

ETHICAL ISSUES IN A TRUSTS & ESTATES PRACTICE

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ETHICS CONSEQUENCES OF ESTATE PLANNING ADVICE



- Executor has the authority (actually a duty) to bring malpractice action against the attorney-draftsperson (Schneider v Finmann, 15 NY3d 306 [2010]).
- The Court of Appeals reversed the long-standing precedent that there was **no privity** between the legal representative of the decedent's estate and the attorney who provided estate planning advice to the decedent.
- Beneficiaries do NOT have a right to sue the draftsperson; but. . . remember that the Executor has a fiduciary duty to the beneficiaries, and the duty to sue on their behalf.



PROTECTING YOURSELF AFTER SCHNEIDER V FINMANN

Even if the client does not ask/want, counsel should:

- Discuss estate tax planning.
- Discuss long term care planning.
- Discuss current and future marital issues, right of election, and children's situations.
- **Document, document, document.**
- Terminate relationship when plan is complete: Send a "We're done - we did what you wanted" letter to start the statute of limitation running, which won't happen if "continued" representation.



ESTATE PLANNING ETHICS PROTECTION

- Client should be informed **in writing** that counsel will be relying on the information provided to make planning recommendations.
- Estate planning attorney needs a **detailed description of the client's assets** and **copies of all legal documents that might affect the client's estate plan**, such as:
 - Beneficiary Designations
 - Summary Plan Descriptions for Retirement Accounts
 - Financial Statements of Closely Held Businesses
 - Partnership, Shareholder or Operating Agreements
 - Separation Agreements and Divorce Decrees
 - Pre- and Post-Nuptial Agreements



IMPLICATIONS OF SCHNEIDER

- *New York State Committee on Professional Ethics*
 - **Opinion 865** – May an attorney who prepared an estate plan for a client agree to act as counsel to the executor after the client’s death? Rules: 1.7, 1.10(a), 1.16
- 3 Situations for lawyer who prepared the estate plan:
 1. Before representing executor, lawyer realizes may have committed legal malpractice and executor would have colorable malpractice claim against him
 2. At the outset of representing the executor, lawyer does not perceive any basis for malpractice or that the executor would have any colorable malpractice claim against him
 3. Lawyer comes to realize after representation of the executor begins that he may have committed legal malpractice and the executor would have a colorable malpractice claim against him



IMPLICATIONS OF SCHNEIDER

Situation 1: Before representing executor, lawyer realizes may have committed legal malpractice and executor would have colorable malpractice claim against him.

- Conflict of interest- “significant risk” that lawyer’s professional judgment will be adversely affected.
- Cannot get consent. Lawyer would be suing himself for malpractice.
- Lawyer cannot represent the executor, and the conflict is imputed under Rule 1.10(a).
- Since executor “stands in the shoes of the decedent” the lawyer is ethically bound to report to the executor any significant error or omission that may give rise to a claim of malpractice.



IMPLICATIONS OF SCHNEIDER

Situation 2 : At the outset of representing the executor, lawyer does not perceive any basis for malpractice or that the executor would have any colorable malpractice claim against him or her.

- ❑ No conflict. No “significant risk” that professional judgment will be adversely affected.
- ❑ *Schneider* will not affect representation in this situation.
- ❑ Even if there are insignificant errors or omissions, lawyer has no duty to report it to the client.



IMPLICATIONS OF SCHNEIDER

Situation 3: Lawyer comes to realize after representation of the executor that he may have committed legal malpractice and the executor would have a colorable malpractice claim against him or her.

- ❑ Conflict of interest – “significant risk” that lawyer’s professional judgment will be adversely affected.
- ❑ Cannot get consent. Lawyer would be suing himself for malpractice.
- ❑ Lawyer cannot represent the executor, and the conflict is imputed under Rule 1.10(a).
- ❑ Lawyer must withdraw under Rule 1.16(b)(1).
- ❑ Since executor “stands in the shoes of the decedent” the lawyer is ethically bound to report to the executor any significant error or omission that may give rise to a claim of malpractice.



ANOTHER ETHICAL ISSUE IN PLANNING: JOINT REPRESENTATION OF SPOUSES

- **Marriages do not always end on death** – there may be divorce or separation, or the financial interests of both spouses may differ now or in the future, especially in second marriage cases.
- **Joint Representation** - Attorneys must address implications of joint representation at the beginning of any client relationship. Clients have a right to know the implications of joint representation so that they can choose not to participate if it is inappropriate for their situation, considering what may happen in the future.
- **Yours, Mine and Ours** – Counsel should address distribution to current spouse, children of previous relationship, children with spouse, and any obligations to previous spouses.



