ETHICS IN THE EYE OF THE BEHOLDER: WHAT CONDUCT IS MOST LIKELY TO RESULT IN DISCIPLINE UNDER CIRCULAR 230?

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INTRODUCTION

Two of the more common queries put to me by tax professionals around the country when I served as Director of the Office of Professional Responsibility ("OPR") were: 1) What is most likely to get me in trouble with OPR; and, 2) How much due diligence is enough? For me, these are opposite ends of the same issue: If you are doing the appropriate amount of due diligence in all your dealings with your client and the IRS, you are unlikely to attract attention from OPR. If you are not, that’s when question #2 arises: what’s an “appropriate amount of due diligence. The ultimate answer: “It depends”, should not surprise anyone. Every provision in Circular 230 is dependent upon specific facts and circumstances for its ultimate applicability. Unlike the Internal Revenue Code which creates “rules” (intended to be of the black and white nature, even if not always the case), the statute governing practice before the Treasury Department originally focused on principles intended to ensure integrity and professionalism in those who represented others before the Department. Most of the regulations promulgated over the years have maintained this principles-based focus with a few exceptions beyond this article’s coverage.

Depending on how one counts, there are no fewer than four regulatory paragraphs in Circular 230 that address some level or stage of the due diligence process. It is a statement in and of

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1 ©Karen L Hawkins, 2016. The author is a California licensed attorney who served as Director, IRS Office of Professional Responsibility from April 2009 until July 2014. This article is a substantial expansion and rewrite of an article titled “How Much Diligence Is “Due?” which appeared in the Dec 2015-Jan 2016 edition of the Journal of Tax Practice & Procedure, a bi-monthly journal published by CCH, a part of Wolters Kluwer. The author is a contributing editor to the publication. Copying or distribution without the author’s permission is prohibited. All views expressed in the article are those of the author and are not intended, nor should they be used as tax or legal advice without further research to ensure correctness and completeness in the context of specific fact patterns.


3 No reference to IRS until 1921 when the regulations were reprinted verbatim into a publication titled “Treasury Department Circular No. 230: Regulations Governing Practice before the Internal Revenue Service.”

4 Regulations at 31 C.F.R. Subtitle A, Part 10

5 Most notably, former sections 10.35 and 10.37 of the versions dating from 2004 to 2014.

6 See 31 C.F.R. Subtitle A, Part 10, (hereafter “Circular 230”) Sections 10.22 (Diligence as to Accuracy); 10.35 (Standards with respect to tax returns and documents, affidavits and other papers); 10.35 (Competence); 10.37 (Requirements for Written Advice). See also, section 10.51(a)(13) (giving false opinions). All citations are to the version of the regulations issued
itself that over the years, Circular 230 has expanded from a single general due diligence provision\(^7\) to multiple regulations addressing specific aspects of due diligence as they arise in the tax practice context. As Director, I felt that the only provision that was needed to address 90% of the transgressions under Circular 230 was section 10.22, Diligence as to Accuracy. The remainder of the due diligence sections merely elaborate on the concept in greater detail for those less inclined to want to think too hard on their own about a tax professional’s integrity and responsibilities to client’s and to tax administration.

**GENERAL DUE DILIGENCE**

So what does section 10.22 say? It admonishes those subject to Circular 230\(^8\) to exercise “due diligence” throughout the course of their dealings with clients, and with Internal Revenue Service (IRS) personnel. Three types of activities are identified in the regulation: 1) when an individual is “preparing or assisting in the preparation of, approving, and filing tax returns\(^9\), documents, affidavits and other papers in connection with” tax matters; 2) when an individual is making oral or written representations to Treasury personnel; and, 3) when an individual is making oral or written representations to a client in connection with “any matter administered by the [IRS]”.\(^10\) Subject to the more specific due diligence provisions contained in sections 10.34 and 10.37, section 10.22(b) also articulates a “safe harbor” defense for those who might rely on the work product of others such as an employee, another tax professional, an appraiser etc. The safe harbor is available only if an individual can demonstrate that reasonable care was used in engaging, supervising, training and evaluating the person whose work product is being relied upon. If the safe harbor is successfully invoked, an individual will not be held accountable for any errors resulting from the reliance- due diligence will be “presumed”. The adage of the “buck stops here” can be circumvented by hiring/engaging competent staff/other professionals; by supervising and training employees sufficiently; and by evaluating the work product that comes from others with a reasonable level of scrutiny.

But just what is the “due diligence” expected in 10.22? The term is not specifically defined in the regulations. However, the term permeates the legal and business worlds. Lawyers and

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\(^7\) Circular 230, section 10.22.

\(^8\) There are many people subject to Circular 230 based on their specific activities, some are not defined in the Circular as “practitioners”. I intend this discussion to encompass any of these types of people at the relevant times.

\(^9\) In the wake of the *Loving v IRS*, 742 F.3d 1013 (D.C. Cir. 2014) and *Ridgely v Lew*, 2014 WL 3506888 (D.D.C. July 16, 2014) cases, there is a superficial argument to be made that this portion of the provision no longer applies to “mere tax return preparers”. Enrolled Agents, in particular should not seek comfort in that argument. And others who wish to retain their rights to represent their clients during administrative disputes also would be well advised not to be too cavalier about adherence to all of 10.22(a).

\(^{10}\) Section 10.22(a).
business people do their “due diligence” before finalizing a contract, a business deal or before engaging in any major transaction. Due diligence is a process by which one evaluates the decisions to be made, the risks being taken, and the costs versus the benefits of specific options. The purpose in conducting due diligence is to investigate facts, circumstances, and actors sufficiently to enable one’s self, or those being advised, to make informed decisions about actions to be taken. This means any due diligence should be conducted with an eye toward enhancing the amount and quality of information available to the decision-maker, and to ensure that the available information is used methodically in the decision-making deliberations, including an analysis of the cost-benefits and risks associated with alternative choices.

It seems the concept of due diligence entered legal lexicon as a term of art with its inclusion in the Securities Act of 1933. A “safe harbor” defense for broker-dealers accused of making inadequate disclosures to investors with respect to a purchase of securities required the broker-dealers to demonstrate they had exercised “due diligence” in the investigation of a particular security to be sold, and that they made full disclosure to any potential investor of what was uncovered during that investigation. Recognizing the value of such a defense to lawsuits by disgruntled investors, the concept was institutionalized by the securities industry relatively quickly and, as we see in Circular 230, migrated to other types of professional advising activities. In Circular 230, however, the “shield” was turned into a “sword”. The exercise of due diligence became an expectation for tax professionals, first in the general sense described above in section 10.22, and then in more specific contexts to address specific behavioral areas where tax professionals were not getting it right as often as the tax agency thought they should.

