Ethics Lecture

Ethical Issues in Tax Practice

A. *Introduction - The Role of the Tax Practitioner in Preserving Tax Compliance*

To begin, please think about the tax practitioner's role in encouraging or discouraging compliance with the tax laws. Economic literature suggests that tax practitioners operate as rule enforcers, while some also exploit ambiguities in the law. For example, a client might win the lottery and ask the practitioner whether this needs to be reported. The practitioner should respond yes and if the taxpayer seems skeptical, most practitioners should counsel the client about both the clear law on this issue and the penalties associated with non-compliance.

In the role of "ambiguity exploiter," the practitioner generally serves a function that reduces the overall level of tax compliance, in the sense of encouraging clients to report a more aggressive position than they might have had they not obtained the advice.

Tax professionals have always been concerned with ethical issues in conducting their practice. Three prominent promulgations that impact tax professionals are (1) the AICPA's *Statements on Standards for Tax Services*, (2) the IRS's *Circular 230*, and (3) relevant penalty provisions in the Internal Revenue Code ("the Code") affecting both tax professionals and their clients, mainly § 6694. The goal of my discussion today is to examine these items and suggest ways for the tax professional to strengthen his or her ethical awareness.

Before delving into the non-statutory guidance provided by the AICPA; Circular 230 and Code Section 6694, I think it is paramount to first address the following topics: (i) Rules for Practice before the IRS – Who is Allowed to Practice; and (ii) How to Appropriately Conduct Primary Tax Research (which is what is relied upon as a defense to the imposition of § 6694 penalty as discussed later).

B. *Rules for Practice Before the IRS*

Attorneys, CPAs and enrolled agents may all practice before the IRS and the Tax Court. Some ethical restrictions, such as the rules of Circular 230, which apply to practice before the IRS, and the tax penalty provisions within the Code apply to all types of tax practitioners. Over time, regulators have developed ethical restrictions that apply in various contexts, including tax advice given during tax planning; preparation of the client's return; and the tax controversy process. These contextual considerations, along with several conflict of interest issues that arise in tax practice, are discussed in more detail as we move through this morning.

A. In summary, Treasury has the statutory authority to issue regulations governing practice before the IRS under 31 USC §330.

B. The Enabling Act (31 USC §330(a)) grants the Treasury Secretary the authority to regulate the practice of taxpayer representatives before the Treasury, and requires persons who seek to

practice before the Treasury to demonstrate good character, good reputation, necessary qualifications, and competency.

C. Section 10.50(c) of Circular 230 also authorizes a monetary penalty against a practitioner if the practitioner is shown to be incompetent or disreputable, fails to comply with any regulation in part 10, or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client.

D. Circular 230 §10.1(a) established the Office of the Director of the (OPR) within the Office of the Secretary of the Treasury. The IRS established the OPR in 2003, to replace the former Office of the Director of Practice. The Office of Professional Responsibility is charged with enhancing the oversight of tax professionals as part of the IRS's ongoing modernization effort, and has twice the staff of the old office to accomplish its mission.

The Office of Professional Responsibility has exclusive responsibility for discipline related to practitioners.

i. Authorization to Practice

A. Why Authorization is Necessary?

A person who desires to practice before the IRS must be knowledgeable and familiar with fundamental concepts and principles of federal taxation, and be able to interpret and apply the Code, regulations, and rulings to the particular facts of his client's case. In addition, such person must keep abreast of the developments in federal tax matters which occur daily.

B. Statutory Authorization for CPAs

Attorneys and certified public accountants have a statutory right to represent clients before the IRS pursuant to 5 USC §500(c) provides:

> *An individual who is duly qualified to practice as a CPA in a state may represent a person before the Internal Revenue Service of the Treasury Department on filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.*

Paragraph (d)(1) of 5 USC §500 specifically provides that 5 USC §500 does not grant or deny to an individual who is not a qualified attorney or CPA the right to appear for or represent a person before an agency or in an agency proceeding. Thus, 5 USC §500 only statutorily authorizes representation to qualified attorneys and certified public accountants.

A CPA must be duly qualified to practice as a certified public accountant in any state, possession, territory, commonwealth, or the District of Columbia. CPAs should have little difficulty in meeting the requirements and definition of "certified public accountant" in Circ. 230 §10.2(b). Most CPAs are "duly

qualified" because they are licensed to practice in a state by only one agency, such as a state board of accountancy like here in Oregon.

A CPA who is licensed to practice in one state is allowed to practice before the IRS in any state. A person who has passed the CPA exam but does not meet a state's experience requirements, is not allowed to practice before the IRS

Circular 230 §10.3(a) and (b) additionally provide that attorneys and CPAs (as defined in Circ. 230 §10.2(a) and (b)) who are not currently under suspension or disbarment may practice before the IRS upon filing with the IRS a written declaration of qualifications and authorization to represent the party on whose behalf they are acting.

CPAs who otherwise meet the requirements of Circular 230 must file written declarations of qualifications in order to represent clients before the IRS. The requirements of such written declaration are discussed later on in this lecture.

Regardless of whether a declaration is actually made under oath, a person who misrepresents his status before the IRS by willfully making a false statement or submitting a false document with knowledge that the statement is false may be subject to prosecution for making false statements to the government under 18 USC §1001, a felony, which is outside the scope of this lecture.

Proposed rules modifying Circ. 230 §10.3(a) and §10.3(b) clarify that a CPA is not required to file Form 2848 with the IRS when rendering written advice, but the rendering of such advice is considered practice before the IRS. I find this an interesting side point.

ii. Powers of Attorney and Tax Information Authorizations

A. A Power of Attorney ("POA") is a written authorization that allows a recognized individual to represent the taxpayer before the IRS and/or perform certain acts on the taxpayer's behalf.

a. A recognized representative is defined as an individual who: (1) is appointed as an attorney-in-fact under a power of attorney; (2) is an attorney, CPA, enrolled agent, enrolled actuary, or certain other individual granted temporary recognition; and (3) files a declaration meeting the requirements of Regs. §601.502(c).

B. A POA can be broad or limited in scope. Specific types include:

• *General Power of Attorney:* Authorizes a recognized representative to perform any and all acts a taxpayer can perform.

• *Durable Power of Attorney:* Specifies that the appointment of the recognized representative will not end due to either the passage of time or the incompetency of the taxpayer.

• *Limited Power of Attorney:* Authorizes the recognized representative to perform only certain specified acts (*e.g.*, the representative is only permitted to receive information and make written or oral factual presentations or arguments on the taxpayer's behalf.

C. When is a POA required? A POA is required when the taxpayer wants to authorize a recognized representative to perform one or more of the following acts on the taxpayer's behalf:

• Represent the taxpayer before the IRS;
• File written responses to the IRS;
• Execute a waiver of restriction on the assessment or collection of a tax deficiency or waiver of notice of disallowance of a claim for credit or refund;
• Execute consents to extend the statute of limitations on assessment or collection;
• Execute a closing agreement;
• Receive, but not endorse or negotiate, a refund check; and
• Sign tax returns.

D. A POA is not required under the following circumstances:

• To receive confidential tax return information. Unless otherwise limited by the power of attorney, a representative is implicitly authorized to receive all confidential tax information concerning the tax matter(s) specified in the document.
• **If a representative attends a conference with the IRS and the taxpayer is present**. >>>> Most practitioners are not aware of this. Sometimes I have to do this when a taxpayer literally calls me a day before an audit meeting and wants to hire me.
• If the representative is serving only as a witness for the taxpayer.
• Estate matters: No POA is required if the representative is the attorney of record for the executor before the court where the estate is being administered.
• In the case of a fiduciary, such as a trustee, receiver, executor, or administrator. Form 56, *Notice Concerning Fiduciary Relationship*, rather than Form 2848 should be used in such cases.

E. Treas. Reg. §601.503(a) provides that a POA must contain the following information:

• Taxpayer's name and mailing address;
• Taxpayer's SSN or EIN;
• Employee plan number (if applicable);
• Name and mailing address of the recognized representative;
• Description of the tax matter(s) for which representation is authorized (which, if applicable, must include the type of tax

involved; the tax form number; the specific year(s) or period(s) involved; and in estate matters, decedent's date of death); and
• Clear expression of the taxpayer's intention regarding the scope of the authority granted to the representative.

F. A representative must attach to a non-Form 2848 power of attorney a written declaration whereby the representative acknowledges that:

• He/she is not currently under suspension or disbarment from practice before the IRS or other profession or authority;
• He/she is aware of Circular 230;
• He/she is authorized to represent the taxpayer; and
•He/she is an attorney, CPA, enrolled agent/actuary, etc., authorized to practice before the IRS.

*** Procedures for curing a defective POA are found in Regs. 601.503(b)(3).

G. IRS Form 2848

i. Form 2848, *Power of Attorney and Declaration of Representative*, is the most commonly used method of granting a power of attorney to a qualified representative. A properly completed Form 2848 satisfies both the content and declaration requirements discussed above. However, Forms 2848 altered and/or modified such that the power of attorney does not comply with established rules and regulations regarding powers of attorney will not be accepted.

ii. Form 2848 consists of two parts. Part I (Power of Attorney), signed by the taxpayer, sets forth the scope of the representative's authorization to act on the taxpayer's behalf. Part II (Declaration of Representative), is signed by the representative. An example of a completed Form 2848 is provided in IRS Pub. 947.

iii. There are three IRS CAF units located in Ogden (we file POAs there), Memphis, and Philadelphia and each state is assigned to a particular CAF unit. The three CAF units process powers of attorneys from its respective areas, for the nationwide CAF database. Prior to January 1, 2001, the CAF database was divided among 10 service centers, now the CAF database is centralized and is accessible nationwide.

iv. Changes to Form 2848: As of March 1, 2012, a Form 2848 cannot be filed jointly; each spouse must sign a separate authorization.

v. A taxpayer can revoke a power of attorney by sending a copy of the Form 2848 to the appropriate CAF unit as designated in IRS Pub. 947, reproduced in the Worksheets, below. The copy must have the word "REVOKED" appearing at the top, and the taxpayer's

vi. Copies of Notices – Where Form 2848 or other valid power of attorney has been filed, the IRS will send copies of notices and other written communications to the first representative listed. The IRS will also send additional copies to the second listed representative, but will not send copies to more than two representatives FYI.

vii. Refund Checks - A refund check may be mailed to a taxpayer's representative as long as the power of attorney so provides, unless the representative is an un-enrolled preparer. Treas. Reg. §601.504(a)(5) and Circular 230 provide special rules that limit a representative's ability to endorse and collect a refund check.

