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# Professional Tax Practice Responsibilities – Conflicts of Interest



The Office of Professional Responsibility



# Rules Relevant to Conflicts of Interest in Practice before the IRS

- Circular 230 (*Regulations Governing Practice before the Internal Revenue Service*) (31 C.F.R. Part 10)
- AICPA *Code of Professional Conduct* (Dec. 15, 2014)
- ABA Model Rules of Professional Conduct  
(Adopted in all States and the District of Columbia)
- Uniform Standards of Professional Appraisal Practice  
(USPAP)





# Rules Relevant to Conflicts of Interest in Practice before the IRS (Cont.)

- National Association of Enrolled Agents Code of Ethics and Rules of Professional Conduct (Aug. 2014)
- Appraisal Institute's *Valuers Code of Professional Ethics and Standards of Valuation Practice*
- Rules applicable to Enrolled Actuaries – 20 C.F.R. Part 901 (*Regulations Governing the Performance of Actuarial Services Under the Employee Retirement Security Act of 1974*) / 20 CFR § 901.20(d) (“Conflicts of interest”) (mirrors Cir. 230, §10.29)
- Local law





# Circular 230 and Conflicts of Interest in General

- Circular 230 has several provisions related to conflicts of interest
- Most notably section 10.29 (“Conflicting interests”), but also:
  - Section 10.3(h) prohibits a government officer or employee from practice before the IRS IAW 18 U.S.C. §§ 203 and 205
  - Section 10.25 restricts practice by former government employees and officers before Treasury and the IRS, based on timing and the matters involved





# Section 10.29 in Detail

- Section 10.29 was added as an intentional analogue to ABA Model Rule of Professional Responsibility 1.7
- Basic prohibition of the section:

A “practitioner shall not represent a client before the Internal Revenue Service if the representation involves a conflict of interest.”





# Section 10.29 in Detail (Cont.)

- Prohibits (in paragraph (a)) two types of conflicts of interest:
  - First type: dual- (or multiple-) representation of clients who have “directly adverse” interests
  - Second type: a “significant risk” that the practitioner’s representation of a client will be “materially limited” by:
    - responsibilities to another client, a former client, or a third person; OR
    - a personal interest of the practitioner
- Neither type = a *per se* bar to practice / Both are subject to the exception in paragraph (b) of the section





# Section 10.29 in Detail (Cont.)

## Exception

- Applies when *all* of the following conditions are satisfied:
  - (1) Practitioner must reasonably believe that the practitioner will be able to provide “competent and diligent representation” to each client represented;
  - (2) Representation of any of the clients is not prohibited by law; and
  - (3) Each affected client “waives the conflict of interest and gives informed consent, confirmed in writing” by the client(s).





# Section 10.29 in Detail (Cont.)

## Timing

- Waivers and informed consent → “at the time the existence of the conflict of interest is known by the practitioner”
- Affected clients’ written confirmation of waiver and consent → “within a reasonable period of time after the informed consent, but in no event later than 30 days”





# Section 10.29 in Detail (Cont.)

## Retention Requirement

- Section 10.29's final paragraph (par. (c)):
  - Requires written waivers/consents be:
    - retained for 3 years post-representation; and
    - made available to the IRS upon request





# ABA Model Rules of Professional Responsibility

- Model Rules—and, in particular, the commentary to them and interpretative decisions—can aid in understanding and applying § 10.29
- At least ten rules relate in some way to conflicts of interest: Rules 1.0, 1.7 – 1.11, 1.13, 1.16, 1.18, and 3.7 (See appendix for more information on rules other than 1.7)



# ABA Model Rules (Cont.)

- Model Rule 1.7: “Conflict of Interest: Current Clients”  
Virtually identical to § 10.29
- Like § 10.29, bifurcated into a **general rule** and its **exception** –  
General rule: an attorney may not represent a client if the representation involves a “concurrent conflict of interest,” meaning either—
  - Representation of one client will be directly adverse to another client; or
  - There’s a significant risk representation of a client will be materially limited by the attorney’s own interests or by responsibilities to another client, a former client or a third person