In tax practice, due diligence first comes into play (or should) as the initial process in which the professional engages to get to know the client and the nature of the services sought. Thereafter, the professional engages in on-going due diligence to assure an up-to-date “picture” of the client and the facts. Initial due diligence should occur with every new client as the professional learns the facts necessary to perform the services for which s/he is being engaged. Obviously the factual inquiry will be different for the preparation of an income tax return\(^\text{11}\) than for a merger transaction opinion\(^\text{12}\). Determining the degree and sufficiency of the due diligence “investigation” is part of the professional’s responsibility\(^\text{13}\). This is the essence of section 10.22(a)(1). Professionals who fail to ask probing, detailed questions about a client’s facts, situation, goals, intentions, etc., is doing him/herself, and the client, a disservice. It is not “prying” to expect a client to respond to inquiries reasonably intended to provide the professional with sufficient information from which to make reasonable recommendations for the client’s informed consideration. It is also good practice, to make a written record of the

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\(^{11}\) See section 10.34(d).

\(^{12}\) See section 10.37.

\(^{13}\) See section 10.35.
relevant information identified and (as appropriate) discussed with the client. This is the essence of section 10.22(a)(3). Accepting all representations made by a client without question, will almost never be adequate due diligence.

An element of due diligence that is unique to tax professionals appears in section 10.22(a)(2)-ensuring that oral and written representations made to the IRS are correct. It is a concept which results from the tax professional’s dual responsibilities to clients and to the system of tax administration. It is crucial to the process that “truths be told”. Failures to provide correct information to the Agency can result in disastrous results for the tax professional and/or the client.

**SITUATIONAL DUE DILIGENCE**

On-going due diligence implicates the other more specific provisions in Circular 230.

**Tax Returns**

Section 10.34(a) admonishes the professional not to give advice or to sign a tax return containing a position which lacks substantial authority, unless the position does have a reasonable basis and the client is advised of his/her penalty exposure unless the position is disclosed on the return. The professional also may not willfully attempt to understate the client’s tax liability, or recklessly disregard rules or regulations when signing or advising on tax return positions. This requires the tax professional to take reasonable steps to ensure relevant factual information has not changed from one year to the next (or maybe from one week to the next), or from one transaction to the next. So, a return preparer might not have to ask to see a child’s social security card every year, but inquiring as to the existence of a foreign bank account on an annual basis is appropriate due diligence. A client who uses “SALY” numbers, with the knowledge of the preparer, for a current year schedule C is causing a problem for him/herself and the tax professional. The professional will be participating in preparing a return that is misleading at best and fraudulent at worst. Due diligence requires the professional to educate the client on the importance of accuracy in the tax return and to “tease out” the correct facts/data to ensure that the professional (and the client) is signing an accurate return. In my opinion, it is never a defense to say the client is solely responsible for the entries on the tax return. If that were the case, both signing and non-signing return preparers would be irrelevant to the tax return preparation process. The tax professional is expected to make further inquiry with respect to information received from the client which appears to be incorrect, inconsistent with other known relevant facts, or incomplete. Nor can the professional

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14 “willfully, recklessly, or through gross incompetence”...
15 See, section 10.34(c).
16 See, section 10.34(a)(1)(i)(C) and 10.34(a)(1)(ii)(C).
17 “Same as Last Year”.
ignore the implications of information received or already known. This on-going due diligence is a critical aspect of providing solid professional tax services.

**Controversy**

Section 10.34(b) of Circular 230 addresses conduct, most likely to arise in tax controversy practice, where documents are being submitted to the IRS. Under section 10.34(b)(1), a document or other paper submitted to the IRS, whether by the practitioner or taxpayer on advice of the practitioner, may not contain any positions which are frivolous. This very low bar seems currently out of synch with many other provisions both in the Circular and in the Internal Revenue Code. Nevertheless, during my tenure at least a handful of practitioners submitted written arguments and work papers to the IRS containing purported support and arguments for what were clearly scams and shams. Frivolous has sometimes been described as “a position that cannot be defended with a straight face,” but the evaluation of what constitutes a “frivolous position” is an objective one, not a subjective one. What would the general community of tax professionals think about the position.

Section 10.34(b)(2) addresses the act of making a submission. Practitioners may not advise a client to submit documents or other papers to the IRS when the submission is frivolous; when the submission is intended to delay or impede IRS actions; or when the submission contains or omits information suggesting an intentional disregard for the law, unless additional documentary evidence is submitted supporting a good-faith challenge to a statute or regulation.

Submissions of post-dated documents to support a transaction; omitting asset from a collection form; providing fabricated receipts to support non-existent income or expense items; submitting an offer in compromise proposal for the sole purpose of stopping a bank levy, are all examples of potential violations under section 10.34(b)(2).

If a practitioner advises a client with respect to a position taken on a tax return or prepares/signs the return containing the position and the practitioner knows (or should know) that the client could be subject to a penalty, the practitioner must advise the client accordingly and provide information on how the client may avoid the penalty through adequate disclosure on the return. This admonition applies equally to the submission of any document to the IRS. It was my position that the practitioner need not “force” the client to make the requisite disclosure. However, unless the return or submission meets the standards articulated in

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18 See section 10.34(d).
19 Section 10.34(b) can also apply to submissions being made in connection with letter ruling requests, applications for exempt status and applications for enrollment to practice before the IRS. Since the bulk of submissions occur during the examination and collection activities of the IRS, the text discussion will confine itself to those contexts.
10.34(a) and (b), the practitioner may not prepare/sign the return or make the submission without professional jeopardy.

**Competence**

While not technically a “due diligence” provision, section 10.35 of Circular 230, newly added to the regulations in 2014, requires a practitioner to be competent to practice before the IRS. Competence is a facts and circumstances test; but as a foundational matter, it requires the requisite knowledge, skill, preparation and thoroughness necessary for the matter for which the practitioner has been engaged. While a practitioner may not be competent in all things tax, the regulation expects the practitioner to be self-aware enough to know when to research or study a subject before giving advice or interacting with IRS personnel. It is also incumbent upon the practitioner to know when s/he is not competent, and cannot become competent in sufficient time, to provide the requested services. In these instances, the practitioner can meet the regulatory expectations by consulting or hiring someone who is competent. In this regard, section 10.35 interplays with section 10.22(b): when relying on someone else’s work product, a practitioner will only be deemed to have exercised adequate general due diligence if the practitioner “used reasonable care in engaging, supervising, training and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person” being relied upon.

**Written Tax Advice**

Section 10.37 of Circular 230 was substantially rewritten in 2014 in conjunction with the removal or former section 10.35 dealing with Covered Opinions. While purporting to address only written advice, the provisions in that section serve as a helpful synopsis for the due diligence required during all phases of tax practice: to ensure that all relevant and available information is obtained and used appropriately in the decision-making deliberations by both advisor and client. The section tells us that it’s all about behaving “reasonably”- again, an objective, not subjective exercise, with the final step consisting of applying the appropriate legal principles and concepts to all known relevant facts and all reasonably assumed future facts. The facts must fit the law- recrafting facts to fit the law after-the-fact will never sustain a challenge and is not adequate due diligence. I have seen this kind of “advising” in tax shelters when a “cookie-cutter” scheme is sold wholesale to clients without the facts to support the tax treatment being espoused in the opinion. This is tantamount to selling a recipe without knowing whether the cook has the proper ingredients.

