous position on ABC's upcoming return. **What must you do?**

- a) File amended returns on behalf ABC to correct the erroneous position.
- b) Inform the CFO about the erroneous position on prior returns and its consequences.
- c) Inform the CFO about the erroneous position on the upcoming return and its consequences.
- d) Both B and C.
- e) Nothing.

## Answer 9

- c) **Inform the CFO about the erroneous position on the upcoming return and its consequences.**

Generally no requirement to file an amended return to correct a prior error. *Badaracco v. Commissioner*, 464 U.S. 386 (1984). *But see* Treasury Regulation § 1.451-1(a) (guiding taxpayers to file amended returns).

Circular 230 § 10.21: "A practitioner who . . . knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission . . . [and] of the consequences as provided under the Code and regulations of such noncompliance, error, or omission."

## Question 10

Can the Section 7525 privilege be used to prevent disclosure of protected materials to any US federal agency?

## Answer 10

b) **No.**

The Section 7525 privilege cannot be used to prevent disclosure to any regulatory body other than the IRS.

## Question 11

Penny Procrastinator is swamped with work. Her supervisor calls on a Monday, asking her to review a stock purchase agreement by the end of the week. Penny agrees, even though she knows she does not have enough time. Penny waits until late Sunday night, quickly skims the SPA, and sends her comments. Penny spent about an hour reviewing the SPA, but, had she had more time, she would have spent about 15 hours to fully review the SPA.

**Has Penny committed an ethical violation?**

## Question 11 continued

**Has Penny committed an ethical violation?**

- a) Yes, because she did not act with reasonable diligence and promptness.
- b) No, because she responded as promised by the end of the week.
- c) No, because she did her best to review the agreement.

## Answer 11

- a) Yes, because she did not act with reasonable diligence and promptness.

ABA Model Rule 1.3 (Client-Lawyer Relationship: Diligence): “A lawyer shall act with reasonable diligence and promptness in representing a client.”

Comment 2: “A lawyer’s work load must be controlled so that each matter can be handled competently.”

Comment 3: “Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness. A lawyer’s duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer’s client.”

## Question 12

Brilliant Co, a global company with a lot of really high-value, important technology, hires an accounting firm, YesMa’am LLP, to design and implement a global reorganization of its IP ownership so as to lower its effective tax rate and repatriate cash. Brilliant Co is nervous about only having one advisor for such an important project. Brilliant sends an RFP to We Can Law Firm to bid on the project in a co-planning type role with YesMa’am. We Can Law Firm is hired, but Brilliant Co decides We Can Law Firm is too expensive and asks YesMa’am to do the bulk of the work on the project, including all factual development and analysis. Brilliant Co asks We Can Law Firm to enter into a Kovel with YesMa’am and asks YesMa’am to include We Can Law Firm on correspondence to obtain Attorney Client Privilege.

**Is it appropriate for We Can Law Firm to engage YesMa’am under a Kovel arrangement under these circumstances?**

- a) Yes.
- b) No.
- c) Maybe.

## Answer 12

### b) No.

No Kovel relationship exists because YesMa'am was not engaged to assist Best Law Firm in providing legal advice.

ABA Model Rule 4.1 (Transactions with Persons Other Than Clients: Truthfulness in Statements to Others)

ABA Model Rule 8.4 (Maintaining the Integrity of the Profession: Misconduct)

## Question 13

Pollyanna is the tax director of PublicCo. To Pollyanna's surprise, the VP tax invited one of PublicCo's external auditors to a meeting. Pollyanna does not want to be rude, so she distributes a privileged memo to everyone (including the auditor) in the meeting. The memo addresses the strengths and weakness of PublicCo's worthless stock deduction. It also contains an "Attorney Work Product" watermark.

**Is the memo work product protected?**

- a) Yes.
- b) No.
- c) Maybe.

## Answer 13

### c) Maybe.

*United States v. Textron*, 577 F.3d 21 (1st Cir. 2009) (Work product doctrine does not apply to tax accrual work papers because they were not prepared in anticipation of litigation);

*United States v. Deloitte LLP*, 610 F.3d 219 (D.C. Cir. 2010) (Disclosure to outside auditor does not waive work product protection);

*Frank Betz Associates v. Jim Walter Homes*, 226 F.R.D. 533 (D.S.C. 2005) (same);

*In re Disonics Securities Litigation*, 1986 U.S. Dist. LEXIS 24177 (N.D. Cal. 1986) (Disclosure to outside auditor waives work product protection).

## Question 14

You are asked to provide an analysis relating to tax consequences of an IP restructuring. Your supervisor represents that a key entity in the restructuring did not own any valuable IP. However, based on your own experience, you recall reviewing a valuation report that assigned significant value to customer lists that were owned by the entity and are concerned that the representation may be inaccurate or incomplete.

**Can you rely upon the supervisor's representation when rendering the opinion?**

- a) Yes, you can rely upon the representation without further verification.
- b) Yes, but only if you confirm that it is complete and accurate.
- c) No, you cannot rely upon representations.

## Answer 14

**b) Yes, but only if you confirm that it is complete and accurate.**

Circular 230 Section 10.34(d): A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

## Question 15

As the head of global tax controversy, you have led the company through a prolonged IRS audit. The VP of Tax advises that he wants to settle the issue so that he can wrap the audit up before his retirement at the end of the calendar year. The chances of winning the issue in litigation are well above 80% but he instructs you to accept the IRS's offer to settle the case at 20% of the tax benefit. You believe that this is the wrong strategy and think that you can get a much better deal by countering to settle the case at 70% of the tax benefit.

**Can you pursue your preferred settlement strategy?**

- a) Yes, because you have more expertise than the VP of Tax regarding settlement strategy.
- b) Yes, because the VP of Tax is pursuing settlement for personal goals rather than the goals of the company.
- c) No, because a lawyer must defer to the client regarding the objectives of representation.

## Answer 15

- c) **No, because a lawyer must defer to the client regarding the objectives of representation.**

ABA Rule 1.2(a): "A lawyer shall abide by a client's decision whether to settle a matter."

ABA Model Rule 1.13, Comment 3: Ordinarily, a lawyer has no obligation to seek, within the organization's hierarchy, review of an authorized representative's settlement directive merely because the attorney believes the directive reflects poor judgment or otherwise doubts the utility or prudence of the authorized representative's directive.

## Question 16

You are a CPA. You are about to sign and file the 1120 tax return for your company. You are advised that certain numbers were not final and reasonable estimates based on the best available information were used to compute the amount of income tax liability reflected on the return.

**Is it ethical to sign and file a tax return that you know is based in part on an estimate used to compute the amount of tax owed?**

- a) No, all numbers must be final.
- b) Yes, because it is not practical to obtain exact data and the estimates are reasonable.
- c) Yes, any estimate is fine.



## Answer 16

b) **Yes, because it is not practical to obtain exact data and the estimates are reasonable.**

AICPA SSTS No. 4, Use of Estimates, provides that “[u]nless prohibited by statute or by rule, a [CPA] may use the taxpayer’s estimates in the preparation of a tax return if it is not practical to obtain exact data and if the [CPA] determines that the estimates are reasonable based on the facts and circumstances known to the [CPA]. The taxpayer’s estimates should be presented in a manner that does not imply greater accuracy than exists.”



- Eric G. Pearson
  - Partner | Milwaukee
- T: 414.319.7360
- E: [epearson@foley.com](mailto:epearson@foley.com)