

New Ethical Challenges Emerge as the COVID-19 Pandemic Fades

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Agenda

Review of ABA Rules of Professional Conduct--Discuss ABA Ethics Rules 1.1 (Competence), 1.15(a) (Safekeeping Property & Comments) 1.6 (Confidentiality of Information), 1.8 (Conflict of Interest: Specific Rules & Comments), among others, as they apply to cutting-edge case studies.

Review of Select ABA Formal Opinions and Select State Ethics Rules and Opinions concerning acceptance of cryptocurrency as payment for legal fees, securing protected client information, lawyers or CPAs working remotely, and issues concerning virtual practice. Review key newly enacted rules relating to the use of technology and cryptocurrency by tax professionals.

Review AICPA Ethics Standards and Code of Professional Conduct Structure.

Learn how to navigate the unique ethical dilemmas that have arisen due to the COVID-19 Pandemic. Apply professional ethics standards to cutting-edge scenarios.

Ethical Norms in Taxation

Who determines what is “ethical behavior” for tax advisors?

State Laws and Professional Organizations

Professional Requirements:

State Bar Associations (Mandatory and Elective)

State Boards of Accountancy

Professional Standards:

ABA Model Rules

AICPA

Statements on Standards for Tax Services (SSTS)

IPT Canons of Ethics

Ethical Norms in Taxation (cont.)

Who determines what is “ethical behavior” for tax advisors?

Tax Statutes (including Penalty statutes)

Internal Revenue Code

Treasury Regulations

Regulations promulgated by IRS/Treasury

Circular 230

What are Tax “Ethics”

Ethical conflicts arise between a lawyer’s responsibility to his/her clients, to the legal system generally, and to the lawyer’s own specific interests.

For tax professionals, the “legal system” is broader than it is in other contexts, as it implicates:

- state substantive law;
- federal substantive law;
- professional organization rules;
- treasury regulations; and
- treasury organizational rules.

Compare to non-tax professionals who are typically constrained by a set of laws and professional organization rules alone.

What are Tax “Ethics” (Cont.)

Tax is inherently neutral from an ethical perspective.

- No Roots in “Natural Law” as there is no tax branch of moral philosophy.
- Tax and tax liability are not a recognized phenomenon in the natural world; they exist entirely within civilized society.
- Tax Ethics and “moral considerations” are not necessarily in line with each other.

Who is the ethical obligation owed to?

- Clients?
- Administrative Agencies? (IRS, Treasury, State Department of Revenue)
- State Licensing Authorities? (ABA, AICPA, State Bar, IPT)

Select ABA Model Rules Applicable to Tax Professionals

<u>ABA</u>	<u>Topic</u>
Rule 1.1	Competence
Rule 1.15	Safekeeping Property
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.3	Due Diligence
Rule 1.4	Communication
Rule 1.5	Fees
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients
Rule 1.8	Conflict of Interest: Current Clients: Specific Rules
Rule 5.2	Oversight of subordinate attorneys
Rule 5.3	Oversight of non-lawyer personnel
Rule 5.5	Unauthorized Practice of Law

Select ABA Formal Opinions

ABA Formal Opinion

Topic

ABA Opinion 378

Acceptance of Cryptocurrency as Payment for Legal Fees

ABA Opinion 477R

Securing Communication of Protected Client Information

ABA Opinion 495

Lawyers Working Remotely

ABA Opinion 496

Responding to Online Criticism

ABA Opinion 497

Conflicts Involving Materially Adverse Interests

ABA Opinion 498

Virtual Practice

ABA Opinion 499

Passive Investment in Alternative Business Structures

ABA Opinion 500

Language Access in the Client-Lawyer Relationship

Select State Ethics Rules & Opinions

State Rule or Opinion

Topic

D.C. Opinion 24-20

Teleworking from Home and the COVID-19 Pandemic

D.C. Opinion 300

Acceptance of Ownership Interest in Lieu of Legal Fees

D.C. Opinion 378

Acceptance of Cryptocurrency as Payment for Legal Fees

N.C. Opinion 5

Receipt of Virtual Currency in Law Practice

N.J. Opinion 739

Lawyers Who Include Clients on Group Emails and Opposing Lawyers Who “Reply All”

