CALIFORNIA CONTINUING EDUCATION, INC

PRESENTS

LIMITED SCOPE TAX PRACTICE

by

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Premise: "In the world of -Limited Scope- ; tax law contours are not often well contemplated. This is an early discussion.

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I. Generic Basics

In the United States, the terms "Limited Scope" and "Un-bundling" have progressed from a "dangerous new mechanism" to a "more defined principle with identified danger points. Danger points have been more well defined for more universal popular of law such as divorce and contracts, but less well defined for other areas of law. This presentation explores some of the contours of limited scope as to tax.

Some base rules (general) stated tersely & for safety. See other references for a more thorough understanding.
1. Limited scope requires an AGREED writing that succinctly sets forth limitations on what will be done (and also preferably what will not be done) (includes some decision based upon a judgement of whether the client is capable of completing the client's tasks on his own.)
2. Limitations must logically make sense to divorce from complete set of reasonably needed tasks.
3. Changes in scope (expansion or contraction) should be documented and must be AGREED as in (1.) above.
4. Duty to inform on related matters, preferably as much as possible.
5. Address court rules CA 5.425 & 3.35; as well as ABA model rules 1.2 and 6.5. Also consult circular 230 and any state tax agency rules. Keep in mind that federal tax uses the ABA model rules in absence of a more specific rule. (California practitioners therefore need to keep the ABA model rules and any California rules in mind).

The base math logic is that omissions CAN come from failure to state what you are not going to do and failure to inform about the possible state of affairs that may have nothing to do with what you are going to do. Things that don't relate to the limited scope tasks may or may not be within the contemplated tasks that a client will be handling on their own. Starting with the base model, if 100 tasks would be involved in a stated issue, and the attorney agrees to perform 50 tasks, the treatment of the non-performed tasks can take on more exploration and effort than the tasks that the attorney is performing.

For the 50 tasks not performed, there is a practical duty to state them and exclude them as not within the attorney's scope, and to make some indication of how critical the non-performed tasks are to the overall goal that the client is interested in attaining. One example of the remoteness of how liability for a non-performed, non-contemplated task is illustrated in the case of Keef v. Widuch, 254 Ill. Dec 580 (1st Dist. 2001). In Keef it was held that a retained workers' compensation attorney had a duty to advise an injured worker that he might also have a general product liability cause of action against a manufacturer of a machine used by Keef's employer. An agreement between lawyer and client that lawyer was to represent plaintiff only in his workers' compensation claims was insufficient. Lawyer was held to have a had a duty to advise plaintiff about "the possibility of third party liability and the applicable statutes of limitations," as to the client's employer's supposedly defective lathe.

What Keef illustrates is the need to provide as many warnings regarding other causes of action that may possibly relate, even remotely in terms of related skill & forum, to the limited scope engagement. The principles of Keef create a duty to expand and make complete at least all of the five basic elements set forth above, and probably a great many more. What this means is that an attorney who is expert in a given area "z" should to a greater or lesser extent think and consider the possibilities of "a-y" so that the alphabet of rights is covered, informed, or waived in the limited scope agreement.

II. Some Possible Checklist Considerations

The following is a skeleton outline to help the attorney to only begin to start a complete list for that attorney's limited scope area. This list is slanted a bit toward active business & income tax, and each practitioner needs to make a rigorous checklist for their area of practice, as well as for the specific facts of each engagement.

- Limited scope requires an AGREED writing that succinctly sets forth limitations on what will be done (and also preferably a complete list of what will not be done).

(1) Significant additional time should be spent in creating an ever-expanding recitation of a series of ancillary & remote, present & future aspects of not having full scope managed issue engagement, including:

other causes of action	possible other consequences of limited scope engagement
tax implications	potentials for synergy with the limited scope task
criminal implications	export/import recitations & associated consequences
bankruptcy implications	personal estate liability exposure
insurance effect	possibility of consulting other general attorneys
indemnity mechanisms	possibility of consulting with a number of specialist attorneys
known impacting cases	advantages to the client from not pursuing the issue

(2) The engagement letter should set forth a succinct mechanism for having the client agree to any changes in scope or tasks, as well as the time and proof memorialization of changes of scope with an agreed writing.