H. Tax Information Authorization (Form 8821)

i. A tax information authorization (Form 8821) is a document signed by the taxpayer that authorizes an individual or entity (*e.g.*, a partnership, trust, or other organization) designated by the taxpayer to receive and/or inspect confidential information under § 6103.

I. Third Party Designations

i. Written consent from the taxpayer, executed on Form 8821 or by any other separate form, is not required to authorize the IRS to disclose or discuss tax return information to a designated third party.

C. *Conducting Tax Research*

This portion of our discussion focuses on how to research a civil, federal income tax question. I perceive this is extremely important as many Section 6694 preparer penalty defenses I have been hired for, the issue lied squarely with the sources of authority relied upon by the tax preparer. I think it is crucial that everyone understand the principal sources of federal tax law and how they interrelate.

i. There are three primary sources of federal tax law: (i) legislative; (ii) administrative; and (iii) judicial.

ii. Legislative Sources:

A. *Internal Revenue Code* – Federal tax law may be the purest form of statutory law. The answer to almost any tax question will depend upon an interpretation of the statutory language. The main source of federal tax statutes is the Internal Revenue Code, which is Title 26 of the US Code. The current version is commonly called "The Internal Revenue Code of 1986". (Prior to that it was the '54 code and the '39 code).

a. The code is divided into 11 subtitles (designated by letter), each of which is further divided into chapters (designated by number), which in turn are divided into subchapters, parts, subparts, sections, subsections, paragraphs, sentences and clauses.

B. *Legislative History* – Although the Code is highly detailed, many provisions may seem ambiguous when applied to a given set of facts. The meaning of an ambiguous Code section may be gleaned by resorting to legislative history to ascertain Congressional intent. The three principal sources of legislative history in the tax area are: (i) hearings before Congressional committees; (ii) debates on the floor of the House of Representatives and Senate; and (iii) Congressional committee reports.

a. These three sources of legislative history are the by-products of the tax legislative process as I learned when I worked in D.C. The legislative process usually originates with one or more proposals from the President delivered to Congress as part of the State of the Union Address in January.

b. The US Constitution requires that bills for raising revenue originate in the House of Representatives (Art 1 Para 7).

c. I think this is important to understand because hearings before the House Ways and Means Committee and the Senate Finance Committee may help illuminate technical issues and offer insight into the meaning of newly enacted legislation. I refer to this quite often when in a contested audit where there is law on both sides. Sometimes courts forget to look at this when making own interpretation.

    i. Transcripts of these hearings are published by the Government Printing Office and are most easily obtained through the Library of Congress website and www.thomas.loc.gov.

    ii. Hearings transcripts also available on microfiche from the Congressional Information Service, a commercial publisher that also prepares a helpful finding index.

    iii. Text of the House and Senate floor debates are published in the Congressional Record.

    iv. Of these three basic sources of tax legislative history, Committee Reports tend to be the most crucial. They typically include a general explanation section that describes present law, the need for the legislation, and the expected impact the bill will have on various taxpayers. The report sometimes also has a technical explanation of each section of the Committee report.

        1. Committee reports have become increasingly more detailed – many incorporate examples and instructions to Treasury for drafting regulations.

    v. Selected Committee Reports are reprinted in the US Code Congressional and Administrative News published by Thomspon Reuters/West, as well as the Cumulative Bulletin.

C. *Joint Committee Explanation ("Bluebook")* – Following enactment of major tax legislation, the staff of the Joint Committee on Taxation ("JCT") (comprised of representatives of the House Ways and Means Committee) may issue a single volume "general explanation" of newly enacted or amended Code sections. These post-enactment explanations are organized in much the same way as Committee Reports: Prior Law; Reasons for Change; Explanation of Provision.

i. Typically bound in a blue cover they are commonly called "bluebooks".

ii. Because these are written after the law passes, bluebooks are not technically legislative history.

iii. However, when the JCT staff expresses an opinion on an issue left unresolved by the Committee reports, the precedential weight is debatable.

iii. Administrative Sources

The IRS alone or in conjunction with other Treasury Department divisions, issues a wide variety of pronouncements pursuant to its administrative rule-making authority. These are discussed as follows:

A. *Treasury Regulations* – These represent formal and authoritative interpretations of the Code. Treasury Department officially releases all final regs, although initial responsibility for drafting rests with IRS Office of Chief Counsel.

i. Most courts afford a significant degree of deference, although a reg may be declared invalid if the agency's interpretation is inconsistent with Congressional intent or is otherwise unreasonable.

ii. Regs help explain complex statutory provisions, resolve doubtful questions of interpretation, and often include specific examples of how a Code section should operate.

iii. Of all administrative sources of tax law, regs are the most important and should be consulted whenever available.

iv. Note that not every Code section has regs.

v. Regs issued under the 1954 and 1986 Codes are numbered by a prefix designation and then by the Code section number that it interprets. A regs prefix indicates its basic subject matter.

   A. "1" – income tax

   B. "20" – estate tax

   C. "25" – gift tax;

   D. "301" – procedural and administrative regs

vi. The APA 5 USC 553 obligates government agencies to issue most regulations first in proposed form and to solicit comments from the public before regs go final.

vii. Proposed Regs along with invite to comment are published in Federal Register as Notices of Proposed Rulemaking.

viii. Before being finalized, proposed regs DO NOT carry force and effect of law.

ix. IRS has also stated that it will follow proposed regs if no other version of reg in force (CC-2003-014).

x. When Congress enacts new Code provision and taxpayers need immediate guidance to comply with new law, regs may be issued in Temp form.

xi. Final and Temp regs and any amendments thereto, are officially issued in form of TD's which are eventually codified in Title 26 of CFR.

xii. When reading regs, BE AWARE that many have not been updated to reflect subsequent amendments to underlying Code section.

   A. Example -

xiii. You also must remember to see if a court has reviewed and upheld/overruled a statute - I always use CCH, BNA or RIA.

B. *IRS Pronouncements*

i. Procedural Regulations – You are better able to represent a client if you know, before the fact, how the IRS will approach the tax controversy.

A. Once source of info about the IRS' internal procedures and operations is the Statement of Procedural Rules. These are issued by the IRS without need for Treasury approval and carry prefix "601" in regs.

B. Internal Revenue Manual – This describes how the IRS implements the law. It includes detailed instructions for IRS personnel on topics such as corporate and individual audits, Appeals process, and collection procedures, just to name a few.

1. Although this is written for IRS employees, it is invaluable to us. It alerts us to issues of IRS concern when planning transactions and tax strategies for clients.

C. Revenue Rulings and Revenue Procedures –

1. Revenue Rulings - IRS official interpretation of the Code as it applies to a given set of facts. IRS agents and Appeals officers will normally follow IRS own Rev Ruls and, as a result, taxpayers generally may rely upon them to support a reporting position if the facts are substantially identical to those in the ruling. Beyond that, the precedential weight is uncertain.

2. Rev. Proc. – These describe the IRS practices in relation to specific issues and provide taxpayers with instructions for requesting information form the IRS.

a. The first Rev Proc of each year (2012-1) lists the general guidelines for requesting a Private Letter Ruling or determination letter.

b. Some Rev Procs are merely directive while others affect the application of substantive tax law.

c. Both of these are issued bi-weekly in the Internal Revenue Bulletin and are reprinted in the CB. They are numbered based upon the year of issuance and order of issuance during that year – Rev. Rul. 2007-39 – 39th Rev Rul issued in 2007.

D. Letter Rulings – Often called PLR's, they are written responses from the Office of Chief Counsel to a taxpayer who formally requests advice concerning tax consequences of specific transaction.

1. Usually requested when taxpayer wants assurance of results before consummating transaction/reporting on return.

2. Sometimes you research a find PLRs on point. Although § 6110(k)(3) says you cannot rely on them for precedential value, it can help you predict how an audit would turn out.

3. THEY CAN BE USED TO GET OUT OF A SUBSTANTIAL UNDERSTATEMENT PENALTY – See Treas. Reg. § 301.6662-4(d)(iii).

4. PLR are numbered according to year of issuance, week of issuance, and order within that week. Ex – PLR 200839025 – 2008 PLR, 25th letter ruling issued in the 39th week.

5. Section 6110 requires that the IRS release PLR to public after deleting sensitive taxpayer data.

E. Other IRS Pronouncements – IRS National releases other pronouncements that address substantive and procedural issues. None constitute precedent

for anyone other than the taxpayer in issue, if any, yet they often reveal to use the IRS position and litigation strategy with respect to important issues. Here are the most relevant:

1. Tech Adv. Memo – Similar to PLR, except that the request for guidance comes from the Office of Chief Counsel during exam or appeals process.
    a. Numbered the same way as PLR.
2. General Counsel Memo – GCM's are a historical form of guidance. They were released by the Office of Chief Counsel and set forth the reasoning underlying a Rev Rul, PLR or TAM.
    a. Taxpayer can rely on these to avoid a substantial understatement penalty.
    b. These were numbered sequentially with no number referencing year of issuance.
3. Action on Decision – AOD's issued by Office of Chief Counsel and explain the IRS's decision to acquiesce or non-acquiesce in a judicial determination adverse to the government.
    a. Acq does not necessarily mean that the IRS agrees with court reasoning, but only that, in the future, the IRS will treat similar disputes in a similar fashion based on conclusion reached.
    b. Non Acq reflects chance that IRS will continue to litigate position.
4. Chief Counsel Advice – Describes separate type of written advice from the Office of Chief Counsel containing the analysis and

legal conclusions of the Chief Counsel with respect to the resolution of a specific taxpayer's case.

a. These are numbered like PLR's.

