

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.

Andy Howlett is a member at the law firm of [Miller & Chevalier](#) in Washington D.C. He focuses his practice on tax planning and helps his clients understand and plan for the federal tax consequences of a wide range of transaction. He is married with two children, all of which made sense from a tax perspective at the time.

Guinevere Moore is a tax controversy and litigation partner with [Johnson Moore LLP](#) 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:

I am a third-year associate. More and more I find myself disagreeing with the judgment calls the partner I work for makes. Some of the disagreements are about strategy. Some are about what I consider to be our duty to keep our client informed. The client isn't "my" client, and the partner has a lot more experience than I do. Should I just keep my mouth shut?

– *The Third Rail*

Dear The Third Rail:

Take a deep breath. This is a situation comes up a lot.

First, some perspective. Generally, if you're a lawyer working for a firm, and the firm represents the client, the client IS your client because you are an attorney of the firm. Even though the partner manages the client relationship, you are part of that relationship. You not only owe that client fealty to all of the applicable bar rules but also, in the case of certain tax representations, to the rules of Circular 230 as well. That means, among other things, you personally owe the client competent representation and are required to keep him or her reasonably informed about the status of the representation. These duties may be discharged through the partner, but they nonetheless apply to you as well. Take a hard look at ABA Model Rule 2.1, which provides that "a lawyer shall exercise independent professional judgment and render candid advice." This rule is not limited to supervising attorneys.

Now, every firm has a different culture, but some principles of the associate-partner relationship are basically universal. If you think that a partner is making a mistake about some aspect of a representation that represents either an error in judgment or potentially a failure to keep the client properly informed, consider the following approach. First, take some time to think it through, and verbalize why you think the partner is in error. Fully analyze the applicable facts and relevant law as you perform this self-assessment. Acknowledge that in many cases "the tie goes to the runner" and it may be wise to defer to the experienced partner in cases where the answer is unclear.

If, after performing this exercise, you still think that the partner is clearly wrong, the time has come to sit down with him or her. Explain your views in a concise and deferential manner and be prepared to support your position if challenged. Always remember the age-old piece of wisdom: never come to your boss with a problem without already having thought of the solution.

At this point, the partner will either accept your position or not. If the partner rejects your position, and you are completely sure he or she is incorrect and you think that there is a potential violation of your bar's rules or of Circular 230 (if applicable), then you've probably reached the point where you need to talk to someone else at your firm about what to do next. Most firms have a firm counsel who serves in this role. In other cases, you may want to talk to firm management directly. Re-read ABA Model Rule 5.2, *Responsibilities of a Subordinate Lawyer*, and the comments. If the question is a close one, you may follow the direction of the partner.¹ If it isn't close, then you are responsible for your own action or inaction.² You should also re-read Rule 10.33 in Circular 230, which sets forth important best practices for tax advisors to follow. In all cases, you should be guided by the principles set forth in your bar's rules and proceed in a way that—to the extent consistent with those rules and any other requirements of law—minimizes any harm to the firm-client relationship.

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Dear Incompetent Authority,

I am considering leaving a government job to go to private practice. I have heard it can take a long time to build up business. I am worried about the amount of time it will take me to build up business and also whether I'll be able to bill the hours I need to bill. The firms I

¹ ABA Model Rule 5.2 (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."

² ABA Model 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."

have been talking to say they will give me a good runway, but I'm worried. I don't want to come out of government to private practice and fail. Do you have any suggestions for me?

– *Hopefully Private*

Dear Hopefully Private:

These are healthy concerns, and the risk of a faceplant can be substantially reduced with due diligence research, assertive communication and discussion of expectations. First, though, let's make sure we're clear on the starting point. While outliers do occur, most law firms will not be hiring you for your day 1 (or even day 365) rainmaking abilities. You will likely be hired for your hard-to-get government experience and insider perspective. Those attributes should give you a good start to building a practice one day. Further, if you are looking to “switch sides” into the DC market, you are in luck. Most larger firms in the nation's capital are well aware of the unique challenges facing lateral government hires and have supportive training and mentoring ready to go. To prepare, take a hard look at ABA Model Rule 1.11, Special Conflicts of Interest for Former and Current Government Officers and Employees. How will these rules impact your ability to work on existing business in the firm you are thinking of joining? How will they impact your ability to generate your own business? Regardless of where you are looking to make the jump, the following points may also be helpful.