(3) If the occurrence of any contingencies is possible, were those contingencies set to affect the scope of tasks not yet performed?

(4) Have the compensation for partial and full completion of each task been allocated so that refund of unearned fees can be computed reliably? Is there a provision for an hourly allocation to an unfinished task? Is there an allocation for hourly items that are mixed with task completion amounts? Is there an hourly rate against a cap for each task?

(5) The engagement letter should include an exhaustive list of tasks that the client will do, including tasks based upon progress developments in the case. The list should be updated and agreed upon as the case develops in order for the client to get the benefit of the lawyer's expertise and training. Any updates should contemplate all of the possibilities that would have been included if known at the time of the initial engagament. A very meager structural outline includes:

-the sequence and order in which tasks will, must precede each other
-as much timing information on the time to perform tasks (both attorney and client)
-as much dependency information where a task can only be properly done after another task
-overall effect & contribution of task completeness & the risks of being wholistically incomplete
-the risks of being wholistically inconsistent
-whether items performed by the client will be done to a level sufficient for attorney's or agencies' standards submission

(6) The engagement letter should include an exhaustive list of potential tasks that the attorney will do, and the contribution importance that each task will make to the clients makes to the client's desired outcome, including:

-the sequence and order in which tasks will, must precede each other
-as much timing information on the time to perform tasks (both attorney and client)
-as much dependency information where a task can only be properly done after another task
-overall effect & contribution of task completeness & the risks of being wholistically incomplete
-the risks of being wholistically inconsistent

(7) Exit arrangements in terms of task or milestones or times at which the attorney is excused from further tasks or monitoring and likely future involvement, including:

-procedure to cancel powers of attorney or substitute client into powers of attorney
-whether the case is expected to be passed to a different type of professional for next phase
-the manner and timing and effect of returning files to the client
-availability of attorney to perform later to-be-agreed-upon tasks
-risks of client self-monitoring for problems after the attorney ends the engagement
-client responsibility for any failures that may trigger further liability or abrogate benefits

- Limitations must logically make sense to divorce from complete set of reasonably needed tasks.

(1) Is it normal in the law area for tasks to be done separately by (a) different firms, even in a full scope context, (b) in a limited scope context, and/or (c) in a low income pro bono agency?

(2) Will the nature and number of tasks specifically agreed not to be performed seriously affect the utility of the client's goals? Put another way, is the risk to the goals so significant that no reasonable person would see the performed tasks as having any value compared to the goal?

(3) Are tasks being performed for the purpose of producing an affect in a related or unrelated area that is important to the client? If so, have these been memorialized somewhere? (Sometimes good to have this outlined in the retainer agreement, but in some cases its location there might negatively impact privilege).

(4) Can each task or sub-grouping of tasks be articulated as having a potential effect? If so, have these expectations been memorialized somewhere?

(5) Did the attorney offer or direct the client to get an independent opinion on the division of tasks and the propriety of that division?

- Changes in scope (expansion or contraction) should be documented and must be AGREED as in (1.) above.

(1) Is there an emphasis on getting client's assent and agreement to all changes, including a mandatory promise to unambiguously have agreement, memorialize the agreement for change, and an agreed realization that agreements for changes are just as or even MORE important than an original retainer agreement?

(2) Is there an emergency circumstance when performance of a task is requested and agreed such that an event can change scope? Is there a provision to agree on the emergency event and an agreed method to make a later memorialization for changed scope after the emergency occurrence?

- Duty to inform on related matters, preferably as much as possible.

(1) Have possible potentially related matters been listed and addressed?

(2) For areas which the limited scope attorney is not familiar, or where the limited scope attorney suggests that research be done and the client refuses, does the client either affirmatively waive those rights and / or promise to consult with another attorney in that area? (Would a Consultation with a personal injury attorney have changed the result in the Keef case?)

- Address court rules CA 5.425 & 3.35; as well as ABA model rules 1.2 and 6.5. Also consult circular 230 and any state tax agency rules. Keep in mind that federal tax uses the ABA model rules in absence of a more specific rule. (California practitioners therefore need to keep the ABA model rules and any California rules in mind).

(1) Has the limited scope attorney kept up with limited scope ethics opinions in their law area and in their state?

