ETHICS OF TAXATION

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Ethics in Tax Practice

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Transcripts

- Tax professionals have several options to obtain tax transcripts necessary for tax preparation or representation as follows:
  - Request that the IRS mail a transcript to the taxpayer's address of record, or
  - Use e-Services' Transcript Delivery System online to obtain masked individual transcripts and business transcripts, or
  - Obtain a masked individual transcript or a business transcript by calling the IRS, faxing authorization to the IRS assistor and the IRS assistor will place the document in the tax practitioner's e-Services secure mailbox.
  - When needed for tax preparation purposes, tax practitioners may:
    - Obtain an unmasked wage and income transcript by calling the IRS, faxing authorization to the IRS assistor and the IRS assistor will place the document in the tax practitioner's e-Services secure mailbox, or
    - Obtain an unmasked wage and income transcript if authorization is already on file by using e-Service's Transcript Delivery System.

- **Online Tools for Tax Professionals**
  - e-Services is a suite of web-based tools that allow tax professionals, reporting agents, mortgage industry, payers and others to complete transactions online with the IRS.
  - All e-Services users must register and create new accounts using a two-factor authentication process called Secure Access. To complete this process, select the e-Services application or product in which you are trying to access and select either Sign Up or Log In.
  - Transcript Delivery Service- TDS

PTIN Suit

- *Steele v. United States*, D.D.C., No. 14-cv-01523, 6/1/17- IRS cannot charge for PTIN's
- IRS ordered to refund all PTIN fees
- IRS prevailed on appeal to DC Circuit

PTIN Fees for 2021

- IRS announced on 7/16/20 the annual fee for 2021 that tax return preparers must pay to apply for or renew their Preparer Tax Identification Number (PTIN).
- The IRS set a $21 fee per PTIN application or renewal (plus a fee payable to a contractor).
- Total **$30.75**

Preparer Complaint Form

- **Form 14157.**

Due Diligence

- **8867 Form- expanded for 2022**
  - **EITC**
  - **American opportunity credit**
  - **Child Tax Credit**
  - **Additional Child Tax Credit**
  - **Other Dependents Credit**
  - **Head of Household**

Conflicting Interests

- **Section 10.29**
- **Express consent of all directly interested parties after full disclosure.**
- **Practitioner is required to obtain consents in writing from each affected client in order to represent the conflicting interests.**
- **A verbal consent followed by a confirming letter written by the practitioner will suffice if the client also signs the letter. Confirmation now can be made "within a reasonable period after the informed consent," but in no event later than 30 days.**

Avoiding Conflicts of Interest While Representing Clients Before IRS

- Explain joint and several liability when filing a joint federal or state income tax return
- Explain what joint and several liability means.
- Explain right of contribution.
- Make reference to the innocent spouse provisions in the Internal Revenue Code and your state taxation code as well.
- Liability may be determined in a pending audit or Tax Court proceeding.
- Asserting the defense of innocent spouse.
- Discuss the potential conflict of interest.
- Explain that both must acknowledge and waive the conflict
- Advise that they have the right to seek independent counsel

2011 Rule Change Solicitation

- §10.30(a)(1) of the regulations provides that a practitioner may not, with respect to any IRS matter, in any way use or participate in the use of any form of public communication or private solicitation containing a false, fraudulent, coercive, misleading, or deceptive statement or claim.
- RTRPs may not utilize the term "certified" or imply an employer/employee relationship with the IRS.

Discipline for False Representations

- IR-2018-155, 7-25-18 IRS announced OPR reached a settlement agreement including a monetary penalty with a tax practitioner. His firm also accepted responsibility for knowing the practitioner engaged in misconduct in attracting clients with outstanding collection issues. The practitioner agreed to five years of probation and a 12-month suspension of practice before the IRS if the probation is violate

6-10-14 Regulations

- 10.31
- A practitioner may not endorse a check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or other entity with whom the practitioner is associated) issued to a client by the government in respect to a federal tax liability

6-10-14 Regulations

- Modify the standards dealing with written advice and update certain other provisions.
- Amend Circular 230 by eliminating the rules governing covered opinions in Section 10.35 of the U.S. Tax Code, expand the requirements for written advice under Section 10.37.

6-10-14 Regulations

- Regulations also broaden the scope of the procedures to ensure compliance under Section 10.36, requiring that a practitioner with principal authority for overseeing a firm's federal tax practice take reasonable steps to ensure the firm has adequate procedures in place for purposes of Circular 230 compliance.

6-10-14 Regulations

- New 10.35
- Practitioners must exercise competence when engaged in practice before the IRS, and that the prohibition on a practitioner endorsing or negotiating any check issued to a taxpayer regarding a federal tax liability applies to government payments made by any means.

6-10-14 Regulations

- **Eliminates the need to put disclaimer on emails & letters:**
  - **This electronic mail transmission may contain confidential or privileged information. If you believe that you have received this message in error, please notify the sender by reply transmission and delete the message without copying or disclosing it. Pursuant to Internal Revenue Service guidance, be advised that any federal tax advice contained in this written or electronic communication, including any attachments or enclosures, is not intended or written to be used and it cannot be used by any person or entity for the purpose of (i) avoiding any tax penalties that may be imposed by the Internal Revenue Service or any other U.S. Federal taxing authority or agency or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.**

10.82 Expedited Suspensions

- Failing to make an annual Federal tax return, in violation of the Federal tax laws, during 4 of the 5 tax years immediately preceding the institution of a proceeding
- Failing to make a return required more frequently than annually, in violation of the Federal tax laws, during 5 of the 7 tax periods immediately preceding the institution of a proceeding

Preparer Regulation

- 2011 IRS issued regulations mandating that certain tax-return preparers
  - Complete 15 hours of continuing education each year and
  - Pass an initial qualifying exam
  - Undergo background checks
- Loving v. IRS, No. 12-385 (JEB) (D.D.C. Jan. 18, 2013), held IRS' lacks authority to continue preparer regulation.
- IRS lost appeal in February 2014

Voluntary Program

- Announced 6-26-14 for 2015 tax season
- Annual Filing Season Program
- For preparers who are not CPA’s EA’s or attorneys
- Tax return preparers who elect to participate in the program and receive a record of completion from the IRS will be included in a database on IRS.gov
- Database will include(CPAs), EA’s enrolled retirement plan agents (ERPAs) and enrolled actuaries who are registered with the IRS

Voluntary Program

- Non-exempt return preparers will need to:
  - Complete 18 hours of CE annually from IRS-approved CE providers to obtain an IRS record of completion. The hours will need to include:
    - 6 hours of federal tax filing season refresher course (with a required comprehension test at completion)
    - 10 hours of federal tax law topics
    - 2 hours of ethics

Voluntary Program

- As a prerequisite to receiving a record of completion, an individual will be required to consent to the duties and restrictions relating to practice before the IRS in subpart B and section 10.51 of Treasury Department Circular No. 230.

Statements on Standards for Tax Services American Institute of Certified Accountants

- **General Information on SSTSs**
- • Written simply & objectively
- • Provides for an appropriate range of behavior
- • Some rules are subjective & some terms are left undefined deliberately
- • Terms & concepts are generally tax-based
- • Many similarities to Circular 230
- • Enforcement is undertaken with flexibility
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Relevant Terms

- **Will** Generally 90% or greater probability of Generally 90% or greater probability of success if challenged by IRS success if challenged by IRS
- **Should** Generally 70 Generally 70 -80% probability of success if 80% probability of success if challenged by IRS challenged by IRS
- **More Likely More Likely than Not than Not (MLTN)** Greater than 50% probability of success if Greater than 50% probability of success if challenged by IRS challenged by IRS.

Relevant Terms

- **Substantial Authority**
- Weight of authorities in support of a position Weight of authorities in support of a position is substantial in relation to the weight of is substantial in relation to the weight of authorities in opposition to the position (40%) authorities in opposition to the position (40%)
- **Realistic Possibility of Success** 1 in 3 possibility of success if challenged by 1 in 3 possibility of success if challenged by IRS
- **Reasonable Basis** Significantly higher than not frivolous and significantly higher than not frivolous and lower than realistic possibility of success lower than realistic possibility of success
- **Not Frivolous** Not patently improper; some merit to position Not patently improper; some merit to position
- **Frivolous** Patently improper

Definitions Relevant to §6694 Penalty

- More likely than not
  - More than 50%
- Substantial authority
  - 40% or more
    - Below this standard must disclose on Form 8275
- Realistic possibility
  - 33% or more
- Reasonable basis
  - 20% or more
  - Must make a disclosure Form 8275
- Frivolous

Suggested Due Diligence Steps

- • Establish the relevant background facts
- • Consider the reasonableness of the assumptions & representations
- • Apply the pertinent authorities to the relevant facts
- • Consider whether there is a business purpose & economic substance for the
- transaction
- • Arrive at a conclusion supported by the authorities

SSTS No. 2, Answers to Questions on Returns

- • Standards when one or more questions on the return have not been answered
- • Make a reasonable effort to obtain the information necessary to provide appropriate answers to all questions
- • Allows judgment to omit answers to a question if the answer is not readily available & the answer is not significant in terms of taxable income or loss or the tax liability

SSTS No. 3, Certain Procedural Aspects of Preparing Returns

- • Standards for obligation to examine or verify supporting data or to consider information related to another taxpayer
- • May in good faith rely, without verification, on information furnished by taxpayer or third parties
- • Should not ignore the implications of information furnished

SSTS No. 3, Certain Procedural Aspects of Preparing Returns

- • Make reasonable inquiries if the information furnished appears to be incorrect, incomplete, or inconsistent
- • Refer to the taxpayer's returns for one or more prior years
- • Make appropriate inquiries to determine whether tax requirements have been met; i.e. travel and entertainment documentation

SSTS No. 4, Use of Estimates

- • Taxpayer's estimates may be used unless prohibited by statute or rule, provided the member determines the estimates are reasonable based on the facts known to the member
- • Estimates should not imply greater accuracy than exists
- • Disclosure of use of estimate is generally NOT required (unless due to unusual circumstances such as fire, illness or death)

SSTS No. 5, Departure From a Position Previously Concluded in an Administrative Proceeding or Court Decision

- • May recommend a tax return position (or prepare or sign a tax return) that departs from the previous treatment; taxpayer facts may have improved, such as proper documentation available
- • However, a taxpayer may be bound to a specified treatment in a later year
- • When previous-year decision is binding, it may be the only position supported bythe standards of SSTS No. 1

