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

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Footnotes

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 effective June, 2014. The complete text of these provisions and several others relevant to the Hypotheticals are contained in Appendix B.

7 Circular 230, section 10.22.
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.

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).

See section 10.22(a).

See section 10.34(d).

See section 10.37.

See section 10.35.

“willfully, recklessly, or through gross incompetence”…

See, section 10.34(c).

See, section 10.34(a)(1)(i)(C) and 10.34(a)(1)(ii)(C).

“Same as Last Year”.

See section 10.34(d).

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.

A very helpful discussion of the process and procedure during disciplinary proceedings was drafted while I was Director. It is included at Appendix C.

Case closing choices available to OPR staff include: lack of jurisdiction; no cause of action; and close without sanction.

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.
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.

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.

25 Available at IRS.gov.

26 Samples of the letter and the procedures to follow can be found at Appendix D.

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.

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.