F. IRS Forms and Publications – The IRS issues a variety of tax forms to help taxpayers comply with the law.

1. Forms and accompanying instructions explain requirements of the Code and guide taxpayers how to report.

2. IRS drafts Publications to help taxpayers meet reporting requirements.

3. This is an easy to use source of information about commonly encountered questions and filing issued.

4. Remember that IRS not bound by statements made in Publications.

C. *Judicial Sources* – The Tax Court, the Federal District Court, and the Court of Federal Claims all handle the trial of tax cases, all of which may be appealed to the appropriate Federal Circuit Court of Appeals (we are 9th Circuit), and then, if certiorari is granted, the USSC.

i. Opinions in federal tax cases – generally interpret and apply the Code, and in the process consider Treas regs, Rev Rul and many of administrative authorities we just discussed.

Judicial decisions in the tax area have also generated a number of common law doctrines, including "assignment of income" and the "Step transaction doctrine."

D. *Non-statutory Guidance for Tax Professionals Ethics*

Tax advisors must ensure that they adhere to two non-statutory standards that affect tax practice: (1) Statements on Standards for Tax Services (applies only to AICPA members)[1], and (2) Circular 230[2] (applies to all who practice before the IRS). Because many AICPA members practice before the IRS,

[1] The Statements on Standards for Tax Services are enforced as part of the AICPA's Code of Professional Conduct Rule 201, *General Standards*, and Rule 202*, Compliance with Standards*.
[2] Title 31 Code of Federal Regulations, Subtitle A, Part 10.

they must be aware of both standards. Please note that the issues the standards address make them meaningful for all tax professionals.

A. Statement on Standards for Tax Services - The SSTSs are ethical tax practice standards for AICPA members. They differ from other standards of tax practice. For example, *Circular 230* (discussed subsequently in this lecture) does not provide the depth of guidance contained in the SSTSs. Section 6694 (also discussed later) applies only to income-tax return preparation. Both *Circular 230* and §6694 apply only to federal tax practice, while the SSTSs apply to all tax practice.

I. Statement No 1: Tax Return Positions – The Standard

Important to applying Statement #1 (SSTS #1) is "tax return position." SSTS #1 specifies the applicable standards for AICPA members when they recommend tax return positions, and when they prepare or sign tax returns. Tax returns include amended returns, claims for refund, and information refunds. "Tax return position" is defined in SSTS #1 as: a position that is reflected on the tax return as to which the taxpayer has been specifically advised by a member, or a position about which a member has knowledge of all material facts and, on the basis of those facts, has concluded whether the position is appropriate. The taxpayer includes a client, the AICPA member's employer, or any other third-party recipient of tax services.

SSTS #1 delineates four specific standards that apply to a member when the member provides professional services that involve tax return positions:

1. Before the AICPA member can recommend that a tax return position be taken with respect to an item, the member must have a *good-faith belief* that the position has a *realistic possibility* of being sustained administratively or judicially on its merits if challenged.

It seems that member compliance with SSTS #1 requires the member to consider the court which has jurisdiction for the member's client. However, were the member's client in a circuit that is against the client's position, and there is widespread disagreement among the other circuits on the position, the member may make the argument that existing law in the circuit with jurisdiction may be reversed through

the judicial process. In this instance, the member might have met the realistic possibility standard in SSTS #1.

2. An AICPA member should not prepare or sign a return that the member is aware contains a position that the member would not recommend under the standard in standard 1 above.

3. Notwithstanding the standards set forth in 1 and 2 above, an AICPA member may recommend a tax return position, or prepare or sign a return, as long as two conditions are met: (a) the member concludes that the return position is not frivolous; and (b) the member advises the client to appropriately disclose the position.

4. When the AICPA member recommends a tax return position, or prepares or signs a return on which a tax return position is taken, when it is relevant, the member should advise the client regarding potential penalty consequences of the tax return position and the opportunity, if any, for the client to avoid the penalties through disclosure.

II. Statement No 1: Tax Return Positions – Meeting the Standard

The AICPA states in SSTS #1 that in order for an AICPA member to meet the standards discussed in the previous section, he or she should in good faith believe that the tax return position is warranted in existing law or can be supported by a good-faith argument for an extension, modification or reversal of existing law. What is very critical about the AICPA's position on a "good-faith argument" is the basis the member may rely on to make such an argument.

Basically, SSTS #1 provides that a member meets the realistic possibility (REPOS) standard by having a good-faith belief (1) that the position is warranted by existing law, or (2) that the position can be supported by a good-faith argument for an extension, modification or reversal of the existing law through the administrative or judicial process. SSTS #1 states that the REPOS standard is less stringent than the Code's "more likely than not" and "substantial authority" standards. However, the REPOS standard is more stringent than the Code's "reasonable basis" standard.

> SSTS #1 essentially requires the member to implement a sound tax research methodology to determine if a realistic possibility exists. There are five steps in a sound tax research methodology:
>
> 1. Establish relevant background facts.
>
> 2. Distill the appropriate questions from the background facts.
>
> 3. Search for authoritative answers to the questions that are identified.
>
> 4. Resolve the questions by weighing the authorities found by the search.
>
> 5. Arrive at a conclusion that is supported by the authorities.
>
> SSTS #1 indicates that a member may conclude that more than one position meets the REPOS standard.

E. *Return Preparer Penalties – Section 6694*

i. Introduction

There are standards of performance and disclosure requirements for persons who prepare tax returns and refund claims for compensation. If a return preparer violates these standards or requirements, the IRS can impose civil penalties and may seek an injunction to prevent the preparer from preparing additional returns and/or bar the preparer from practice before the IRS.

Tax return preparer penalties are designed to buttress the penalty structure that applies to taxpayers. In particular, the rules seek to discourage practitioners from cooperating with taxpayers who seek to underreport their liabilities and to prevent practitioners from encouraging inaccurate reporting. If a tax return preparer knows (or reasonably should know) that an understatement on the taxpayer's return is due to an "unrealistic position," the preparer is subject to a penalty equal to the greater of $1,000 or 50% percent of advisor's fees derived from preparing the return.

ii. Standard of Conduct

A. Prior to amendments to Section 6694 in 2007, an unrealistic position, if not disclosed by the taxpayer, was one that had no realistic possibility of being sustained on the merits. A position was considered to have a realistic possibility of being sustained on its merits "if a reasonable and well-informed analysis by a person knowledgeable in the tax law would lead such a person to conclude that the position has approximately a one in three, or greater, likelihood of being sustained on its merits (realistic possibility standard). In applying this 1 in 3 standard, the possibility that the return would not be audited or, if audited, the issue would not be raised, was not taken into account.

B. The 2007 amendments raised the expected standards of conduct on the part of tax return preparers. The standards differed somewhat based on whether the position is disclosed or undisclosed. The tax return preparer may be subject to a penalty if the position that creates the tax understatement is not disclosed; the preparer knew of the position; and the preparer did not reasonably believe that the position would "more likely than not" be sustained on its merits. If the position that creates the tax understatement is disclosed, the preparer may be penalized if the preparer knew, or reasonably should have known of the position, and "there was no reasonable basis for the position."

iii. Assessing Exposure to Penalty

In assessing exposure to these penalties, to what extent must the return preparer verify the information provided by the taxpayer?

A. As a general rule, a preparer may rely in good faith on information furnished by the taxpayer, and need not review the taxpayer's books and records for accuracy and completeness.

B. Although a return preparer is not required to independently verify information provided by the taxpayer or a 3rd party, the penalty may apply where the preparer fails to inquire as to furnished information that appears to be based on facts actually known to the preparer, to be incomplete or incorrect.

a. Examples

The IRS provides two good examples:

I. During an interview conducted by preparer E, a taxpayer stated that he had made a charitable contribution of real estate in the amount of $50,000 during the tax year, when in fact he had not made this charitable contribution. E did not inquire about the existence of a qualified appraisal or complete Form 8283, Noncash Charitable Contributions, in accordance with the reporting and substantiation requirements of Section 170(f). E reported deductions on the tax returns for the charitable contribution which resulted in an understatement of liability for tax, and signed the tax return as the tax return preparer. E is subject to penalty under § 6694.

II. While preparing the 2008 tax return for an individual taxpayer, Preparer F realizes that the taxpayer did not provide a Form 1099 for a bank account that produced significant taxable income in 2008. When F inquired about any other income, the taxpayer furnished Form 1099 for F to use in preparation of the 2008 tax return. F did not know that the taxpayer owned an additional bank account that generated taxable income for 2008 and the taxpayer did not reveal this information to the tax return preparer notwithstanding F's general inquiry about any other income. F signed the taxpayer's return as the tax return preparer. Preparer F is not subject to a penalty under § 6694.

iv. Who is a "Preparer?"

A. As a result of amendments made in 2007 that generally are effective as of the beginning of 2008, the penalty in § 6694 applies not just to those who prepare income tax returns, but also to preparers of amended returns and claims for refund, estate and gift tax returns, excise tax returns and employment tax returns.

1. A "tax return preparer is any person who prepares for compensation all or a "substantial portion" of a tax return or a claim for refund under the Code.

   a. "Substantial portion" -
   b. "Compensation" –

2. A preparer can be any person, it does not have to be an individual. A preparer may be a corporation, partnership, trust, etc.

