

Know Before You Go: Ethical Considerations In Representing Charities

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It is Monday morning. A friend who works for a charity¹ left a voicemail asking you to act as outside counsel on a particular tax matter. You have provided advice to charities on limited matters from time to time, and you have noticed a growing need for legal professionals to be guided by certain practices and procedures when serving in that role.

This article will review key considerations in determining how to proceed primarily based upon the Florida Rules of Professional Conduct (collectively the “Rules” and individually, a “Rule”), and the Regulations Governing Practice Before the Internal Revenue Service (“Circular 230”).²

We will also discuss: (i) opening and concluding the representation of a charity, (ii) navigating conflicts of interest when representing a charity, and (iii) audit and Circular 230 Matters (tax matters). Finally, we will provide a practitioner’s list of items to consider before agreeing to represent a charity.

I. Opening and Concluding Representation of a Charity

Question: What provisions should be included in the engagement letter?

Answer: The engagement letter should clearly identify the scope of the representation.³ For example, is the work limited to revising Bylaws or perhaps to answering a particular Federal tax question? If so, the engagement letter should specifically state the scope, so that both the client and the attorney understand the legal advice requested.

In addition, the engagement letter should clearly identify the client, in this case, the charity alone. The charity’s directors, officers, managers or employees are not the client, individually or in any other capacity, and the engagement letter should state such.⁴

Lastly, the engagement letter should be clear about communications. For example, with whom are you, as counsel, authorized or required to communicate? This question may be affected by who will sign the engagement letter on behalf of the charity. For example, if you are instructed to communicate with two of five directors, you may wish to have all five

directors sign the engagement letter acknowledging that limitation. The lawyer shall advise the client (i.e., the charity) that the representation is limited to such represented persons and shall make sure that all parties agree to the limitation.⁵

It is important to discuss these terms up front, as many times lawyers and law firms provide legal services to charities on a pro bono basis, or at a discounted rate. If all parties are not in agreement regarding the scope and the terms of representation, the charity may incur additional expenses. Rule 4-1.6 will also come into play if certain information is deemed confidential.⁶ It is important for the lawyer to know with whom he or she is authorized to communicate and when information may be revealed by the lawyer.

Question: What items should you address upon withdrawal from the matter?

Answer: Upon withdrawal, a lawyer shall take steps reasonably practicable to protect a client’s interest.⁷ Examples include providing reasonable notice to the client and allowing time for the employment of other counsel.⁸ The particular grounds for withdrawal may define what is considered reasonable action. For example, if a withdrawal is required, such as when a client has used the lawyer’s services to perpetuate a crime or a fraud, the lawyer shall withdraw “even if [such withdrawal] would materially prejudice the client.”⁹

Under Rule 4-1.13, a method of permissive withdrawal is set forth, if a violation of law is involved.¹⁰ This method of permissive withdrawal is described further below. In that circumstance, the lawyer must remember that “[a]ny measures taken shall

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be designed to minimize disruption of the [charity], and the risk of revealing information relating to the representation to persons outside the organization.”¹¹

II. Navigating Conflicts of Interest when Representing a Charity

Question: What are examples of issues when representing a charity that affect the duty of loyalty and conflicts of interest?

Answer: The decision makers may believe that you represent them as individuals.¹²

Of course, this is not the case, and as discussed above, your engagement letter should specify that. Rule 4-1.13(a) provides, a “lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”¹³

Rule 4-1.13 provides that a lawyer may represent the organization and any of its directors, officers, employees, members or other constituents, subject to conflict rules for current clients.¹⁴ Rule 4-1.7 provides that a lawyer may represent a client despite a conflict of interest, if: (i) each affected client provides informed consent, confirmed in writing, (ii) the representation is not prohibited by law; and (iii) the lawyer will not be involved in asserting a position adverse to another client if the lawyer represents both parties in the same proceeding; and (iv) the lawyer reasonably believes you competent and diligent representation can be provided to each affected client.¹⁵ Other procedures apply, such as providing a prior explanation of the risks.¹⁶

If the lawyer chooses to represent the charity and an individual constituent, the lawyer should suggest to the individual that he or she first obtain independent counsel to advise the individual whether to give informed consent to the dual representation.¹⁷ Additionally, exercise caution, as some circumstances may be ripe for conflict. For example, if a particular action of the charity is being questioned or under investigation, the lawyer may not want to represent directors who voted differently on that action.

Question: What should you do to navigate potential conflicts of interest when representing a charity?

Answer: Explain that the organization is your client.

Rule 4-1.13(d) provides that this explanation is a duty, not an option, when the lawyer knows or reasonably should know that the organization’s interests are

opposed to the constituents with whom the lawyer is dealing.¹⁸ As stated above, this should be clearly stated in the engagement letter.

Question: What should you do upon learning of wrongdoing in an organization?