HOW COUNSEL SHOULD HANDLE JOINT REPRESENTATION AT THE PLANNING STAGE

- A **written statement** should be prepared regarding joint representation and requiring clients to consent to such representation in writing, before commencing the estate plan. Important points to include:
 - Attorney's freedom to share information furnished by one spouse with the other.
 - Attorney's duty to share information furnished by one spouse with the other spouse.
 - Attorney's obligation to terminate the joint representation when proper.



WHEN PLANNING, COUNSEL MUST: UNDERSTAND THE RIGHT OF ELECTION

If a spouse is disinherited, there is a consequence!

NY law gives the surviving spouse a right to elect to receive the “elective share” instead of what the decedent left her/him under the Will or by testamentary substitute (EPTL 5-1.1-A)

Election is only available if the surviving spouse receives less than the elective share **OUTRIGHT (not in trust)** from the decedent.

The elective share is \$50,000 or one-third of the decedent's "net estate", whichever is greater. The “net estate” consists of the decedent's probate assets, assets that pass by intestacy, and non-probate assets known as “testamentary substitutes.”



ISSUES TO CONSIDER WITH REGARD TO THE RIGHT OF ELECTION

- A surviving spouse is not required to elect . . . **UNLESS:**
 - A surviving spouse then receiving Medicaid nursing home benefits will be required to elect against the deceased spouse's estate. Planning ahead may avoid this problem when a spouse dies and the other is in a nursing home.
 - **If the spouse does elect against the estate** (or is required to due to Medicaid receipt), provisions for the spouse under the decedent's Will or living trust such as bequests, trusts, or life estate interests are no longer effective.
 - Distribution of the elective share will be **outright.**



PLANNING ADVICE REGARDING THE ELECTIVE SHARE – COUNSEL SHOULD:

- Compute the client's net estate.
- Determine whether the spouse will receive at least one-third of the net estate, given the client's current estate plan.
- If not, determine whether beneficiary designations may be changed to achieve the one-third goal.
- If not, determine whether an **elective share waiver** by the spouse is a possibility (but avoid potential conflicts).
- If not, determine a drafting strategy that takes into account the fact that the client's surviving spouse may elect against the will.



ESTATE REPRESENTATION

- Initial ethical considerations when undertaking representation in an estate matter include **potential conflicts of interest** (see New York Rules of Professional Conduct 1.7 through 1.10).
- Be sure that there is no actual or potential conflict of interest, or if there is, determine whether it can and should be waived in accordance with the Rules.
- An attorney should consider such matters at the interview stage with potential clients -- it is always better to discover and deal with ethical dilemmas earlier rather than later.



ESTATE CONFLICTS OF INTEREST

- Counsel may be contacted by a named fiduciary, a distributee, a beneficiary under an instrument, a creditor or another person or entity with an interest in the estate. **Each potential client may have interests that conflict with those of other potential clients.**
- Accepting employment by one party or hearing confidential information from that party in the course of the interview may preclude the attorney from representing other potential clients whose interests conflict with that party.
- **BUT remember:** first contact with an attorney may be only investigative; to decide whether to hire the attorney, whether attorney will accept the employment, and how much representation would cost. During this initial stage, counsel must avoid getting information of a confidential nature **if there is any possibility of being hired by an adverse party in the same matter.**



WHO'S YOUR CLIENT?

- **The extent and nature of the engagement, the duties to be performed, and the source of the payment of the fees determine and depend on who the client is!**
- Being the so-called “attorney for the estate” differs from being the attorney for a beneficiary, a creditor, an objecting distributee or another party. When the attorney is hired by the fiduciary, long-standing New York case law holds that **an attorney retained by an estate fiduciary for the performance of estate duties is the attorney for the fiduciary, not for the estate** (In re Schrauth's Will, 249 A.D. 847, [2d Dep't 1937]; 2 CPLR 4503 [a] [2]).