SSTS No. 6, Knowledge of Error: Return Preparation and Administrative Proceeding

- • Become aware of an error in a taxpayer's previously filed tax return or of a failure to file
- • Error includes any position, omission, or method of accounting that, at the time the return is filed, fails to meet the standards set out in SSTS No. 1
- • Includes a position taken on a prior year's return that no longer meets these standards due to legislation, judicial decisions, or administrative pronouncements having retroactive effect
- • An error does not include an item that has an insignificant effect on the taxpayer's tax liability
- • Should promptly inform the taxpayer of the error and recommend corrective measures
- • Recommendations may be given orally
- • May not inform the taxing authority without the taxpayer's permission, except when required by law or court order
- • Should advise client to seek legal counsel if the error could possibly lead to fraud or other criminal charges

SSTS No. 7, Form and Content of Advice to Taxpayers

- • Standards concerning certain aspects of providing advice to a taxpayer
- • Considers responsibility to communicate with client when subsequent developments affect advice previously provided
- • Should use judgment to ensure that tax advice reflects professional competence & appropriately serves the taxpayers' needs
- • Should always assume the advice given will affect the taxpayer's tax returns; consider Statement No. 1
- • Not required to follow a standard format in communicating written or oral advice
- • No obligation to communicate when subsequent developments affect advice
- previously provided except: While assisting taxpayer in implementing procedures or plans associated with the advice, or When a member undertakes this obligation by specific agreement

Lawyers: ABA Opinion 314

- Reasonable basis
  - A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Lawyers: ABA Opinion 314

- Reasonable basis
  - Rule 1.2(d), which applies to representation generally, states:
    - A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Lawyers: ABA Opinion 314

- Reasonable basis
  - A lawyer, in representing a client in the course of the preparation of the client's tax return, may advise the statement of positions most favorable to the client if the lawyer has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law. A lawyer can have a good faith belief in this context even if the lawyer believes the client's position probably will not prevail.
  - However, good faith requires that there be some **realistic possibility** of success if the matter is litigated.

Lawyers: ABA Opinion 314

- Reasonable Basis
  - In summary, a lawyer may advise reporting a position on a return even where the lawyer believes the position probably will not prevail, there is no 'substantial authority' in support of the position, and there will be no disclosure of the position in the return. However, the position to be asserted must be one which the lawyer in good faith believes is warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law. This requires that there is some realistic possibility of success if the matter is litigated. In addition, in his role as advisor, the lawyer should refer to potential penalties and other legal consequences should the client take the position advised.

Scenario 1

- Tax return preparer prepares an income tax return that shows $50000 in gross income from a consulting business on a Schedule C. Deductions are $35000. Preparer delivers the unextended return on April 14 of the year following the income year to the taxpayer's home. Client lives in a 5000 square foot home in an affluent suburb. There is a late model Jaguar sitting in the driveway. The preparer had never been to the taxpayer's home before delivering the return. How might OPR handle this situation? Is this a situation where §10.22 might come into play?

Issues for discussion:

- What must the preparer tell her client?
  - Section 10.21 of Circular 230, Knowledge of a client's omission
- Diligence as to Accuracy10.22
- What if any conflicts may exist in this scenario?
  - Conflicting Interests 10.29

Scenario 2

- ABC Security Service Inc. has had financial problems as a result of the economic downturn. As a result it currently owes three quarters of unpaid withholding taxes totaling $150,000 to the Internal Revenue Service. It has received three notices of Intent to Levy (CDP Notices) from the Internal Revenue Service and has not responded to any of those letters. On March 15, 2022 the owner of ABC Security Service, George Jones, engages you to represent the company with respect to his collection problems. At the time of your engagement the client provides you with a copy of a Notice of Levy on Last National Bank which was served by the Internal Revenue Service two weeks prior to your engagement. Your client tells you that all of the company funds are in the bank account and that the approximate balance at the time of levy was $20,000. Jones states that he cannot make payroll unless he can secure these funds. The client also states that he is about to receive a large payment from an account receivable in the amount of $50,000. He asks if it would be wise to put the monies in the same bank account that has been levied by the Internal Revenue Service or should he open a new bank account at a different bank so that the IRS might not be able to levy it.

Scenario 2

- **Queries**
- May you advise the taxpayer to open a new bank account so that the newly acquired funds from the account receivable will not be easily levied by the Internal Revenue Service?
- May you take the engagement with respect to the already levied funds and what courses of action may you take on behalf of the client?

10.51

- Disreputable conduct

Scenario 3

- OPR receives a referral from an Examining Agent who determines that the preparer of an income tax return has given the taxpayer an opinion on the presence of substantial authority. The agent disagrees and finds the preparer/advisor did not follow §10.37 in writing the opinion. The agent's position is that the practitioner unreasonably relied on the facts presented by the taxpayer. The facts so presented were, in fact, incorrect, and the practitioner had accepted them without verification.
- How might OPR handle this situation?

Scenario 4

- Samantha Smith engaged you in March, 2021 to represent her before the Internal Revenue Service with respect to income tax liabilities for the years 2016 through 2019. Samantha states she has minimal assets and earns approximately $80,000 per year as a mid-level manager for a large company. Her tax liabilities resulted because she had claimed too many dependents and had too little withholding taken out of her paychecks during the applicable periods. As part of your engagement, you gather financial information from the client and prepare a 433A, Collection Information Statement, on behalf of your client. That 433A lists a personal residence with a value of $300,000 with a $295,000 mortgage on it and a personal vehicle with a Kelly Blue Book value of $10,000 and a balance due on it of $14,000. The financial statement was submitted to the Revenue Officer and the Revenue Officer has been considering an appropriate amount for an installment agreement

Scenario 4

- Samantha Smith engaged you in March, 2022 to represent her before the Internal Revenue Service with respect to income tax liabilities for the years 2018 through 2020. Samantha states she has minimal assets and earns approximately $80,000 per year as a mid-level manager for a large company. Her tax liabilities resulted because she had claimed too many dependents and had too little withholding taken out of her paychecks during the applicable periods. As part of your engagement, you gather financial information from the client and prepare a 433A, Collection Information Statement, on behalf of your client. That 433A lists a personal residence with a value of $300,000 with a $295,000 mortgage on it and a personal vehicle with a Kelly Blue Book value of $10,000 and a balance due on it of $14,000. The financial statement was submitted to the Revenue Officer and the Revenue Officer has been considering an appropriate amount for an installment agreement. On March 20, 2021, you receive a call from the Revenue Officer who states that she believes your client has failed to disclose all of her assets. She notes that when she pulled a credit bureau report on your client, the following items appeared which did not appear on the original 433A.

1. 2019 Corvette
2. 2019 Harley Davidson Motorcycle
3. Condominium located in Lake Geneva, WI with a valuation per the county tax assessor of $200,000 with a $125,000 mortgage on the property

Scenario 4

- Subsequent to the call from the Revenue Officer you call your client who confirms that in fact she has failed to disclose the assets listed above. She states that he believes the Corvette is worth about $30,000 and is paid for. The Harley Davidson is worth about $15,000 and has no encumbrances and that the approximate value stated by the Revenue Officer for the Wisconsin property is accurate.

Scenario 4

- **Queries**

- What are your duties to the client now that you have determined that a 433A prepared by you is inaccurate?
- What are your duties to the tax system with respect to an inaccurate financial statement?

Issues for discussion:

- What must the preparer tell her client?
  - Section 10.21 of Circular 230, Knowledge of a client's omission
- Diligence as to Accuracy10.22
- What if any conflicts may exist in this scenario?
  - Conflicting Interests 10.29

Scenario 5

- Sid and Mary Castle of Indianapolis, IN engaged you in December, 2022 to represent them with respect to unpaid joint income tax liabilities for the years 2019 through 2020. The total liability due from the Castles exceeds $250,000. Since your engagement you have been engaged in negotiations with the IRS in an attempt to secure an installment agreement. As part of that negotiation you have secured a 433A from the parties and submitted it to the Revenue Officer. That 433A indicates that Sid is sole proprietor of Sid's Shoe Store which has a net profit of approximately $180,000 per year. Mary is a school teacher in the public school system and is paid approximately $60,000 per year. The Castles have joint assets that are fairly minimal other than their home. The home has a value of $300,000 and has a $150,000 mortgage on it. It is held in joint tenancy. On March 10, 2023, you receive a call from Mary stating that the parties have irreconcilable differences and that she has filed for divorce. She states that she really trusts you and would like you to continue negotiating with the Internal Revenue Service.

Scenario 5

- **Queries:**
  - What are your duties in an engagement for joint liability of husband and wife?
  - How do those duties change when the parties begin a divorce proceeding?
  - May you continue representing the parties subsequent to the filing of a divorce?
  - What, if any, actions must you take once you learn of the divorce?

Scenario 6

- An attorney advises two of your business clients of a plan for selling their businesses that involves a complex, multi-tier LLC structure to accomplish both estate and income tax savings as they enter retirement. The attorney drafts a research memorandum for you and the client, covering the plan's technical aspects. You review the memo and present your arguments to the attorney that the LLC may be deemed a related party or controlled group by the IRS, thereby negating any tax advantages of the plan. You agree that the plan may have some merits, but are concerned that IRS has issued recent rules requiring disclosure of such transactions and you are concerned about your client's willingness to participate in transactions that may not have a more likely than not probability of success if litigated.

Scenario 6

- Should you prepare a return adopting the attorney's tax position to your client?
- If so, how can you manage the clients' expectations about potential penalties to you and the taxpayer that may result from it?

Scenario 7

As you meet with a new client who had prepared his own return, you discover he has taken a loss deduction of a substantial amount that is inappropriate. You indicate that you expect the examiner to notice it during the course of the examination, and let him know how much additional tax to expect from it. You convincingly present the taxpayers' information when the Revenue Agent comes out, and he does not address the erroneous deduction. He requests additional substantiation for an expense you know your client will readily be able to provide; and he does. When the examination report comes to you, it reflects a disallowance of the appropriate expense, proposes a modest additional assessment, but does not mention the deduction for which you had initially raised concerns.

- Should you have informed the RA of the client's inappropriate deduction?

Scenario 8

- In the course of representing a client before IRS Exam, preparer realizes she has made a significant error in advice given the taxpayer relating to a position taken on the return. If the error is discovered, the taxpayer will certainly owe additional tax and most probably an accuracy related penalty. There is also a potential the IRS will invoke a preparer penalty against her. Further, the preparer must consider her obligation of due diligence and accuracy to both the tax system and the client.
- **Issues for discussion:**
  - What must the preparer tell her client?
  - What if any conflicts may exist in this scenario?

Scenario 9

- Long time clients Rob and Terri separated in 2020; the divorce was not final until 2022. Only Rob came in for the 2021 return preparation appointment, indicating they were separated. He had kept the family residence and Terri had moved to Arizona. Rob provided information about jointly paid property taxes and mortgage interest, and offered Terri's new address and contact information so preparer could contact her directly to obtain tax information needed to preparer the 2021 return. Upon doing so, Terri agreed to file jointly if it resulted in the lowest legal tax liability for each of them. Preparer briefly reviewed the information and roughly calculated the tax with filing separate returns vs. joint. Both Rob and Terri were in agreement they would split the larger refunds they would obtain if joint returns were filed, and it was their decision to do so. Preparer completed and filed the returns.

