

The Incompetent Authority: Questions and Answers

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The Incompetent Authority: Questions and Answers, provides some useful responses to your questions about the mysteries of the tax profession, including tax career, business of tax, tax ethics, and other burning tax questions. If we don't know the answer, we know who to ask. And we hope to offer the answer with a touch of humor. Of course, the standard disclaimer applies: this column does not dispense individualized tax advice, but merely presents the considered views of the writers about tax topics of general interest to the readers.

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Guinevere Moore is the Managing Member of [Moore Tax Law Group, LLC](#) in Chicago. She's worked at big shops (both accounting and law firms) but has found true tax bliss at her four lawyer firm. She is married with four children, all of whom are still young enough to want to spend time with her. Her favorite section of the Internal Revenue Code is § 7430. Obviously.

Andrew Strelka is counsel at [Latham & Watkins LLP](#). He has worked for the IRS, the D.C. U.S. Attorney's Office, the Department of Justice Tax Division, and the White House Counsel's Office, and can therefore speak authoritatively on the varying definitions of what constitutes "business casual attire" in D.C.

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Dear Incompetent Authority:

Clients often call asking me "can I do x?" and are anxious to get an answer right then and there. Sometimes I have a pretty good idea whether they can or not, but other times I really don't know without further research. How do I handle this?

– On the hot seat

Dear hot seat:

There are few bright line rules in tax practice, but one of them is that you should (almost) never give a definitive answer right away. Now, there are some exceptions. If, for example, a client asks you what provision of the Internal Revenue Code contains the income tax rates, you can of course tell him or her it's section 1 (not legal advice—Code provisions move around sometimes).

But anytime a client—or potential client—is asking you to draw a conclusion about the potential application of the law to facts? Slow your roll. If a client is asking you, it's because he or she isn't sure of the answer.

They need you to be, and that's how you earn your bacon. Even if you're 100-percent confident of the answer, there's typically little to be gained by giving an answer on the spot without first taking the time to check to make sure your recollection is correct, the law hasn't changed, you have all the pertinent facts, and so on.

Easier said than done, right? It's no secret that clients now more than ever are expecting rapid turnaround on their legal questions. So, instead of simply saying "*I don't know*" or "*Let me look into that,*" here are some ways to "further the engagement" so you can do the work you need to do to get to "yes" (or "no", as the case may be).

First, consider walking through the facts to make sure you're not missing anything. Take notes. And once you have everything, convey that whatever Code provision is at issue is complicated (they all are, of course), and you'll need some time to be sure how it applies to the client's facts.

Second, if it's a provision that you're familiar with, it's OK to state things to the client in general terms. "*In general, the liquidation of an 80-percent owned corporate subsidiary is tax-free to both the liquidating corporation and the receiving corporation.*" That's generally true. But what if the subsidiary is foreign? What if it's insolvent? Is there a different rule for preferred stock? Consolidated groups? So you say, "*Anyway, that's the general rule. Let me dig into it to make sure that no exception applies to the facts you've given me.*"

Third, be proactive (but reasonable) about setting a timeline to get back to the client. "*I can probably run this down in a day or two*" (or maybe a week or two if you're really busy or you need to catch up on *Homeland*). Don't suggest a timeline if you don't think you can meet it, though. In some cases there are known unknowns: For example, you know there's not much authority under section 1202, so it shouldn't take too long. In other cases, there are unknown unknowns: you haven't done anything with the section 704(b) regulations in a while, but you can remember that they were kind of involved. The client can always push back if the timeline doesn't work for them. This is also a good time to ask what the client wants in terms of a deliverable: "*Would you like a phone call? Short analysis in an email? Full-blown memo?*"

Fourth, remember you're in the service industry. Convey that you're trying to help the client achieve his or her goal. "*I'm not sure, to be honest; but if there's a way to do it, I'll find it.*" Maybe there's no way to do "it." In most cases that's not a call you want to make on the spot, though there are exceptions for clear cut cases. You can tell people Son-of-BOSS transactions aren't going to work at this point, for example. But don't tell the client they can't file that check-the-box election without explaining what makes you sure it's not allowed.

And of course, sometimes, even after doing all the research, the right answer isn't clear. Maybe it depends on some fact not yet known. Or maybe the law is simply unclear, and there are arguments on both sides. In these cases, your job as an attorney is to set forth what is known as clearly as possible, and advise the client on the strengths and weaknesses of the potential approaches.

That's definitely not something you want to be doing on the first phone call.

Want to see your questions about the mysteries of the tax profession, including tax career, business of tax, tax ethics, and other burning tax questions answered by The Incompetent Authority? Readers may submit questions anonymously for a future The Incompetent Authority column through our [Submission Portal](#).

Dear Incompetent Authority,

In my practice, we routinely get cases referred by an accounting firm. Recently I have discovered two mistakes that the accounting firm made for two different clients. The accounting firm is the most important referral source my practice group has. In one case, the client has not asked me about these issues, and it isn't part of what we have been engaged to handle. In the other, the client hasn't asked why the tax is so much, but I know it is a matter of time, and the reason the tax will be so high is because the accounting firm recommended the wrong kind of structure for the sale of a business. I don't want to bite the hand that feeds me. What do I do?

– Not Technically Conflicted

Dear Not Technically Conflicted:

It is true that you don't have a conflict of interest between two clients, but that doesn't mean a conflict hasn't arisen between you and your client. ABA Model Rule 1.7 provides that a lawyer shall not represent a client if "there is a significant risk that the representation ... will be materially limited by ... a personal interest of the lawyer."

Would you tell your client the absolute truth about the services performed by the accounting firm if it were not for the prospect of future referrals? ABA Model Rule 1.4 requires you to keep your client reasonably informed about the status of the matter, and to explain matters to the extent necessary to permit your client to make informed decisions regarding the representation. You can't meet this obligation if you are withholding information that you have, but your client does not, about the quality of the accounting services that the client received.

Keep this in mind: even if your engagement limits the scope of your representation to include only representation before the IRS, if you have information about a potential malpractice claim that could be brought against the accounting firm and don't tell the client about it, a court may later find that the client reasonably believed you were representing him or her in all tax matters, including potential malpractice against the accounting firm. A limited scope representation must be reasonable, and if you don't tell the client what his or her rights are, especially if the statute of limitations expires on your watch without ever informing the client of the problem, you may not be successful in limiting the scope.

Taken together, your ethical obligations to tell your client the truth and to cease any representation in which your own interests are in conflict with telling your client the truth compel you to tell your client that you have identified a potential problem with past services, and ask if he or she would like a referral to a malpractice attorney to discuss it. Make sure you document the conversation and expressly state that you are not representing the client in investigating or pursuing a malpractice claim if that is true.

Hard conversations are part of our job as lawyers. The more difficult it may be for you to tell your client that the accounting firm made a mistake, the clearer the indication that you may not be able to continue the representation due to your own self-interest. ■