(2) Are there court rules that teach the propriety of limited scope by analogy? (Often family and civil law areas are the first to adopt rules and forms)

III. The Blind Task Trap

The Keef case touches on a lack of understanding of the related non-task case. Worse and difficult to uncover is the full story on the task for which the limited scope attorney is hired. The limited scope client may not be forthcoming about all of the facts relating to the limited scope representation. Consider an attorney "hired to write collection letters" without being told anything about the circumstances of the debts, and not knowing whether the threats in the letters are genuine. Just for sending letters, the limited scope practitioner could have a liability of more than $1000 per letter under the FDCPA and possibly higher special damages. Thousands of other scenarios could be described.

What this means is that the limited scope attorney has to take more due diligence time in (a) learning the complete circumstances about the case, (b) documenting that understanding in an attorney client fee letter, and (c) providing exits upon learning that the nature of the case is different than represented. The combination of)The Blind Task Trap + The Duty to Discover and Inform on Related Matters + Evaluating the ability of the limited scope client to perform the client's tasks competently and in a timely manner) + Construction of a limited scope agreement that memorializes everything in the parenthetical, emphasizes that the limited scope engagement statistically of necessity will be front loaded and will involve more investigation and "testing" than would a normal retainer.

IV. Vertical Separations v. Smaller Scope Horizontal Subdivisions

Vertical divisions have generally been good places to limit practice. In Tax, limited responsibility may be based upon (a) filing taxes, (2) audit examination, (3) appeals (presenting arguments on the law), (4) tax court or U.S. District Court, or Court of Claims, (5) appeals to the circuit courts, and (6) appeal to the supreme court. Bankruptcy court is also empowered to hear tax cases.

Criminal cases generally enable vertical divisions in task, but probably represent principles of the least effective limited scope-able representation. Attorney representation prevents law enforcement from pressuring the criminal defendant to make disclosures. Any horizontally differentiated limited scope could destroy a criminal defendant's most valuable safeguard. Generally, one attorney needs to be in charge of all of the state, municipal and federal criminal aspects of the client's related criminal acts. A position taken on a traffic ticket could affect a related felony case. In a criminal case an attorney may have to be provided by the state, but only for the offense for which imprisonment is possible - so the state to some extent forces a limited scope for appointed cases.

Tax matters have a similar, but in many ways more severe danger mechanism that acutely needs the representation power of attorney. First, just about every civil tax liability is ultimately subject to a criminal

liability potential. Second, state tax personnel are paid to elicit admissions from tax clients that will form the basis for expanding the taxpayers's liability civilly along a path in the direction of fraud and criminal liability. A power of attorney is the best insulation to prevent the pressurization of a client to make admissions.

Lesser powers of attorney to enrolled agents and CPA's is governed by IRC 7525, but it is limited only to civil matters. If the tax authority can obtain enough evidence to indicate some criminal probable cause, the tax agency can abrogate the "civil only" limitation of the IRC 7525 privilege, and obtain the testimony of the tax professional. Even attorneys are not exempt if a conspiracy is established. However, a practitioner that understands the potential for any tax matter to "go criminal" is the best isolative protection for a client.

Given the value of power of attorney in tax matters, actions and considerations should take this factor to account:

1. It is always best for taxpayers to prepare their own tax returns because there is NO privilege possible for a paid tax preparer. This true even if the preparer is an attorney. The probability for a paid tax preparer to turn over records, intake forms and actually testify against the taxpayer can be high.

2. During any audit, gaps in a civil power of attorney give the tax agency an ability to directly engage and question and obtain confusing admissions from the taxpayer. (In a criminal case, a defendant can continue to keep silent, but sometimes they relent and talk.) Taxpayer powers of attorney should be maintained continuously through the end of the trial court phase.

3. Taxpayers that wish to do some of the work tasks related to their representation should do so under the guidance of an attorney having a full understanding and full grasp of all of the potential tax effects. A good example is the civil requirement that the taxpayer produce documents that may help the government to establish a stronger case against the taxpayer. Taxpayers generally tend to show the least complete and most spotty records, either because its a lot of trouble to assemble the records or because they have kept shoddy records. When records have to be reconstructed in order to present a cogent picture, many taxpayers are unwilling to pay for the time to create a more complete and substantial record.