COMMON REPRESENTATION OF FIDUCIARIES

- ❑ Absent a conflict, this is not a problem.
 - ❑ They owe a common fiduciary duty to the estate
 - ❑ Generally held jointly and severally liable to the beneficiaries of the estate
 - ❑ Even if fiduciaries hire separate lawyers, court will generally only award one reasonable legal fee from the estate
- ❑ May be “differing interests” that prevents multiple representation
 - ❑ Disagreement as to investment decisions
 - ❑ Where the fiduciary is also a beneficiary-possible disputes on how to satisfy bequests
 - ❑ Arguments for who is “more at fault” for contribution
 - ❑ Where one is “substantially more at fault than the other... the other is entitled to indemnity from him”
 - ❑ Where one co-trustee is an attorney and the other is a layperson



Attorney - Client Privilege, Fees!

In connection with the application of the attorney-client privilege, **no beneficiary of the estate will be treated as the client of the attorney for the fiduciary in his capacity as fiduciary** and the existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself waive the privilege for confidential communications made in the course of professional employment between the attorney and the personal representative (2 CPLR 4503 [a] [2] [A] [i], [ii]).

Fees: The attorney who represents the nominated fiduciary can expect to be compensated by the fiduciary out of estate assets. Attorneys for other parties, such as objectants, distributees, beneficiaries and creditors, will have to look to their clients for compensation except under limited circumstances.



WILL THE ESTATE BE CONTESTED?

- If counsel represented the decedent (in planning) and expects to be retained to represent the nominated executor of the decedent's will in the probate and administration of the estate, **there is a conflict** if attorney advises or represents a potential beneficiary or party who will be litigating against the personal representative.
- Under Rule 1.18 (New York Rules of Professional Conduct), however, **a person who communicates unilaterally with counsel without reasonable expectation that counsel is willing to form a lawyer-client relationship, or for the purpose of disqualifying the attorney from representing the person's adversary is not considered to be a prospective client entitled to the benefit of Rule 1.18.**



ATTORNEY MAY NOT REPRESENT PARTY IN OPPOSITION TO FORMER CLIENT

- Counsel may not begin to represent a party where there was a **prior attorney-client relationship with another party** and the representations are both adverse and substantially related, unless the former client gives informed consent in writing (Solow v W.R. Grace & Co., 83 NY2d 303 [1994]).
- What constitutes a conflict tends to be fact-specific and is the subject of continued refinement by the courts. However, it is well settled that **an attorney who has represented two fiduciaries cannot later represent one in a proceeding against the other** involving the same estate (Matter of Hof, 102 AD2d 591 [2d Dept 1984]).



MORE ON CONFLICTS! EXAMPLES:

Matter of Poll, 6/29/98 NYLJ 33, col. 6 (Sur Ct Queens Co): Law firm represented co-executors for the prior 10 years. Appellate Division directed the parties to apply to the Surrogate for the appointment of a third fiduciary to act as tie breaker. The Surrogate ruled that **the law firm was disqualified from acting for one of the original co-executors with respect to this application, because it would be acting for one client against a former client** in an adversarial relationship.

Matter of Santos, 6/24/2004 NYLJ 19, col. 3 (Sur Ct Kings Co), petitioner **failed to establish she was a former client** and made no showing that any confidences were impacted or that any information would be prejudicial (compare **Matter of Larizza**, 11/17/2005 NYLJ 34, col. 3 [Sur. Ct. Westchester Co.]), which was a proceeding to revoke letters of guardianship previously issued to a ward's mother under SCPA 17-A, and the ward's father moved to disqualify the law firm that had previously represented the father and mother in the original guardianship proceeding. The court held the father had **established all the elements required to disqualify the law firm, but denied the motion to sanction the firm.**



WHAT CAN COUNSEL DO IN A CONTEST?

- Suggesting that other counsel be retained does not create a conflict. **Counsel for the estate fiduciary may advise a potentially adverse party to retain counsel** without running afoul of this rule.
- For instance: The attorney for an executor may not advise a surviving spouse regarding the merits of a possible claim for an elective share against the will under which the executor is acting, but the attorney may advise the spouse that such claim may be considered **and it would be wise to seek separate counsel.** (1 NYSBA Opinion No 477, December 29, 1977 (129-177)).



THE LAWYER-WITNESS PROBLEM

- An ethical issue arises if there is a possibility that the attorney may be called as a witness in a matter. **NY Rule 3.7** now provides that **a lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:** (1) the testimony relates solely to an uncontroverted issue or to the nature and value of legal services rendered in the matter; (2) if the disqualification would work a substantial hardship on the client; (3) if the testimony relates solely to a matter or formality with no expectation of opposition evidence; or (4) if the testimony is authorized by the court.
- A lawyer may not act as an **advocate if another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue** other than on behalf of the client **and it is apparent that the testimony may prejudice the client**, or if Rules 1.7 or 1.9 preclude the lawyer from acting. If the lawyer witness believes the testimony will absolutely not prejudice the client, this may be OK.



