26th Annual Tax Practitioner & IRS Fall Seminar
November 5, 2020

Federal Ethics for Tax Professionals:
Office of Professional Responsibility (OPR) and Circular 230

Agenda
• Statutory and Regulatory Authority
• The Office of Professional Responsibility (OPR) and Circular 230
• Top Practitioner Violations under Circular 230
• Discipline Options for Violations of Circular 230
• Contact Information and Resources

STATUTORY AND REGULATORY AUTHORITY
Statutory Authority

• 31 USC §330 (1884) authorizes:
  • The regulation of the practice of representatives of persons before the Department of the Treasury, including the IRS, and determinations of practitioner "fitness" to practice. (31 USC §330(a)).
  • Types of disciplinary action, to include monetary penalties. (31 USC §330(b)).
  • The regulation of certain appraisers. (31 USC §330(c)).
  • Setting standards for certain written advice. (31 USC §330(d)).

Statutory Authority (cont.)

• Fitness to Practice
  • Good character
  • Good reputation
  • Necessary qualifications to provide valuable service to the client
  • Competency to advise and assist persons in presenting their cases

Statutory Authority (cont.)

• "Practice" before the IRS is defined in §10.2(a)(4) — all matters under laws or regulations administered by the IRS relating to a taxpayer's rights, privileges, or liabilities. Examples:
  • Advocating/representing a client in an audit, before IRS Collections, and/or appearing before IRS Appeals
  • Preparing or filing documents for submission to the IRS
  • Corresponding and communicating to the IRS regarding a taxpayer
  • Advising clients (including emails, texts) regarding tax positions
  • Providing appraisals for tax positions
  • Not mere tax return preparation
Regulatory and Other Authority

- 31 CFR Subtitle A, Part 10 (commonly called "Treasury Circular No. 230")
- Originally published 1921; latest revision issued 6/9/14 (eff. 6/12/14 (TD 9668))
- 31 CFR 10.1(a)(1)
- Delegation Order 25-16 (Rev. 1)
  - Rev. Proc. 81-38
  - Rev. Proc. 2014-42

Statutory Authority (contd.)

The regulated community is principally:

- Attorneys
- CPAs
- All Enrolled Agents, Enrolled Retirement Plan Agents, Enrolled Actuaries
- Annual Filing Season Program Record of Completion Holders
- Appraisers who submit appraisals supporting tax positions

OFFICE OF PROFESSIONAL RESPONSIBILITY (OPR) AND CIRCULAR 230
OPR

- Administers the laws and regulations governing practice of tax professionals before the IRS;
- Interprets and applies the standards of practice for tax professionals in Circular 230 in a fair and equitable manner;
- Investigates allegations of misconduct by practitioners in their practice before the IRS and imposes disciplinary sanctions if warranted; and
- Supports the IRS's strategy to enhance enforcement of the Internal Revenue Code by ensuring tax practitioners adhere to professional standards and follow the law.

OPR Organizational Structure

Treasury Circular No. 230

- Circular 230 is the document containing the statute and regulations detailing a tax professional's duties and obligations while practicing before the IRS
- Authorizes specific sanctions for violations of the duties and obligations
- Describes the procedures that apply to administrative proceedings for discipline
- Treasury Department Circular No. 230 (Rev. 6-2014)
TOP PRACTITIONER VIOLATIONS UNDER CIRCULAR 230

Practitioner Discipline – Top Violations

October 1, 2014 through September 30, 2020

Practitioner Violations – Case Study*

From 1999 to 2003, Taxpayer, a CPA, resided at a home in Hermosa Beach, CA, owned by his long-time friend, Practitioner. Practitioner was an attorney, CPA, and tax return preparer.

In 2005, Taxpayer moved to New York, where he bought a co-op unit. Taxpayer would occasionally return to the Hermosa Beach property for brief stints, including holidays.

Taxpayer enjoyed living in Hermosa Beach so much, he claimed to have bought a 32.5% interest in the Hermosa Beach property from Practitioner in 2010 financed by an interest-bearing loan from Practitioner. Taxpayer claimed that at that time, Practitioner owed him $150,000.

In 2015, after his job in New York City ended, Taxpayer moved to Minnesota. He rented out his New York property during all of 2015.