Scenario 9

- 15 months later Rob walked into the preparer's office with a CP2000 letter addressed jointly to Rob and Terri. The notice revealed additional income and proposed additional income and SE tax as well as interest and penalties. Preparer reviewed the letter and determined the additional income was solely from 1099-MISC, non-employee compensation Janice had failed to disclose at the time the returns were prepared.
- Preparer advised Rob to be sure the letter was forwarded immediately to Terri, and that to advise her to seek competent assistance where she currently lived in responding to the notice.
- Preparer then suggested that since a joint return had been filed, IRS would likely make the final assessment against both Rob and Terri for the full amount of the tax. Since Rob reacted that it was not fair for that to happen, preparer then suggested she could file a request for innocent spouse relief, requesting separation of liability. He should easily qualify for relief.

Scenario 9

- **Issues for discussion:**
  - Where did preparer make his first mistake?
  - What were his choices at that time?
  - Presuming the clients would have still agreed and did to file jointly, what should have happened at the time Rob showed up with the CP2000 letter?
  - Why?

Scenario 10

- Andrew, a Circular 230 sole practitioner, had sufficient income to trigger a filing requirement for the years in question. For 5 years, Andrew failed to file his personal income tax returns on time. When contacted by the Office of Professional Responsibility, Andrew responded by stating that he never intended to defraud the IRS by pointing out that his returns always showed a refund. Andrew also offered as mitigating factor the fact that his clients' returns were always filed timely and all stood up to audits.

- Andrew also had compliance issues with his Quarterly Federal Tax Return (Form 941) for several quarters. He failed to timely file his 941 and had balances due and owing.

Scenario 10

- Circular 230 Issues:
- Section 10.51 (f)
- Willfully failing to make a Federal tax return in violation of the revenue laws of the United States.

- Factors to consider:
- 1040 issues: A refund return does not relieve the practitioner from the duty to file timely all tax returns. Willfulness does not require proof of any motive other than an intentional violation of a known legal duty. The practitioner knew of his legal duty to file his tax returns on time but did not meet his legal requirement and established a pattern of filing late returns.

- 941 issues: The OPR views compliance and monies owing on 941s very seriously.

Scenario 11

- A practitioner has prepared the corporate and personal returns for the owners of a corporation for several years. The owners are a married couple who filed joint returns since they became the practitioner's client several years ago. As with previous years, the practitioner met with both the husband and the wife to go over their tax information. During the meeting, they informed the practitioner that they are in the process of getting a divorce but that they agree on how their taxes should be filed, and that they would both like him to continue representing them individually.

Scenario 11

- Circular 230 issues:
- Conflict of interest
- Due Diligence
- Factors to consider:
- Does the divorce present an actual conflict of interest situation or is there a potential for a conflict of interest? What is proper due diligence in this situation and how is the divorce going to affect his ability to prepare the corporate and the personal returns for the past year and future tax years? Do they have any children? Who is going to be involved in the corporation? The current conflicts rules allow the clients to waive the conflict if the practitioner informs the clients of the conflict and the client gives informed consent, confirmed in writing. Under the rules, the practitioner is required to obtain the consents in writing "at the time the existence of the conflict of interest is known by the practitioner." Thus, under the rules, the practitioner is required to obtain the consents in writing prior to representing clients with conflicts of interest within 30 days. If the parties do not agree to the waiver, the practitioner must withdraw from representation for all returns.

Scenario 12

- In year 1, Glen, a Circular 230 practitioner, has a client requesting return advice on whether to claim a loss on an activity that is subject to the passive activity rules. Glen has done work for the client in the past and knows that the client doesn't spend much time on this activity, and definitely not enough time to claim it as a loss. The client provides general information about her involvement in the activity. Despite knowing the client does not spend enough time on the activity to claim the loss, Glen prepares the return claiming an active loss from the activity. Glen does the same for the client in years 2 and 3 as well, despite the fact that the client's limited involvement in the activity has not changed.

Scenario 12

- Factors to consider:
- Glen has done work for this client in the past and is familiar with the client's minimal involvement in the activity.
- Glen should be familiar with the passive activity loss rules and the limitations the rules provide.
- The client provided general information to Glen related to her involvement in the activity. Did Glen exercise due diligence and follow up with questions or request further documentation or proof regarding the client's involvement in the activity?

Scenario 12

- Suppose that in year 4, the client retains Susan, another Circular 230 practitioner, to prepare that year's returns. Susan requests documentation regarding the client's involvement in the activity and notices, given the information provided, that the prior 3 returns contain the incorrect claim for loss on the activity. Susan advised the client of the error in the prior years' returns and the consequences of such an error under the Code. The client decides not to amend the returns for years 1, 2 and 3. Susan does not inform the IRS of the errors. Susan prepares the client's return for year 4 and correctly, does not claim the loss under the passive activity rules. Later that year, an agent examining the client for years 1, 2, and 3 proposed audit adjustments for the passive activity claim and asserted penalties against the client.

Scenario 12

- Factors to consider:
- Susan correctly advised the client of the error on returns 1, 2 and 3.
- Susan has no obligation to inform the IRS of the error or to amend the returns for years 1, 2 and 3. However, she cannot perpetuate the error on the returns she prepares. Since Susan did not claim the passive activity loss on year 4's return, she did not perpetuate the error. Therefore, she exercised due diligence in this scenario.
- Had the client refused to make the correction in year 4, Susan should not have prepared the return. If Susan had prepared the return with the passive activity loss claim, she could face a potential Circular 230 violation.

Scenario 13

- Revenue Agent Jay requests support for a certain deductions taken on a taxpayer's return. Bob, a Circular 230 practitioner representing the taxpayer, submits a series of confusing and complex schedules to Jay. Jay still does not understand how the deduction was calculated, and he asks Bob to explain the calculation further in a face-to face meeting.
- During the meeting, Bob states repeatedly and in a loud voice that Jay is "an idiot" and should be removed from the case.
- During the meeting, Bob states that his client will sue the IRS for damages based on the way the IRS has treated the client in this matter.

Scenario 13

- During the meeting, Bob tells Jay that, if Jay does not approve the deduction, Bob will file a Section 1203 complaint against Jay, and Jay will lose his job. This is not the first time that Bob has used this tactic with IRS personnel, and Bob knows he has no real basis for such a complaint.
-
- After the meeting, Bob contacts Jay's supervisor to complain that Jay is incompetent, and Bob demands that a different Revenue Agent be assigned to the case. Subsequently, Bob refuses to respond to Jay's telephone calls or requests for more information.

Scenario 13

- **Circular 230 Issues:**
- False or misleading information
- Abusive language
- Unreasonable delay
- Threats or coercion
- **Factors to consider:**
  - Have Bob and Jay worked together on any prior cases?
  - Does Bob have a history of abusive behavior with IRS personnel
  - Did Bob go through proper channels to make his complaints known?

HAVE A LESS

TAXING YEAR!!!!!

Thank You!!

American Bar Association

TAX RETURN ADVICE; RECONSIDERATION OF FORMAL OPINION 314

July 7, 1985

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A lawyer may advise reporting a position on a tax return so long as the lawyer believes in good faith that the position is warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law and there is some realistic possibility of success if the matter is litigated.

The Committee has been requested by the Section of Taxation of the American Bar Association to reconsider the 'reasonable basis' standard in the Committee's Formal Opinion 314 governing the position a lawyer may advise a client to take on a tax return.

Opinion 314 (April 27, 1965) was issued in response to a number of specific inquiries regarding the ethical relationship between the Internal Revenue Service and lawyers practicing before it. The opinion formulated general principles governing this relationship, including the following:

[A] lawyer who is asked to advise his client in the course of the preparation of the client's tax returns may freely urge the statement of positions most favorable to the client just as long as there is a reasonable basis for this position. (Emphasis supplied).

The Committee is informed that the standard of 'reasonable basis' has been construed by many lawyers to support the use of any colorable claim on a tax return to justify exploitation of the lottery of the tax return audit selection process. [FN1] This view is not universally held, and the Committee does not believe that the reasonable basis standard, properly interpreted and applied, permits this construction.

However, the Committee is persuaded that as a result of serious controversy over this standard and its persistent criticism by distinguished members of the tax bar, IRS officials and members of Congress, sufficient doubt has been created regarding the validity of the standard so as to erode its effectiveness as an ethical guideline. For this reason, the Committee has concluded that it should be restated. Another reason for restating the standard is that since publication of Opinion 314, the ABA has adopted in succession the Model Code of Professional Responsibility (1969, revised 1980) and the Model Rules of Professional Conduct (1983). Both the Model Code and the Model Rules directly address the duty of a lawyer in presenting or arguing positions for a client in language that does not refer to 'reasonable basis.' It is therefore appropriate to conform the standard of Opinion 314 to the language of the new rules.

This opinion reconsiders and revises only that part of Opinion 314 that relates to the lawyer's duty in advising a client of positions that can be taken on a tax return. It does not deal with a lawyer's opinion on tax shelter investment offerings, which is specifically addressed by this Committee's Formal Opinion 346 (Revised), and which involves very different considerations, including third party reliance.

The ethical standards governing the conduct of a lawyer in advising a client on positions that can be taken in a tax return are no different from those governing a lawyer's conduct in advising or taking positions for a client in

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other civil matters. Although the Model Rules distinguish between the roles of advisor and advocate, [FN2] both roles are involved here, and the ethical standards applicable to them provide relevant guidance. In many cases a lawyer must realistically anticipate that the filing of the tax return may be the first step in a process that may result in an adversary relationship between the client and the IRS. This normally occurs in situations when a lawyer advises an aggressive position on a tax return, not when the position taken is a safe or conservative one that is unlikely to be challenged by the IRS.

Rule 3.1 of the Model Rules, which is in essence a restatement of DR 7- 102(A)(2) of the Model Code, [FN3] states in pertinent part:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Rule 1.2(d), which applies to representation generally, states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

On the basis of these rules and analogous provisions of the Model Code, a lawyer, in representing a client in the course of the preparation of the client's tax return, may advise the statement of positions most favorable to the client if the lawyer has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law. A lawyer can have a good faith belief in this context even if the lawyer believes the client's position probably will not prevail. [FN4] However, good faith requires that there be some realistic possibility of success if the matter is litigated.

This formulation of the lawyer's duty in the situation addressed by this opinion is consistent with the basic duty of the lawyer to a client, recognized in ethical standards since the ABA Canons of Professional Ethics, and in the opinions of this Committee: zealously and loyally to represent the interests of the client within the bounds of the law.