# Model Rule 1.7 (Cont.)

Exception: allows for the representation to proceed provided there is:

- a reasonable belief on the attorney’s part that he or she can act with competence and diligence as to each affected client;
- no legal prohibition exists that bars the representation;
- no assertion of a client’s claim against another client in the “same litigation or other proceeding before a tribunal”;
- and*
- informed consent of the clients, confirmed in writing





# AICPA Code of Professional Conduct

- Integrity and Objectivity Rule (ET section 1.100.001)
  - .01 – in performing “any professional service,” an AICPA member must “maintain objectivity and integrity,” must “be free of conflicts of interest,” and must not “knowingly . . . subordinate his or her judgment to others”
- 1.110 “Conflicts of Interest”





# AICPA Code (Cont.)

- 1.110.010 “Conflicts of Interest for Members in Public Practice”
  - .01 – “In determining whether a professional service, relationship or matter would result in a conflict of interest, a member should use professional judgment, taking into account whether a reasonable and informed third party who is aware of the relevant information would conclude that a conflict of interest exists.”





# AICPA Code (Cont.)

- Conflicts in General
  - What is a conflict?
    - 1.110.010.02 – a situation that “creates adverse-interest and self-interest threats to the member’s compliance with the ‘Integrity and Objectivity Rule’ [1.100.001]”





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# AICPA Code (Cont.)

- Conflicts in General (Cont.)
- What is a conflict? (Cont.)
  - 1.000.020 “Ethical Conflicts”
    - .01 – an “ethical conflict” arises when there are:
      - “Obstacles to following an appropriate course of action due to internal or external pressures”; or
      - “Conflicts in applying relevant professional . . . or legal standards”

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# AICPA Code (Cont.)

- Identifying a conflict of interest

When? ⇒ At the outset

- 1.110.010.05 – before “accepting a new client relationship, engagement, or business relationship, a member should take reasonable steps to identify circumstances that might create a conflict of interest including identification” of the “nature” of:
  - “the relevant interests and relationships between the parties involved”; and
  - “the service and its implication for relevant parties”



# AICPA Code (Cont.)

## Evaluating a conflict of interest

- 1.110.010 .09 – when a conflict is identified: member “should evaluate the significance of the threat created” and “determine if the threat is at an acceptable level”
- If not at an acceptable level: “apply safeguards to eliminate the threat or reduce it to an acceptable level” [1.110.010.10]

## Disclosure and Consent

- 1.110.010.12 – whenever a conflict of interest is present: “disclose . . . [it] to clients and other appropriate parties affected by the conflict and obtain their consent to perform the professional services”





# NAEA Code of Ethics and Rules of Professional Conduct

- Rules of professional conduct prohibit both members and associates from:
  - “...represent[ing] conflicting interests without express written consent of all parties after full disclosure” (RPC 5)
  - “...allow[ing]...related business interests to affect [client] representation” (must “immediately disclose” EA’s interests when referring client to another service provider) (RPC 6)
- Rules require members/associates to avoid a conflict of interest when engaged in another occupation and providing a “professional tax service” or advice (RPC 11)





# HYPOTHETICAL 1

- Ernie is an enrolled agent with a varied tax practice. As of yesterday, Ernie has two new clients, husband-and-wife taxpayers, Tom and Tanya Tuttle, who want Ernie to represent them before the IRS Office of Appeals
- Tom is a wage earner, who works 30 hrs. a week as an employee of a local caterer, and he is a part-time college student
- Tanya is a one-third owner, with two other individuals, of a small business that does interior design and decorating. The business is an LLC that is treated as a partnership for Federal tax purposes
- Tom and Tanya filed a joint Federal income tax return (Form 1040) for tax year 2013

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# HYPOTHETICAL 1 (Cont.)