ADVISING WHETHER TO ACCEPT APPOINTMENT AS FIDUCIARY

- Acceptance of the fiduciary responsibility is voluntary. Having once accepted, the fiduciary cannot resign without permission of the court and accounting for the actions taken.
- The nominated fiduciary should carefully weigh the risks, responsibilities and duties involved in deciding whether to accept or decline the appointment (see EPTL Art. 11 authority of fiduciary).
- Relevant questions for making the decision:
 - **Does the fiduciary have a conflict that will make it difficult to administer the estate?** (see *Schneider v. Finmann*, 15 NY3d 306 [2010]).
 - **Is there potential litigation against the attorney-drafter, existing litigation in which the decedent was a plaintiff or defendant, an ongoing business that needs to be continued or sold, or administration of unusual assets or assets subject to significant fluctuations in value?**
 - **Does the fiduciary have authority under the Will to deal with property (including complex assets subject to administration) and what protections, if any, are offered before and after the Will is probated?**
 - **Is the estate insolvent, and if so, will fiduciary still receive commissions?**



IN RE PUTNAM'S WILL, 257 NY 140 (1931)



- **Putnam Rule:** Clearly, **lawyers should not draft their own legacy.** Doing so will result in suspicion and a “Putnam hearing” before the Court to investigate the circumstances.
- In ***Matter of Putnam***, a testator made a Will leaving his residuary estate in trust for his niece for life, remainder to the attorney-drafter. Prior Wills left the trust remainder to charity. The testator's niece contested the Will on undue influence grounds. The Court of Appeals held that the attorney-drafter was required to explain the circumstances of the bequest and show that it was freely and willingly made. **The Court warned and ruled: “Attorneys for clients who intend to leave them or their families a bequest would do well to have the Will drawn by some other lawyer...In the absence of any explanation of the circumstances of the bequest, a jury may be justified in drawing the inference of undue influence, although the burden of proving it never shifts from the contestant.”**
- An embarrassing number of cases exist in which attorney drafters - clearly in a position to influence a testator - became beneficiaries or included their family members as beneficiaries in Wills, even though they were not related.



PUTNAM HAS BECOME A RULE OF PROFESSIONAL CONDUCT

- **Rule 1.8 of the New York Rules of Professional Conduct** now mandates that **a lawyer shall not solicit a gift, including a testamentary gift, for the benefit of the lawyer or a relative of the lawyer, nor prepare an instrument giving the lawyer or such relative a gift unless the lawyer or recipient of the gift is related to the client and the transaction is fair and reasonable.** “Related persons” is defined to include a spouse, child, grandchild, parent, grandparent, or other relative, or an individual with whom the lawyer or client maintains a familial relationship.
- Note that the rule does not offer absolute protection to attorneys who are drafting Wills for their relatives. An **attorney-drafter who is a beneficiary of the Will of a relative** must show that the bequest is “fair and reasonable.” A drafter should not represent a relative who wishes to make a gift to the drafter that is larger than gifts made to others in the same relationship to the testator.



WEINSTOCK!

- In another “WHAT WAS I THINKING” case, the Court of Appeals addressed a case in which **the lawyers, who had been strangers to the testator before they were hired, became executors of the will.** The charge and finding was that the testator was induced to nominate the lawyers as the result of the **lawyers’ overreaching**, and the Surrogate’s denial of letters was upheld (**Matter of Weinstock, 40 N.Y.2d 1, [1976]**).

- Most cases will not result in denial of letters to an attorney/fiduciary. Most nominations of attorney/drafters as fiduciaries can be justified (see, e.g., Matter of Esberg, 215 AD2d 655 [2d Dep’t 1995]).

- This is an extension of the Putnam rule. **Weinstock has led to statutes and rules of ethical practices in attorney/executor cases and compensation of attorneys** (see SCPA 2307-a).



ATTORNEY-EXECUTORS AND THE RULES

- While the **New York Rules of Professional Conduct** do not prohibit a lawyer from being named as executor or trustee, the Commentary to **Rule 1.8 (c)** provides that, **to obtain a client's informed consent, the lawyer must inform his or her client of the nature and extent of the lawyer's financial interest in the appointment and the availability of alternative candidates.**

- The lawyer who drafts the Will may offer his services as executor **if the client is competent, there has been a longstanding relationship between lawyer and client, and the client appears to experience difficulty in selecting some other qualified candidate** to serve (4 New York Ethics Opinion 481 [1977]).