Nev. S. C. R. 42.1

Practice of Attorneys Admitted in Nevada but not Maintaining Nev. Offices

Nev. Opinion 59

Coworking Office Space

NYS Opinion 1102

Insured Counsel: Sharing Office space with Nonlawyers

Select State Ethics Rules & Opinions

State Rule or Opinion

Topic

NYS Opinion 1223

Dual Practice; Rental of Office Space

NYS Opinion 1239

Attorney's Ethical Obligation When a Court Orders Forensic Analysis of Hard Drive
Containing Client Confidential Information

NYS Opinion 1240

Duty to Protect Client Information Stored on a Lawyer's Smartphone

NYS Opinion 1241

New York Attorney with Out-of-State Office; Attorney Advertising and Letterhead

Texas Opinion 692

Duty to Correct False Statements by Client During Deposition

Ethics Standards - AICPA

AICPA Code of Professional Conduct Structure

Introduction

- Section 50 – Principles of Professional Conduct
- Section 90 – Rules: Applicability and Definitions
- Section 100 – Independence, Integrity, and Objectivity
- Section 200 – General Standards Accounting Principles

AICPA Code of Professional Conduct Structure

Introduction (cont.)

- Section 300 – Responsibilities to Clients
- Section 400 – Responsibilities to Colleagues
- Section 500 – Other Responsibilities and Practices
- ET Appendixes
- ET Topical Index

<http://www.aicpa.org/about/code/index.htm>

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Scenario # 1

Facts: Larry Lawyer decided to accept future payment from his clients in cryptocurrency only. On January 13th, he take on two new matters. The first is for a friend and longtime client, Clark, who retains him for a small matter, for which Larry agrees to represent him at his customary rate of \$500 per hour. When Larry submits his first and final invoice a week later for three hours' work, he advises Clark about his new cryptocurrency payment policy going forward. Clark agrees to pay Larry 15 Bitcoin (then worth \$1,500) for the representation. Did Larry violate any ethical rules by accepting Bitcoin as payment for his legal services?

- A. Yes, attorneys may not accept assets as unstable as Bitcoin as payment for legal services.
- B. No, there is nothing in the ABA Model Rules that specifically prohibits a lawyer from accepting assets as payment for legal services, even potentially unstable and unpredictable ones such as Bitcoin.
- C. Cryptocurrencies are not accountable to a central authority. The lack of regulation and an accountable central authority is one of the most significant ethical concerns for accepting it as payment for legal services. However, as long as both Larry and Clark agree to this form of payment, it does not violate any ethical rules.
- D. Both B and C.

Scenario #2

Facts: Larry's second client is Clara, who retains Larry for a complex matter at an hourly rate of 5 Ravencoin (then worth \$500). Per Larry's written retainer agreement, she provides a fee advance of 300 Ravencoin (then worth \$30,000) which is deposited directly into his personal digital wallet. His retainer also states that Larry will provide monthly invoices and take all outstanding fees out of the advance, which must be periodically replenished. On February 14th, Larry emails Clara a detailed invoice for 200 Ravencoin for 40 hours of work. The next day, the value of Ravencoin increased five-fold from \$100 to \$500. Larry plans to sell all of cryptocurrency—including Clara's 200 Ravencoin that he had earned for services rendered (for which he will receive \$100,000). Before he can sell the Ravencoin, Clara calls him, enraged, and demands the immediate return of her entire 300 Ravencoin advance. She argues that she has essentially paid Larry a fee of \$2,500 per hour, which is both per se unreasonable under ABA Rule 1.5 (a) and rapacious. Have any ethical rules been violated by Larry?

- A. No. Since Larry's retainer agreement provided for monthly invoices to be paid out of Clara's advance, he has not violated any ethical rules.
- B. Yes, because Larry failed to adequately explain to Clara the financial implications and risks inherent in paying advance fees in Ravencoin.
- C. Yes, because Larry failed to give Clara a reasonable opportunity to seek the advice of independent counsel in the transaction before she agreed to the arrangement.
- D. Yes, because Larry was required to obtain Clara's informed consent in writing.
- E. Both B and C.
- F. Both C and D.
- G. B, C, and D.

Scenario #3

Facts: Janette's client is being deposed in a state income tax case concerning the client's involvement in a company's complicated tax shelter in PA. The deposition is being held via video conference, and the parties are located in different states (the case is in PA, but the client is sitting in Nashville, TN having stepped out of the Hartman Forum to take the deposition). Janette knows her client was involved and instructs client to answer the DOR's questions truthfully. During the course of the deposition, DOR's Counsel directly asks the client if she knew anything about the transactions, and the client states, "I knew nothing about those shifty dealings." Horrified, at the break, Janette urges her client to correct the false statement, explaining to the client that she is perjuring herself and there could be serious repercussions. The Client refuses and tells Janette to "shut up about it, already." If Janette remains silent about the falsehood, and refuses to use it to the client's advantage during the rest of the proceedings, is her conduct ethical?