Relying on someone who is known to be unreliable, or incompetent, is not reasonable conduct, nor is accepting information or an opinion from someone who has an unresolved conflict of interest in the matter. If written advice is being provided to someone for use in marketing a tax strategy, the advising practitioner will be subject to a more thorough due diligence assessment by OPR if the strategy is found to be a tax shelter.
DEFENDING YOURSELF BEFORE OPR

Early Stages

A practitioner always hopes to steer clear of an OPR investigation during his/her career, of course. However, OPR is a “receptacle” for third party complaints about practitioner behavior. In other words, OPR does not generate its own cases; it receives referrals and complaints from IRS personnel, other governmental agencies, other practitioners, and the general public. Therefore as an initial matter, a referral to OPR is going to be dependent on the “eye of the beholder” making the allegations of misconduct.

Once a complaint is received, OPR is required to take, at least a cursory look to determine on the first hand, whether it has jurisdiction over the person and the behavior complained about. During my tenure as Director, nearly 65% of the cases received were disposed of at this intake phase. In these instances, no contact between the OPR staff and the practitioner occurs, and the record of the referral may not be used as a cumulative event if a subsequent complaint/referral is received. If OPR determines that it has jurisdiction and the behavior is subject to Circular 230, two things occur. First, the practitioner’s tax compliance record is checked (i.e., personal, controlled entities, employment). If nonfiling is discovered, or there are unpaid tax liabilities which may suggest willful evasion of payment, those charges will be added to whatever else has been alleged about the practitioner’s conduct. Second, consideration will be given to the nature of the transgressions and the appropriateness of alternatives to discipline explored. In this instance, the practitioner will receive a preliminary Notice of Allegation from OPR which recites the allegations of misconduct and invites the practitioner to respond in writing.

TIP: THIS IS AN OPPORTUNITY A PRACTITIONER SHOULD NOT PASS UP

This represents your first opportunity to explain yourself, express remorse where appropriate, demonstrate you have learned from your mistake and convince OPR that no, or alternate discipline, is a better use of its resources in your case.

TIP: Too many practitioners opt to self-represent at their own peril. Having an objective representative to assist with your analysis of the situation and to present your case to OPR is an option every contacted practitioner should consider.

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20 A very helpful discussion of the process and procedure during disciplinary proceedings was drafted while I was Director. It is included at Appendix C.
21 Case closing choices available to OPR staff include: lack of jurisdiction; no cause of action; and close without sanction.
22 There is no “law” about this policy. As Director, I deemed it inappropriate to resurrect derogatory information about a practitioner who had not, in the first instance, been given an opportunity to get his/her story into the file in a timely fashion. Whether future Directors will maintain the policy is unknown.
Alternatives to Discipline

In order to make the most efficient use of OPR’s resources several alternatives have been developed for use in appropriate cases; for instance, where the facts and circumstances are in dispute and any litigation would result in “he said, she said” testimony; where the conduct alleged appears to be a onetime “hiccup” acknowledged by a chagrined practitioner with an otherwise unblemished record; or, where the practitioner has corrected the behavior. This happens most often where the practitioner’s own tax compliance has come to OPR’s attention. The discipline alternatives are designed to serve as “wake-up” calls to give practitioners an opportunity to get back into behavioral compliance without consequence to their livelihoods. They include:

1. Soft Letter regarding tax filing or payment obligations;
2. Soft letter regarding bad behavior in violation of one or more of the regulations
3. Private reprimand
4. Deferred disciplinary agreement.

The soft letters call the practitioner’s attention to the violating behavior and admonish the practitioner to become better acquainted with his/her obligations under Circular 230. Depending upon the facts, the soft letter may provide a deadline (e.g., for filing delinquent tax returns) or may just warn that a subsequent referral could result in disciplinary action being taken.

The private reprimand is issued at the discretion of the Director, OPR, and is the private equivalent of a censure (discussed below). It almost always advises that a future transgression could result in harsher disciplinary action being taken.

A deferred disciplinary agreement (DDA) is used most often in cases of tax noncompliance where the individual involved is not a “regular” practitioner before the IRS. The majority of DDAs are executed with attorneys whose practices touch on tax (family law, bankruptcy etc.) but who rarely represent a client before the IRS. Public discipline of these individuals can often result in a loss of state bar license, perceived by many to be a harsh result for tax non-compliance by someone who interacts very little with tax administration. The DDA contains negotiated terms for the future conduct of the practitioner with default provisions identifying a summary process for imposing public discipline. Unless the DDA is breached, the fact of the agreement is not published in the Internal Revenue Bulletin (see below for more on this).

Some of the staff in OPR negotiated DDAs which were “hybrids”, that is, they contained provisions for an immediate censure with provisions for future behavior and consequences for

23 Section 10.51(a)(6) says it is disreputable and incompetent conduct to fail to file your own tax returns (personal, entity, employment, etc.) in accordance with statute; or to willfully evade (or participate in the evasion of) the assessment or collection of a tax.
any default. I personally did not favor this approach, so very few such hybrid DDAs are in existence.

There is no current indication of how new management is addressing any of these alternative disciplinary approaches.

**TIP**: If you receive a notice of allegation with respect to your own tax compliance or specific behavior that you admit occurred, the most efficient approach is to acknowledge the transgression and pledge to correct the conduct, i.e., commit to filing delinquent returns in a reasonable period of time.

*Investigation and Conference*

If a practitioner has either failed to respond to OPR’s communications or the case is not one which can be closed early or with an alternative, OPR will commence its investigation and documentation in anticipation of a disciplinary hearing. During this phase, OPR will contact the referral source, as needed, for additional documentation and will also conduct its own search of available databases to see what other information is available on the practitioner. This research can result in discovering tax-noncompliance with respect to the individual, a controlled entity, or employment taxes. It can also uncover the loss of a state license (attorney or CPA) which will result in an expedited procedure for indefinite suspension. Internal databases will also inform OPR as to whether the practitioner has ever had preparer penalties assessed, and at what level (i.e., negligence, willful).

Once the OPR staff has identified all possible violations, an Allegation Letter will be sent to the practitioner. The letter should contain a detailed and precise description of the alleged violating conduct, citations to the specific Circular 230 provisions violated, and notice of the opportunity to request a conference with OPR staff. The letter will sometimes contain requests for additional information if there are some missing facts which OPR believes are relevant to its final determination.

**TIP**: DO NOT IGNORE AN ALLEGATION LETTER. Request a conference. And, if you haven’t already done so, consider hiring someone to represent you.