Thus, where a lawyer has a good faith belief in the validity of a position in accordance with the standard stated above that a particular transaction does not result in taxable income or that certain expenditures are properly deductible as expenses, the lawyer has no duty to require as a condition of his or her continued representation that riders be attached to the client's tax return explaining the circumstances surrounding the transaction or the expenditures.

In the role of advisor, the lawyer should counsel the client as to whether the position is likely to be sustained by a court if challenged by the IRS, as well as of the potential penalty consequences to the client if the position is taken on the tax return without disclosure. Section 6661 of the Internal Revenue Code imposes a penalty for substantial understatement of tax liability which can be avoided if the facts are adequately disclosed or if there is or was substantial authority for the position taken by the taxpayer. Competent representation of the client would require the lawyer to advise the client fully as to whether there is or was substantial authority for the position taken in the tax return. If the lawyer is unable to conclude that the position is supported by substantial authority, the lawyer should advise the client of the penalty the client may suffer and of the opportunity to avoid such penalty by adequately disclosing the facts in the return or in a statement attached to the return. If after receiving such advice the client decides to risk the penalty by making no disclosure and to take the position initially advised by the lawyer in accordance with the standard stated above, the lawyer has met his or her ethical responsibility with respect to the advice.

In all cases, however, with regard both to the preparation of returns and negotiating administrative settlements, the lawyer is under a duty not to mislead the Internal Revenue Service deliberately, either by misstatements or by silence or by permitting the client to mislead. Rules 4.1 and 8.4(c); DRs 1- 102(A)(4), 7-102(A)(3) and (5).

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In summary, a lawyer may advise reporting a position on a return even where the lawyer believes the position probably will not prevail, there is no 'substantial authority' in support of the position, and there will be no disclosure of the position in the return. However, the position to be asserted must be one which the lawyer in good faith believes is warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law. This requires that there is some realistic possibility of success if the matter is litigated. In addition, in his role as advisor, the lawyer should refer to potential penalties and other legal consequences should the client take the position advised.

[FN1]. This criticism has been expressed by the Section of Taxation and also by the U.S. Department of the Treasury and some legal writers. See, e.g., Robert H. Mundheim, Speech as General Counsel to Treasury Department, reprinted in How To Prepare and Defend Tax Shelter Opinions: Risks and Realities for Lawyers and Accountants (Law and Business, Inc. 1981); Rowen, When May a Lawyer Advise a Client That He May Take a Position on a Tax Return? 29 TAX LAWYER 237 (1976).

[FN2]. See, e.g., Model Rules 2.1 and 3.1.

[FN3]. DR 7-102(A)(2) states:

In his representation of a client, a lawyer shall not:

. . .

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

[FN4]. Comment to Rule 3.11; see also Model Code EC 7-4.

ABA Formal Op. 85-352

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Ethical Considerations in Tax Matters

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Office of Professional Responsibility
In January, 2003 the Internal Revenue Service announced the creation of a new Office of Professional Responsibility as part of its modernization effort The Office of Professional Responsibility is charged with enhancing the oversight of tax professionals. It replaced the office of the Director of Practice. The office now has a much larger staff and is aggressively pursuing disciplinary matters against tax professionals. The current director is Karen Hawkins who formerly was a tax controversy lawyer in Oakland, CA.

IRS Voluntary Program for Preparers Upheld
In *American Institute of Certified Public Accountants* ("AICPA") *v. Internal Revenue Service* ("IRS"), the D.C. Circuit for the District of Columbia Circuit ("D.C. Circuit") reversed the District Court for the District of Columbia's ("District Court") dismissal and held, for a second time, that the AICPA had standing to challenge the IRS's promulgation of the Annual Filing Season Program ("AFSP" or "the Program"). The D.C. Circuit then went a step further and ruled on the merits of the AICPA's challenge to the IRS's rulemaking. It held that the IRS had the statutory authority to promulgate the voluntary program to enhance the skills of licensed tax return preparers. However, while the D.C. Circuit was unanimous on standing and the merits, it split two-to-one on whether the IRS had followed proper procedure when it adopted the AFSP without first providing the requisite "notice and comment" period required by the Administrative Procedures Act ("APA").

2014 Regulations
On June, 2014 the IRS released regulations that would eliminate the complex rules in Circular 230 governing covered opinions (REG-138367-06). To replace the covered opinion rules, the regulations would expand the requirements for written advice under Circular 230, Section 10.37.

The three regulations that will most likely significantly impact law firms and accounting firms would:

> (1) eliminate section 10.35 (the rules relating to covered opinions, which rules were the impetus for the Circular 230 legend that appears on much written work product)
>
> (2) expand the requirements for written advice under section 10.37, which requirements would apply to all written advice and
>
> (3) require that "the practitioner with principal authority for overseeing a firm's

federal tax practice take reasonable steps to ensure the firm has adequate procedures in place for purposes of complying with Circular 230."

The regulations would also make several other changes to Circular 230.

Eliminate 10.35 Covered opinions
Current Circular 230, Section 10.35, contains detailed rules for tax opinions that constitute "covered opinions." Covered opinions include written advice concerning:

1. A listed transaction;

2. A transaction with the principal purpose of tax avoidance or evasion; or

3. A transaction with a significant purpose of tax avoidance or evasion, if the advice is a reliance opinion, marketed opinion, subject to conditions of confidentiality, or subject to a contractual protection.

Practitioners must comply with extensive requirements when providing written advice that constitutes a written opinion, and the IRS acknowledges that they have to expend considerable effort to determine whether advice rendered in a particular circumstance is subject to the covered opinion rules.

The IRS also notes in the preamble to the regulations that, "[y]ears of practical experience, however, have shown that the covered opinion rules in current §10.35 have produced some unintended consequences and should be reconsidered." For example, the IRS has concluded that many practitioners attempt to exempt their advice from the covered opinion rules by making a prominent disclaimer stating that the opinion cannot be relied on for penalty protection.

The IRS observes that, "Practitioners have consistently voiced their concern over the current rules since their promulgation in 2004." The IRS has concluded that the rules are overbroad, are difficult to apply, and do not necessarily produce higher-quality tax advice.
Therefore, the IRS is proposing to eliminate Section 10.35 and replace it with a revised Section 10.37. Section 10.37 would require practitioners to base all written advice on reasonable factual and legal assumptions, exercise reasonable reliance, and consider all relevant facts that the practitioner knows or should know. New Sec. 10.35 of Circular 230 simply provides a broad requirement that a practitioner must be competent to professionally perform the specific services that he or she has agreed to undertake for a client.

Section 10.39
The regulations withdraw proposed amendments to Section 10.39 governing requirements for state or local bond opinions, and remove the definition of, and exclusion for, state or local bond opinions from the definition of covered opinions.

Section 10.36

The regulations broaden the scope of the procedures to ensure compliance under Section 10.36 by requiring that a practitioner with principal authority for overseeing a firm's federal tax practice take reasonable steps to ensure the firm has adequate procedures in place for purposes of complying with all provisions of Circular 230.

Section 10.51
The regulations clarify that practitioners must exercise competence when engaged in practice before the IRS. Under the current version of Circular 230, a practitioner can be sanctioned for incompetent conduct (Section 10.51), but there was no specific requirement that a practitioner exercise competence.

The regulations clarify that the prohibition on a practitioner's endorsing or otherwise negotiating any check issued to a taxpayer in respect of a federal tax liability applies to government payments made by any means, electronic or otherwise.

Section 10.82
The regulations expand the categories of violations subject to the expedited proceedings in Section 10.82 to include failures to comply with a practitioner's personal tax filing obligations that demonstrate a pattern of willful disreputable conduct.
Finally, the regulations clarify that the IRS Office of Professional Responsibility has exclusive responsibility for matters related to practitioner discipline, including disciplinary proceedings and sanctions.

Tax Preparer Regulation
In January, 2010 based on the results of a Return Preparer Review, the IRS recommended a number of steps that it plans to implement for future filing seasons.

IRS Barred From Enforcing Preparer Regulation
The court in Loving enjoined the IRS from enforcing its specialized education mandate because the United States Department of the Treasury (the administrative body that oversees the IRS) did not have the statutory authority to create such a regulation. The IRS had justified its new examination and education requirements through a statute that allows the IRS to "regulate the practice of representatives of persons before the Department of the Treasury." 31 U.S.C. § 330(a) This statute allows the IRS to require such representatives to meet certain levels of character, reputation, qualifications, and competence. Id. The IRS' position was that "practice" included "preparing and signing tax returns and claims for refund." See, e.g., 31 C.F.R. § 10.3(f); id. § 10.2(a)(4) (noting that "practice" includes preparing and filing documents). Yet the Loving court turned that approach on its head by concluding tax preparers do not "practice" before the IRS by filing, signing, and sending tax returns. The court reasoned that applicable statutes themselves insist the term "practice" cannot include simply preparing tax returns; the court found the above statutory language not permissive of the IRS' education requirements Loving, No. 12-385 (JEB), *10-12.

Additional Opinion
The Loving court issued an additional opinion and order on February 1, 2013, clarifying

and modifying its previous injunction. Loving v. IRS, No. 12-385 (JEB) (D.D.C. Feb. 1, 2013) This order denied the IRS' attempt to stay the injunction pending its appeal; however, the court modified the injunction such that the PTIN application and assignment system, at its core, is not implicated (citing 26 U.S.C. § 6109(a)(4) for support that the IRS' preparer numeration system is congressionally supported), and that the injunction has no relation to tax preparers not previously required to complete the IRS education requirements.

Appeal

The DC U. S. Court of Appeals upheld the decision of the district court. The court held:

> "The precise question is whether the IRS's statutory authority to 'regulate the practice of representatives of persons before the Department of the Treasury' encompasses authority to regulate tax-return preparers. The District Court ruled against the IRS, relying on the text, history, structure, and content of the statute. We agree with the District Court that the IRS's statutory authority under Section 330 cannot be stretched so broadly as to encompass authority to regulate tax-return preparers. We therefore affirm the judgment of the District Court."

The appeals court rested its decision on six considerations. We'll focus on five of them here. The italicized text is from the appeals decision and we have for the most part stripped out references to code sections and other court cases.