- A. No. She is deemed to be assisting in committing a fraud.
- B. No. She didn't lie, and the client did. Keeping silent does not amount to aiding and abetting so long as she does not use the information.
- C. This answer could vary by jurisdiction.

Bonus Question: Which state's ethical rules would apply?

Scenario #4.

Facts: Now that COVID is over, audits are back!! The Department of Revenue is auditing a specific issue and issues an Information Document Request (remember them?) asking for specific information on that issue. In addition to the specific information requested, you and your client are also aware of information that is both helpful to the issue and harmful to the issue.

You tell your client to:

- A. Just provide the specific information requested;
- B. Provide specific information requested and the helpful information but none of the harmful information;
- C. Provide specific information, the helpful information, and some but not all of the harmful information; or
- D. Provide all of the information.
- E. Do what the client instructs you to do after full disclosure of the situation

Scenario #5

Facts:

Atticus Filched, attorney for Big Firm, provided transactional services to a client who is now in litigation over the transaction. Atticus has received a trial court order directing him to turn over, for a forensic analysis, a hard drive in a computer that contains data of the client (who has waived the attorney-client privilege) but also contains the data of non-party clients (who have not waived the attorney-client privilege or consented to the disclosure of their confidential information). If Atticus provides the hard drive, he will most certainly violate ABA Model Rule 1.6(a) by “knowingly revealing confidential information gained during and related to the representation of a client, whatever its source”. May Atticus comply with the trial court order without violating any ethical rules?

- a) No. Atticus may not comply with the trial court order without violating Rule 1.6(a) (Confidentiality of Information) and Rule 1.4 (Communication) of the ABA Model Rules of Ethics.
- b) No. Even though Atticus may be held in contempt of court by failing to comply with the trial court order, he must protect the confidential information of all non-waiving clients that is stored on his hard drive.
- c) Yes, if Atticus notifies the non-waiving clients of what has occurred, the extent to which their confidential information may be subject to unauthorized review, and the reasonable steps he will take to minimize or eliminate any impact on the non-party non-waiving clients’ confidential information.
- d) Yes, there is a safe harbor exception in Rule 1.6(b)(6) providing that a lawyer may reveal confidential information of a client to the extent that the lawyer reasonable believes necessary when permitted or required under the ABA Model Rules **OR** to comply with the law or a court order.
- e) Both A and B
- f) Both C and D

Scenario #6

Facts:

Jerry Pence, a trial lawyer from Wyoming, has never lost a criminal case before a jury either as a prosecutor or a defense attorney, and has not lost a civil case since 1969. Jerry loves Social Media and downloads a lot of social media apps on his smartphone. Sometimes, he is asked to give consent for the app to access the “contacts” on his smartphone. Jerry’s contacts include personal, family, and client contacts. May Jerry give consent for an app to access the contacts on his smartphone?

- a) Yes. Giving consent to an app to access his contacts can only increase his standing on social media and gain him followers.
- b) No. If Jerry determines that any of his contacts include a client whose identity or other information is confidential, he may not consent to share contacts with an app.
- c) Yes. If Jerry determines that any of his contacts include a client whose identity or other information is confidential, he may consent to share the contacts with an app **if he concludes that no human being will view that confidential information.**
- d) Yes. If Jerry determines that any of his contacts include a client whose identity or other information is confidential, he may consent to share the contacts with an app **if he concludes that the information will not be sold or transferred to additional third parties without the client’s consent.**
- e) Both C and D.

Scenario #7

Facts:

Vicky Virtual has taken the world by storm. She created a new fee structure for her law firm as a result of reduced overhead costs of running her firm, Victory Vision Virtual Partners (“VVVP”). VVVP has no offices, no paper file storage, and is completely digital. Lawyers at the firm are admitted to practice in their respective states in order to perform services and represent clients across the country. Vicky was a computer scientist before becoming a lawyer. She spends most of her time examining wireless network security, virtual private network (VPN) access, and email encryption requirements, and then deploys the latest technology to VVVP.

True or False: Vicky has violated ethical standards.