The regulations include the following examples:

Example 1. Practitioner A, a CPA, provides advice to a taxpayer in structuring a large corporate transaction. The advice provided by A is directly relevant to the determination of an entry on the taxpayer's return and the advice constitutes a substantial portion of the return. A, however, does not prepare any other portion of the taxpayer's return and is not the signing preparer of this return. A is considered a tax return preparer.

Example 2. Practitioner B, a CPA, provides advice to a taxpayer in structuring a large corporate transaction. Based upon this advice, the corporate taxpayer enters into the transaction. Once the transaction is completed, the corporate taxpayer does not receive any additional advice from B with respect to the transaction. B did not provide advice with respect to events that have occurred and is not considered a tax return preparer.

a. A person's status as a tax return preparer does not take into account educational qualifications or professional status.

b. In Rev Rul 86-55, for example, the IRS ruled that a used car dealership that offered to prepare returns free of charge to customers who bought cars with the resulting refund was an income tax return preparer.

v. Penalty:

A. Unreasonable Position - A tax return preparer is subject to a penalty equal to the greater of $1,000 or 50% of the income derived (or to be derived) by the preparer with respect to a return or claim for refund that it prepares that results in an understatement due to a position if:

* The preparer knew or should have known of the position, and

* There was no substantial authority

- Exception if the preparer can show he/she acted in good faith.

- Based on facts and circumstances.

i.

ii.

A. Adequate disclosure – Position disclosed on Form 8275/8275-R.

iii. Exception for Reasonable Cause and Good Faith - The penalty under §6694 will not be imposed if, considering all the facts and circumstances, it is determined that the understatement was due to reasonable cause and the tax return preparer acted in good faith. Factors to consider include:

• *The nature of the errors causing the understatement* -

• *The frequency of errors* -

• *The materiality of the errors* -

• *The preparer's normal office practice* -

• *Reliance on advice of others* -

• *Reliance on generally accepted administrative or industry practices* -

B. Understatement due to Willful or Reckless Conduct - The preparer penalty for willful or reckless conduct is the greater of $5,000 or 50% of the income derived (or to be derived) by the preparer with respect to the return, but is reduced by the amount of the preparer penalty for taking an unreasonable position with respect to the same position — i.e., the greater of $1,000 or 50% of the income derived (or to be derived). As a result, the maximum additional penalty is $4,000 and only applies where the income derived (or to be derived) by the preparer from the return or claim for refund is not more than $2,000. If the preparation fee is at least $10,000, no additional penalty would be imposed.

i. A preparer is considered to willfully attempt to understate a taxpayer's liability on a return or claim for refund if the preparer disregards information furnished to him in an attempt to wrongfully reduce the tax liability on the return or claim for refund.
ii. A preparer generally is considered to recklessly or intentionally disregard a rule or regulation if the preparer takes a position on a return or claim for refund that is contrary to a rule or regulation,

and the preparer knows (or is reckless in not knowing) of the rule or regulation.

iii. A preparer is not considered to have recklessly or intentionally disregarded a rule or regulation if the position contrary to the rule or regulation has a reasonable basis and is adequately disclosed, in each case as described above with respect to the preparer penalty under §6694(a) (with respect to an unreasonable position). For this purpose, however, it is not sufficient for a signing preparer to provide the disclosure on the return or claim for refund if that disclosure is not actually filed or to disclose in accordance with the annual revenue procedure under §6662(d)(relating to the substantial understatement of tax penalty on the taxpayer).

vi. Understatement of Tax Liability - For purposes of the §6694 preparer penalties, an understatement of the taxpayer's tax liability exists if, viewing the return or claim for refund as a whole, there is an understatement of the net amount payable by the taxpayer or an overstatement of the net amount refundable or creditable to the taxpayer, with respect to any tax under the Code.

vii. Verification of Information - For purposes of the penalty under §6694, a tax return preparer generally may rely in good faith without verification upon:

• Information furnished by the taxpayer;

• Information and advice furnished by another advisor, another tax return preparer or other party (including another advisor or preparer at the same firm); and

• A tax return that has been previously prepared by the taxpayer or another tax return preparer and filed with the IRS.

A. The preparer is not required to audit, examine or review the books and records, business operations, documents or other evidence to independently verify the information received.

B. However, the preparer may not ignore the implications of information furnished to him or actually known by him.

C. In addition, the preparer must make appropriate inquiries to determine if the specific requirements for a deduction or credit are met.

viii. Defending Against the Section 6694 Penalty – More in Depth

A. Premise – "Reasonable Belief – More Likely Than Not": The reasonable belief that the position would MLTN be sustained on its merits = preparer analyzes facts and authorities, and in reliance upon that analysis, reasonably concludes in good faith that the position has a greater than 50% chance of being sustained on its merits, based on all facts and circumstances.

a. Reasonable Belief/MLTN requires that tax preparer analyze the facts and authorities, and in reliance upon that analysis, reasonably concludes in good faith position has more than 50% of being sustained.

B. Premise – "Reasonable Cause – Good Faith": IRS may decline to impose the return preparer penalty if, after considering the facts and the circumstances, the understatement was due to reasonable cause, and the preparer acted in good faith (Treas. Reg. 1.6694-2(d)).

a. Treas. Reg. 1.6694-1(e) – a return preparer may rely in good faith upon information furnished by the taxpayer – not required to independently verify taxpayer information and only must make reasonable inquiries to determine whether support for the deduction exists.

i. Argue "good faith" exception through research of credible sources and conclusion. Authority you can use is from Treas Reg 1.662-4(d)(3)(iii) – IRC, regs, Rev Rul, Rev Proc, IRS Pronouncements, IRS publications

b. Treas Reg 1.6694-2(d) and 2(e) lays out what the IRS should consider:

i. Nature of the error that caused the understatement – the potential error that IRS Agent perceives tax preparer made is a provision that is very technical and authority cuts both ways.

ii. Frequency of error – Is this an isolated error? Has the tax preparer ever been charged with a preparer penalty in the past? Is this error a trend found in all audited returns vs. this is completely out of the norm.

1. Tax Preparer normal office practice – Do you use a system for promoting accuracy and consistency in tax return preparation including checklists, methods of obtaining information from taxpayers , review procedures etc.

F. *Introductory Summary of Circular 230*

A. Any person engaged in "practice before the IRS" is subject to the rules of Circular 230, which is promulgated by the Treasury Department under the authority of 31 USC 330(a) and (b).

B. A practitioner subject to Circular 230 may be sanctioned for "incompetence and disreputable conduct." This type of conduct includes: (i) conviction of a criminal tax offense; (ii) giving false or misleading information to the IRS; (iii) willfully failing to file a federal tax return; (iv) assisting a client in violating the federal tax laws; (v) giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the IRC.

C. Available sanctions against practitioners who violate the duties or prohibitions in Circular 230 include censure, as well as suspension and disbarment from practice before the IRS. Congress has also authorized the treasury to impose monetary penalties against a tax practitioner for

violations of Circular 230. The maximum penalty is the "gross income derived or (to be derived) from the conduct giving rise to the penalty.

D. As discussed below, Subpart D of Circular 230 sets out the disciplinary procedures for violations. Enforcement authority rests with the Director of the Office of professional Responsibility ("OPR").

G. *Prohibited or Restricted Representation – Circular 230*

i. Statutory Prohibitions

A. Certain government employees and their partners and former government employees are prohibited or severely restricted by statute from representing taxpayers both during employment and after the termination of their government employment. The basic statute is the "Conflict of Interest" Act (*see* 18 USC §§201–219, as amended). Criminal penalties including fine and imprisonment are provided for its violation.

B. In addition to statutory prohibitions, government officials may also be restricted by Executive Orders.

C. Further, subsection 10.3(f) of circular 230 provides that no officer or employee in any branch of government, or any agency thereof, may practice before the IRS if such practice would violate the "Conflict of Interest Act."

ii. Practice by Former Government Employees – Circular 230 Restrictions

A. Subsection 10.25(b)(1) of Circ. No. 230 contains a general prohibition against representation by former government employees of anyone in any matter administered by the IRS if the representation would violate 18 USC §207 or any other laws of the United States.

B. Subsection 10.25(b)(2) prohibits any former government employee who personally and substantially participated in a "particular matter involving specific parties" (as defined in §10.25(a)(4)) from representing or knowingly assisting in that particular matter, any person who is or was a specific party to that particular matters.

C. Subsection 10.25(b)(3) provides that no former government employee who within one year before the end of his employment had official responsibility for a "particular matter involving specific parties" may, within two years after the end of his government employment, represent or knowingly assist in that particular matter, any person who is or was a "specific party" to that particular matter.

D. Subsection 10.25(b)(4) prohibits any former government employee, within one year after his employment ends, from communicating with or appearing before, which the intent to influence, any Treasury employee in connection with the publication, withdrawal, amendment, modification, or interpretation of a "rule" (defined in §10.25(a)(5)) in the

development of which the former employee participated or for which, within a year before the end of his employment, he had official responsibility.

E. No member of a firm of which the former government employee is also a member may represent or knowingly assist a person who was or is a "specific party" in any particular matter to which §10.25(b)(2) and (3) of Circ. No. 230 applies to the former government employee in that particular matter. However, this restriction does not apply if the firm isolates the former employee in such a way that he cannot assist in the representation.

H. Practice Duties and Restrictions – Circular 230

Subpart B of Circular 230 imposes certain duties and restrictions on representatives. These duties and restrictions are prospective in nature, since they spell out steps to be taken and activities to be avoided during practice.

i. Furnishing Information

A. Subsection 10.20(a)(1) of Circ. No. 230 requires information to be submitted promptly upon proper and lawful request of a duly authorized IRS officer or employee, while §10.20(c) of Circ. No. 230 prohibits interference or attempted interference with proper and lawful IRS efforts to obtain records or information.