Under the regulations, a practitioner has a right to a one conference with OPR. Don’t pass this up. The conference can be telephonic or in person, but, if in person, the conference will be held in Washington, DC where OPR resides. The practitioner is entitled to representation during this process. There will be at least two OPR staff in attendance at any conference:

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24 Not the most advisable approach since section 10.20(a)(3) requires cooperation with OPR and failure to do so is a separate chargeable offense in a discipline proceeding.
least one lawyer, with the other being a paralegal, manager, or, on rare occasion, the Director. The person with whom you have been corresponding will take the lead in opening the conference with some ground rules but this is really the practitioner’s conference and should be conducted accordingly. The practitioner should come prepared with any supporting documentation to refute the allegations, or raise litigation hazards. If the practitioner realizes that violations have occurred, it is the wiser approach to acknowledge them and try to demonstrate mitigation, remorse, rehabilitation etc., to dissuade OPR from expending further resources pursuing the case. This is the time to be pragmatic and realistic. If the violations can be seen as causing harm to taxpayers or the system, it is the practitioner who must propose a level of discipline commensurate with the violations committed. It is unrealistic to think that a private reprimand or even a censure is appropriate in the context of an Allegation Letter.

**Public Discipline**

One misconception practitioners have is that OPR can “discipline” them at will. This is simply not the case. OPR has authority to receive complaints and referral, investigate alleged violations and negotiate a resolution with the practitioner. During that process, practitioners must be notified of the investigation and the allegations made against them. There is at least one opportunity for a conference to tell your side of the story and numerous opportunities for settlement.

OPR has four options available when pursuing discipline: censure, suspension; disbarment; monetary penalty. All disciplinary events are published in the Internal Revenue Bulletin (IRB) on a regular basis. The information published in the IRB includes: practitioner name; state where the practitioners is located; licensure status; provisions of Cir 230 violated and type and duration of the discipline. The published discipline is republished by some of the tax trade publications. In addition, the various states and the United States Tax Court review the OPR discipline events to identify individuals who may be subject to further inquiry and discipline in those fora, i.e., state boards of accountancy; state bars; Tax Court list of admitted litigators.

A censure is a one-time public reprimand. It carries with it no practice consequences, although its publication in the IRB may cause embarrassment with colleagues and clients. It is not considered “discipline” for most state licensing issues. OPR can require certain conditions for future conduct before agreeing to a censure.

A suspension may be for a period of one to fifty-nine months. Obviously, OPR is not going to waste resources on short-term suspensions. During my tenure, there were a handful of suspensions in the 6-9 month timeframe; most were in excess of one year. During the period of suspension, a practitioner may not represent, in any context, any other person before the IRS. This includes both direct and indirect representation of a taxpayer during a tax controversy, providing business appraisals, and the rendering of written tax advice. OPR requires suspended

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25 Available at IRS.gov.
practitioners to petition for reinstatement (either near the end of the suspension period or at the end of five years whichever occurs first), which will be granted so long as there have been no intervening violations. Conditions for reinstatement may be imposed by OPR.

A disbarment is for a period of five years. During the five-year period and unless and until authorized to do so, a practitioner may not engage in any representation activities as described above with respect to suspensions. A petition for reinstatement must be submitted (near the end of the five year period) and OPR will grant reinstatement, with or without conditions, only if OPR is satisfied that the practitioner is not likely to engage in conduct contrary to Circular 230 and that granting reinstatement would not be contrary to the public interest.

**Mounting a Defense**

Practitioners are entitled to receive all evidence in OPR’s possession which is relevant to the allegations recited in the allegation letter. A request for that material does not require a Freedom of Information Act request (FOIA). In fact, making a FOIA request will delay the practitioner’s access to the relevant material. OPR has authority under IRC section 6103 to provide such information upon request so long as the practitioner, and any representative, execute an acknowledgment of their prohibition on disclosure under which both civil and criminal penalties may be imposed for any violation. OPR has provided guidance on making these “6103 requests” and a sample letter on its webpage.

**TIP:** Always send a 6103 letter as soon as first contact has been made by OPR. Waiting until the Allegation Letter arrives is too late.

## Defending Against a Complaint

**General Legal Services**

If the practitioner is unsuccessful in resolving the issues on a basis satisfactory to OPR, OPR staff will draft a formal complaint reciting all available causes of action and the facts which support each element of an offense under one or more of the regulations. The complaint will also contain OPR’s recommendation for a level of discipline which it believes the conduct requires. The draft, along with all factual evidence and a legal analysis is sent to Chief Counsel, General Legal Services branch (GLS). GLS litigates the disciplinary cases and OPR becomes the “client”. GLS and OPR work closely together in finalizing the complaint, in conducting any discovery, and in preparation for the administrative hearing. As a matter of policy, GLS will send a letter to the practitioner offering one final opportunity to propose a settlement of the case.

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26 Samples of the letter and the procedures to follow can be found at Appendix D.
A very important right arises for the practitioner once the complaint is filed. Because OPR disciplinary cases are no longer available to the public, a practitioner will not be able to defend unless s/he can access the case precedent which currently is a “secret” body of law. In order to do this, the practitioner must make a request, using the 6103 letter as a template, requesting the entire body of ALJ and TAA decisions, unredacted. OPR’s current policy is to provide a CD-Rom containing all decisions dating back to at least 2007 to the practitioner and any authorized representative provided each executes an acknowledgement that the CD contents are protected under IRC 6103 and may only be used in the context of defending in the disciplinary case. The letter also requires acknowledgement that any violation carries with it civil and criminal penalties.

**Tip:** Request the CD at the earliest possible moment to ensure access to potentially relevant case law with which to defend yourself.

If informal resolution cannot be reached with GLS, the complaint will be filed with an Administrative Law Judge (ALJ) and served on the practitioner. This is the “institution of a proceeding”. Read the complaint carefully to ensure the facts stated are accurate and that there are no allegations made about which you were not previously advised and/or to which you have not been granted an opportunity to respond. Once served, the practitioner’s answer must be filed within 30 days. FAILURE TO RESPOND WITHIN THE 30-DAY TIMEFRAME WILL RESULT IN A DEFAULT JUDGMENT against practitioner.27

Once the answer is filed, the case is “at issue” and, in consultation with the parties and or their counsel, the ALJ will issue a scheduling order reflecting timeframes for discovery, pretrial briefing and a hearing date. It is important to realize that these proceedings are serious. And failing to treat them accordingly will bring disastrous results.

**The Hearing**

The administrative hearing will most often be held in the closest city that is convenient for the practitioner and which has a federal courthouse. There will be a court reporter recording the entire proceeding. Witnesses may be called only if previously identified in the pretrial brief. Documentary evidence will be admitted only if it has previously been provided to the opposing party. All testimony is under oath. The rules of evidence are followed although in somewhat relaxed fashion.

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27 As Director, I was very aggressive about taking defaults when answers were not timely filed. I do not know current management’s policy on this.
At the hearings, GLS will call IRS personnel who are either familiar with the facts of the case or who have expertise in a particular subject matter that needs to be explained to the court (e.g., reading IRS transcripts). One witness who always appears is a representative of OPR. The OPR representative is there to explain OPR’s position and the basis therefore as well as to explain why a specific level of discipline has been proposed. All witnesses are subject to cross examination.

At the termination of the hearing, the ALJ will set a briefing schedule. Most often the briefing is simultaneous (both parties submitting their opening and responsive briefs on the same dates), but the ALJ has discretion to order consecutive briefs with GLS making the first submission, followed by a responsive brief from the practitioner. The briefs are an opportunity to ask the ALJ to make findings of fact (as supported by the record) and reach conclusions of law (as appropriately applied based on the facts found). GLS must prove by clear and convincing evidence that practitioner’s violations were willful, reckless or grossly incompetent.