- **Due Diligence:** Consider reaching out to attorneys from your government office who have made the jump before. What was surprising or challenging for them? Additionally, review attorney bios at target firms to get a sense of how many former government attorneys work there. Are there any practice-area concentrations of former government attorneys? What is the composition of your practice area?
- **Tunnel Vision:** Many government laterals get blindsided by the holistic nature of private practice. Government attorneys can build up substantial expertise in specific areas while remaining largely ignorant of adjacent issues—or issues regulated by different agencies or jurisdictions (e.g., federal versus state law). Consider studying an *industry* as opposed to merely your current practice area. Read relevant trade publications and try to get a sense for the market and current challenges. Review materials from recent ABA meetings: what topics did the panels cover? Who spoke and what did they say?
- **Find Friendlies:** If you have commenced discussions with a firm, consider asking to speak to someone who transitioned from the government in the last five years. Ask the firm's recruiting staff for information on transitioning former government attorneys into the firm. Will you have an official mentor? Perhaps ask if you can have a mentor from your practice area and one that is a recent government lateral if not the same person.
- **Expectations:** “How can I leverage my experience to help this practice area?” If you don't know specific answers to that question, ask attorneys in the practice group.
- **The Haircut:** Unless you're coming in as an equity partner for your subject matter expertise, understand that larger law firms generally view attorneys by class year. And in an effort to promote fairness, firms generally attempt to apply the same review standards equally by class. In other words, where you sit in the school cafeteria on day 1 may matter a tremendous

amount. In this regard, it is not uncommon to start government laterals down a class year or two to allow them time to grow. Indeed, if partnership is a goal in your near future, you may need several years of law firm experience to point to first. If the firm intends to give your class-standing a haircut, get the details. Is it permanent? Is it common—if not, why you? How will the haircut impact your compensation arrangement? How will it impact progression timing?

- **Challenges:** Understand that there will be unforeseen challenges. However, never forget that you are armed with an enviable amount of specialized expertise and your concerns about building a practice and billing hours are concerns shared by nearly everyone else at any law firm.

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,

My firm won't pay for ABA meetings unless the attorney requesting to go is a speaker. The meetings are expensive for a junior attorney. Is it really worth it? Let's be honest, I would be paying a lot of money out of my own pocket for the registration and travel costs, in addition to taking the time away from billing.

– *Saving My Pennies for Student Loans*

Dear Saving My Pennies for Student Loans,

The answer to this question is the same as the answer to almost every legal question. It depends.

The Incompetent Authority has found attendance at ABA meetings not only to be worth it, but *valuable*. ABA meetings *are* expensive, in that the pure cost for CLE is higher than many other options, including online options that are readily available. But ABA meetings offer what online CLE never can: access to a network of the top practitioners in the country, access to government officials at the highest level who help administer the laws we are advising our clients how to follow, access to the judges and opportunity to hear from the judges who will decide your clients' cases, and in-person, top-quality programming that offers a diversity of opinion and presenters. The ABA meetings cost more because there is a higher cost of having an in-person meeting, but there is also a *much* more significant benefit.

Here are just some of the ways we have benefited from attending ABA meetings in person:

- Invited to present on panels in areas that have generated future business;
- Invited to participate in comment projects that have generated future business;

- Met and worked closely with Tax Court and District Court judges to prepare and present CLE panels on topics;
- Published articles in ABA publications;
- Formed friendships that have turned into referral relationships; and
- “Borrowed” each other’s conference rooms around the country.

As with most things in life, you will get out of the ABA what you put into it. Some of us have been actively involved in the ABA for many, many years and looking back to the beginning, it is easy to see why a young lawyer may feel like paying for the meetings isn’t worth it. We urge you to look at your future self and reconsider in light of this: it takes years to plant the seeds that later turn into generating business. If you show up and participate in a comment project, volunteer to put materials together for a panel, or even just volunteer to bring your laptop and run the slide deck, you may be next in line to be asked to participate on a panel. If you do volunteer your time and talents to the ABA, you will soon be adding those accolades to your firm bio. And the next thing you know, you may be able to come to the ABA meetings for free. The [John S. Nolan Fellowship](#) provides young lawyers who are actively involved in the ABA Tax Section waived Meeting registration fees and assistance with travel costs.

Being an active member of the ABA Tax Section can provide many meaningful opportunities for you to distinguish yourself and to make connections that can last a lifetime. ■