- **Under no circumstances may a lawyer seek to convince his or her client that he is best suited to be executor.**



ATTORNEY – EXECUTORS & SCPA 2307-A

- **SCPA 2307-a** provides for a **disclosure statement** to be signed by testator, and witnessed by one witness. It is generally executed with the Will.
- Statement must be filed with probate petition, or executor will be limited to ½ commissions, if was draftsman of Will or was affiliated with draftsman. Also need **affidavit per Uniform Rule 207.16(e)** re: who drafted Will, etc.
- Use language in statute exactly. The disclosure statute form changed 11/16/2004 - if executed after that date and old form used - limited to ½ commissions. (see SCPA 2307-a [5]; Matter of Tackley, 13 Misc 3d 818, 822 [Sur Ct, NY County 2006])
- Fees and commissions are fixed by Court.



HOW TO GET PAID IN A SURROGATE COURT PROCEEDING



Uniform Rule 207.45 requires **that all attorneys file an affidavit of services in a proceeding in which there is a determination of attorney fees, which must state:**

- when and by whom the attorney was retained;
- the terms of the retainer (a copy of the retainer agreement);
- the amount of compensation requested;
- whether the client has been consulted and consented to the fee;
- if no consent, the extent of the disagreement or controversy;
- the period during which the services were rendered;
- the details of the services rendered and the time spent;
- the method by which the requested compensation was determined;
- whether the requested fee includes all services up to and including settlement of the decree and distribution; and
- whether the attorney waives a formal hearing as to compensation.



HOW TO GET PAID IN A SURROGATE'S COURT PROCEEDING

Uniform Rule 207.45 also requires that legal fees be fixed only as provided in SCPA 2110 or in an accounting proceeding. This determination is made with jurisdiction of all interested parties. (SCPA 2111 is only an ex parte application for **advance payment** of fees of an attorney-fiduciary during administration, but is not a final determination of fees, which is determined on accounting.

EPTL 11-1.1(b)(22) and SCPA § 2307(2) authorize a fiduciary, on his own, to pay reasonable attorney's fees as an administration expense of the estate, without application, if there is a separate fiduciary from the attorney, and there is no contest.

By the way, time spent by the attorney preparing the affidavit of legal services **is not compensable**. (Matter of Heino, 1999-4868, 1/10/2014 NYLJ 1202639807252, at *1 [Sur Ct Kings Co]).



HOW ARE ATTORNEY FEES DETERMINED ?

- The Freeman and Potts cases set the standards in determining legal fees (In re Freeman's Estate, 34 NY2d 1 [1974]; In re Potts' Estate, 123 Misc 346 [Sur Ct 1924], aff'd, 213 A.D. 59 [4th Dept 1925], aff'd, 241 NY 593 [1925])
- In Freeman, the Court of Appeals stated **eight factors** to be used in determining reasonable attorney's fees:
 - the time and labor required
 - the difficulty of the questions involved
 - the skill required to handle the problems presented
 - the lawyer's experience, ability and reputation
 - the amount involved and benefit resulting from the services
 - the customary fee charged by the bar for similar services
 - the contingency or certainty of compensation
 - the responsibility involved



All factors will be considered, although the facts of each case may make some factors more important than others.



MORE ON FEES

- In addition to attorneys for executors, the Freeman and Potts factors apply to attorneys for trustees, guardians ad litem and attorneys and other professionals providing services to an estate or trust.
- If the attorney was also a fiduciary, the legal fees will be examined for reasonableness depending on whether the attorney will also receive statutory commissions. An attorney may not charge legal fees for performance of executor duties. Compliance with SCPA § 2307-a does not change the court's authority to reduce attorney's fees when the attorney also serves as a fiduciary.
- Time spent on a matter is never unimportant to the court, or to tax authorities. An attorney is required to provide **contemporaneously maintained time records** of the specific time spent and the particular services rendered.
- Matter of Von Hofe, 145 AD2d 424 (2d Dep't 1988): An affidavit of services was found insufficient on its face to support the fee requested because, although it set forth the nature of the services performed, it did not include contemporaneous time records with a fee request corresponding to the time expended. The \$20,000 fee request was cut in half.