Once the briefing has concluded, the ALJ takes the matter under submission. The expectation is that the ALJ will issue a Preliminary Decision and Order within 180 days after briefing has concluded. In nearly all instances this timeframe is maintained. The ALJ serves both parties with his/her decision and order. In reaching a preliminary decision, the ALJ has three options: sustain OPR as to both the allegations of misconduct and the level of discipline recommended; reject OPR’s case against practitioner in its entirety; adjust the allegations found to conform to the facts found and modify the discipline accordingly.

**Appeal**

If either party does not agree with the ALJ’s decision, an appeal may be filed with the Treasury Appellate Authority (TAA) within 30 days of being served. An appeal requires a Notice of appeal and a brief that states precisely the exceptions being taken to the ALJ’s findings of fact or legal conclusions, along with supporting reasons for the exceptions. A failure to enumerate exceptions and a basis therefore, will be fatal to any appeal. The non-appealing party has 30 days to file a Response. No further hearing is held before the TAA. After briefing has concluded, the TAA takes the matter under consideration and, in a reasonable period of time (the regulations say should be within 180 days, but it is not mandatory), the TAA will issue the Final Agency Decision (FAD) and serve both parties. The TAA may adopt entirely the findings of fact and conclusions of law by the ALJ, or may modify any aspect of the opinion which is contradicted by facts in evidence or where the ALJ has misconstrued the law. The TAA may also remand the case for further proceedings before the ALJ but this approach is very rare. Any

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28 During my tenure, I testified at every disciplinary hearing.
29 Reckless and gross incompetence is the threshold for section 10.34, 10.35, 10.36 and 10.37 violations. Willfulness is the threshold for all regulations except 10.33 (which is a nonchargeable aspirational provision).
30 This does not always result in less discipline than that recommended by OPR. There are occasion when the ALJ has been more severe.
discipline imposed in the FAD is effective immediately and the fact of the discipline will be published in a future IRB.

The FAD is the final word from Treasury on the case. OPR is obliged to follow whatever has been determined. The practitioner, however, may take a form of appeal by filing a complaint in federal district court (in practitioner’s domicile) which alleges the agency acted in an arbitrary or capricious fashion in bringing the case and/or imposing the discipline; acted contrary to law; or abused its discretion. During my tenure, a single complaint of this kind was filed against OPR. Ultimately, OPR (the ALJ, GLS, and the TAA) was found not to have abused its discretion in any manner and the practitioner’s discipline was sustained.31

CONCLUSION

As Director of the Office of Professional Responsibility, I observed myriad varieties of due diligence failures. Most could be distilled down to either a lack of communication with and/or a failure to manage the client; sloppy or lazy thinking; or, incompetence (not knowing what you don’t know). The standard for determining a due diligence failure is essentially what another competent tax professional would have done, thought, or said in similar circumstances. This is a national standard and is based on the objectively reasonable tax professional, not the subjective beliefs of the individual professional.

So, whether it’s in connection with the preparation of a tax return or the crafting of a multinational tax transaction, due diligence requires reasonable fact gathering; use of assumptions only if reasonable; further inquiry when facts are incomplete, inconsistent with other facts, or contradictory to other information known to the professional; no willful blindness; and reasoned application of all relevant law to all the relevant facts. Only then will the decision-making deliberations result in a defensible and sustainable choice.

When a practitioner finds him/herself the target of an OPR investigation for alleged violations under Circular 230, the watchwords should be: prompt response; complete cooperation; realistic evaluation of the circumstances; acceptance of responsibility (when appropriate); pursuit of all rights afforded by the process; don’t represent yourself.

HYPOTHETICALS

1. Practitioner (P) advises client (C) about a tax arrangement that makes it possible for client to omit certain income from her tax return as “exempt”. P learned of this opportunity when he attended a seminar given by a “prominent” tax lawyer. P received handouts diagramming the arrangement and took copious notes during the lecture but did no other research or investigation. C accepts P’s advice and enters into the arrangement. A subsequent examination of C’s tax return results in additions to tax, plus interest, and imposition of penalties under sec. 6662 and 6663. P, who represented C during the examination, is notified that a preparer penalty under sec. 6694(b) will be proposed.

Potential Cir 230 violations: 10.22(a)(1) and (2); 10.29; 10.34(a)(1)(i)(C) and (2)(i)(C); 10.34(c); 10.35; 10.51(a)(4) and (7).

2. Practitioner (P) does the books and prepares the tax return for a partnership with two partners. The business has a great year and the partners tell P they want to reduce the amount of tax that will be owed. They ask P if there is some way to increase deductions to offset some of the income being reported. The partners are advised by P to forward all cash remaining in their business on Dec. 30th, to a corporation P set up as owner. The corporation rebated the funds to the partnership in January. P prepared the partnership’s books and business tax return expensing and deducting the entire amount “forwarded” to P’s corporation at the end of the year. Subsequently, the partnership receives a notice of examination and P undertakes the representation.

Potential Cir 230 violations: 10.22(a)(1); 10.29; 10.34(a)(1)(i)(C) and (2)(i)(C); 10.34(c); 10.51(a)(4) and (7).

3. Potential Client (PC) comes to Practitioner with an IRS levy notice attempting to collect unpaid employment taxes from the company’s bank account. PC has been using the tax money to pay net payroll and vendors in order to keep the business afloat. PC says that

32 OPR discipline cases are no longer available to the general public. The examples describe hypothetical situations accumulated by the author over the course of many years in tax practice. While these fact patterns may bear some resemblance to actual disciplinary cases, it is not the author’s intention to disclose information not otherwise publicly available. Any similarities result from the reality that a lot of bad conduct looks the same. Regulations relevant to the potential violations are printed in full at Appendix B.
all he needs is a little more time for some of his contracts to start paying and then he can start paying the IRS. The assessed liability on the levy notice is for $100,000. PC tells Practitioner that the account to which the levy was directed has very little money in it now but that he needs to put funds in it soon to make payroll and cover vendor deliveries that are coming c.o.d. In rapid succession, Practitioner has PC do the following: a) form a corporation; b) open a corporate bank account at a different bank; c) deposit the funds for net payroll and vendors into the new account; d) apply for a new employer id number on behalf of the new corporation; d) advise all clients to make future remittances in the name of the new corporation.