Scenario #8

Facts:

While Vicky is a very good computer scientist, she is not a very good lawyer or managing attorney for VVVP. She is never concerned with ministerial tasks such as documenting policies and procedures or informing the partners and associates of their responsibilities vis a vis PPPV's procedures. Instead, Vicky focuses on technology.

True or False: Vicky has violated ethical standards.

Scenario #9

Facts:

Vicky Virtual of VVVP, is licensed to practice law in the state of Nevada. She is not licensed in any other state, even though she frequently represents clients in California, Oregon, Idaho, Utah, and Arizona. However, Vicky requires that VVVP only engage clients from states where it has a licensed attorney, and that the licensed attorney be assigned to that matter.

True or False: Vicky has violated ethical rules?

Scenario #10

Facts:

Vicky Virtual of VVVP has an associate, Randy Remote, who resides and works from within the State of Tennessee. Vicky asked Randy to set up a ZOOM call with one of her biggest clients whom she is representing in litigation in Nevada. Randy set up the call but failed to engage a lobby feature for the ZOOM video conference. (Note: A lobby feature requires that the host of the ZOOM conference “admit” all attendees.) As a result, during the ZOOM call with Vicky, Randy and the client, opposing counsel in the litigation matter against client was able to join the call without being noticed, and overheard key pieces of VVVP’s case which he will use against Vicky’s client. Have Vicky or Randy violated any ethical rules?

Scenario #11

Facts: Horatio Homebody is a licensed attorney in Nevada and California. He lives just over the Nevada border in California and represents clients in both states. Horatio hates to leave his house, so he works primarily from his home in California. Horatio will periodically meet with his California clients at his home in California; however, when he needs to meet with his Nevada clients, he utilizes an open concept co-working arrangement where he can pay by the hour. (Nevada is notorious for professions where patrons pay by the hour). Horatio is not affiliated with any attorney in Nevada and has never had a Nevada attorney admitted in any of his cases *pro hac vice*. As part of Horatio's co-working arrangement, he has an administrative assistant and a receptionist. The receptionist transfers phone calls received at the workspace to Horatio's cell phone, collects mail for Horatio, immediately forwarding it to him without opening it.

True or False: Horatio violated his Ethical Duties to his Nevada Clients

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Questions?

Thank you!

Ethics Standards - ABA

Ethics Standards - ABA

Standards of the American Bar Association

- Model Rules of Professional Conduct. Scope, Section 14 provides:
 - The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline.
 - Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.
 - Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should."
 - Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

Ethics Standards - ABA

Standards of the American Bar Association

- Model Rules of Professional Conduct. Scope, Sections 16 & 21 provide:
 - Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.
 - The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.
 - The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.
 - The Preamble and the note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Select ABA Model Rules Applicable to Tax Professionals

- **ABA Topic**
- Rule 1.1 Competence
- Rule 1.15 Safekeeping Property
- Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer
- Rule 1.3 Due Diligence
- Rule 1.4 Communication
- Rule 1.5 Fees
- Rule 1.6 Confidentiality of Information
- Rule 1.7 Conflict of Interest: Current Clients
- Rule 1.8 Conflict of Interest: Current Clients: Specific Rules
- Rule 5.2 Oversight of subordinate attorneys
- Rule 5.3 Oversight of non-lawyer personnel
- Rule 5.5 Unauthorized Practice of Law

Select ABA Model Rules Applicable to Tax Professionals

Competence

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.

Select ABA Model Rules Applicable to Tax Professionals

- **Due Diligence**
 - **Rule 1.3** A lawyer shall act with reasonable diligence and promptness in representing a client.
- **Confidentiality of Information**
 - **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) or required by paragraph (c).

Select ABA Model Rules Applicable to Tax Professionals

Rule 1.15: Safekeeping Property

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

Select ABA Model Rules Applicable to Tax Professionals

Rule 1.5: Fees Client-Lawyer Relationship

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;

Select ABA Model Rules Applicable to Tax Professionals

Rule 1.5: Fees Client-Lawyer Relationship (cont.)

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
- (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.

Select ABA Model Rules Applicable to Tax Professionals

Rule 1.6 (b): Confidentiality of Information

Rule 1.6 (b) A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);
- (2) to prevent the client from committing 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 interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Select ABA Model Rules Applicable to Tax Professionals

Confidentiality of Information (cont.)

Rule 1.6 (b) A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (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, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest if the revealed information would not prejudice the client.