- As w/ all of their returns as a married couple, Tanya self-prepared the 2013 return, presented it to Tom for signature, signed it herself, and filed it by mail. Tom's only involvement was handing Tanya his Form W-2 and signing/dating the completed return. Tanya accurately reported Tom's wages on Line 7
- The IRS selected the return for examination, disallowed certain business deductions that were passed through to Tanya, reduced other deductions as overstated, determined a resulting deficiency, and asserted a 20% accuracy-related penalty



# HYPOTHETICAL 1 (Cont.)

- The Tuttle did not agree to the proposed assessment and filed a timely protest with Appeals on the belief that they had “nothing to lose”
- Ernie’s review indicates (1) there is a deficiency, but the amount is less than determined; and  
(2) Tom is likely eligible for relief from joint-and-several liability under section 6015, on the basis that the deficiency is attributable to Tanya’s erroneous items on the return and Tom did not know or have reason to know of the deficiency. If so, it appears Tanya would have sole liability.





# HYPOTHETICAL 1 (Cont.)

**Question:** What should be Ernie's next step?

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# HYPOTHETICAL 2

- Clyde is a CPA who was retained several years ago by Bradley Boone to assist in opening a small business, Boone's Confections. Among other tasks, Clyde incorporated the business, including filing the corporate papers with the Secretary of State. For its initial two years, the corporation contracted with Clyde for attestation services and preparation of all Federal and State tax returns. Bradley later found lower-cost services
- Despite a promising start, Boone's Confections began to fail, and within a few years its increasing costs were outstripping its income, which was declining. It was apparent that Boone's would soon have to close shop permanently





# HYPOTHETICAL 2 (Cont.)

- Boone's owed many creditors, including the IRS. When Bradley asked Clyde for advice, Clyde recommended declaring bankruptcy and if necessary filing an offer-in-compromise with the IRS post-bankruptcy
- Bradley agreed, and Clyde began the paperwork, w/ full access to books and records, though some of the more recent entries alarmed Clyde. Regardless, not long after, Bradley abruptly changed his mind as to Clyde's recommendation, and the two amicably parted ways a second time
- The corporation was later dissolved, w/out going thru bankruptcy, and Clyde assumed remaining assets were used to pay creditors





# HYPOTHETICAL 2 (Cont.)

- Clyde is visited by Tony Torres, who's in the same line of business as Boone's was. Tony received a notice of transferee liability from the IRS, which he intends to dispute. Seems Bradley sold some valuable equipment to Tony, who says he was unaware Boone's was underwater, and he paid FMV (albeit in cash), which he can prove
- Meanwhile, Bradley has tax troubles, too: his own transferee liability (for hefty dividends and distributions paid to him during his co.'s end stage); proposed TFRPs; and understatements of individual income tax due to personal use of company assets and payment of living expenses w/ company funds





# HYPOTHETICAL 2 (Cont.)

- Clyde would like to help Tony but is worried his prior involvement w/ Bradley could get in the way

**Question:** Is Clyde right to be concerned?





# HYPOTHETICAL 3

- Cassie is a CPA and a new hire at Stype LLP, a prominent accounting firm in the city where Cassie lives. One of her first new assignments (w/ partner Paul) is to explore the merits of a possible request to the IRS for a letter ruling o/b/o Gee-Whiz Co., a high-tech startup
- The issue involves an I.R.C. tax credit generally available to taxpayers in Gee-Whiz's industry, if they meet basic criteria prescribed in the statute to claim the credit and more extensive requirements in the implementing regulations. Gee-Whiz is interested in a particular position that would maximize allowance of the credit





# HYPOTHETICAL 3 (Cont.)

- At an initial meeting w/ Paul to discuss the matter, Cassie informs Paul that her research and analysis indicate that the position is legally tenable and is a reasonable application of the controlling law to Gee-Whiz's situation
- Although PLRs are non-precedential, based on two past rulings on closely similar issues and facts, Cassie's view is that the Associate Office of Chief Counsel that would rule on the issue is likely to validate the position advocated
- She recommends seeking approval from the client to prepare and submit the ruling request