Answer: Rule 4-1.13(b) provides a fairly broad path for the lawyer when allegations of wrongdoing arise in the representation of an organization. Essentially, if the lawyer knows that a person associated with the charity is or will violate a legal duty to the charity or a legal duty that reasonably might be imputed to the charity and will cause harm to the charity, the lawyer shall proceed as reasonably necessary in the best interest of the charity.¹⁹ Among other reasonable measures, the lawyer may ask for reconsideration of the matter, recommend that a separate legal opinion be sought on the matter, and/or refer the matter to higher authority in the charity.²⁰ If the highest authority in the charity insists on no change in respect to the alleged wrongdoing, the lawyer may resign.²¹

The topic of investigating wrongdoing, upon the charity’s request, within the organization can raise complex issues should the lawyer agree to investigate. If lawyer is not in-house counsel for the charity, or does not have experience conducting such investigations, it may be better for all involved (including the lawyer) to suggest that a different party conduct the investigation. This bifurcation of work may free the lawyer to continue representing the charity in its substantive work as the lawyer was doing before the potential wrongdoing came to light.

III. Audit and Circular 230 Considerations

Question: What rules apply to legal representation when the charity-client is being audited?

Answer: When certain criteria are met, the lawyer may only withhold requested records and information from the Internal Revenue Service (“IRS”) that the lawyer believes are privileged.²² The threshold requirement is that the request must be “proper and lawful.”²³ If the request is proper and lawful, and the lawyer believes the requested record or information is privileged, the lawyer must have “reasonable grounds” and a “good faith” belief in his or her assertion of privilege in order to not comply with the request.²⁴

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If neither the lawyer nor your client possess a requested record, the lawyer must notify the IRS of that much and inform the IRS of the identity of any person the lawyer believes may possess the record.²⁵ The lawyer must also make a reasonable inquiry of his or her client for the identity of any person who may possess the requested record.²⁶

The lawyer may not give written advice that takes into account the possibility that a matter may never be raised on audit.²⁷

The lawyer must do due diligence to determine the accuracy of all representations he or she makes to the IRS.²⁸

The lawyer may not participate in giving misleading information to the IRS, knowing the information to be misleading.²⁹ This rule includes verbal statements, as well as affidavits, declarations or financial statements.³⁰

Recall that the lawyer may discuss the legal consequences of proposed conduct with the client, but the lawyer may not counsel a client in what the lawyer should know is fraudulent conduct.³¹ The lawyer may help the client to determine the validity and the meaning of the law.³²

Question: Which IRS requirements or best practices apply when giving tax advice?

Answer: You should consider the best practices set forth in Circular 230.³³

Best practices include, “[c]ommunicating clearly with the client regarding the terms of the engagement.”³⁴ The lawyer should identify the client’s purpose for the representation, and it is advisable for the lawyer to reach an agreement on the “form and scope” of the proposed representation.³⁵

The client’s impression of his or her tax situation may be different from reality; therefore, it is recommended to “evaluat[e] the reasonableness of any assumptions or representations” prior to beginning work.³⁶ Identifying the reasonableness of the client’s position may have the beneficial side effect of avoiding a potential understatement penalty for the client in the future.³⁷

The lawyer “should take reasonable steps to ensure [his or her] firm’s procedures for all members, associates, and employees are consistent with” these Circular 230 best practices.³⁸

The lawyer may not advise a client to take a position on a tax return (or prepare a part of a return) that: (i) lacks a reasonable basis, (ii) is an unreasonable position described in IRC section 6694(a)(2) [preparer penalty], or (iii) is a willful attempt to understate tax liability or a reckless or intentional disregard of rules or regulations.³⁹

The Secretary of the Treasury may impose a monetary penalty on a tax practitioner and the practitioner’s firm for violation of Circular 230.⁴⁰ The Secretary may also censure, suspend or disbar any practitioner from practice before the IRS for violation of Circular 230.⁴¹

IV. A Practitioner’s (Non-exhaustive) Checklist

- 1) Does the lawyer have the time and the desire to represent this particular charity?
- 2) Is the lawyer aware of the ethical issues that may arise when representing a charity?
*Take a brief assessment of whether the lawyer can discharge his or her ethical duties for this particular charity, including competence, confidentiality, and avoiding conflicts of interest.*⁴²
- 3) Obtain a signed engagement letter clearly outlining the scope of the engagement.
- 4) At the beginning of representation, the lawyer should clarify that he or she represents only the charity and as needed, reiterate this fact during representation.
- 5) Be aware of the situations in which a conflict of interest could arise in the representation of the charity, such as requests from officers or employees for personal legal advice, especially when the advice may be contrary to the charity’s interests.
The lawyer should consider how he or she will respond to requests to provide legal services to those involved in the charity? Does the lawyer have a list of trusted attorneys to whom he or she might refer the person making the request?
- 6) Know generally what the lawyer will do ahead of time should the lawyer encounter potential wrongdoing.
- 7) Consider relevant ethical procedures to use if the lawyer encounters a potential conflict of interest, including providing an explanation

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of the risks and the benefits of the requested arrangement, determining whether any conflict is consentable, obtaining informed written consent, and using independent counsel.