“1) The meaning of the key statutory term "representatives." (pp. 6-8)

> In its opening brief, the IRS simply asserts that there "can be no serious dispute that paid tax-return preparers are 'representatives of persons.'" Beyond that ipse dixit, however, the IRS never explains how a tax-return preparer "represents" a taxpayer. And for good reason: The term "representative" is traditionally and commonly defined as an agent with authority to bind others, a description that does not fit tax-return preparers.
>
>> Put simply, tax-return preparers are not agents. They do not possess legal authority to act on the taxpayer's behalf. They cannot legally bind the taxpayer by acting on the taxpayer's behalf. The IRS cites no law suggesting that tax-return preparers have legal authority to act on behalf of taxpayers. Indeed, a tax-return preparer who tried to act on the taxpayer's behalf would run into trouble with the IRS: Under the IRS regulation found at 26 C.F.R. § 601.504(a), "representation" of a taxpayer before the IRS requires formally obtaining the taxpayer's power of attorney, something tax-return preparers do not typically obtain when preparing returns. Moreover, because a tax-return preparer is not a representative, the taxpayer ordinarily must still sign and submit the return in his or her own name even when the taxpayer uses the services of a tax-return preparer.

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Other IRS directives buttress the understanding that tax-return preparers are not representatives. For example, the IRS permits taxpayers to select any person as a "Third Party Designee" who may talk to the IRS about questions that arise during the processing of the taxpayer's return. But as the instructions for the standard tax return form make clear, that third-party designee status is not the same as representative status or power of attorney: "You are not authorizing the designee to receive any refund check, bind you to anything (including any additional tax liability), or otherwise represent you before the IRS.

2) <u>The meaning of the phrase "practice...before the Department of Treasury." (pp. 8-12)</u>

To be sure, "preparing and signing tax returns" could be considered a "practice" of sorts, particularly if the tax-return preparer is providing advice or making judgment calls about a taxpayer's liability. But Section 330 does not regulate the act of "practice" in the abstract. The statute instead addresses "practice . . . before the Department of the Treasury." Although the exact scope of "practice before" a court or agency varies depending on the context, to "practice before" a court or agency ordinarily refers to practice during an investigation, adversarial hearing, or other adjudicative proceeding.

3) <u>The broader statutory framework (pp. 13-15)</u>

Over the years, Congress has enacted a number of targeted provisions specific to tax-return preparers, covering precise conduct ranging from a tax-return preparer's failing to sign returns to knowingly understating a taxpayer's liability. See, e.g., 26 U.S.C. §§ 6694, 6695, 6713. Each of those statutory proscriptions comes with corresponding civil penalties. Congress has continued to revise those statutes.

Under the IRS's view here, however, all of Congress's statutory amendments would have been unnecessary. The IRS, by virtue of its heretofore undiscovered carte blanche grant of authority from Section 330, would already have had free rein to impose an array of penalties on any tax-return preparer who "is incompetent," "is disreputable," "violates regulations prescribed under" Section 330, or "with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented" 31 U.S.C. § 330(b) and that would have already covered all (or virtually all) of the conduct that Congress later spent so much time specifically targeting in individual statutes regulating tax-return preparers.

4) <u>The nature and scope of the authority being claimed by IRS (p.15)</u>

If we were to accept the IRS's interpretation of Section 330, the IRS would be empowered for the first time to regulate hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry. Yet nothing in the statute's text or the legislative record contemplates that vast expansion of the IRS's authority.

5) <u>IRS' past approach to the statute (pp. 15-16)</u>

Until 2011, the IRS never interpreted the statute to give it authority to regulate tax-return preparers. Nor did the IRS ever suggest that it possessed this authority but simply chose, in its discretion, not to exercise it.

In 2005, moreover, the head of the IRS's Criminal Investigation Division testified to Congress that "[t]ax return preparers are not deemed as individuals who represent individuals before the IRS."... At the same hearing, the National Taxpayer Advocate ... stated to Congress that "the IRS currently has no authority to license preparers or require basic knowledge about how to prepare returns."

The IRS is surely free to change (or refine) its interpretation of a statute it administers. But the interpretation, whether old or new, must be consistent with the statute. And in the circumstances of this case, we find it rather telling that the IRS had never before maintained that it possessed this authority...In light of the text, history, structure, and context of the statute, it becomes apparent that the IRS never before adopted its current interpretation for a reason: It is incorrect."

Compliance Checks
The IRS had planned to require all signing paid tax return preparers be subject to verification of personal and business tax compliance every three years. During the initial three-year implementation period, the IRS planned to conduct the tax compliance checks after registration and prior to the required renewal date. After the three-year phase-in period, the IRS intended to require tax compliance as a condition of registration and PTIN issuance.

For those individuals who are registered and have a PTIN, the IRS intended to refer potential tax compliance violations discovered at renewal to the IRS Office of Professional Responsibility for investigation and possible disciplinary sanctions.

PTIN's
On March 24, 2010 the IRS issued proposed regulations under IRC §6901 setting forth registration and testing rules. All preparers of returns and claims for refund were required to apply for a PTIN. As the IRS revealed when it first proposed mandatory registration of return preparers, under the proposed regulations, applying for a PTIN may subject a return preparer to a tax-compliance check, which could include a review of whether the individual has timely filed his or her personal and business tax returns and paid all tax due. The Loving decision allows the IRS to require PTIN's but barred it from imposing any standards on unlicensed and unenrolled preparers.

Penalties
Under the regulations issued in 2011, failure to include a PTIN on a return could subject

a return preparer to penalties under IRC § 6695(c). That penalty is $50 for each failure to furnish a required identifying number, up to $25,000 in each calendar year.

User Fees

Tax return preparers have been required to pay a user fee of $64.25 when first applying for a PTIN and at every renewal. There are also user fees for CPE providers and for testing. Small Business and Work Opportunity Tax Act of 2007 expands the definition of a tax return preparer to cover the preparation of a return or claim for refund of any federal tax, including estate and gift taxes, employment taxes, excise taxes and the returns of exempt organizations. Prior standard realistic possibility: A position satisfies the standard if a reasonable and well-informed analysis by a person knowledgeable in the tax law would lead that person to conclude that the position has an approximately one in three,

Continuing Education Providers

You are subject to requirements in the final regulations. The final regulations provide requirements applicable to continuing education providers who provide continuing education programs to RTRPs and enrolled agents. Continuing education providers must obtain and renew continuing education provider numbers and continuing education provider program numbers and pay any applicable fees.

IRS Offices Administering and Enforcing Circular 230

Under the disputed regulations to fully implement the return preparer initiative, the IRS announced that a new return preparer office was created to administer PTIN applications, competency testing, and continuing education. The IRS decided that an office dedicated solely to the matters will allow the IRS to best serve tax return preparers and taxpayers by providing efficiency and expertise in this area.

Concurrently, the Office of Professional Responsibility will continue to enforce the Circular 230 provisions relating to practitioner conduct and discipline. The Office of Professional Responsibility will continue to carry out its mission to interpret and apply the standards of practice for tax professionals in a fair and equitable manner. As discussed in the Report, a strong enforcement regime is a key component to increased oversight of the tax return preparer industry. Commentators on the proposed regulations also suggested that the return preparer initiative must be met with appropriate enforcement measures. The IRS recognizes that the Office of Professional Responsibility is central to the IRS' goal of maintaining high standards of ethical conduct for all practitioners and that the Office must operate independently from IRS functions enforcing Title 26 requirements.

The final contested regulations accommodate the internal structure by generally removing references to the Office of Professional Responsibility. The final regulations allow the flexibility to adjust responsibility appropriately between the offices as the return preparer initiative is implemented. The Commissioner may delegate necessary authorities to appropriate offices.

Eligibility to Become an Enrolled Agent or Enrolled Retirement Plan Agent
The final regulations provide that an enrolled agent or enrolled retirement plan agent must be eighteen years old and obtain a PTIN to be eligible to practice before the IRS as an enrolled agent or enrolled retirement plan agent.

§10.4(d) of the final regulations also provides that a former employee who, by virtue of past service and technical experience in the IRS, may be granted enrollment as an enrolled agent or enrolled retirement plan agent if certain criteria are satisfied. Some commentators on the proposed regulations suggested that former IRS employees should not be granted enrollment because the IRS is not exempting, or "grandfathering," experienced unenrolled practitioners from the testing and continuing education requirements. This recommendation is not adopted because the IRS may easily check a former employee's IRS employment record to ensure the individual has the past service and technical experience for the scope of enrollment sought by the former employee.

Competency Exam & Suitability Checks
Before it was barred by the Loving case, the competency examination was administered under the oversight of, the IRS, similar to the special enrollment examinations for enrolled agents and enrolled retirement plan agents. Tax return preparers will be subject to suitability checks to determine whether the tax return preparer has engaged in disreputable conduct, which, at the time the application is filed with the IRS, could result in suspension or disbarment under Circular 230. An individual who has engaged in disreputable conduct is not eligible to become a RTRP.

The IRS announced that the implementation of the continuing education requirement will be postponed and that there will be no continuing education requirement until a preparer passes the competency exam.

Requirements for PTINs
§10.8(a) of the final regulations provides that any individual who for compensation prepares or assists with the preparation of all or substantially all of a tax return or claim for refund must have a PTIN. Except as otherwise prescribed in forms, instructions, or other appropriate guidance, an individual must be an attorney, certified public accountant, enrolled agent, or RTRP to obtain a preparer tax identification number. The rules are consistent with the final PTIN regulations under §6109. An individual who is not an attorney, certified public accountant, enrolled agent, or RTRP who nevertheless prepares for compensation all or a substantial portion of a document (including tax returns and claims for refund) for submission to the IRS is engaged in practice before the IRS and is subject to the rules and standards of Circular 230.

Solicitation
§10.30(a)(1) of the regulations provides that a practitioner may not, with respect to any IRS matter, in any way use or participate in the use of any form of public communication or private solicitation containing a false, fraudulent, coercive, misleading, or deceptive statement or claim. In describing their designation,

Standards With Respect to Tax Returns and Documents, §6694 & §10.34(a)
After consideration, the IRS and the Treasury Department continue to conclude that the professional standards in §10.34(a) generally should be consistent with the civil penalty standards in §6694 for tax return preparers. As discussed in this preamble, the limited differences between the standards in §10.34 and §6694 arise from the different purposes served by those provisions and the different manner in which the two standards will be administered.

The standards with respect to tax returns in §10.34(a) in the final regulations provide broader guidelines that are more appropriate for professional ethics standards. Under §10.34(a)(1)(i) of the regulations, a practitioner may not willfully, recklessly, or through gross incompetence, sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that: (A) lacks a reasonable basis; (B) is an unreasonable position as described in §6694(a)(2) (including the related regulations and other published guidance); or (C) is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in §6694(b)(2) (including the related regulations and other published guidance).

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

Independent Determination
Some commentators were concerned that a violation of §6694 would translate to a per se violation of §10.34. If the IRS, however, assesses a penalty against a practitioner under §6694 and also refers the practitioner for possible discipline under Circular 230, an independent determination as to whether the practitioner engaged in willful, reckless, or grossly incompetent conduct subject to discipline under §10.34(a) will be made before any disciplinary proceedings are instituted or any sanctions are imposed. Thus, a practitioner liable for a penalty under §6694 is not automatically subject to discipline under §10.34(a) of the regulations.