# HYPOTHETICAL 3 (Cont.)

- Paul asks Cassie to first draft a detailed memo on the issue for his review, along w/ an outline of a proposed ruling request
- At a follow-up progress meeting, Paul tells Cassie he now has concerns about the project and explains that a prospective client, BiggerCo, is seeking a replacement firm to provide tax-return preparation services for the company. Stype is a candidate, and the firm and the company have discussed terms. If finalized, the engagement could be very lucrative for Stype
- A complication is that Gee-Whiz's position on the credit could have incidental downsides as to other tax items/transactions that matter to BiggerCo



# HYPOTHETICAL 3 (Cont.)

- Paul instructs Cassie to reanalyze the issue and consider whether the standard for a positive recommendation to the client should be more exacting than “tenable,” “reasonable” or “likely,” given the large fee for a PLR and the chance of an unfavorable outcome, even if Gee-Whiz were to withdraw its request before an actual ruling

**Question:** Assuming Cassie is unsure how to proceed, would it be a good idea for her to schedule an appointment with the partner in the firm responsible for risk avoidance and quality control to discuss the situation?





# HYPOTHETICAL 4

- An elderly taxpayer and retiree, Tucker Tylon (also a widower), has come to the office of Chip, a CPA, to consult w/ Chip about an undisclosed foreign financial account. With Mr. Tylon are his adult son, Trask, and Trask's wife, Tammie
- Tucker opened the overseas account and has maintained it for some time
- Three years ago, Tucker gave one-quarter interests in the account to his son and daughter-in-law, and provided them w/ copies of the operative instruments

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# HYPOTHETICAL 4 (Cont.)

- Beginning with a large initial investment, the account has produced substantial interest income year by year and amassed a high current value
- As indicated, Tucker did not disclose his ownership interests in or signatory authority over the account on any of his Fed'1 income tax returns, nor has he filed any FBARs, explaining to Chip that he omitted doing so based on what he now knows was bad advice received from Tucker's former tax return preparer, who is under indictment for State crimes (fraud, embezzlement, and deceptive advertising)





# HYPOTHETICAL 4 (Cont.)

- The couple, who always file a joint Form 1040, also failed to report their interests in the account, relying on advice from their benefactor, Tucker
- After lengthy discussion, Tucker tells Chip he's inclined toward making a voluntary disclosure under the OVD Program, mainly because of the risk of potential criminal investigation and prosecution (regardless of however probable or not that might be). Trask, however, urges for a so-called “quiet” disclosure, by filing amended tax returns showing the previously unreported income subject to tax

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# HYPOTHETICAL 4 (Cont.)

- Tammie says she is unsure what to think - coming fully clean w/ the IRS seems wisest, but she will defer to what her husband wants to do
- Chip has not had the time or opportunity yet to calculate the estimated civil tax liabilities of the taxpayers, including the various penalties that could apply, or analyze what the advantage or disadvantage is to opting into or out of OVDP

**Question:** Depending on that factual development (or irrespective of it), may Chip assist all three taxpayers?





# HYPOTHETICAL 5

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- Eliza is a former IRS employee and an active enrolled agent. She prefers to work cases for taxpayers whose liabilities are in collection, as Eliza was a revenue officer and bankruptcy specialist
- Right now, she is assisting taxpayer Tess in a collection due process (CDP) proceeding pending before the Office of Appeals. Eliza filed the Form 12153 (*Request for a Collection Due Process or Equivalent Hearing*) for Tess, and initially communicated with the assigned Settlement Officer, though a hearing date has not been scheduled yet





# HYPOTHETICAL 5 (Cont.)

- Eliza hopes to convince Appeals that Tess did not have a prior opportunity to contest the liability, and establish that the correct amount is what Tess reported and paid. Eliza will also pursue if necessary an OIC as a collection alternative. She started preparing Form 433-A (*Collection Information Statement*) and gathering supporting documentation
- Unknown to Eliza (Tess hasn't mentioned it), Tess is legally represented in a claim against an insurer, Red Coast Life, Auto & Casualty, for payment of medical expenses Tess incurred for treatment of personal injuries sustained as a passenger in an automobile accident 3 years ago