*Case Study based on facts in McCarthy v. Commr, T.C. Memo. 2020-74
Practitioner Violations – Case Study

- Practitioner prepared Taxpayer’s 2015 tax return reporting:
  - Taxpayer’s Minnesota address as his home;
  - Married Filing Separately (MFS) filing status;
  - Wage income, but no interest or rental income;
  - Rental loss for the New York property (Schedule E); and
  - Deduction for mortgage interest paid on the New York and Hermosa Beach properties (Schedule A). But Practitioner didn’t:
    - Confirm which property was Taxpayer’s primary residence.
    - Receive written consent from Taxpayer’s spouse about this deduction.
    - During all of 2015, Practitioner rented out the Hermosa Beach property to his niece.
    - The IRS examined Taxpayer’s 2015 return and made adjustments, including disallowing the mortgage interest deduction and penalties.

Practitioner Discipline – Top Violation

§10.22 Due Diligence

Practitioner Discipline – Top Violation

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Due diligence—reasonable steps taken by a person in order to satisfy a legal requirement.

§10.22 Diligence as to Accuracy

Tax practitioners who practice before the IRS have a dual responsibility with the IRS to ensure the fair and correct administration of the tax laws.
§10.22 Diligence as to Accuracy (contd.)

• A practitioner must exercise due diligence –
  • In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to IRS matters;
  • In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and
  • In determining the correctness of oral or written representations made by the practitioner to clients regarding any matter administered by the IRS.

§10.22 Diligence as to Accuracy (contd.)

• Relying on information furnished by clients (§10.34(d))
  • Generally may rely in good faith without verification upon information furnished by the client.
  • Can not ignore the implications of information furnished to or actually known by the practitioner.
  • Must make reasonable inquiries if the information furnished appears incorrect, incomplete, or inconsistent with other facts or assumptions.
  • Willful blindness violates a practitioner's due diligence responsibilities under Circular 230.

§10.22 Diligence as to Accuracy (contd.)

• Reliance on another professional's work (§10.34(d))
  • May rely on their work unless you have reason to question it.
    • No willful blindness!
  • Under the safe harbor provision in 10.22, deemed to have exercised reasonable due diligence if used reasonable care in selecting, engaging, supervising, training, overseeing, or evaluating the individual's work relying on.
    • Reasonable care is based on the facts and circumstances of the situation.
§10.22 Diligence as to Accuracy (contd.)

• To ensure you exercise your due diligence responsibilities, best practices (§10.35) should include:
  • Using an engagement agreement with provisions that set forth the mutual responsibilities of the client and tax practitioner.
  • Obtaining copies of a new client's prior years IRS-filed tax returns — at a minimum, obtain the most recent IRS-filed tax return, if possible.
  • Tailoring client tax information organizers to ensure correct and complete information is gathered.

... (Contd.)
• Ask questions of the client and make reasonable inquiries if the information being given appears incorrect, inconsistent, or incomplete.
• Contemporaneously document questions and taxpayer responses.
• No Cir. 230 requirement regarding documenting information receive from clients and others. Still, it's good practice to maintain a written record of such communications—can assist during an IRS examination or alleged malpractice claims.
• Confirm the taxpayer has maintained appropriate books and records or substantiation to support deductions or tax treatments.

... (Contd.)
• Obtain appropriate and sufficient information to determine the correct reporting of items on the return (e.g., income, deductions, credits, etc.) and compliance with the tax laws.
• If an estimate must be used (e.g., lost record), critical to maintain a record on how the estimate was determined to substantiate the position on the return and as a defense to penalties and sanctions.
• Think "substantial authority" or "reasonable basis" with disclosure (i.e., Form 8275).
• Don't take unnecessary risks or be cute; loss of livelihood and damage to reputation and integrity is not worth it.
§10.22 Diligence as to Accuracy (contd.)

• What if, in exercising your due diligence responsibilities, it’s discovered a client hasn’t complied with US revenue laws or made an error in, or omission from, a return, affidavit, or other document the client submitted or executed under US revenue laws?

• Duty re: Client’s Error/Omission (§10.21)
  • Duty to promptly inform client of noncompliance, error, or omission and advise client regarding consequences under the Code and regulations of that noncompliance, error, or omission.