Potential Circular 230 violations: 10.22; 10.51(a)(6) and (7)

4. Practitioner (P) is asked to assist new Client (NC) with an Offer in Compromise (OIC) for assessed personal income taxes. All CDP opportunities have been exhausted. P receives a $10,000 fee advance from NC which he places in the firm’s trust account to be paid as earned, and assigns preparation of the Forms 433A and 656 to new Associate (NA). NC provides all financial information to NA, including disability income distributions paid to NC’s wife resulting from an industrial accident. The disability income is used toward NC and wife’s living expenses. NA prepares the form 433A, omitting the disability income and the $10,000 and has NC and wife sign the Form 656. The Form 433A reflects negative income received on a monthly basis by NC and wife. The Form 656 offers $100 to compromise NC’s tax liability. Without reviewing the forms, P forwards them to the offer specialist (OS). The OS contacts NA to inquire about the canceled $10,000 check to the firm and the periodic deposits of income in excess of the monthly amount reported on the Form 433A she discovered in reviewing NC’s bank records. NA argues that the disability income should not be considered because it is scheduled to end next year and the $10,000 is the firm’s fee for legal services being rendered. OS rejects the OIC and refers NA and P, both of whom are on the PoA to OPR. NA resigns from the firm and takes a teaching position. When contacted by OPR, P states that he was on the PoA as a “pro forma” matter because he is the partner, but NA, now gone and no longer practicing, is responsible for the financial statement submissions and subsequent positions taken with OS. P says he had no idea what NA was doing or saying and therefore cannot have violated any provision of Cir 230.

Potential Cir 230 violations for P: 10.22(a)(1) and (2) because 10.22 (b) will not protect P; 10.34(b)(2)(iii); 10.36; 10.50(c).
5. Practitioner (P) was engaged to represent a taxpayer in a collection matter. The client gave P two money orders totaling $1,500 to forward to the IRS along with an offer in compromise for delinquent taxes. P altered, endorsed and cashed the money orders for her own personal use because “times were tight”.

Potential Cir 230 violations: 10.51(a)(8); 10.22; 10.35.

6. Practitioner (P) is retained by Husband (H) & Wife (W) to represent them in an IRS examination of their 2012, 2013 and 2014 joint income tax returns. Both spouses are gainfully employed. When reviewing the clients’ tax return preparation documents before meeting with the revenue agent for the first time P becomes aware after analyzing H’s business checking account that H failed to report on each year’s tax return approximately $100K in gross receipts in connection with his Schedule C business. W’s gross income was reported to the IRS on Form W-2 that had sufficient FIT withheld consistent with her gross wages of $200K. While interviewing H & W P determines that W is unaware of H’s omission of income. P tenders his PoA to the IRS and proceeds to represent H&W, jointly, during the examination. Result: adjustments to tax in all three years; fraud penalty or in the alternative accuracy-related penalty; interest.

Potential Cir 230 violations: 10.29; 10.21 (with respect to W); 10.35.
7. Firm prepares tax returns for C-Corporation and its two shareholders, who are married. Corporation’s tax information is delivered to Firm in late February so the corporate return can be filed timely on March 15th. Among its deductions are expenses for employee compensation and Director’s fees paid to each shareholder of $100,000, each; various travel and entertainment expenses; and section 179 expense. The corporate return is prepared reflecting these items and amounts. In early September, shareholders deliver their joint tax information to Firm for preparation of their personal return which is on extension until October 15th. Among the items are two W-2’s for compensation in the amount of $50,000 each shareholder received as an employee of the C-Corporation. The joint 1040 is prepared reflecting the W-2 income and is filed timely on Oct 15th. A subsequent examination of the Corporation by the IRS expands to the individual’s joint return for the same year. A member of Firm represents all three taxpayers during the examination. Result: The Corporation’s deductions for T&E and sec 179 are disallowed for lack of proper documentation and/or payment of personal expenses of the shareholders. The disallowed amount is treated as a taxable dividend to shareholders. Adjustments are made to the individual return for the additional Directors’ fee income and the dividend income. Fraud penalty asserted against the individual taxpayers. Preparer penalties under 6694(b) asserted against the members of the Firm who prepared the two returns. Referral of both to OPR.

Potential Cir 230 violations (Preparers): 10.22(a)(1); 10.34(a) and (d); 10.35.

Potential Cir 230 violations (Representative): 10.29

Potential Cir 230 violations (Firm): 10.36, 10.50(c)
APPENDIX B

RELEVANT CIRCULAR 230 PROVISIONS
§ 10.22 Diligence as to accuracy.

(a) In general. A practitioner must exercise due diligence —

(1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;

(2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and

(3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.

(b) Reliance on others. Except as modified by §§10.34 and 10.37, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.
§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(a) Tax returns.
   (1) A practitioner may not willfully, recklessly, or through gross incompetence —
      (i) 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 section 6694(a)(2) of the Internal Revenue Code (Code) (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 section 6694(b)(2) of the Code (including the related regulations and other published guidance).
      (ii) 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 section 6694(a)(2) of the Code (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 section 6694(b)(2) of the Code (including the related regulations and other published guidance).
   (2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence.

(b) Documents, affidavits and other papers —
   (1) A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.
   (2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —
      (i) The purpose of which is to delay or impede the administration of the Federal tax laws;
      (ii) That is frivolous; or
      (iii) That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

(c) Advising clients on potential penalties —
   (1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —
      (i) A position taken on a tax return if —
         (A) The practitioner advised the client with respect to the position; or
         (B) The practitioner prepared or signed the tax return; and

(ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.

(2) The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.

(3) This paragraph (c) applies even if the practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.

(d) Relying on information furnished by clients. A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.
§ 10.35 Competence.

(a) A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law.
§ 10.37 Requirements for written advice.

(a) Requirements.

I. A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section. Government submissions on matters of general policy are not considered written advice on a Federal tax matter for purposes of this section. Continuing education presentations provided to an audience solely for the purpose of enhancing practitioners’ professional knowledge on Federal tax matters are not considered written advice on a Federal tax matter for purposes of this section. The preceding sentence does not apply to presentations marketing or promoting transactions.

2. The practitioner must—
   i. Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);
   ii. Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;
   iii. Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;
   iv. Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;
   v. Relate applicable law and authorities to facts; and
   vi. Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

(b) Reliance on advice of others. A practitioner may only rely on the advice of another person if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances. Reliance is not reasonable when—

1. The practitioner knows or reasonably should know that the opinion of the other person should not be relied on;

2. The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice; or

3. The practitioner knows or reasonably should know that the other person has a conflict of interest in violation of the rules described in this part.

(c) Standard of review.

1. In evaluating whether a practitioner giving written advice concerning one or more
Federal tax matters complied with the requirements of this section, the Commissioner, or
delegate, will apply a reasonable practitioner standard, considering all facts and circumstances,
including, but not limited to, the scope of the engagement and the type and specificity of the
advice sought by the client.

(2) In the case of an opinion the practitioner knows or has reason to know will be used or
referred to by a person other than the practitioner (or a person who is a member of, associated
with, or employed by the practitioner’s firm) in promoting, marketing, or recommending to one
or more taxpayers a partnership or other entity, investment plan or arrangement a significant
purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code,
the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all
facts and circumstances, with emphasis given to the additional risk caused by the practitioner’s
lack of knowledge of the taxpayer’s particular circumstances, when determining whether a
practitioner has failed to comply with this section.