The Treasury Department and the IRS continue to believe that a practitioner also acts unethically in violating the civil penalty standards under §6694(a) (including when there is a reasonable basis for a position on a return or claim for refund but the practitioner does not adequately disclose the position within the meaning of §1.6694-2(d)(3)) through willful, reckless, or grossly incompetent conduct. Accordingly, final §10.34(a)(1)(i) and (a)(1)(ii) provide three independent standards of practitioner conduct and a practitioner who fails to satisfy any one of the three standards is subject to discipline under §10.34(a).

Procedures to Ensure Compliance
§10.36(b) of the regulations provides that firm management with principal authority and responsibility for overseeing a firm's practice of preparing tax returns, claims for refunds and other documents filed with the IRS must take reasonable steps to ensure that the firm has adequate procedures in effect for purposes of complying with Circular 230. The Treasury Department and the IRS continue to believe that expansion of §10.36 to require firm procedures for tax return preparation practice, in addition to the pre-existing application to covered opinions, will help ensure compliance and encourage firms to self-regulate. Firm responsibility is a critical factor in ensuring high quality advice and representation for taxpayers.

Authority to Accept a Practitioner's Consent to Sanction
§10.50 of the final regulations provides that the IRS has the authority to accept a practitioner's offer of consent to be sanctioned under §10.50 in lieu of instituting or continuing a proceeding under §10.60(a). §10.61(b)(2) currently provides that the IRS may accept or decline such an offer from a practitioner. A provision similar to the provision added to the regulations was removed during a previous revision of Circular 230. Due to the removal, some stakeholders have expressed concern over whether the IRS has the authority to accept an offer of consent to sanction. The provision added in the final regulations is merely intended to clarify any ambiguity with respect to the authority of the IRS to accept an offer of consent to sanction in lieu of instituting or continuing a proceeding.

Incompetence and Disreputable Conduct
§10.51 of Circular 230 defines disreputable conduct for which a practitioner may be sanctioned. §6011(e)(3) of the Code, enacted by §17 of the Worker, Homeownership, and Business Assistance Act of 2009, Public Law 111-92 (123 Stat. 2984, 2996) (Nov. 6, 2009), requires certain specified tax return preparers to file individual income tax returns electronically. Because the Treasury Department and the IRS believe that the failure to comply with this requirement is disreputable conduct, the regulations are amended to add a new paragraph in §10.51 to address practitioners who fail to comply with this requirement. Under §10.51(a)(16), disreputable conduct includes willfully failing to file on magnetic or other electronic media a tax return prepared by the practitioner when the practitioner is required to do so by Federal tax laws (unless the failure is due to reasonable cause and not due to willful neglect).

Electronic Filing
The Treasury Department and the IRS conclude that it is appropriate to include as disreputable conduct a tax return preparer's willful failure to electronically file tax returns subject to the mandatory electronic filing requirement. The IRS cannot permit tax return preparers to intentionally disregard the internal revenue laws and continue to practice before the IRS. §6011(e)(3) only applies to certain tax return preparers who file a specified number of returns per year and the tax return preparers need to be aware of the new electronic filing requirement.

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Exclusions From Electronic Filing
The Treasury Department and the IRS have issued final regulations (TD 9518) published in the Federal Register (76 FR 17521) on March 30, 2011, that provide exclusions from the electronic filing requirement. The exclusions in the final regulations include undue hardship waivers and administrative exemptions. See Rev. Proc. 2011-25 for additional information on hardship waivers and Notice 2011-16 for additional information on administrative exemptions. Moreover, tax return preparers are only subject to sanction under §10.51(a)(16) of the final regulations for not electronically filing if such a failure is willful. Accordingly, §10.51(a)(16) is sufficiently narrowly tailored to only apply to these tax return preparers who willfully fail to comply with the electronic filing requirement.

Failure to Possess PTIN
Under §10.51(a)(17) of the final regulations, disreputable conduct also includes willfully preparing all or substantially all of, or signing as a compensated tax return preparer, a tax return or claim for refund when the practitioner does not possess a current or otherwise valid PTIN or other prescribed identifying number. §10.51(a)(18) of the regulations states that it is disreputable conduct for a practitioner to willfully represent a taxpayer before an officer or employee of the IRS unless the practitioner is authorized to do so pursuant to Circular 230. These changes are consistent with the other revisions in the regulations and under §6109.

Appeal of Decision of Administrative Law Judge
The regulations amend §10.77 to provide additional, clarifying information regarding the procedure for filing an appeal of an Administrative Law Judge's decision with respect to a proceeding under subpart D of Circular 230.

Records
§10.90 of the final regulations clarify that the roster requirements also pertain to RTRPs and qualified continuing education programs.

Standards for Continuing Education Providers and Accrediting Organizations
On December 6, 2011 the Internal Revenue Service announced the standards to become an IRS-approved Continuing Education (CE) Provider and the requirements to become an IRS CE Accrediting organization. The guidance paves the way for the implementation of new CE requirements for certain tax return preparers starting next year.

To be an IRS-approved CE Provider, an organization must be one of the following:

An accredited educational institution,

Recognized for continuing education purposes by the licensing body of any state or U.S. territory, Approved by a qualifying organization as a provider of CE on subject matters designed for registered tax return preparers, enrolled agents, and enrolled retirement plan agents (such qualifying organizations will be known as accrediting organizations), or

Any other professional organization, society or business recognized by the IRS as a provider of CE on subject matters designed for registered tax return preparers, enrolled agents, and enrolled retirement plan agents.

Any organization that wants to become an accrediting organization can immediately submit the required documentation outlined in Revenue Procedure 2012-12 to the address provided in the revenue procedure. Once approved, any accrediting organizations will be publicized by the IRS and must renew their status as accrediting organization with the IRS every three years.

New provider application process
Organizations in all four categories must obtain an IRS CE provider number. Organizations are able to apply through a new on-line process beginning today. As part of the process, continuing education providers are required to pay an annual fee to the third-party vendor selected by the IRS to administer the CE provider application and renewal processes. The fee covers costs to maintain a public listing of all approved providers and to collect course completion information from providers, identifying to the IRS, by PTIN, those attendees who have completed a program. There is no additional IRS fee.

IRC §6694 - Prior Standard
Prior standard realistic possibility: A position satisfies the standard if a reasonable and well-informed analysis by a person knowledgeable in the tax law would lead that person to conclude that the position has an approximately one in three, Generally, the penalty would apply in the case of ANY understatement arising from a position the preparer did not reasonably believe meets the “more likely than not” test, unless there was a reasonable basis for the position and the position is disclosed.

Penalty Increase
Increases the penalty to the greater of:

A. $1,000 or

B. 50 percent of the income derived by the preparer with respect to a return or claim of any federal tax.

The minimum penalty is increased to $5,000 in the case of an understatement that is due to willful or reckless conduct by the preparer.

Adequate Disclosure
Disclosure is adequate with respect to the tax treatment of an item (or group of similar

items, such as amounts paid or incurred for supplies by a taxpayer engaged in business) or a position on a return if the disclosure is made on a properly completed Form 8275 (or Form 8275-R, if the position is contrary to a reg) that is attached to the return or to a qualified amended return.

Monetary Penalties Notice 2007-39
IRS will not impose monetary penalties in cases of minor technical violations, when there is little or no injury to a client, the public, or tax administration, and there is little likelihood of repeated similar misconduct. The treasury secretary may impose separate penalties against the practitioner and against the employer, firm, or other entity for any prohibited conduct. Each separate penalty may not exceed the gross income derived by the practitioner and the employer, firm, or other entity, respectively. If a practitioner acted on behalf of an employer, firm or other entity in connection with prohibited conduct, the notice said, the treasury secretary may impose a separate monetary penalty on the employer, firm, or other entity if the employer, firm, or other entity knew, or reasonably should have known, of the prohibited conduct.

Acted on Behalf Of Firm
IRS said a practitioner is considered to have acted on behalf of an employer, firm, or other entity if:

A. an agency relationship existed between the practitioner and the employer, firm, or other entity;

B. the purpose of the agency relationship was to provide services in connection with practice before IRS, as defined in Section 10.2(d) of Circular 230); and

C. the prohibited conduct giving rise to the penalty arose in connection with the agency relationship.

Knowledge
Entity knows or reasonably should know of the prohibited conduct if:

A. one or more members of the principal management (or officers) of the entity, or one or more members of the principal management of a branch office knows, or has information from which a person with similar experience and background would reasonably know, of the prohibited conduct; or

B. the entity through willfulness, recklessness, or gross indifference (including ignoring facts that would lead a person of reasonable prudence and competence to investigate or ascertain) did not take reasonable steps to ensure compliance with Circular 230; and one or more individuals associated with the employer, firm, or other entity, in connection with their agency relationship with the employer, firm, or other entity, engages in prohibited conduct within the meaning of section 10.52 of Circular 230 that harms a client, the public, or tax administration, or a pattern or practice of failing to comply with Circular 230.

2007 Circular 230 Revisions
On Sept. 26, 2007 the Internal Revenue Service issued final rules (T.D. 9359) making a host of changes to controversial regulations governing tax practice under Circular 230, among them allowing contingent fees under limited circumstances and slightly modifying rules requiring disclosure of conflicts of interest.

Practice Before the Internal Revenue Service
On October 22, 2004, the President signed the Jobs Act. Section 822(b) of the Act amends section 330 of title 31 of the United States Code by adding a provision that recognizes the Secretary's authority to impose standards for written advice rendered with respect to any entity, transaction plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion. Accordingly, §10.2(d) has been modified to clarify that the rendering of this written advice is practice before the IRS subject to Circular 230 when it is provided by a practitioner.

Contingent Fees 10.27
IRS said it will now allow contingency fees for services in connection with an original tax return, or an amended return or claim for refund or credit filed within 120 days after the taxpayer receives written notice of an audit or a written challenge to the original return. Contingent fees also will be permitted for interest and penalty reviews "because there is no exploitation of the audit lottery in these situations as they are generally completed on a post-audit basis," IRS said.

The contingent fee exception for interest and penalty reviews also revolved around timing, IRS said, since these reviews are usually completed after an audit. Finally, the final regulations adopt the original proposal that allows a practitioner to charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code. To eliminate any adverse impact that the adoption of these final regulations could have on pending or imminent transactions, IRS said the language on contingent fees applies to arrangements entered into after March 26, 2008.

Notice 2008-43, 2008-15 IRB
In a Notice, IRS has provided interim rules for contingent fees under the Circular 230 Reg. § 10.27(b)(2) rules governing practice before IRS. The Notice clarifies that IRS doesn't have to furnish a written notice of examination to a taxpayer before a practitioner may charge a contingent fee and provides a new exception allowing contingent fees for whistleblower claims under Code Sec. 7623(b). The interim rules are effective for fee arrangements entered into after Mar. 26, 2008, and apply until the regs are amended.