Select ABA Model Rules Applicable to Tax Professionals

Confidentiality of Information

Rule 1.6 (c) A lawyer *shall* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

Select ABA Model Rules Applicable to Tax Professionals

Conflicts of Interest: Specific Rules

Rule 1.8

- (a) A lawyer **shall not** enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires the interest 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;
 - (2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and
 - (3) 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.

Select ABA Model Rules Applicable to Tax Professionals

Attorney Oversight – Responsibility of Supervisory Lawyer

Rule 5.1

- 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. Rule 5.2:
 - a. A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
 - b. A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Select ABA Model Rules Applicable to Tax Professionals

Attorney Oversight – Supervision of Subordinate Attorneys

Rule 5.2:

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Select ABA Model Rules Applicable to Tax Professionals

Attorney Oversight: Responsibilities Regarding Supervision of Nonlawyers

Rule 5.3

- (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) (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.

Select ABA Model Rules Applicable to Tax Professionals

Unauthorized Practice of Law

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

- 1) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- 2) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - 1) 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
 - 2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- 3) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
 - 1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - 2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - 3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
 - 4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
- 4) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:
 - 1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
 - 2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.
- 5) For purposes of paragraph (d):
 - 1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,
 - 2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

Select ABA Formal Opinions

Select ABA Formal Opinions

ABA Formal Opinion 378: Acceptance of Cryptocurrency as Payment for Legal Fees--Conclusion (June 2020)

We do not perceive any basis in the Rules of Professional Conduct for treating cryptocurrency as a uniquely unethical form of payment. Cryptocurrency is, ultimately, simply a relatively new means of transferring economic value, and the Rules are flexible enough to provide for the protection of clients' interests and property without rejecting advances in technologies. So long as the fee agreement between a lawyer and her client is objectively fair and reasonable (and otherwise complies with Rules 1.5 and 1.8), and the lawyer possesses the requisite knowledge to competently safeguard the client's digital currency, there is no prohibition against a lawyer accepting cryptocurrency from or on behalf of a client.

Select ABA Formal Opinions

ABA Formal Opinion 477R: Securing Communication of Protected Client Information--Conclusion (Revised May 22, 2017)

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.

Select ABA Formal Opinions

ABA Formal Opinion 477R: Securing Communication of Protected Client Information--Conclusion (Revised May 22, 2017) (cont.)

Rule 1.1 requires a lawyer to provide competent representation to a client. Comment [8] to Rule 1.1 advises lawyers that to maintain the requisite knowledge and skill for competent representation, a lawyer should keep abreast of the benefits and risks associated with relevant technology. Rule 1.6(c) requires a lawyer to make “reasonable efforts” to prevent the inadvertent or unauthorized disclosure of or access to information relating to the representation.

Select ABA Formal Opinions

ABA Formal Opinion 495: Lawyers Working Remotely--Conclusion (December 16, 2020)

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.

Select ABA Formal Opinions

ABA Formal Opinion 495: Lawyers Working Remotely--Conclusion (December 16, 2020) (cont.)

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

Select ABA Formal Opinions

ABA Formal Opinion 496: Responding to Online Criticism--Conclusion (January 13, 2021)

Lawyers are frequent targets of online criticism and negative reviews. ABA Model Rule of Professional Conduct 1.6(a) prohibits lawyers from disclosing information relating to any client's representation or information that could reasonably lead to the discovery of confidential information by another. A negative online review, alone, does not meet the requirements for permissible disclosure under Model Rule 1.6(b)(5) and, even if it did, an online response would exceed any disclosure permitted under the Rule.

Lawyers who are the subject of online criticism may request that the website or search engine host remove the information but may not disclose information relating to any client's representation, or information that could reasonably lead to the discovery of confidential information by others. Lawyers should consider ignoring a negative post or review because responding may draw more attention to it and invite further response from an already unhappy critic. Lawyers who choose to respond online must not disclose information that relates to a client matter or that could reasonably lead to the discovery of confidential information by others. Lawyers may post an invitation to contact the lawyer privately to resolve the matter. Another permissible response would be to indicate that professional considerations preclude a response. A lawyer may respond directly to a client or former client who has posted criticism of the lawyer online but must not disclose information relating to that client's representation online.