(d) Federal tax matter. A Federal tax matter, as used in this section, is any matter concerning
the application or interpretation of---

(1) A revenue provision as defined in section
6110(i)(1)(B) of the Internal Revenue Code;

(2) Any provision of law impacting a person’s obligations under the internal revenue laws
and regulations, including but not limited to the person’s liability to pay tax or obligation to file
returns; or

(3) Any other law or regulation administered by the Internal Revenue Service.
§ 10.50 Sanctions

(c) Authority to impose monetary penalty —

(1) In general.

The Secretary of the Treasury, or delegate, after notice and an opportunity for a proceeding, may impose a monetary penalty on any practitioner who engages in conduct subject to sanction under paragraph (a) of this section.

(i) If the practitioner described in paragraph (c)(1)(i) of this section was acting on behalf of an employer or any firm or other entity in connection with the conduct giving rise to the penalty, the Secretary of the Treasury, or delegate, may impose a monetary penalty on the employer, firm, or entity if it knew, or reasonably should have known of such conduct.

(2) Amount of penalty. The amount of the penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty.

(3) Coordination with other sanctions. Subject to paragraph (c)(2) of this section —

(i) Any monetary penalty imposed on a practitioner under this paragraph (c) may be in addition to or in lieu of any suspension, disbarment or censure and may be in addition to a penalty imposed on an employer, firm or other entity under paragraph (c)(1)(ii) of this section.

(ii) Any monetary penalty imposed on an employer, firm or other entity may be in addition to or in lieu of penalties imposed under paragraph (c) (1)(i) of this section.
§ 10.51 Incompetence and disreputable conduct.

(a) Incompetence and disreputable conduct. Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to —

(4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, 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 the information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term “information.”

(6) 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.

(7) Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to 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.

(13) 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 Federal tax laws. False opinions described in this paragraph (a)(13) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading. For purposes of this paragraph (a)(13), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client.
APPENDIX C

Rights and Responsibilities of Practitioners in Circular 230 Disciplinary Cases

33 Public Domain material written by the author while Director, OPR
Rights and Responsibilities of Practitioners in Circular 230 Disciplinary Cases

Who is subject to discipline under Circular 230?

- State licensed Attorneys and Certified Public Accountants authorized and in good standing with their state licensing authority who interact with tax administration at any level and in any capacity.
- Persons enrolled to practice before the IRS- Enrolled Agents, Enrolled Retirement Plan Agents, and Enrolled Actuaries.
- Persons providing appraisals used in connection with tax matters (e.g., charitable contributions; estate and gift assets; fair market value for sales gain, etc.).
- Unlicensed individuals who represent taxpayers before the examination, customer service and the Taxpayer Advocate Service in connection with returns they prepared and signed.
- Licensed and unlicensed individuals who give written advice with respect to any entity, transaction, plan or arrangement; or other plan or arrangement, which is of a type the IRS determines as having a potential for tax avoidance or evasion. For this purposes “written advice” contemplates all forms of written material, including the content of an email, given in connection with any law or regulation administered by the IRS.
- Any person submitting a power of attorney in connection with limited representation or special authorization to represent before the IRS with respect to a specific matter before the Agency.

See Circular 230, Section 10.3 – Who may practice; Circular 230, Section 10.8 – Return preparation and application of rules to other individuals; Circular 230, Section 10.50 – Sanctions; Circular 230, Section 10.51 – Incompetence and disreputable conduct; and Circular 230, Section 10.60) - Institution of proceeding.

The Office of Professional Responsibility (OPR) has exclusive authority for all matters related to practitioner discipline, including disciplinary proceedings and sanctions. See Circular 230, Section 10.1 - Offices. OPR is committed to processing referrals and conducting investigations in a timely and fair manner. The investigative process and disciplinary proceedings follow established due process guidelines designed to ensure that practitioners receive notice of the allegations against them and an opportunity to present their side of the story at multiple stages.

Receipt and Review of Complaints: OPR receives referrals about practitioners from a variety of sources. The majority of referrals come directly from IRS field personnel, such as Revenue Agents, Revenue Officers, Special Agents and Appeals/Settlement Officers. OPR also receives referrals from other government agencies, such as the Treasury Inspector General for Tax Administration (TIGTA), the Department of Justice and state licensing authorities. An OPR manager reviews all referrals when they arrive in OPR. If it appears that a violation of Circular 230 has occurred, the manager will assign the case to
an attorney or paralegal for communication with the referred individual and for further investigation.

Right to Representation: During an OPR investigation, you may choose to be represented by someone authorized to practice before the IRS. If you choose to have a representative during an OPR investigation into issues relating to your own tax compliance, your representative must file a Form 2848, Power of Attorney and Declaration of Representative. If your investigation relates to a conduct matter, your representative must provide a representation letter at first contact with OPR.

Notice of an Investigation: Whenever OPR receives a referral that describes a possible violation of Circular 230, OPR will mail a letter to your last known address on file with the IRS. The letter will describe the nature of the allegations and the specific provisions of Circular 230 that appear to have been violated. The letter will also include the name and contact information of the OPR attorney or paralegal assigned to the case.

Opportunity to Respond: You should respond promptly to any correspondence from OPR. You will have an opportunity to respond to the allegations and to provide evidence throughout the investigation. You may provide evidence when OPR initially contacts you and determines the case warrants additional investigation. You also may provide evidence after OPR informs you of its conclusion that the Circular 230 violations identified call into question your fitness to continue practicing before the IRS. During the course of its investigation, OPR may request, in writing, additional information and/or documentation from you. Any failure to respond to such an inquiry is a separate violation of Circular 230, Section 10.20. Any letter from OPR staff will include a deadline by which a response from you will be required. If you are unable to meet the deadline, you must ensure that you or your representative communicates that to the OPR contact immediately.

Right to Submit Evidence: OPR encourages you to submit any evidence that will aid in resolving the issue as early as possible in the investigative stage. If the matter proceeds to an administrative hearing, the judge does not have to admit evidence that you try to produce at the last minute.

Negotiated Sanctions: OPR will attempt to negotiate any sanction it believes is warranted in connection with your violations of Circular 230. Possible options include censure, suspension or disbarment from practice before the IRS, or a monetary sanction. See Circular 230, Section 10.50 – Sanctions. Monetary sanctions may be applied to individuals or firms. Generally, OPR may not impose a sanction on you if you do not agree. Nevertheless, OPR does have discretion to reprimand you privately without Notice, or opportunity to be heard, if sufficient evidence exists that you have violated Circular 230.

Administrative Hearing: If OPR is unsuccessful in negotiating acceptable discipline with you, OPR will commence a proceeding by drafting a complaint, which is sent to the IRS Office of
Chief Counsel, General Legal Services (GLS), for filing with an Administrative Law Judge (ALJ). The ALJ will come from another federal agency.

GLS will serve you with the complaint, most open by regular and certified mail. You will have thirty (30) days to file an Answer. If you fail to answer, OPR will file a Motion of Default against you. You must answer in 30 days to preserve all your fight. Once you file an answer, the ALJ will set discovery, motion, and hearing dates for the case. The ALJ holds hearings in Washington, D.C., unless you request a location where a federal courthouse is located closer to your residence. Anyone authorized to practice before the IRS, or a licensed attorney, may represent you at the hearing. See Circular 230, Sections 10.60-10.76 – Rules applicable to Disciplinary Proceedings.