B. The representative must promptly respond to a lawful and proper request for documents by either submitting the requested information or advising the requesting IRS officer or employee why the information cannot be provided (*e.g.*, privileged, or not controlled by the practitioner or his or her client).

C. If the requested records or documents are not in the possession of, or subject to the control of, the representative or the client, the representative must promptly notify the requesting IRS officer or employee and must provide any information that the representative has concerning the identity of any person who the representative believes may have possession or control of the requested records or information. Knowledge of Client Omission

A. Section 10.21 of Circ. No. 230 requires the representative to notify the client promptly if he learns that the client has not complied with the tax laws, or if there has been an error or omission in any return, document, affidavit, or other paper submitted or executed by the client in a matter before the IRS.

B. The representative also must advise the client of the consequences as provided under the Code and regulations of the noncompliance, error, or omission.

ii. Diligence as to Accuracy and Standard of Conduct

A. Due diligence

Section 10.22(a) of Circ. No. 230 requires a representative to use "due diligence" in preparing, or assisting in preparing, approving, and filing tax returns, documents, affidavits, and other papers relating to matters before the IRS, in determining the correctness of oral or written representations made by him to the Treasury Department, and in determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the IRS.

B. Standards for tax returns and documents, affidavits and other papers

Circular 230 §10.34(a)(1)(i) provides that a practitioner may not willfully, recklessly, or through gross incompetence, *sign* a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that: (a) lacks a reasonable basis; (b) is an unreasonable position as described in §6694(a)(2) (including the related regulations and other published guidance); or (c) is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in §6694(a)(2) (including the related regulations and other published guidance).

Under Circ. 230 §10.34(a)(1)(ii), a practitioner may not willfully, recklessly, or through gross incompetence, *advise* a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that: (a) lacks a reasonable basis; (b) is an unreasonable position as described in §6694(a)(2) (including the related regulations and other published guidance); or (c) is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in §6694(a)(2)(including the related regulations and other published guidance).

Under Circ. 230 §10.34(b) a practitioner may not advise a client to take a frivolous position on a submission to the IRS or advise a client to submit a document to the IRS that is meant primarily for delay, is frivolous or groundless, or contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation.

A practitioner has an affirmative duty to inform a client of any penalties that are reasonably likely to apply to a position taken on a return if the practitioner advised the client about the position or the practitioner prepared or signed the return. A practitioner must also inform a client of any penalties that are reasonably likely to apply to the client involving any document, affidavit or other paper submitted to the IRS.

In preparing or signing a tax return as a preparer or advising a taxpayer to take a position on a tax return, a practitioner may generally rely upon information furnished by the taxpayer without verification of such information. The practitioner's reliance must be in good faith. If the information furnished to the practitioner appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete, the practitioner must make reasonable inquiry regarding such information. Further, a practitioner may not ignore the implications of information furnished to, or actually known by, the practitioner.

C. Competency

Under §10.35, a practitioner must exercise "competence" when engaging in practice before the IRS. Competent practice requires the knowledge, skill, thoroughness and preparation necessary for the matter for which the practitioner is engaged.

D. Prompt Disposition of Pending Matters

Section 10.23 states that a representative may not "unreasonably delay" the prompt disposition of any matter before the IRS.

Ex. David was in the middle of an extremely heavy busy season when he was notified that one of his clients was being audited. The revenue agent wanted to commence the audit in the following week.

A. Is it unreasonable for David to attempt to delay the audit until after tax filing season? (No) Would your answer maybe change if instead of being a solo, David had four subordinates working for him?
B. If the Revenue Agent gave David an extension until April 20th, is it unreasonable for David to request another extension because he wants to take vacation right after tax season (yes).
C. Is it unreasonable for David to use Caller ID to avoid the Revenue Agent? (Yes).

E. Assistance from Disbarred or Suspended Persons

A representative may not knowingly and directly or indirectly accept assistance from or assist anyone who is under disbarment or suspension from practice before the IRS if the assistance relates to matters constituting practice before the IRS.

A practitioner does not have to disassociate himself or herself from a suspended or disbarred person if the other proscriptions regarding disbarred or suspended persons are observed.

Subsection 10.24(b) of Circ. 230 prohibits a practitioner from knowingly and directly or indirectly accepting assistance from any former government employee where the provisions of §10.25 of Circ. 230 or any federal law would be violated.

F. Fees

Section 10.27 of Circ. No. 230 provides that a representative may not charge clients an "unconscionable" fee for representation of a client in any matter before the IRS. No indication is given in Circ. No. 230, however, as to what constitutes an "unconscionable" fee.

For fee arrangements entered into after March 26, 2008, Circ. 230 §10.27 has been amended to generally prohibit a practitioner from charging a contingent fee for services rendered in connection with

any matter before the IRS. However, under amended §10.27 of Circ. No. 230 a practitioner may charge a contingent fee in three limited exceptions. First, §10.27(b)(2) permits a practitioner to charge a contingent fee for services rendered in connection with the examination of or challenge by the IRS to an original tax return or an amended return or claim for refund or credit where the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return.

Second, §10.27(b)(3) permits a practitioner to charge a contingent fee for services rendered in connection with a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the IRS.

Third, §10.27(b)(4) of Circ. No. 230 provides that a practitioner may charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Code.

For purposes of this rule, Circ. 230 §10.27(c)(1) defines a contingent fee as any fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge by the IRS or is sustained either by the IRS or in litigation. The term encompasses any fee that is at all based on a percentage of the refund reported on a return or a percentage of taxes saved, or that otherwise depends on the specific results attained.

Ex. Jonathan operates his own tax preparation business in a city where the cost of living is high. His clients are informed about his fee schedule when they arrive. He charges a minimum fee of $250 or 5% of any refund, whichever is higher.

A. A client's refund is $8,400, and Jonathan charges him $420. Is that unconscionable (probably not). Is there anything else wrong? Yes, you can't charge a contingent fee for tax prep.

G. Return of Client Records

Subsection 10.28(a) of Circ. No. 230 requires a representative to promptly return, upon a client's request, any and all of the records of the client that are necessary for the client to comply with his federal tax obligations. This rule generally applies regardless of a fee dispute. Nonetheless, if state law permits the representative to retain the client's records if a fee dispute exists, *e.g.*, the law provides for a lien on a client's records in favor of the representative during the course of a fee dispute, the representative is required to return only those records that must be attached to the client's return. Despite any state lien provision, however, the representative must provide the client access to review and copy any of the client's records retained under state law that are necessary for the client to comply with his or her federal tax obligations.

The records of the client are defined by §10.28(b) of Circ. No. 230 to include the following:

- all documents or written or electronic materials provided to the representative, or obtained by the representative in the course of his representation of the client, that preexisted the client's retention of the representative;

• materials that were prepared by the client or a third party, but not the representative's employee or agent, at any time and provided to the representative in connection with the subject matter of the representation; and

• any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the representative, or his or her employee or agent, that was presented to the client for a prior representation if that document is necessary for the client to comply with current federal tax obligations.

H. Conflicting Interests

Subsection 10.29(a) of Circ. No. 230 provides that a representative must not represent a client in the representative's practice before the IRS if the representation involves a conflict of interest, unless §10.29(b) of Circ. No. 230 permits the representation. A conflict of interest exists if the representation of one client will be directly adverse to another client. A conflict of interest also exists if there is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person or by a personal interest.

Waiver - Under §10.29(b) of Circ. No. 230, despite the existence of a conflict of interest, the representative may represent a client if three requirements are met. First, the representative must reasonably believe that he will be able to provide competent and diligent representation to each affected client. Second, the representation cannot be prohibited by law. Third, each affected client must give consent, which must be informed and confirmed in writing at the time the existence of the conflict of interest is known by the practitioner. The written confirmation must be provided within a reasonable period of time after the informed consent, and in no event later than 30 days.

The representative must retain copies of the written consents for at least 36 months from the date of the conclusion of the representation of the affected clients. The representative also must provide the written consents to any IRS officer or employee upon request.

Example. Practitioner Bill has an interview concerning a potential new client, Chip Kelly WTD, Inc. CKWTD is an S corporation with 12 shareholders (Chip calls them coordinators and coaches). Bill agrees to prepare the personal income tax return for the CEO, Chip Kelly, and its treasurer, Nick Allioti, who is his tax matters partner for the corporation. Are there potential areas of conflict?

Yes – Bill will consult with Nick about how certain tax return items should be handled (i.e., claiming depreciation or expensing under § 179). Nick may want CKWTD to accelerate deductions because he has ample basis for deducting a loss, while other shareholders, including Chip, have a low basis and cannot use the loss at this time. Because he is now Bill's client, he has the opportunity to talk to him about his own issues.

I. Advertising and Solicitation

Section 10.30 of Circ. No. 230 sets forth rules and guidelines for solicitation, advertising, communications and improper associations. Under §10.30(a)(1), a practitioner may not, with respect to any IRS matter, in any way use or participate in the use of any form of public communication or private solicitation containing a false, fraudulent, or coercive statement or claim; or a misleading or deceptive statement or claim. Enrolled agents, enrolled retirement plan agents, or registered tax return preparers, in describing their professional designation, may not utilize the term "certified" or imply an employer/employee relationship with the IRS.

Subsection 10.30(a)(2) of Circ. 230 prohibits attorneys, CPAs, enrolled agents, enrolled actuaries, or other individuals eligible to practice before the IRS from making, directly or indirectly, an uninvited written or oral solicitation of employment in matters relating to the IRS if the solicitation violates federal law, state law, or another applicable rule, such as a state bar rule limiting or prohibiting solicitation by attorneys.