For arrangements entered into after Mar. 26, 2008, final regs provide that a practitioner may not generally charge a contingent fee for services rendered in connection with any matter before IRS. (Reg. § 10.27(b)(1)) However, one of the exceptions to this rule provides that a practitioner can charge a contingent fee for services rendered in connection with an IRS examination of, or challenge to:

A. an original tax return; (Reg. § 10.27(b)(2)(i)) or

B. an amended return or claim for refund or credit where it was filed within 120 days of the taxpayer receiving a written notice of the examination of, or challenge to, the original tax return. (Reg. § 10.27(b)(2)(ii)). [See Federal Taxes Weekly Alert 09/27/2007]

Specifically, IRS modified Reg. § 10.27(b)(2)(ii), to provide that a practitioner may charge a contingent fee for services rendered in connection with an IRS examination of, or challenge to, an amended return or claim for refund or credit filed before the taxpayer received a written notice of examination of, or a written challenge to, the original tax return; or filed no later than 120 days after the receipt of such written notice or written challenge. The 120 days is computed from the earlier of a written notice of the examination, if any, or a written challenge to the original return.

Whistleblower exception. Notice 2008-43 also provides that a practitioner may charge a contingent fee for services rendered in connection with a whistleblower claim under Code Sec. 7623. (Reg. § 10.27(b)(4))

Conflicting Interests 10.29
Section 10.29 of the regulations prohibits a practitioner from representing conflicting interests before the IRS, except with the express consent of all directly interested parties after full disclosure. Section 10.29 of the revised regulations clarifies that a practitioner is required to obtain consents in writing from each affected client in order to represent the conflicting interests. The written consent may vary in form. The practitioner may prepare a letter to the client outlining the conflict, as well as the possible implications of the conflict, and submit the letter to the client for the client to countersign. A verbal consent followed by a confirming letter written by the practitioner will suffice if the client also signs the letter. Confirmation now can be made "within a reasonable period after the informed consent," but in no event later than 30 days In general, the countersigning requirement is "appropriate to protect taxpayer interests and protect settlements from future collateral attack," IRS said. The government said it did not intend to crack down on minor technical violations in this area "when there is little or no injury to a client, the public, or tax administration." will not satisfy §10.29 unless the confirmation letter is countersigned by the client.

Enrolled Retirement Plan Agents 10.3(e)
The final rules established, under Section 10.3(e), the ERPA designation for certain programs in the Employee Plans Division, including:

A. determination letters,

B. compliance resolution, and

C. master and prototype and volume submitter programs.

ERPAs "also are permitted to represent taxpayers generally with respect to IRS forms under the 5300 and 5500 series, which are filed by retirement plans and plan sponsors, but not with respect to actuarial forms or schedules," IRS and Treasury said. To be enrolled as an ERPA, an individual who has not engaged in misconduct would have to pass a written examination given by the Office of Professional Responsibility. The designation also would be available to certain former IRS employees with technical knowledge who have not engaged in misconduct. Under the final rules, ERPAs must re-enroll every three years and receive 72 hours of continuing professional education credits and six hours of ethics education during the enrollment cycle. The education and ethics credits must be taken each year in the three-year cycle.

Standards With Respect to Tax Returns and Documents, Affidavits and Other Papers 10.34

Section 10.34 sets forth standards applicable to advice with respect to tax return positions and applicable to preparing or signing returns. Section 10.34 of the regulations sets forth standards applicable to practitioners who advise clients with respect to documents, affidavits and other papers submitted to the IRS. The final regulations also provide separate standards for papers that take a position with respect to Federal tax matters and standards for advising a client to file papers involving procedural or factual matters. Under the regulations, a practitioner may not advise a client to take a position on a submission to the IRS unless the position is not frivolous. A practitioner also may not advise a client to submit a document to the IRS that is meant primarily for delay; is frivolous or groundless; or contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation. With regard to factual matters, 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. These standards supplement the existing requirement in §10.22 that practitioners exercise due diligence in preparing, or assisting in the preparation of, tax returns and other documents relating to IRS matters. §10.34 is applicable to tax returns, documents, affidavits and other papers filed on or after September 26, 2007.

Sanction 10.50

In accordance with section 822(a) of the Jobs Act, §10.50 authorizes the Secretary to impose a monetary penalty against a practitioner if the practitioner is shown to be incompetent or disreputable, fails to comply with any regulation in part 10, or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. Under the regulations, the monetary penalty may be imposed in addition to, or in lieu of, any other sanction. If a practitioner acts on behalf of the practitioner's employer, firm or other entity and the employer, firm or other entity knew or should have known of the practitioner's conduct, the Secretary may impose a monetary penalty on the employer, firm or other entity. The Treasury Department and the IRS have issued procedures relating to the imposition of the monetary penalty through separate published guidance.

The amount of the penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty. Any monetary penalty imposed on a practitioner under this paragraph 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. Any monetary penalty imposed on an employer, firm or other entity may be in addition to or in lieu of penalties imposed under this section. The sanctions imposed by this section shall take into account all relevant facts and circumstances. The regulations also contain conforming amendments to other provisions relating to sanctions.

Incompetence and Disreputable Conduct 10.51
Many commentators supported expanding the definition of disreputable conduct to specifically include the willful failure of a practitioner who is a tax return preparer to sign a return. Section 10.51 of the regulations defines disreputable conduct for which a practitioner may be sanctioned. Section 10.51 of the final regulations modifies the definition of disreputable conduct to include willful failure to sign a tax return prepared by the practitioner. The definition of disreputable conduct also includes the disclosure or use of returns or return information by practitioners in a manner not authorized by the Code, a court of competent jurisdiction, or an administrative law judge in a proceeding instituted under section 10.60.

Violations Subject to Sanction 10.52
A practitioner may be sanctioned under §10.50 if the practitioner—

A. Willfully violates any of the regulations contained in this part; or

B. Recklessly or through gross incompetence (within the meaning of §10.51(a)(13)) violates §§10.34, 10.35, 10.36 or 10.37.

This section is applicable to conduct occurring on or after September 26, 2007.

Supplemental Charges 10.65
Section 10.65 of the final regulations provides that the Director may file supplemental charges against a practitioner by amending the complaint to reflect the additional charges if
the practitioner is given notice and an opportunity to prepare a defense to the supplemental charges.

Publicity of Disciplinary Proceedings 10.72
Previously, disciplinary proceedings brought pursuant to Circular 230 are closed to the public unless the Administrative Law Judge granted a practitioner's request that the proceedings be public. The final regulations amend §10.72(d) to provide that all reports and decisions including any reports and decisions of the Administrative Law Judge,

under are public and open to inspection within 30 days after the agency's decision becomes final. The Administrative Law Judge may grant a request by a practitioner or appraiser that all the pleadings and evidence of the disciplinary proceeding be made available for inspection where the parties stipulate in advance to adopt the protective measures in paragraph (d)(4) of this section.

Expedited Suspension 10.82

Section 10.82 of the regulations authorizes the Director of the Office of Professional Responsibility to suspend immediately a practitioner who has engaged in certain conduct. The regulations extend the expedited process to practitioners who, within five years of the date a complaint instituting a proceeding:

A. Has had a license to practice as an attorney, certified public accountant, or actuary suspended or revoked for cause (not including failure to pay a professional licensing fee) by any authority or court, agency, body, or board described in §10.51(a)(10).

B. Has, irrespective of whether an appeal has been taken, been convicted of any crime under title 26 of the United States Code, any crime involving dishonesty or breach of trust, or any felony for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service.

C. Has violated conditions imposed on the practitioner pursuant to §10.79(d).

D. Has been sanctioned by a court of competent jurisdiction, whether in a civil or criminal proceeding (including suits for injunctive relief), relating to any taxpayer's tax liability or relating to the practitioner's own tax liability, for—

   (1) Instituting or maintaining proceedings primarily for delay;
   (2) Advancing frivolous or groundless arguments; or
   (3) Failing to pursue available administrative remedies.

This section is applicable on September 26, 2007.

Conforming 10.34 to §6694

The Treasury Department and the IRS have determined that the professional standards under §10.34 of Circular 230 should conform with the civil penalty standards for return preparers. Previously, for example, on June 20, 1994, the regulations were modified to reflect more closely the rules under §6694 and professional guidelines. The standards with respect to tax returns in §10.34(a) of these proposed regulations have been amended to reflect changes to §6694(a) of the Internal Revenue Code made by the Small Business and Work Opportunity Tax Act of 2007.

Reasonable Belief More Likely Than Not

Under §10.34(a) of these proposed regulations, a practitioner may not sign a tax return as a preparer unless the practitioner has a reasonable belief that the tax treatment of each position on the return would more likely than not be sustained on its merits, or there is a reasonable basis for each position and each position is adequately disclosed to the Internal Revenue Service. A practitioner may not advise a client to take a position on a tax return, or prepare the portion of a tax return on which a position is taken, unless (1) the practitioner has a reasonable belief that the position satisfies the more likely than not standard; or (2) the position has a reasonable basis and is adequately disclosed to the Internal Revenue Service. The definitions of "more likely than not" and "reasonable basis" under §10.34(e) also are proposed to be amended to reflect these changes in accordance with the well-established definitions of these terms under the §6662 penalty regulations. These regulations apply to returns filed or advice provided on or after the date that final regulations are published in the Federal Register, but no earlier than January 1, 2008.

2004 Circular 230 Revisions

§10.33 Best Practices for Tax Advisors

A. Best practices. Tax advisors should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service. In addition to compliance with the standards of practice provided elsewhere in this part, best practices include the following:

- Communicating clearly with the client regarding the terms of the engagement. For example, the advisor should determine the client's expected purpose for and use of the advice and should have a clear understanding with the client regarding the form and scope of the advice or assistance to be rendered.

- Establishing the facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating the applicable law (including potentially applicable judicial doctrines) to the relevant facts, and arriving at a conclusion supported by the law and the facts.

- Advising the client regarding the import of the conclusions reached, including, for example, whether a taxpayer may avoid accuracy-related penalties under the Internal Revenue Code if a taxpayer acts in reliance on the advice.

- Acting fairly and with integrity in practice before the Internal Revenue Service.

B. Procedures to ensure best practices for tax advisors. Tax advisors with responsibility for overseeing a firm's practice of providing advice concerning Federal tax issues or of preparing or assisting in the preparation of submissions to the Internal Revenue Service should take reasonable steps to ensure that the firm's procedures for all members, associates, and employees are consistent with the best practices set forth in paragraph (a) of this section.