4. A significant call for tax help is made by taxpayers that have been ignoring the government. Where the taxpayer ignores the notice of proposed assessment, the final assessment, and the tax court filing deadline, the only actions left are payment or pleading poverty through an offer-in-compromise or bankruptcy filing. These actions are typically not subdividable. Significant records and ownership need to be shown.

5. When taxes are owed, and offer-in-compromise or bankruptcy filing are being considered, the collective amount owing and composite collection potential should be assessed simultaneously for maximum benefit. Any inconsistency in reports of assets owned or earning power could be construed as a criminal badge of fraud.

V. Planning to Keep Tax Controversy Costs Low

The purpose for government laws and procedures making "Limited Scope" available to clients was to keep client costs low and thus enable more controlled, agreed upon help from professionals. Based upon the above base factors, and because tax representation is so "pre-criminal" in nature, tax does not lend itself to divisions other than the traditional vertical divisions. Here re some examples to create a minimum cost path for tax controversy.

1. Consulting with a tax practitioner may only be a 1 minute phone call, or it may involve paid research that can be commissioned with a limited scope preliminary engagement.

2. Communication saves time. If a taxpayer keeps their own books, a spreadsheet should be available to accompany receipts and canceled checks. A look at the spreadsheet can instantly convey the aspects of a business & income. After one or two verifications confidence will be attributed to the spread sheet as a whole.

3. Tax return information should be kept in an organized binder and in pdf format after taxes are filed. Any need for an audit will involve educating and / or re-educating both the taxpayer and the practitioner that has to represent the taxpayer in an audit. Where spreadsheets and pdf copies of checks and receipts are available, their reproduction and transmission to the auditor is facilitated. Even a large number of documents can be easily sent by fax, or printed on paper and sent. In addition a CD rom or thumb drive can be provided. A correspondence audit will save money by eliminating travel time and meeting time. Materials should include:

-verification that any address changes were reported as soon as the address changed.
-verification that the return was filed to the proper address and delivered. Post card receipts can help.
-verification that all of the forms were present with a cover letter and/or post card receipts.
-Include pay stubs, brokerage reports, 1099's received, and any other records of interest.
-Include any explanatory text form so that it will be clear that a position was explained at filing (8275).
-Include any simplified income, balance, or spread sheets for business and/or investment income.
-Keep any pre-filing opinions at the ready to help reduce penalties, if needed.

4. The audit process can lend itself to vertical segregation. After position research in 1., the segregable task miles might be:

(a) practitioner audit contact and verbal representation.
(b) request to reconsider the audit result.
(c) Advocacy letter to appeals with arguments on the state of the law and how the taxpayer meets the requirements of the law.
(d) Filing a Tax Court petition in more detail to help eliminate issues at every stage from a return to appeals, through tax court trial and adjudication. Request for reconsideration.
(e) Appeal to the circuit court of appeals & possibly to the supreme court

There is some variation on (c) with some practitioners taking a limited scope agreement to work with potential clients that have already filed a tax court petition. Often this is done in order to (a) enable a practitioner more time to test the cooperation of the taxpayer as the tax court date approaches, and (b) to represent the taxpayer on a return trip to Appeals in order to try and resolve the issue before the tax court trial. Notice CC-2017-006 ("Communication with Limited Scope Representatives in Docketed Tax Court Cases") was created to advise on government attorneys to communicate with the taxpayer on tasks which are NOT a part of the taxpayer's limited scope agreement with an attorney, and to talk to the attorney as to the tasks which ARE a parts of the limited scope agreement.

This has to be a tremendously trying to the IRS representatives. But even more so, the attorney client agreement should not be disclosed, perhaps opting for a list of tasks on a single sheet of paper, initialed by both the taxpayer and the taxpayer's limited scope representative. Just before the trial date arrives, the limited scope attorney and the taxpayer may come to some arrangement concerning an appearance, or not.

5. Lateral bookkeeping help can also be done under a Kovel letter in order to provide the practitioner's level of confidentiality to the taxpayer, if necessary.

6. In many cases the initial consultation, investigation, evidence gathering and likely outcome evaluation should be done at the earliest moment before starting any practitioner client relationship. The more that is learned and tested at an early stage, the more efficient and agreed the limited scope investigation will be.

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