Subsection 10.30(a)(2) further provides that any lawful solicitation made by or on behalf of the representative must clearly identify the solicitation as a solicitation.

Subsection 10.30(b)(1) of Circ. No. 230 allows a representative to disseminate fee information concerning fixed fees for specific routine services, hourly rates, range of fees for particular services, and fees charged for an initial consultation.

Under Circ. 230 §10.30(c), practitioners may communicate through the use of professional lists, telephone directories, print media, mailings, electronic mail, facsimile, hand-delivered flyers, radio, television, and any other method. The method chosen cannot cause the communication to become untruthful, deceptive, or otherwise violative of Circular 230, however.

Where radio or television is used, Circ. 230 §10.30(c) requires a practitioner to retain a recording of the actual transmission. In the case of direct mail and e-commerce communications, a practitioner must retain a copy of the actual mailing, along with a list or other description of persons to whom such communication was distributed. Copies of broadcasts or mailings must be retained by a practitioner for at least 36 months from the date of the last transmission or use.

A representative may not, according to Circ. 230 §10.30(d), in matters related to the IRS, assist or accept assistance from a person or entity who, to the representative's knowledge, obtains clients or otherwise practices in a manner forbidden under these advertising and solicitation rules.

J. Negotiation of Taxpayer Refund Checks

Under Prop. Circ. 230 §10.31, a practitioner may not endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise) issued to a client by the government with respect to a federal tax liability.

K. Best Practices

Treasury and the IRS amended Circular 230 to provide aspirational best practices standards. To comply with best practices, tax advisors should provide their clients with the "highest quality representation concerning federal tax issues" in providing tax advice and in preparing IRS submissions. A practitioner who fails to comply with best practices is not subject to discipline under Circular 230

L. Written Advice and Covered Opinions

Circular 230 currently imposes standards upon tax practitioners who render written tax advice in two distinct situations. Circular 230 §10.35 provides specific rules for "covered" opinions, i.e., tax shelter opinions. Circular 230 §10.37 provides rules for all other written advice. In September 2012 Treasury and the IRS unveiled proposed changes to the rules governing written advice and tax shelter opinions (i.e., "covered opinions") that would greatly simplify the current and somewhat complex rules discussed below by replacing the two sets of rules in Circ. 230 §§10.35 and 10.37 with one set of basic principles under Circ. 230 §10.37 applicable to all written advice.

i. Covered Opinions

a. Definition

Circular 230 §10.35 provides requirements for covered opinions issued after June 20, 2005. A covered opinion is written advice by a practitioner, including an electronic communication, that concerns one or more federal tax issues arising from: (1) a transaction that is the same as or substantially similar to a transaction that the IRS has determined to be a tax avoidance transaction and identified by published guidance as a listed transaction; (2) any partnership or other entity, investment plan or arrangement, or other plan or arrangement, with a principle purpose of avoidance or evasion of any tax imposed by the Code; or (3) any partnership or other entity, investment plan or arrangement, or other plan or arrangement, with a significant purpose of avoidance or evasion of any tax imposed by the Code, if the written advice is (a) a reliance opinion, (b) a marketed opinion, (c) subject to conditions of confidentiality, or (d) subject to contractual protection. The following terms are defined below: reliance opinion, marketed opinion, conditions of confidentiality, and contractual protection.

The term "covered opinion" does not include written advice provided to a client during the course of an engagement if the practitioner reasonably is expected to provide subsequent written advice to the client that satisfies the requirements of Circ. 230 §10.35**.** A covered opinion does not include written advice prepared for and provided to a taxpayer, solely for use by that taxpayer, after the taxpayer has filed a tax return with the IRS reflecting the benefits of the transaction. However, this exclusion does not apply if the practitioner knows or has reason to know that the written advice will be relied upon by the taxpayer to take a position on a tax return filed after the date on which the advice is provided to the taxpayer. Written advice provided to an employer by a practitioner in that practitioner's capacity as an employee of that employer solely for purposes of determining the tax liability of the employer is excluded. Also excluded from the definition of covered opinion is written advice that does not resolve a federal tax issue in the taxpayer's favor, unless the advice reaches a conclusion favorable to the taxpayer at any confidence level with respect to that issue.

A "reliance opinion" is written advice that concludes at a confidence level of more likely than not (*i.e.*, greater than 50% likelihood) that one or more significant federal tax issues would be resolved in the taxpayer's favor.

A "marketed opinion" is written advice where the practitioner knows or has reason to know that the advice will be used or referred to by a person other than the practitioner (or an associated person), in promoting, marketing, or recommending a partnership or other entity, or an investment plan or arrangement, to another taxpayer. As with a reliance opinion, an exception is available for opinions other than those involving a listed transaction or a transaction with the principle purpose of avoiding or evading taxes**.**

b. Requirements for Covered Opinions

Circular 230 requires the practitioner, with respect to a covered opinion, to: (1) determine the facts; (2) relate the facts to the law; (3) evaluate the significant federal tax issues and reach a conclusion with respect to each such issue; and (4) reach an overall conclusion regarding the tax treatment of the transaction.

i. Determine the Facts

Circular 230 §10.35(c)(1) requires a practitioner to use reasonable efforts to identify and ascertain the facts, to determine which facts are relevant, and to identify and consider all of the relevant facts in the opinion. In the case of a proposed or prospective transaction, the facts may relate to future events.

Example – Unreasonable Reliance on Client Representation. Boris told his accountant, Jack, that deposits into his American bank account were from a hoard of rubles he had accumulated before he moved to the US and became a citizen. Based on that representation, Jack did not include the deposits in Boris' income when he prepared his tax return. DO you think it is reasonable to rely on this? No – In *American Valmar International Ltd v. Comm'r*, TC Memo 1998-419, the court held it was unreasonable for a practitioner to rely on such a statement without further documentation of the source of the deposits.

ii. Relating the Law to Facts

The practitioner must relate the applicable law, including potentially applicable judicial doctrines, to the relevant facts in the opinion.

iii. Considering All Significant Federal Tax Issues

The practitioner must conclude that the taxpayer will prevail on the merits with respect to each significant federal tax issue considered in the opinion, at a confidence level of at least more likely than not, and describe the reasons for the conclusions, including the facts and analysis supporting the conclusions.

iv. Providing an Overall Conclusion

The opinion must provide the practitioner's overall conclusion as to the likelihood that the federal tax treatment of the transaction or matter that is the subject of the opinion is the proper treatment and the reasons for that conclusion.

c. Competence Requirements

Circular 230 §10.35(d)(1) requires the practitioner to be knowledgeable in all of the aspects of federal tax law relevant to the practitioner's opinion, unless the practitioner relies on the opinion of another practitioner with respect to one or more significant federal tax issues. In cases where the practitioner relies on the opinion of another practitioner, the relying practitioner's opinion must identify the other opinion and set forth the conclusions reached in the other opinion.

d. Disclosure Requirements

All covered opinions must contain the appropriate disclosures discussed in this section, below. All disclosures must be prominently disclosed in the opinion. To be prominently disclosed, the disclosure must be readily apparent to a reader of the written advice. Whether an item is readily apparent will depend on the facts and circumstances surrounding the written advice including, but not limited to, the sophistication of the taxpayer and the length of the written advice.

Example – Written Advice – Practitioner Mary promised one of her clients to research a tax issue. Because the client is notoriously long-winded, Mary decided to save time by sending her a letter outlining the results of her research. Her final conclusion was not documented using the more detailed requirements for covered opinions. Does Circular 230 cover this letter? Yes. If she wants to avoid application of the covered opinion standards, she should include a notation in the letter informing her client that the advice in the letter should not be relied upon to avoid an accuracy-related penalty for a subsequently filed return. It should say "Any advice in this letter is not intended to be used for the purpose of avoiding any penalties that may be imposed under the Internal Revenue Code." (Remember to always have this at the bottom of every e-mail you send to clients).

I. *Disciplinary Proceedings*

Under Circ. 230 §10.50(a) the Treasury Secretary may censure (publicly reprimand), suspend or disbar, for cause, an attorney, CPA, enrolled agent, enrolled retirement plan agent or enrolled actuary from practice before the IRS for:

- Technical incompetence;
- Disreputable conduct (within the meaning of Circ. 230 §10.51;
- Failure to comply with the Circular 230 regulations (under the prohibited conduct standards of Circ. 230 §10.52); or

• With intent to defraud, in any manner willfully and knowingly misleads or threatens a client or prospective client.

The Secretary of the Treasury may impose a monetary penalty on any practitioner who engages in conduct subject to sanction under Circ. 230 §10.50(a). A monetary penalty may be imposed in addition to the other disciplinary actions described above. The Treasury Secretary has the authority to impose a monetary penalty on the practitioner's firm, employer, or other entity if the practitioner was acting on behalf of such practitioner's firm, employer, or other entity in connection with the conduct giving rise to the penalty if the practitioner's firm, employer, or entity knew, or reasonably should have known, of the practitioner's conduct. The amount of the monetary penalty imposed under Circ. 230 §10.50 shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the monetary penalty.

Basis for Action

a. Disreputable Conduct

The terms "incompetence" and "disreputable" are not expressly defined in the Enabling Act or Circ. 230. Circular 230 §10.51, however, outlines specific forms of conduct for which an individual subject to Circ. 230 may be censured, suspended, or disbarred. Such conduct, however, is not limited to the specific forms contained in Circ. 230 §10.51(a)(1) through (18) as listed below:

• Conviction of any criminal offense under the federal tax laws of the United States.

• Conviction of any offense involving dishonesty or breach of trust.

• Conviction of any felony under federal or state law for which the conduct involved renders the practitioner unfit to practice before the IRS.