CAN WE BE FRIENDS ON FACEBOOK?... AND OTHER SOCIAL MEDIA ISSUES

The NYS Bar has issued a “**Social Media Ethics Guidelines**” report, updated 6/9/2015, available at www.nysba.org/SocialMediaGuidelines

- It is a lawyer’s duty to understand the ethical implications of using social media.
- “A lawyer is **responsible for all content** that the lawyer posts on her social media website or profile. A lawyer also has a duty to **periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations** to ensure that such third-party posts do not violate ethical rules.”
- A lawyer **must remove or hide improper content** if posted unilaterally by a third party. If the lawyer cannot remove the information, the lawyer must ask the third party to remove the content.
- A lawyer **must correct any misleading information or endorsements posted by a third party.** This requires periodic monitoring. (see NY Rules of Prof. Conduct 7.1, 7.2, 7.3, 7.4)



SOCIAL MEDIA COMMUNICATIONS – WITH A CLIENT, OR WITH A “FRIEND” WHO ASKS A QUESTION?

- While lawyers may provide general answers to legal questions asked on social media... lawyers **must be careful not to provide specific legal advice on social media**. Doing so may unintentionally result in a person believing that an attorney-client relationship has been created through informal communication on a social media site.
- **If an attorney does utilize social media to communicate with a client, the attorney *should* retain records of the communications.**

(see NYC Bar Association, Formal Op. 2008-1 and NY Rules of Professional Conduct 1.1, 1.15)



VIEWING SOMEONE ELSE’S SITE – IS IT ETHICAL?

- A lawyer **may view the public portion of a person’s social media profile, whether represented or not**. But remember that “unintentional communications with a represented party may occur if a social media network automatically notifies that person when someone views her account.”
- If a lawyer requests to see the restricted portion of an unrepresented person’s account, the lawyer **must use their full name and an accurate profile; the lawyer cannot falsely “mask” their identity.**
- “A lawyer **shall not contact a represented person to review the restricted portion of the person’s social media profile unless an express authorization has been furnished by the person’s counsel.**”
- (see NY Rules of Prof. Conduct 4.1, 4.2, 4.3, 5.3, 8.4)



WHAT CAN THE LAWYER ADVISE HIS OWN CLIENT REGARDING POSTINGS?

- A lawyer **may advise a client to remove or “take down” information from the client’s social media account *as long as there is no violation relating to the preservation of information.***
- Thus, a party or non party may not delete information or data from a social media profile that is subject to a duty to preserve.

(see NY Rules of Prof. Conduct 3.1, 3.3, 3.4, 4.1, 4.2, 8.4)



CIRCULAR 230

- Regulations Governing “Practice Before the IRS”
 - preparing documents
 - filing documents
 - corresponding and communicating with the IRS
 - representing a client at conferences, hearings, and meetings
 - rendering written advice.
- § 10.2(a)(4)



SANCTIONS

Possible sanctions include:

- Private reprimand
- (Public) censure
- Suspension from practice before the IRS
- Disbarment from practice before the IRS
- Monetary penalties
- Sanctions may be imposed against individuals, their firms, or both.
- IRS discipline is shared with state bar authorities.
- **§ 10.50, et. seq.**



WRITTEN TAX ADVICE

- Amended rules related to written tax advice apply to written tax advice rendered on or after June 12, 2014.
- Elimination of Covered Opinion Rules in **§ 10.35**.
 - Rules increased the burden on practitioners and clients without necessarily increasing the quality of advice that the client received.
 - Rules in **§ 10.35** contributed to overuse and misleading use of disclaimers on practitioner communication even when the communication did not constitute tax advice.



WRITTEN TAX ADVICE

- **§ 10.37** – All written tax advice must:
 - (1) Be based on reasonable factual and legal assumptions (including assumptions on future events).
 - (2) Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know, which includes a requirement that the practitioner consider all relevant legal authorities and relate that law to the relevant facts.
 - (3) Not rely on representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable.
 - (4) Relate applicable law and authorities to the adduced facts.
 - (5) Not consider the possibility that a tax return will not be audited or that a matter will not be raised on audit, although they allow the advice to take into account the possibility that an issue will be resolved through settlement.



WHAT DO THE RULES APPLY TO?

- The new rules apply to all written advice respecting a "federal tax matter," which they define as any matter concerning the application or interpretation of:
 - (1) A revenue provision, as defined in Section 6110(i)(1)(B).
 - (2) Any provision of law affecting a person's obligations under the internal revenue laws and regulations, including the person's liability to pay tax or obligation to file returns.
 - (3) Any other law or regulation administered by the IRS.



DISCLOSURE

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