Practitioner Violations – Case Study

• In our Case Study, did Practitioner display due diligence in reporting the mortgage interest deductions (IRC §163(a)) on the New York and Hermosa Beach properties on Taxpayer’s 2015 return?
§10.34(a) Standards for Tax Returns

- May not sign a tax return or advise a position on a tax return, willfully, recklessly, or through gross incompetence if:
  - Lacks reasonable basis
  - Unreasonable position
  - Willful attempt to understate liability
  - Reckless, intentional disregard of rules and regulations
  - Patterns matter!

§10.34(a) Standards for Tax Returns (contd.)

- "Reasonable Basis"
  - Means there is a greater than 25% possibility of success the position taken on the return would be sustained if challenged;
    AND
  - The position on the return is disclosed.
  - A preparer should consider disclosing the use of an estimate on a return by filing a Form 8275, Disclosure Statement.

§10.34(b) Standards for Documents and Other Papers

- May not advise taking frivolous positions
- May not advise submissions:
  - To delay or impede tax administration;
    - Conversely, a practitioner must not interfere with any lawful IRS attempt to obtain information unless, in good faith, practitioner reasonably believes the information is privileged. (§10.20)
  - That are frivolous;
  - Containing or omitting information that demonstrates an intentional disregard of rules or regulations.
§10.34(c) Standards and Advising Clients on Penalties

• Must advise client of potential penalty exposure regarding:
  • A position taken on the return if the practitioner advised the client regarding the position OR the practitioner prepared or signed the return
  • Any document, affidavit or other paper submitted to the IRS
  • Must also advise client of penalty avoidance through disclosure

Practitioner Violations – Case Study

• In our Case Study, did Practitioner meet the reasonable basis standard when preparing, signing and filing Taxpayer’s 2015 return reflecting the mortgage interest deduction for the Hermosa Beach property?
§10.51(a) Incompetence and Disreputable Conduct

• General provision under which a practitioner may be sanctioned for incompetence and disreputable conduct.

§10.51(a) Incompetence and Disreputable Conduct (contd.)

• Incompetence
  • A practitioner must have the knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. (§10.35)
  • Know when you are not competent
  • Can provide competent representation by researching and educating self on the issue or by consulting with another tax professional who has established competence in the field.
§10.51(a) Incompetence and Disreputable Conduct (contd.)

• Incompetence can include failing to recognize or comply with ethic responsibilities regarding conflicts of interest.
  • Section 10.29 provides that a conflict of interest exists if:
    • One client's interest directly adverse to another,
    • Significant risk of material limitation by responsibilities to another client, former client, third person, OR
    • By the personal interest of the practitioner.
  • However, may represent if you have a reasonable belief in your ability to provide competent, diligent representation to each affected client, not legally prohibited, and each affected client waives conflict by giving informed consent in writing at the time conflict is known.

§10.51(a) Incompetence and Disreputable Conduct (contd.)

• Disreputable conduct includes:
  • Conviction of any criminal offense under Federal tax laws (§10.51(a)(1)).
  • Conviction of any criminal offense involving dishonest or breach of trust (§10.51(a)(2)).
  • Conviction of any felony under Federal or State law where conduct involved renders practitioner unfit to practice (§10.51(a)(3)).
  • Disbarment or suspension from practice as an attorney or CPA (§10.51(a)(10), §10.82(b)(1)).
  • Conviction of any crime under Title 26, any crime involving dishonesty or breach of trust, or any felony that renders the practitioner unfit to practice (§10.82(b)(2)).

§10.51(a)(4) Giving False or Misleading Information

• No participating in any way in the giving of false/misleading information to the Department of Treasury or any officer/employee thereof. Includes:
  • Testimony
  • Tax returns
  • Financial statements
  • Applications
  • Affidavits, declarations, and any other document or statement (written or oral)
Practitioner Violations – Case Study

• In our Case Study, let’s assume Practitioner was handling the IRS examination of Taxpayer's 2015 return.
  • To support his ownership claim of 32.5% of the Hermosa Beach property and that he paid mortgage interest to Practitioner in 2015, Taxpayer gave Practitioner a “deed of trust” for the property and a promissory note for the purported sale.
  • Practitioner, the other party to the “sale,” knows he didn’t sign/give the deed of trust for partial ownership of the property to Taxpayer, did not enter into a promissory note with Taxpayer, nor receive any income (with interest) from Taxpayer in 2015.
  • If Practitioner gives the deed of trust and promissory note to the IRS to substantiate Taxpayer's ownership of the Hermosa Beach property and mortgage interest payments, has Practitioner violated Section 10.51(a)(4) by giving false or misleading information to the IRS?