# HYPOTHETICAL 5 (Cont.)

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- The company declined payment on the basis the services were for remedial care of a preexisting injury or condition—so far rejecting submissions of patient records and doctors’ reports from Tess’s attorney as proof that all of the denied costs were for new injuries or for aggravation of an older injury due to the collision. If the company persists w/ denial, Tess is willing to sue
- Unknown to Tess, Eliza applied for a job in the insurance company’s tax department, which reacted positively to her résumé, and a first interview went well for Eliza. The two sides have had intermittent discussions bordering on negotiations



# HYPOTHETICAL 5 (Cont.)

- The company has made no commitment, and there would likely still be a second interview, followed by an internal selection process before any offer is made
- Eliza eventually learns of Tess's claim, and tells Human Resources at the company she is very much interested but wants to delay things for up to 90 days to deal with priorities in her practice (i.e., until the CDP matter is over--Eliza will push for whatever expedited handling she can get). Company doesn't object but declines to promise it won't fill the position sooner

**Questions:** Is Eliza's approach a sufficient fix? Is trying to speed thru the CDP case fair to Tess?





# Contacting OPR

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- Questions or comments, contact OPR at:
  - (202) 317-6897
  - Office of Professional Responsibility  
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- For more info on OPR and Circular 230 visit:  
<http://www.irs.gov/>  
*Search: “Circular 230 Tax Professionals”*





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# Appendix

# Appendix

- ABA Model Rules of Professional Conduct *other than* Model Rule 1.7 that deal with conflicts of interest:
  - Rule 1.0: “Terminology”
    - Defining, among other terms:

“informed consent”	“reasonable or reasonably”
“reasonable belief” (or “reasonably believes”)	“writing” / “written”





# Appendix

- ABA Model Rules of Professional Conduct (Cont.)
  - Rule 1.9: “Duties to Former Clients”
    - Requires attorney to refrain from representing someone in a matter that is “the same” as or “substantially related” to a former client’s matter, when the second person's interests in the matter are “materially adverse” to those of the former client, unless the former client gives informed consent, confirmed in writing
    - Prohibits revealing information from the prior representation or use of such information to the former client’s disadvantage



# Appendix

- ABA Model Rules of Professional Conduct (Cont.)
  - Rule 1.18: “Duties to Prospective Client”
    - Information obtained from a prospective client treated the same as a former client’s information under R. 1.9— *i.e.*, attorney generally cannot use or reveal the information
    - If information from a prospective client “could be significantly harmful” to that person in a legal matter, then the attorney may not represent a client in the same matter or a substantially related one, when materially adverse interests are involved



# Appendix

- ABA Model Rules of Professional Conduct (Cont.)
- Miscellaneous Rules relevant to conflicts of interest:
  - Rule 1.8: “Conflict of Interest: Current Clients: Specific Rules”
  - Rule 1.10: “Imputation of Conflicts of Interest: General Rule”
  - Rule 1.11: “Special Conflicts of Interest for Former and Current Government Officers and Employees”
  - Rule 1.13: “Organization as Client”
  - Rule 1.16: “Declining or Terminating Rep’n”
  - Rule 3.7: “Lawyer as Witness”



# Appendix

- AICPA Code of Professional Conduct
- Examples of conflicts of interest:
  - Member or member's firm provides a professional service on a particular matter involving two or more clients whose interests in the matter are in conflict [ET section 1.110.010.02.a]
  - Member's (or firm's) interests in a particular matter handled for a client conflict w/ client's interests in the matter [1.110.010.02.b]



# Appendix

- AICPA Code of Professional Conduct (Cont.)
- Examples of conflicts of interest (Cont.)
  - Member provides tax planning services for multiple family members knowing they have opposing interests [ET section 1.110.010.04.*l*]
  - Member refers a “tax client” to another service provider, which refers clients to the member under an exclusive arrangement [1.110.010.04.*m*]





# Appendix

- AICPA Code of Professional Conduct (Cont.)
  - Evaluation of a Conflict of Interest

Member should consider:

- Significance of relevant interests or relationships;  
and
- Significance of the threats created by performing  
the professional service or services [ET sec.  
1.110.010.09]



# Appendix

- AICPA Code of Professional Conduct (Cont.)