• Giving false or misleading information, or participating in any way in giving such information, to the Treasury Department or any Treasury officer or employee, or to any tribunal authorized to pass upon federal tax matters, in connection with any matter pending or likely to be pending before them, knowing such information to be false or misleading.

• Solicitation of employment as prohibited under Circ. 230 §10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able to improperly obtain special consideration or action from the IRS or an IRS officer or employee.

• Willful failure to make a federal tax return in violation of the revenue laws of the United States, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any federal tax assessment or payment thereof.

• Willfully assisting, counseling, or encouraging a client or prospective client in violating (or suggesting a client or prospective client violate) any federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade federal taxes or payment thereof.

• Misappropriation of, or failure to properly and promptly remit funds received from a client for the purpose of payment of taxes or other obligations due to the United States.

• Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the IRS by use of threats, false accusations, duress, or coercion, by the offer of any special inducement or promise of advantages or by the bestowing of any gift, favor, or thing of value.

• Disbarment or suspension from practice as an attorney, CPA, public accountant, or actuary by any duly constituted authority of any state, possession, territory, Commonwealth, or the District of Columbia, or by any federal court of record, or any federal agency, body or board.

• Knowingly aiding and abetting another person to practice before the IRS during a period of suspension, disbarment, or ineligibility of such other person.

• Contemptuous conduct in connection with practice before the IRS, including the use of abusive language, making false accusations and statements knowing them to be false, or circulating or publishing malicious or libelous matter.

• Giving a false opinion knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or a pattern of providing incompetent opinions on questions arising under federal tax law

• Willfully failing to sign a tax return prepared by the practitioner when such signature is required by the federal tax laws unless the failure is due to reasonable cause and not due to neglect.

• Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code, contrary to the order of a court of competent jurisdiction, or contrary to the order of an administrative law judge in a proceeding instituted under Circ. 230 §10.60.

• Willfully failing to file on magnetic or other media when required to do so (unless the failure is due to reasonable cause and not due to willful neglect).

• Willfully preparing all or substantially all of, or signing, a tax return or claim for refund when the practitioner does not possess a current or otherwise valid PTIN or other prescribed identifying number.

• Willfully representing a taxpayer before an officer or employee of the IRS unless the practitioner is authorized to do so under Circ. 230

The following examples illustrate the types of conduct considered to be "disreputable":

Example 1: A representative files a complaint under 1998 IRS Reform Act §1203, alleging that an IRS examining agent is not following the offer in compromise procedures set out in the Internal Revenue Manual. The representative claims that the agent wants to retaliate against the representative for the representative's success in another case handled by the examining agent, although the representative is aware that the agent is following the Manual. The representative has engaged in disreputable conduct under §10.50 of Circ. No. 230 for which he may be sanctioned.

Example 2: A representative knowingly advances frivolous arguments in a pre-levy collection due process hearing. The representative has engaged in disreputable conduct under §10.50 of Circ. No. 230 for which he may be sanctioned.

Example 3: In *Washburn v. Shapiro*, the taxpayer, a CPA, was disbarred from practice before the IRS after he was criminally convicted of preparing a fraudulent or false tax return under §7206(2). An Administrative Judge's Opinion, affirmed by both the General Counsel of the Treasury and the District Court, declared that the conviction under §7206(2) constituted a violation of a "criminal offense under the revenue laws of the United States" for which the CPA could be disbarred. The opinion also declared the conviction and the conduct supporting it had shown the taxpayer to be "disreputable" within the meaning of §10.50.

Example 4: In *Poole v. U.S.*, the Treasury found that a CPA had willfully failed to file his tax returns for three years, and subsequently disbarred the CPA for engaging in disreputable conduct. The CPA challenged his disbarment arguing that the Treasury did not have the requisite disciplinary authority, that his willful failure to file returns should not constitute disreputable conduct per se and that he was denied due process in his administrative hearing. The court found that the Treasury has the statutory authority to regulate those who practice before the IRS, and that such interpretation had been repeatedly sanctioned by Congress. With respect to whether the CPA's conduct was disreputable, the court found that §10.51 explicitly states that willful failure to file returns constitutes disreputable conduct, and that the failure of a CPA to file his own tax returns falls outside the range of ordinary professional obligation which is disreputable conduct. Even though the CPA was unable to review orders of disciplinary actions in other cases, the court found that the CPA was afforded due process in his administrative hearing because disciplinary proceedings are individualized and decisions from other cases are of limited relevance.

Example 5: In *Harary v. Blumenthal*, a CPA was disbarred from practice before the IRS for attempting to influence an agent in the conduct of an audit of the CPA's client and the CPA's overstating to his client of the amount of a payment that a special agent had agreed to accept. Prior to the administrative hearing in which the CPA was disbarred, the CPA was charged with bribing and conspiring to bribe a special agent and with paying the agent a gratuity, all in violation of federal law. During the CPA's trial, the CPA admitted that he had paid the agent $1,250 on behalf of his client, which he had told

his client that the agent wanted $2,000, and that the CPA had kept the $750 difference. The CPA was acquitted of the conspiracy and bribery charges, but was convicted of the gratuity charge. However, on appeal the conviction on the gratuity charge was dismissed because the gratuity charge was improperly submitted as a lesser included offense to the jury. Since the CPA had been acquitted of the conspiracy and bribery charges and the conviction of the gratuity charge had been reversed, the CPA appealed his disbarment from the administrative hearing. The CPA argued that due to his acquittal of the bribery and conspiracy to bribe charges, collateral estoppel prevented him from being disbarred. The Second Circuit affirmed the District Court's upholding of the CPA's disbarment, stating that the standard of proof in a criminal trial is guilt beyond a reasonable doubt, and an acquittal in a criminal trial using such standard cannot control a subsequent disbarment proceeding in which a lower standard of proof is required. The court further held that the issue in a disbarment proceeding is essentially fitness to practice, not criminal culpability.

Example 6: For several years, a sole practitioner made estimated payments that exceeded his personal income tax liability. During those years he did not file Form 1040. When contacted by IRS Examination personnel, he stated that he always gave his many clients first priority and, as a result, had no time to file his own returns. He claimed, moreover, that his estimated payments not only showed his good faith but, for all practical purposes, satisfied his income tax obligations. The Director regarded the practitioner's conduct as a violation of Circ. No. 230. The Director explained that a willful failure to file tax returns is not a mere formality, even when the practitioner is due a refund. Rather, such failure is a violation of a known legal duty and constitutes disreputable conduct under §10.51 of Circ. No. 230. The Director noted that although the practitioner's estimated payments entitled him to some credit for good faith, this did not offset his failure to meet his responsibility to file

Example 7: After the client's personal return was selected for audit, the client insisted to the practitioner that the matter be resolved as soon as possible. The practitioner immediately telephoned the revenue agent who was to conduct the audit, but found that the agent was unavailable. When the agent returned the call, the practitioner was with a client. Over the next several days — through no fault of either party — they happened to miss each other's calls. The practitioner placed another call and was informed that the revenue agent was in a meeting. The practitioner then said, "This is John Smith at City Hospital emergency room. I must speak to Agent Jones right now. It's matter of life or death." The practitioner's message was relayed to the revenue agent, who became alarmed. When the revenue agent picked up the telephone, the practitioner identified himself and stated that he wanted to schedule the audit. The Director contacted the practitioner concerning this incident, stating that the practitioner may have engaged in disreputable conduct in violation of §10.51 of Circ. No. 230. The practitioner responded that he had used a harmless ruse to bring the revenue agent to the telephone. However, the Director concluded that under any standard of reasonableness, the practitioner must have known that his conduct was unprofessional and hurtful. Therefore, the Director found the practitioner in violation of §10.51.

Example 8: A CPA was disbarred from practice before the IRS based on an Administrative Law Judge's conclusion that he participated in evading or attempting to evade federal tax, or its payment, by counseling clients to pay other creditors with funds which had been withheld from employee wages for

deposit of federal payroll taxes, counseled clients to refuse to honor a lawful IRS summons, and used threats, duress, or coercion to attempt to influence an IRS officer to remove an IRS employee from a case involving his client. The CPA appealed under the Administrative Procedures Act, contending that the Administrative Law Judge was biased against him and that 31 CFR Part 10 was unconstitutional. The courts upheld the result. The district court found evidence that the CPA counseled clients to pay creditors with trust fund taxes in the CPA's testimony in a bankruptcy hearing and in differences in clients' tax payment histories before and after the CPA became their representative. The court also decided that the CPA tried to make the IRS officer undertake a particular personnel action by mentioning risks of the officer being sued personally and being held personally liable for an individual's death and the actions of other IRS employees.

B. Preliminary Procedure

i. Subsection 10.53(a) of Circ. No. 230 requires an officer or employee of the IRS to promptly make a written report to the Director of the OPR if he has reason to believe that has violated any part of Circ. No. 230. Subsection 10.53(b) of Circ. No. 230 permits any other person who is not IRS personnel and who has information of a violation by a practitioner to make an oral or written report of the alleged violation to any IRS officer or employee. The IRS officer or employee then makes a written report of the alleged violation to the Director of the OPR.

ii. Under §10.53(c) of Circ. No. 230, the Director of the OPR must not maintain the report, regardless of whether the report originates with an IRS officer or employee or non-IRS personnel, unless the Director is permitted to do so by the applicable records control schedule as approved by the National Archives and Records Administration and designated in the Internal Revenue Manual.

i. Notification to Representative

Section 10.60 authorizes the Director of the OPR to reprimand or institute a censure, suspension, or disbarment proceeding against a practitioner (or firm, employer or other entity if applicable) for any violation of Circ. No. 230 which the Director of the OPR has reason to believe was committed. Such proceedings are rarely instituted until after the indicated violations have been brought to the representative's attention and his response has been considered.

ii. Response by Representative

A. The notification letter will request the representative to admit, explain, justify, or deny the alleged violations.

B. The representative must decide his course of action at this point. He may either:

- Make a brief denial of any violation and request a proceeding before an Administrative Law Judge; or
- Make a responsive reply to the Director of the OPR.