Hearings before the ALJ generally involve a relaxed application of the Federal Rules of Evidence. Both parties may present documentary evidence and testimony relevant to the issues raised in the case. Most hearings will last one day or less. The ALJ will issue an Initial Order and Decision, usually within 180 days of the conclusion of the hearing. The ALJ may: 1) confirm OPR’s position with respect to the Circular 230 violations and the appropriate level of discipline; 2) reject OPR’s position entirely; 3) modify OPR’s position with respect either to the Circular 230 violations or the appropriate level of discipline.

Appeal from Administrative Decision: Both OPR and you have the right to appeal the Initial Decision and Order of the ALJ to the Department of the Treasury within 30 days of being served. A specially designated senior attorney (called “the Appellate Authority”) within The Department of Treasury’s Office of Chief Counsel reviews the appeals and accompanying briefs and renders the Final Agency Decision in the case. See Circular 230, Section 10.77 – Appeal of decision of Administrative Law Judge; and Circular 230, Section 10.78 – Decision on review.

Filing Suit in U.S. Federal District Court: If you disagree with the Appellate Authority’s Final Agency Decision, you may file a complaint against the Director, OPR in U.S. Federal District Court in the district where you reside. The Administrative Procedure Act contains provisions governing that proceeding. See 5 U.S.C. Sections 551-559, 702. The proceeding will not be a new trial. Rather, the district court will review the entire administrative record already in existence in the case to determine if the agency’s action against you was arbitrary, capricious, contrary to law or otherwise an abuse of discretion.
APPENDIX D

6103 REQUESTS-PROCEDURE AND SAMPLE LETTER

34 Public domain material drafted under the direction of the author while Director, OPR.
SECTION 6103 INFORMATION REQUEST PROCEDURE AND SAMPLE LETTER

OPR has created a standard section 6103 information-request letter for practitioners and their representatives to use to request tax information maintained in OPR case files and obtained as part of an inquiry into possible violations of the regulations governing practice before the IRS (Circular 230).

The letter functions as a request under section 6013 of the Internal Revenue Code (http://www.gpo.gov/fdsys/pkg/USCODE-2013-title26/pdf/USCODE-2013-title26-subtitleF-chap61-subchapB-sec6103.pdf) for access to tax returns and related tax information. A practitioner, or an authorized representative on a practitioner’s behalf, can use the letter to request copies of (1) the practitioner’s own tax information;

(2) relevant tax information of other taxpayers, such as clients or former clients of the practitioner; or (3) both the practitioner’s own tax information and the tax information of third parties, depending on the particular case.

The section 6103 information-request letter is based on certain provisions of the statute, which are different in their coverage:

▪ The provisions in section 6103(e)(1) and (7) provide the method for a practitioner, in his or her status as a taxpayer, to obtain disclosure of the practitioner’s tax information contained in the case file associated with the practitioner. More specifically, the provisions authorize a taxpayer, through a written request, to inspect and receive the taxpayer’s returns filed with the IRS and the taxpayer’s “return information” (defined in section 6103(b)(2)), unless the IRS determines that disclosure of some or all of the return information would seriously impair federal tax administration.

▪ With respect to another taxpayer’s returns and return information, section 6103(l)(4) authorizes their disclosure, upon written request, to “any person . . . whose rights are or may be affected by an administrative action or proceeding” under Circular 230. Additionally, the same returns and return information may also be disclosed to a “duly authorized legal representative” of the person.

Disclosure under this provision is limited only to returns and return information that are or may be “relevant and material” to the action or proceeding involving Circular 230. A practitioner, or a practitioner’s authorized representative, therefore, may use subsection (l)(4) in a Circular 230 matter or proceeding to request disclosure of relevant third-party tax information.

It is important to note that any information disclosed under section 6103(l)(4) is solely for use in, or to prepare for, the action or proceeding. Any other use or disclosure of the third-party tax data is prohibited. A practitioner or representative who makes an unauthorized disclosure is subject to potential civil and criminal liability. The section 6103 information-request letter
includes acknowledgments by the requester(s) of the disclosure restrictions and potential penalties for violations.

The section 6103 information-request letter is distinct from a Freedom of Information Act (FOIA) request. The section 6103 information-request letter generally will be an easier way to obtain the information requested and will most often result in release of more information than a FOIA request. OPR receives and directly handles section 6103 requests; whereas FOIA requests are received and processed, on a first-in, first-out basis, by Privacy, Governmental Liaison and Disclosure within the IRS, which must coordinate with OPR on the identification and release of records responsive to a FOIA request. In addition, a section 6103 request is not subject to fees for search and review time or for photocopying that apply to FOIA requests. The most significant difference is that the IRS will not release any third-party tax information in response to a FOIA request, regardless of the relevance and materiality of the information to a pending or prospective action or proceeding that could affect the rights of the practitioner making the request or on whose behalf the request is made. The third-party tax information is required to be withheld under FOIA Exemption 3, in conjunction with section 6103. A practitioner or representative’s submission of a FOIA request may be a waste of time and resources, to the extent it is necessary to submit a subsequent section 6103(l)(4) request to obtain all available information relevant to the case.
Re: Request for records pursuant to 26 U.S.C. 6103

Dear Director:

I hereby request documents under any and all of the authorities described below that apply.

26 U.S.C. 6103 Request

Pursuant to section 6103(e)(1), I request from your files my own return information (including returns) that is, or may be, relevant and material to an administrative action or proceeding under Treasury Department Circular 230 (Circular 230).

Pursuant to 26 U.S.C. 6103(l)(4)(A)(ii), I request from your files return information (including returns) of third parties (e.g., clients or prospective clients) that is, or may be, relevant and material to an administrative action or proceeding under Circular 230.

I understand and hereby affirm that, as provided by section 6103(l)(4)(A)(ii), any return information disclosed to me is confidential and will be used solely in, or in preparation for, an administrative action or proceeding under Circular 230.

I hereby acknowledge that certain criminal penalties and civil liability apply to unauthorized disclosures, specifically: 26 U.S.C. 7213 (defining the unauthorized willful disclosure of returns or return information as a felony punishable by a fine not exceeding $5,000, imprisonment of not more than 5 years, or both, together with the costs of prosecution); and 26 U.S.C. 7431 (authorizing a taxpayer’s civil action for damages against any individual who knowingly or negligently inspects or discloses any return or return information in violation of 26 U.S.C. 6103).

In order to authenticate my identity, this request includes my signature, my address, and [state (and enclose) one other identifier, such as a photocopy of a driver’s license bearing your signature]. [If you are represented] My representative has signed this request also to acknowledge the responsibilities identified above in handling section 6103-protected information.

[Practitioner and/or Representative names] [addresses] [date]
If you have questions concerning this matter, please contact me at [state phone number]. Thank you for your attention to the matter.

Sincerely,

[typed name and legible signatures of both practitioner and, if represented, authorized representative]

Enclosure: [list an identifier, such as a photocopy of a driver's license bearing your signature]