When threat posed by conflict of interest is “so significant” that safeguards:

- cannot eliminate the threat or reduce it to an acceptable level, *or* effective safeguards are not capable of being implemented then the member should:
- decline to perform or discontinue the professional services; or
- terminate the relationships or dispose of the interests that cause the conflict [ET sec. 1.110.010.11]



# Appendix

- AICPA Code of Professional Conduct (Cont.)
  - Disclosure of a Conflict of Interest and Consent
    - “General” or “specific” disclosure, as applicable (“specific” = disclosing conflict’s circumstances, including an explanation of the situation and any planned safeguards, sufficient for an informed client decision) [ET sec. 1.110.010.13]
    - Document: nature of conflict, safeguards applied to remove or reduce threats to an acceptable level, and clients’ consent [1.110.010.16]



# Appendix

- Rules Related to Appraisals
- USPAP

## Standard 2: “Real Property Appraisal, Reporting”

Standards Rule 2-3 requires a written appraisal report that values real property to contain a signed certification of the appraiser certifying that the signer:

- has no interest in the property or personal interest in relation to the parties involved (or must specify the interest(s));
- has performed specified services or no services regarding the property w/in 3 yrs. prior to accepting the assignment;





# Appendix

- Rules Related to Appraisals (Cont.)
  - USPAP Standards Rule 2-3 (Cont.)
    - ... certifying that the signer:
      - has prepared the report without a contingency to develop or report predetermined results; and
      - has not arranged for compensation contingent on a stipulated result, the valuation amount reported, or a predetermined value or direction in value



# Appendix

- Rules Related to Appraisals (Cont.)
  - Appraisal Institute's *Valuers Code of Professional Ethics*
    - Canons of ethical conduct and Ethical Rules (with “Explanatory Comments”)
    - Canon 3: “In Providing Services, a Valuer Must Develop and Report Unbiased Analyses, Opinions, and Conclusions”



# Appendix

- Rules Related to Appraisals (Cont.)

- VCPE Ethical Rule (ER) 3-1:

“[U]nethical to knowingly contribute to or participate in” an appraisal that is “biased” (one that is not “reasonably supported” and which tends toward “favoring or promoting the cause or interest of the client, one’s self, or another” person)

- ER 3-3:

Unethical to conduct an appraisal or review service “that is contingent upon reporting a predetermined analysis, opinion or conclusion”





# Appendix

- Rules Related to Appraisals (Cont.)
  - ER 3-6 prohibits providing a service in which the provider “has any direct or indirect, current, or prospective personal interest in the subject or outcome” of the service or in regard “to the parties involved,” unless the appraiser:
    - “carefully considers the facts and reasonably concludes” he or she can “remain unbiased” and “reasonable persons, under the same circumstances, would” agree; and
    - discloses the interest to the client and in the valuation report





# Appendix

- Rules Related to Appraisals (Cont.)
  - ER 3-7 prohibits acquiring an interest in the “subject or outcome” of an engagement, unless:
    - a reasonable conclusion is reached that conduct will be unbiased, disclosure is made, each client consents in writing, and personal interest is disclosed in report



# Appendix

- Rules Related to Appraisals (Cont.)
  - AI's *Standards of Valuation Practice*
  - Appraisal report *or* report reviewing another's valuation requires appraiser's certification and disclosure of: any "present or prospective interest in the property" and any "personal interest" in relation to the "parties involved" (Standard C, Standards Rule C-2(a)(ii), (b)(ii))



# Appendix

- **Key Terms**

- “Confirmed in writing”

In connection w/ most recent (2007) amendments to § 10.29—

Treasury & IRS described concept:

- The “written consent may vary in form”—  
can be a practitioner’s “letter to the client outlining the conflict” and the “possible implications of the conflict” (client must countersign)
    - Client’s “oral consent” confirmed only by practitioner’s writing “will not satisfy § 10.29 ”





# Appendix

- Key Terms (Cont.)
  - “Directly Adverse”  
ABA Model Rule 1.7, Comment [6]
    - Generally means no “act[ing] as an advocate in one matter against a person” represented in another matter (even if the matters “are wholly unrelated”) (though informed consent can remedy)
    - Usually NO conflict, however, if interests “are only economically adverse” and concurrent representation is in unrelated matters



# Appendix

- Key Terms (Cont.)
  - “Informed Consent”  
 ABA Model Rule 1.0 (“Terminology”),  
 par. (e) defines “informed consent” as agreement or assent  
 after an attorney communicates to a client or prospective  
 client “adequate information and explanation” of both:
    - The “material risks” of a particular course of  
 conduct; and
    - Any “reasonably available alternatives”

See also comment [6] to the rule; comments [18]  
 and [19] to R. 1.7



# Appendix

- Key Terms (Cont.)
  - “Informed Consent” (Cont.)  
 RESTATEMENT (THIRD) OF THE LAW GOVERNING  
 LAWYERS § 122, comment *c(i)*:
    - Client aware of “material respects in which the representation could have adverse effects” on client’s interests (information “reasonably adequate” to make an informed decision)
    - Former client: aware consent will allow former representative to “proceed adversely” to client



# Appendix

- Key Terms (Cont.)
  - “Materially Limited”  
 ABA Model Rule 1.7, comment [8]
    - Limitation is on the “ability to consider, recommend or carry out an appropriate course of action for the client”
    - “Critical questions” are (i) likelihood of difference in interests; and (ii) material interference w/ “independent professional judgment” in considering alternatives (foreclosure of avenues that reasonably should be pursued)





# Appendix

- Key Terms (Cont.)
  - “Materially Limited” (Cont.)  
RESTATEMENT § 121, comment *c(ii)*
    - Materiality determined by “obligations necessarily assumed” by the practitioner or “assumed by agreement with the client”





# Appendix

- Key Terms (Cont.)
  - “Personal Interest”  
ABA Model Rule 1.7, comments [10], [11]

For example:

- Probity of attorney’s own conduct in the matter is in serious question;
- Discussing possible employment w/ client’s opponent or w/ firm representing opponent;
- Related business interest that can affect representation (such as referring clients to enterprise in which attorney has financial interest)



# Appendix

- Key Terms (Cont.)
  - “Personal Interest” (Cont.)  
ABA Model Rule 1.7, comments [10], [11]

For example:

- Related by blood or marriage, and representing different clients in same matter (or substantially related matters) – presents “significant risk” of:
  - client confidences revealed; and
  - interference w/ duty of loyalty and w/ independent professional judgment



# Appendix

- Key Terms (Cont.)
  - “Reasonable belief” as to “competent and diligent representation”  
 ABA Model Rule 1.0 (“Terminology”),  
 par. (i) defines “reasonable belief” and “reasonably believes”—actually believes and belief is reasonable under the circumstances



# Appendix

- Key Terms (Cont.)
  - “Reasonable belief” as to “competent and diligent representation” (Cont.)
    - Circular 230 § 10.22 (Diligence as to Accuracy), § 10.35 (Competence)
    - ABA Model Rules 1.1 (Competence) and 1.3 (Diligence); Comment [15] to Model Rule 1.7



# Appendix

- Key Terms (Cont.)

- “Significant Risk”

- ABA Model Rule 1.7, comment [26]

“Relevant factors” include: duration and closeness of relationship w/ client, services being performed, likelihood of disagreements, and probable prejudice to client

- RESTATEMENT § 121, comment *c(iii)*

“substantial risk”: often a “material adverse effect” on representation is “immediate, actual, and apparent”; if “potential or contingent” risk → must be “significant and plausible” – *i.e.*, more than a “mere possibility” of adversity