Select ABA Formal Opinions

ABA Formal Opinion 497: Conflicts Involving Materially Adverse Interests--Conclusion (February 10, 2021)

“Material adverseness” under Rule 1.9(a) and Rule 1.18(c) exists where a lawyer is negotiating or litigating against a former or prospective client or attacking the work done for the former client on behalf of a current client in the same or a substantially related matter. It also exists in many but not all instances, where a lawyer is cross-examining a former or prospective client. “Material adverseness” may exist when the former client is not a party or a witness in the current matter if the former client can identify some specific material legal, financial, or other identifiable concrete detriment that would be caused by the current representation. However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client’s interests suffices.

Select ABA Formal Opinions

ABA Formal Opinion 498: Virtual Practice--Conclusion (March 10, 2021)

The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm.¹ When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.

Select ABA Formal Opinions

ABA Formal Opinion 499: Passive Investment in Alternative Business structures--Conclusion (September 8, 2021)

A lawyer admitted to practice law in a Model Rule jurisdiction may make a passive investment in a law firm that includes nonlawyer owners operating in a jurisdiction that permits such investments provided that the investing lawyer does not practice law through the ABS, is not held out as a lawyer associated with the ABS, and has no access to information protected by Model Rule 1.6 without the ABS clients' informed consent or compliance with an applicable exception to Rule 1.6 adopted by the ABS jurisdiction. With these limitations, such "passive investment" does not run afoul of Model Rule 5.4 nor does it, without more, result in the imputation of the ABS's client conflicts of interest to the investing Model Rule Lawyer under Model Rule 1.10. The fact that a conflict might arise in the future between the Model Rule Lawyer's practice and the ABS firm's work for its clients does not mean that the Model Rule Lawyer cannot make a passive investment in the ABS. If, however, at the time of the investment the Model Rules Lawyer's investment would create a personal interest conflict under Model Rule 1.7(a)(2), the Model Rule Lawyer must refrain from the investment or appropriately address the conflict pursuant to Model Rule 1.7(b).

Select ABA Formal Opinions

ABA Formal Opinion 500: Language Access in the Client-Lawyer Relationship--Conclusion (October 6, 2021)

A lawyer's fundamental obligations of communication and competence are not diminished when a client's ability to receive information from or convey information to a lawyer is impeded because the lawyer and the client do not share a common language, or owing to a client's non-cognitive physical condition, such as a hearing, speech, or vision disability. Under such circumstances, a lawyer may be obligated to take measures appropriate to the client's situation to ensure that those duties are properly discharged. When reasonably necessary, a lawyer should arrange for communications to take place through an impartial interpreter or translator capable of comprehending and accurately explaining the legal concepts involved, and who will assent to and abide by the lawyer's duty of confidentiality. In addition, particularly when there are language considerations affecting the reciprocal exchange of information, a lawyer must ensure that the client understands the legal significance of translated or interpreted communications and that the lawyer understands the client's communications, bearing in mind potential differences in cultural and social assumptions that might impact meaning.

Select State Ethics Rules & Opinions

Select State Ethics Rules & Opinions

DC Committee on Unauthorized Practice of Law Opinion 24-20: Teleworking from Home and the COVID-19 Pandemic-- Conclusion (March 10, 2021)

The DC Committee's opinion is that an attorney who is not a member of the District of Columbia bar may practice law from the attorney's residence in the District of Columbia under the "incidental and temporary practice" exception of Rule 49(c)(13) if the attorney (1) is practicing from home due to the COVID-19 pandemic; (2) maintains a law office in a jurisdiction where the attorney is admitted to practice; (3) avoids using a District of Columbia address in any business document or otherwise holding out as authorized to practice law in the District of Columbia, and (4) does not regularly conduct in-person meetings with clients or third parties in the District of Columbia.

Select State Ethics Rules & Opinions

DC Ethics Opinion 300: Acceptance of Ownership Interest In Lieu of Legal Fees--Conclusion

It is not unethical for a lawyer to receive an ownership interest in a corporate client as compensation for legal services, so long as the fee arrangement is a reasonable one, is objectively fair to the client, and has been agreed to by the client after being informed of its implications and given an opportunity to seek independent counsel on the fee arrangement. A lawyer's current or expected ownership interest in a client may create a conflict of interest that may prevent the lawyer from undertaking the representation unless informed client consent is received.