§10.51(a)(6) Willful Noncompliance by Practitioner

• Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.
  • When a referral is made to OPR, the practitioner's tax compliance is always checked.

§10.51(a)(7) Willful Assistance with Violation of Federal Tax Laws

• Willfully assisting, counseling, encouraging, suggesting to a client/prospective client:
  • An illegal plan to evade Federal taxes or payment thereof
  • Violation of any Federal tax law
Practitioner Violations – Case Study

- In our Case Study, assume Practitioner suggests Taxpayer claim he owned part of the Hermosa Beach property in order to take an extra mortgage interest expense deduction in order to reduce Taxpayer’s 2015 taxes. Further, assume Practitioner states he can create some bogus documents (e.g., deed of trust, promissory note, etc.) to “paper the file” incase the IRS challenges the mortgage interest deduction.

- Has Practitioner violated Section 10.51(a)(7)?
  - Would it make a difference if Practitioner did not prepare or sign the return, but rather had an associate in his office prepare, file, and sign the return?
  - Would it make a difference if Taxpayer agreed to Practitioner’s plan?

Disciplined Practitioner List

Where to Search for Disciplined Tax Professionals

https://www.irs.gov/tax-professionals/search-for-disciplined-tax-professionals

OPR’s disciplinary look-up contains searchable information regarding censures of practitioners for Circular 230 misconduct and suspensions and disbarments of individuals from practice before the IRS.

INVESTIGATIVE AND DISCIPLINARY PROCESS
Available Sanctions and Discipline Options

- Soft Letter (private)
- Letter of Reprimand (private)
- Censure
- Suspension
- Disbarment
- Disqualification (appraisers)
- Monetary Penalty

Practitioner Discipline – Case Closures

FY 2017 through FY 2020 Closures by Disciples

Case Disposition Results (Jan. – Jun. 2020)

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*Other Sanctions includes Close without Sanction (CWOS); Lack of Jurisdiction (LOJ); No Cause of Action (NCOA) or Closed without Action (CWOA) or State Board

NOTE: Due to dual licenses and dual actions, the total actions may not equal the total dispositions.
CONTACT INFORMATION AND RESOURCES

Contacting & Referrals to OPR

Office of Professional Responsibility
1111 Constitution Ave., NW
SE:OPR Rm. 7238
Washington, DC 20224
Efax: (855) 814-1722


Referrals:
- To make a referral regarding a return preparer, you can file a Form 14157. It will go to RPO and, if the practitioner is under OPR’s jurisdiction or has representational activities, the information will be routed to OPR.
- For practitioners covered under Circular 230, you can send a fax to OPR’s eFax.

Resources and Guidance

- Treasury Department Circular No. 230 (Rev. 6-2014)
- Publication 947, Practice Before the IRS and Power of Attorney
- Form 2848, Power of Attorney and Declaration of Representative
- IRS Form 8275, Disclosure Statement
- IRS Form 8867, Paid Preparer’s Due Diligence Checklist
## Resources and Guidance (contd.)

- The OPR Website
- News & Updates from the Office of Professional Responsibility
- Rights and Responsibilities of Practitioners in Circular 230 Disciplinary Cases
- Guidance on Restrictions During Suspension or Disbarment from Practice Before the Internal Revenue Service

## Recursos y Orientacion disponibles en Espanol

- Form 2848(SP), Poder Legal y Declaracion del Representante
- Instrucciones para el Formulario 2848(SP)
- Pub. 947, Como Ejercer ante el Servicio de Impuestos Internos (IRS) y el Poder Legal
- Circular 230 del Departamento del Tesoro (Rev. 6-2014), Reglamentos que rigen el ejercicio ante el Servicio de Impuestos Internos