- 8) Before working with the IRS, review Circular 230 and other relevant IRS guidance, especially the rules for providing tax advice.
- 9) Have others in the lawyer's firm been reasonably briefed on Circular 230 and the seriousness of working with the IRS?
- 10) If the lawyer withdraws from representation, the lawyer should be clear in his or her communications and should protect the charity's interests as needed.

Conclusion

Representing a charity can be both demanding and rewarding. The lawyer may choose to represent the charity but must be aware of the usual pitfalls while exercising diligence and following appropriate procedures.



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Endnotes

- 1 The term charity shall refer to an organization described in Internal Revenue Code of 1986, as amended (Code) Section 501(c)(3), whether classified as a private foundation or not a private foundation (generally referred to as a public charity). Other types of tax-

- exempt organizations such as civic leagues, labor organizations, and chambers of commerce were not considered in the preparation of this article. All Section references refer to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.
- 2 Per a call placed with the Florida Bar Ethics Hotline, there is no specific guidance under the Florida Rules of Professional Conduct or opinions for representing a tax-exempt organization.
- 3 R. Regulating Fla. Bar 4-1.2(c) provides in part: [i]f not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if reasonable under the circumstances and the client gives informed consent in writing[.]
- 4 See R. Regulating Fla. Bar 4-1.13 (Organization as Client).
- 5 See R. Regulating Fla. Bar 4-1.2(c) (Objectives and Scope of Representation).
- 6 See R. Regulating Fla. Bar 4-1.6 (Confidentiality of Information).
- 7 See R. Regulating Fla. Bar 4-1.16(d).
- 8 *Id.*
- 9 See comment to R. Regulating Fla. Bar 4-1.16.
- 10 See R. Regulating Fla. Bar 4-1.13 (Organization as Client).
- 11 R. Regulating Fla. Bar 4-1.13(b).
- 12 For further analysis, see Ethical Considerations when Representing Nonprofit and Tax-Exempt Organizations, 21 No. 4 Prac. Tax Law. 37, 38 Shane T. Hamilton (Summer 2007) (Hamilton).
- 13 See Hamilton at 38. For example...it may be in the best interests of the organization to argue that the proper sanction is not for the IRS to revoke the organization's tax-exempt status, but to impose intermediate sanctions personally on the wrongdoers. *Id.*
- 14 See R. Regulating Fla. Bar 4-1.13(e).
- 15 See R. Regulating Fla. Bar 4-1.7(b).
- 16 See generally R. Regulating Fla. Bar 4-1.7.
- 17 Hamilton at 39-40.
- 18 R. Regulating Fla. Bar 4-1.13(d) (Identification of Client).
- 19 See generally R. Regulating Fla. Bar 4-1.13(b).
- 20 See generally R. Regulating Fla. Bar 4-1.13(b).
- 21 See generally R. Regulating Fla. Bar 4-1.13(c).
- 22 31 CFR § 10.20(a)(1) (2026).
- 23 31 CFR § 10.20(a)(1) (2026).
- 24 31 CFR § 10.20(a)(1) (2026).
- 25 31 CFR § 10.20(a)(2) (2026).
- 26 31 CFR § 10.20(a)(2) (2026).
- 27 31 CFR § 10.37(a)(2)(vi) (2026).
- 28 31 CFR § 10.22(a)(2) (2026).
- 29 31 CFR § 10.51(a)(4) (2026).
- 30 31 CFR § 10.51(a)(4) (2026).
- 31 R. Regulating Fla. Bar 4-1.2(d).
- 32 R. Regulating Fla. Bar 4-1.2(d).
- 33 The authority commonly referenced as Circular 230 encapsulates the Treasury Department regulations governing the professional practice of individuals before the Internal Revenue Service (IRS). These regulations are provided under Title 31 of the Code of Federal Regulations, Subtitle A, Part 10 (31 C.F.R. Part 10) (2026), and they establish the duties, restrictions, and standards of conduct for those who represent taxpayers.
- 34 31 CFR § 10.33(a)(1) (2026).
- 35 *Id.*
- 36 See *Id.* at (2).
- 37 See *Id.* at (3).
- 38 *Id.* at (b).
- 39 See 31 CFR 10.34(a)(1) (2026). The details of preparer penalty are beyond the scope of this article.
- 40 31 CFR § 10.50(c) (2026). The amount of the penalty may not exceed the gross income derived from the conduct giving rise to the penalty.
- 41 *Id.*
- 42 31 CFR § 10.50(a) (2026).
- 42 See R. Regulating Fla. Bar 4-1-2, Comment at Agreements limiting scope of representation (citing competence, communication, confidentiality, and avoidance of conflicts of interest as core duties in legal ethics).