Select State Ethics Rules & Opinions

DC Ethics Opinion 378: Acceptance of Cryptocurrency as Payment for Legal Fees--Conclusion

It is not unethical for a lawyer to accept cryptocurrency in lieu of more traditional forms of payment, so long as the fee is reasonable. A lawyer who accepts cryptocurrency as an advance fee on services yet to be rendered, however, must ensure that the fee arrangement is reasonable, objectively fair to the client, and has been agreed to only after the client has been informed in writing of its implications and given the opportunity to seek independent counsel. Additionally, a lawyer who takes possession of a client's cryptocurrency, either as an advance fee or in settlement of a client's claims, must also take competent and reasonable security precautions to safeguard that property.

Select State Ethics Rules & Opinions

NC State Bar 2019 Formal Ethics Opinion 5: Receipt of Virtual Currency in Law Practice (October 25, 2019)

Opinion rules that a lawyer may receive virtual currency as a flat fee for legal services, provided the fee is not clearly excessive and the terms of Rule 1.8(a) are satisfied. A lawyer may not, however, accept virtual currency as entrusted funds to be billed against or to be held for the benefit of the lawyer, the client, or any third party.

Select State Ethics Rules & Opinions

N.J. Advisory Committee on Professional Ethics Opinion 739: Lawyers Who Include Clients on Group Emails and Opposing Lawyers Who “Reply All”--Conclusion (March 10, 2021)

Accordingly, the Committee finds that lawyers who include their clients in the “to” or “cc” line of a group email are deemed to have provided informed consent to a “reply all” response from opposing counsel that will be received by the client. If the sending lawyer does not want opposing counsel to reply to all, then the sending lawyer has the burden to take the extra step of separately forwarding the communication to the client or blind-copying the client on the communication so a reply does not directly reach the client.

Select State Ethics Rules & Opinions

Nev. S. C .R. 42.1: Practice of Attorneys Admitted in Nevada but not Maintaining Nevada Offices--Conclusion (August 12, 2022)

- 1. Application of rule.** This rule applies to an attorney who is admitted to practice in Nevada but who does not maintain an office in Nevada. A post office box or mail drop location shall not constitute an office under this rule.
- 2. Association or designation for service.** Upon filing any pleadings or other papers in the courts of this state, an attorney who is subject to this rule shall either associate a licensed Nevada attorney maintaining an office in Nevada or designate a licensed Nevada attorney maintaining an office in the county wherein the pleading or paper is filed, upon whom all papers, process, or pleadings required to be served upon the attorney may be so served, including service by hand-delivery or facsimile transmission. The name and office address of the associated or designated attorney shall be endorsed upon the pleadings or papers filed in the courts of this state, and service upon the associated or designated attorney shall be deemed to be service upon the attorney filing the pleading or other paper.
- 3.** The requirements of this rule are in addition to any rules of practice of the courts of this state.

Select State Ethics Rules & Opinions

State Bar of Nevada Ethics and Professional Responsibility Formal opinion No. 59: Coworking Office Space-Conclusion

Utilization of a coworking office space for the practice of an attorney admitted in Nevada but residing outside of Nevada constitutes maintaining an office in Nevada for purposes of SCR 42.1. An attorney admitted in Nevada but residing outside of Nevada and using a coworking office space in Nevada is not subject to the advertising filing requirements of NRPC 7.2A with regard to the attorney's business cards, letterhead, and website.

Select State Ethics Rules & Opinions

NYS Committee on Professional Ethics Opinion 1102: Insured Counsel; Sharing Office Space with Nonlawyers--Conclusion (July 15, 2016).

The lawyers in an insurance company's in-house department who provide legal services to the insurance company's policy holders must take reasonable steps to protect client confidential information of the insureds and to avoid conflicts of interest and must comply with other applicable Rules.

Rules: Rule 1.0(h), 1.1, 1.6(a) & (c), 1.8(f), 5.3

Select State Ethics Rules & Opinions

NYS Committee on Professional Ethics Opinion 1223: Dual Practice; Rental of Office Space--Conclusion (May 12, 2021)

Renting law office space for lawful purposes is a permitted nonlegal business for a lawyer. Where a lawyer who owns a nonlegal services business is providing nonlegal services to persons who are not clients, Rule 5.7(a)(3) provides that the nonlegal services entity will be subject to the Rules by virtue of Rule 5.7 only if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

Rules: 5.7(a)(3) and (4), 7.1(h)

Select State Ethics Rules & Opinions

NYS Committee on Professional Ethics Opinion 1239: An Attorney's Ethical Obligation When a Court Orders Forensic Analysis of Hard Drive Containing Client Confidential Information--Conclusion (March 22, 2022)

An attorney in receipt of a court order directing production of his hard drive containing the confidential information of clients who have not waived privilege or consented to disclosure, has the obligation to advise non-waiving clients of the existence of the court order. Absent the clients' informed consent to waiver of the attorney-client privilege and consent to disclosure, an attorney must consult with the non-waiving clients about the reasonable steps necessary to avoid or limit production of confidential information and undertake those steps before complying with the court order.