C. A representative has much to gain, on the other hand, by following the second course described above. A responsive reply might result in the case being closed as "no cause of action" or, perhaps, a minimum action such as a reprimand.

D. The representative must also decide whether to retain an attorney.

E. The reply should contain:

- a response to each indicated violation;
- an admission of any clear-cut violations, together with a discussion of any mitigating circumstances, and an explanation as to how the violations occurred;
- a denial of those violations which are not true, or which are not technically true because of the factual circumstances involved; and
- any additional information which may help influence a favorable determination of the case.

F. The representative, in most cases, should conclude his response by including:

- an indicated willingness to furnish additional information that might be needed; and
- a request for a conference before any suspension or disbarment proceeding is instituted.

G. The response ordinarily should not raise:

- any basic jurisdictional defenses; or
- any affirmative defenses.

H. Jurisdictional or affirmative defenses should not be raised as "issues" at this point, but could be included as inquiries, with a request for answer or clarification.

iii. Negotiated Dispositions

A. Evaluation of the response may result in the representative's case being closed without disciplinary action.

B. The "advice" letter may be signed by the Director of the OPR or a staff attorney. If it does not indicate an acceptable disposition, the representative can usually find out what additional information might be necessary by a phone call to the Director of the OPR.

C. A negotiated disposition is a case closed with the Director of the OPR in order to avoid the institution or conclusion of a disbarment or suspension proceeding. Under Circ. 230 §10.61(a), the Director of OPR has the ability to confer with a practitioner, firm, employer or other entity, or an appraiser concerning allegations of misconduct regardless of whether a proceeding has been instituted.

D. Negotiated dispositions for all representatives include:

- reprimands (§10.60(a)); and

• agreed censure, suspension for a certain period of time, or disbarment (§10.61(b)).

E. An enrolled agent may also resign from practice (§10.61(b)). An appraiser may consent to disqualification (§10.61(c)).

F. A representative may negotiate a disposition of his case either before or at a conference with the Director of the OPR. Such conferences are informal — the proceedings are not transcribed and no testimony is taken. The representative is frankly advised of the government's view of the case and whether disciplinary action is indicated.

G. The representative's case is not handled by the Director of the OPR in an "adversary type" manner. If the representative agrees that a violation or violations occurred, he must decide whether to obtain a negotiated disposition.

H. Section 10.60(a) authorizes the Director of the OPR to issue reprimands. It does not appear that the representative's consent to the reprimand is needed. However, absent a proceeding, consent is needed for censure, as this is a public reprimand.

I. Negotiated dispositions usually require:

• written offers or consents to censure, suspension or disqualification (in the case of an appraiser);
• written resignations; or
• submission of enrollment cards by enrolled agents.

In suspension cases, the cards are returned to agents when the period of suspension terminates.

A representative who obtains a negotiated disposition not only avoids the time and expense of a proceeding before an Administrative Law Judge, but also avoids the grounds for his censure or suspension, or in the case of an appraiser, disqualification being published in the Internal Revenue Bulletin. However, in the case of disbarment by a final order of an Administrative Law Judge, the suspension is published in the Internal Revenue Bulletin along with the grounds for suspension, and notice may also be given to state bar authorities and interested federal agencies.

iv. Institution of Proceeding

A. Under §10.60 of Circ. No. 230, a proceeding is instituted by a complaint signed by the Director of the OPR and filed in his office. In such proceeding, the practitioner (or firm employer or other entity if applicable) is a "respondent." A respondent should engage an attorney upon receipt of a complaint unless he already has one.

Example: The practitioner pleaded guilty to making a false statement in securing a federally insured mortgage, which resulted in a felony conviction under 18 USC §1001. Within five years of the conviction, the Director of the OPR served the practitioner with a complaint seeking his expedited suspension under §10.82 of Circ. No. 230. The practitioner filed an answer, claiming that breach of a

fiduciary duty is a necessary element for a §10.82 suspension that is based on a felony involving dishonesty. The Director explained that the long-standing interpretation of "dishonesty" in §10.51(b) is that it means a knowing falsehood, and therefore fiduciary duty has no relevance to an offense involving dishonesty. The Director therefore concluded that the expedited suspension was proper.

a. Complaint

Subsection 10.62(a) of Circ. No. 230 provides that a complaint must contain a clear and concise description of all of the allegations which constitute the basis for the proceeding. A complaint shall be deemed sufficient if it fairly informs the respondent of the charges against him so that he is able to prepare his defense. The complaint, or a separate paper attached thereto, must also contain:

• The sanction sought against the respondent, and if the sanction is suspension, the length of the suspension;

• A demand for answer;

• The time and place for its filing (which shall not be less than 30 days from the date of service of complaint);

• The name and address of the administrative Law Judge with whom the answer must be filed;

• The name and address of the person representing the Director of OPR to whom a copy of the answer must be served;

• Notification that a decision by default will be rendered against the respondent if he fails to file his answer as required; and

• The signature of the Director of the OPR.

b. Answer

A written answer must be filed by the respondent within the time specified in the complaint or notice of institution of the proceeding, unless on application the time is extended by the Director of the OPR or the Administrative Law Judge. The answer must be filed with the Administrative Law Judge and served on the Director of OPR.

v. Hearing on Complaint

A. Over the years, relatively few suspension and disbarment proceedings have been conducted. (As noted earlier, most potential disciplinary cases are closed by negotiated dispositions.) Where proceedings have been held, they have not been published as reported cases or decisions containing applicable principles, rulings, and holdings.

B. Each case before an Administrative Law Judge is handled as a separate matter, using principles and rules of general administrative law and, where appropriate, tax law.

C. Hearings are conducted pursuant to the Administrative Procedure Act (5 USC §556). Many provisions of the Act have been incorporated into §§10.66–10.78 of Circ. No. 230. The Act should be consulted for those provisions which have been incorporated, and those which have not.

(1) Presiding officer at a hearing on complaint is an Administrative Law Judge
(2) A respondent may act as his own defense counsel or be represented by a practitioner.
(3) The Director of the OPR may be represented by an attorney or other IRS employee.
(4) The Administrative Law Judge determines the time and place of hearing, and regulates its course and conduct. The Administrative Law Judge should, on notice sufficient to allow proper preparation, schedule the hearing to occur no later than 180 days after the time for filing the answer unless the Administrative Law Judge determines that, in the interest of justice, a hearing must be held at a later time. In fixing the time and place for the hearing, "due regard shall be had for the convenience and necessity of the parties or their representatives."
(5) The hearing is usually conducted as a private proceeding. The parties, their counsel, representatives, witnesses, etc., attend, but mere spectators are generally excluded.
(6) Subsection 10.70(b) of Circ. No. 230 specifies certain powers of the Administrative Law Judge. They are not all inclusive. The judge is given the power to:
    • Administer oaths and affirmations;
    • Make rulings upon motions and requests, which rulings may not be appealed before the close of a hearing except in extraordinary circumstances and at the discretion of the Administrative Law Judge;
    • Determine the time and place of hearing and regulate its course and conduct;
    • Adopt rules of procedure and modify the same from time to time as occasion requires for the orderly disposition of proceedings;
    • Rule upon offers of proof, receive relevant evidence, and examine witnesses;
    • Take or authorize the taking of depositions or answers to requests for admissions;
    • Receive and consider oral or written arguments on facts or law;
    • Hold or provide for the holding of conferences for the settlement or simplification of the issues by consent of the parties;
    • Perform such acts and take such measures as are necessary or appropriate to the efficient conduct of any proceeding; and
    • Make decisions.
(7) The basis of the hearing is the initial complaint, plus any supplemental charges that may be filed.
(8) The decision of the Administrative Law Judge includes findings of fact and conclusions of law, with supporting reasons, upon all material issues of fact, law, or discretion presented on the record.
    a. Circ. 230 §10.76(a)(1) provides that the Administrative Law Judge should enter a decision in the case within 180 days after the conclusion of a hearing and receipt of any proposed findings and conclusions timely submitted by the parties.
    b. If a party files a motion for summary adjudication, the Administrative Law Judge should rule on the motion within 60 days after a written response to

the motion for summary adjudication or, if no written response is filed, 90 days after the motion for summary adjudication is filed. The Administrative Law Judge shall thereafter render a decision if the pleadings, depositions, admissions, and any other admissible evidence show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law.

(9) In the absence of an appeal or review by the Secretary of the Treasury, the initial decision of the Administrative Law Judge automatically becomes final 30 days after the date of the Administrative Law Judge's decision.

a. If the final order is disbarment the respondent may not thereafter be permitted to practice before the IRS unless, and until, authorized to do so by the Director of the OPR

b. If the final order is suspension:

• The respondent may not practice before the IRS during the period of suspension; 371

• For periods after the suspension, the respondent's future representations may be subject to conditions "designed to promote high standards of conduct"; 372 and

• Partners of the suspended person or any other practitioners are subject to suspension or disbarment if they knowingly aid and abet the practice by the suspended person while he is under suspension

c. If the final order is censure, or public reprimand, the respondent will be permitted to practice before the IRS, but the respondent's future representations may be subject to conditions.

(10) After five years from the date of disbarment, or disqualification in the case of an appraiser, the Director of the OPR may entertain a petition for reinstatement. In order to determine that such reinstatement is warranted and is not contrary to the public interest, an investigation quite likely would be made. The investigation would likely cover such matters as

• The petitioner's professional conduct since disbarment;

• Whether he avoided all improper aspects of practice before the IRS;

• His present status with state authorities to practice as an attorney, CPA, or licensed accountant; and

• H is compliance with federal tax return filing requirements.