Rules: 1.0(j), 1.4 (a)(1), 1.4(a)(3), 1.6(a), 1.6(b)(6)

Select State Ethics Rules & Opinions

NYS Committee on Professional Ethics Opinion 1240: Duty to Protect Client Information stored on a Lawyer's smartphone--Conclusion (April 8, 2022)

If “contacts” on a lawyer’s smartphone include any client whose identity or other information is confidential under Rule 1.6, then the lawyer may not consent to share contacts with a smartphone app unless the lawyer concludes that no human being will view that confidential information, and that the information will not be sold or transferred to additional third parties, without the client’s consent.

Rules: 1.6

Select State Ethics Rules & Opinions

NYS Committee on Professional Ethics Opinion 1241: New York Attorney with Out-of-State Office; Attorney Advertising and Letterhead --Conclusion (May 31, 2022)

A lawyer who is admitted to practice in both New York and Florida, but whose only physical office is in Florida, may state on the letterhead of his Florida office that he is “admitted to the New York Bar,” provided that this statement does not violate the applicable Rules of Professional Conduct.

Rules: 1.0(a), 7.1(a), 7.5(a), 8.4(c) & 8.5(b)

Select State Ethics Rules & Opinions

Texas Ethics No. 692: Duty to Correct False Statements by Client During Deposition--Conclusion (October 6, 2021)

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer does not have a duty to correct intentionally false statements made by the client while being cross-examined by the opposing party's counsel during a deposition. Nevertheless, the lawyer should urge the client to correct the false statements, including by explaining the potential civil and criminal ramifications of false testimony. If the client refuses, the lawyer may (but is not required to) withdraw from the client representation if permitted by the Rules. If the lawyer does not withdraw, the lawyer is not required to disclose the true facts but may not use the false deposition testimony in any way to advance the client's case.

Ethics Standards - AICPA

Ethics Standards - AICPA

- AICPA Code of Professional Conduct Structure
- Introduction
 - Section 50 – Principles of Professional Conduct
 - Section 90 – Rules: Applicability and Definitions
 - Section 100 – Independence, Integrity, and Objectivity
 - Section 200 – General Standards Accounting Principles
 - Section 300 – Responsibilities to Clients
 - Section 400 – Responsibilities to Colleagues
 - Section 500 – Other Responsibilities and Practices
- ET Appendixes
- ET Topical Index
- <http://www.aicpa.org/about/code/index.htm>

Ethics Standards - AICPA

AICPA Code of Professional Conduct Framework

- Maintain the good reputation of the profession.
- Serve the public interest.
- Perform services with:
 - Integrity.
 - Due care
 - Professional competence
 - Independence & Objectivity
 - Confidentiality
 - Dissociate from others who behave unethically.

Ethics Standards - AICPA

AICPA Code of Professional Conduct Principles

The Principles guide members in the performance of their professional responsibilities:

- Article I – Responsibilities
- Article II – The Public Interest
- Article III – Integrity
- Article IV – Objectivity and Independence
- Article V – Due Care
- Article VI – Scope and Nature of Services

Ethics Standards - AICPA

AICPA Code of Professional Conduct:

- Article III: Integrity
 - Integrity is an element of character fundamental to professional recognition.
 - Integrity is the quality from which the public trust derives and the benchmark against which a member must ultimately test all decisions.
 - Integrity requires a member to be, among other things, honest and candid within the constraints of client confidentiality. Service and the public trust should not be subordinated to personal gain and advantage.
 - Integrity also requires a member to observe the principles of objectivity and independence and of due care.

Ethics Standards - AICPA

Professional Standards for Ethics - AICPA

- Statement on Standards for Tax Services
 - (“SSTS” or “Standards”)
 - SSTS and interpretations issued thereunder reflect the AICPA’s standards of tax practice and delineate members’ responsibilities to taxpayers, the public, the government, and the profession.
 - Ongoing process to articulate standards.
 - Promulgated by the Tax Executive Committee.

New Ethical Challenges Emerge as the COVID-19 Pandemic Fades

Questions?

Thank you!