§10.36 Requirements for covered opinions

The provisions of §10.35 in the final regulations are reorganized to clarify the provisions. Opinions subject to §10.35 are defined as covered opinions.

Definition of Covered Opinion

Under the final regulations, the definition of a covered opinion includes written advice (including electronic communications) that concerns one or more Federal tax issue(s) arising from:

A. a listed transaction;

B. any plan or arrangement, the principal purpose of which is the avoidance or evasion of any tax; or (3) any plan or arrangement, a significant purpose of which is the avoidance or evasion of tax if the written advice

- is a reliance opinion,
- is a marketed opinion,
- is subject to conditions of confidentiality, or
- is subject to contractual protection.

A reliance opinion is written advice that concludes at a confidence level of at least more likely than not that one or more significant Federal tax issues would be resolved in the taxpayer's favor. Written advice will not be treated as a reliance opinion if the practitioner prominently discloses in the written advice that it was not written to be used and cannot be used for the purpose of avoiding penalties. Similarly, written advice generally will not be treated as a marketed opinion if it does not concern a listed transaction or a plan or arrangement having the principal purpose of avoidance or evasion of tax and the written advice contains this disclosure.

On May 18, 2005 the IRS issued a clarification that opinions of in-house counsel would not be considered covered opinions under 10.35. The IRS further provided, however that in-house counsel would be subject to the written opinion standards of 10.37. Situations in which the advice is provided after the client files the relevant tax return; and "Negative advice," wherein an advisor tells a client a transaction will not provide the purported tax benefit. Advice that is excluded from the covered opinion standards by these revisions will continue to be subject to the general requirements for other written advice.

The Treasury Department and the IRS intend to amend 26 CFR 1.6664-4 to clarify that a taxpayer may not rely upon written advice that contains this disclosure to establish the reasonable cause and good faith defense to the accuracy-related penalties. Written advice regarding a plan or arrangement having a significant purpose of tax avoidance or evasion is excluded from the definition of a covered opinion if the written advice concerns the qualification of a qualified plan or is included in documents required to be filed with the Securities and Exchange Commission.

The final regulations also adopt an exclusion for preliminary advice if the practitioner is reasonably expected to provide subsequent advice that satisfies the requirements of the regulations. Written advice that is not a covered opinion for purposes of §10.35 is subject to the standards set forth in new §10.37.

Requirements for Covered Opinions
The final regulations provide that a practitioner providing a covered opinion, including a marketed opinion, must not assume that a transaction has a business purpose or is potentially profitable apart from tax benefits, or make an assumption with respect to a material valuation issue.

Required Disclosures §10.35(e)
These disclosures ensure that taxpayers receive information that is necessary to their evaluation of, and reliance on, a covered opinion.

The final regulations also set forth requirements for written advice that is not a covered opinion. Under §10.37 a practitioner must not give written advice if the practitioner:

A. bases the written advice on unreasonable factual or legal assumptions;

B. unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person;

C. fails to consider all relevant facts; or

D. takes into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled. Section 10.37, unlike §10.35, does not require that the practitioner describe in the written advice the relevant facts (including assumptions and representations), the application of the law to those facts, or the practitioner's conclusion with respect to the law and the facts. The scope of the engagement and the type and specificity of the advice sought by the client, in addition to all other facts and circumstances, will be considered in determining whether a practitioner has failed to comply with the requirements of §10.37.

§10.36 Procedures to ensure compliance

(a) Requirements for covered opinions. Any practitioner who has (or practitioners who have or share) principal authority and responsibility for overseeing a firm's practice of providing advice concerning Federal tax issues must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with §10.35. Any such practitioner will be subject to discipline for failing to comply with the requirements of this paragraph if--

A. The practitioner through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that the firm has adequate procedures to comply with §10.35, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with §10.35; or

B. The practitioner knows or should know that one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, that does not comply with §10.35 and the practitioner, through willfulness, recklessness, or gross incompetence, fails to take prompt action to correct the noncompliance.

§10.37 Requirements for other written advice requirements.
A practitioner must not give written advice (including electronic communications) concerning one or more Federal tax issues if the practitioner bases the written advice on unreasonable factual or legal assumptions (including assumptions as to future events), unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person, does not consider all relevant facts that the practitioner knows or should know, or, in evaluating a Federal tax issue, takes into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised. All facts and circumstances, including the scope of the engagement and the type and specificity of the advice sought by the client will be considered in determining whether a practitioner has failed to comply with this section.

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 determination of whether a practitioner has failed to comply with this section will be made on the basis of a heightened standard of care because of the greater risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances.

On May 18, 2005 the IRS announced revisions to the December Regs. Written advice will not be treated as a reliance opinion if the practitioner prominently discloses in the written advice that it was not written to be used and cannot be used for the purpose of avoiding penalties. Similarly, written advice generally will not be treated as a marketed opinion if it does not concern a listed transaction or a plan or arrangement having the principal purpose of avoidance or evasion of tax and the written advice contains this disclosure. The revised covered opinion standards also provide a definition of “the principal purpose” of tax avoidance that excludes transactions claiming tax benefits that are consistent with the statute and Congressional purpose. In addition, today’s revisions relax specific requirements for the format of disclosures that are required for certain written tax advice. As noted above these requirements maintain the expectation that the disclosures will put taxpayers on notice of any limitations on their ability to rely on written advice.

The final regulations also adopt an exclusion for preliminary advice if the practitioner is reasonably expected to provide subsequent advice that satisfies the requirements of the regulations. Written advice that is not a covered opinion for purposes of § 10.35 is subject to the standards set forth in new § 10.37.

§10.38 Establishment of Advisory Committees

To promote and maintain the public’s confidence in tax advisors, the Director of the Office of Professional Responsibility is authorized to establish one or more advisory committees composed of at least five individuals authorized to practice before the Internal Revenue Service. The Director should ensure that membership of an advisory committee is balanced among those who practice as attorneys, accountants, and enrolled agents. Under procedures prescribed by the Director, an advisory committee may
review and make general recommendations regarding professional standards or best practices for tax advisors, including whether hypothetical conduct would give rise to a violation of §§10.35 or 10.36.

2002 Circular 230 Revisions

On July 26, 2002 final regulations governing practice before the Internal Revenue Service (Circular 230) were issued by Treasury. These regulations affect individuals who are eligible to practice before the Internal Revenue Service. These regulations modify the general standards of practice before the Internal Revenue Service.

> **Section 10.6** requires an enrolled agent to maintain records and educational materials regarding his or her satisfaction of the qualifying continuing professional education credit. Section 10.6 also requires sponsors of qualifying continuing professional education programs to maintain records and educational material concerning these programs and those who attended them. The collection of this material helps to ensure that individuals enrolled to practice before the Internal Revenue Service are informed of the newest developments in Federal tax practice.
>
> **Section 10.29** requires a practitioner to obtain and retain for a reasonable period written consents to representation whenever such representation conflicts with the interests of the practitioner or the interests of another

client of the practitioner. The consents are to be obtained after full disclosure of the conflict is provided to each party.

Section 10.30 requires a practitioner to retain for a reasonable period any communication and the list of persons to whom that communication was provided with respect to public dissemination of fee information. The collection of consents to representation and communications concerning practitioner fees protects the practitioner against claims of impropriety and ensures the integrity of the tax administration system. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number. Books or records relating to a collection of information must be retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Explanation of other provisions

Who May Practice 10.3
Paragraph (d)(2) of '10.3 of the regulations adopts and expanded the list of issues with respect to which an enrolled actuary is authorized to represent a taxpayer in limited practice before the Internal Revenue Service. The list is expanded to include issues involving 26 U.S.C. 419 (treatment of funded welfare benefits), 419A (qualified asset accounts), 420 (transfers of excess pension assets to retiree health accounts), 4972 (tax on nondeductible contributions to qualified employer plans), 4976 (taxes with respect to funded welfare benefit plans), and 4980 (tax on reversion of qualified plan assets to employer).

Enrollment
Section 10.6 sets forth the conditions and process for renewal of enrollment to practice before the Internal Revenue Service. One condition for renewal of enrollment is that the enrolled agent complete a minimum number of hours of continuing professional education in programs comprised of current subject matter in Federal taxation or Federal tax related matters. The final regulations do not adopt the commentator's suggestion to expand the subjects of qualifying tax programs to non-tax related matters, nor do they adopt the suggested language for determining distance learning credits.

Section 10.6 as adopted incorporates a system of rolling renewals for enrollment. The year in which enrolled agents will be required to apply for renewal of enrollment will vary based on the last digit of the enrolled agent's social security number. This change is ministerial only and is made in order to balance the workflow involved in processing renewals.

Unenrolled Practice 10.7(c)(viii)
The final regulations adopt the provisions governing unenrolled practice as proposed in paragraph 10.7(c)(viii). This amendment preserves the scope of unenrolled practice as it has existed and only makes non-substantive changes in nomenclature that are necessitated by the organizational restructuring of the Internal Revenue Service.

Information to be Furnished 10.20
Section 10.20 requires a practitioner to respond promptly to a proper and lawful request for records and information, unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged. The right and ability of practitioners to resist efforts that the practitioner believes to be of doubtful legality is preserved. The phrase “of doubtful legality” was excised from '10.20 merely to eliminate the redundancy in the section's text, which requires requests from the Internal Revenue Service to be “proper and lawful”, not to effectuate a substantive change with regard to a practitioner's ability to resist efforts by the government to obtain documents or information that are irrelevant to an inquiry, confidential, privileged, or otherwise immune from compulsion. The final regulations, require a practitioner to provide information regarding the identity of persons the practitioner reasonably believes may have possession or control of requested documents. The requirement, in paragraph (a)(2) of '10.20, applies only when requested records or information are not in the possession or control of the practitioner or the practitioner's client. The paragraph clarifies that the practitioner's duty is limited only to making reasonable inquiry of the practitioner's client and that there exists no obligation on the practitioner to make inquiry of any other person or to independently verify information provided by a client.

The right and ability of a practitioner to resist a request by the Director of Practice regarding an alleged violation of Circular 230 that the practitioner believes to be of doubtful legality is similarly unchanged in paragraph (b), which requires practitioners to provide information to the Director of Practice regarding the alleged violations of Circular 230 by any person. An alleged violation under paragraph (b) is not limited to a violation that is the subject of
a proceeding under subpart D, for the necessary reason that the Director of Practice should be able to obtain evidence regarding alleged violations to determine whether they merit formal charges.

Knowledge of Client's Omission
Section 10.21 of Circular 230 has historically required a practitioner to advise a client promptly of any noncompliance, error, or omission. The final regulations modify the preexisting duty by simply requiring that, in addition to notifying the client of the fact of the noncompliance, error, or omission, the practitioner advise the client of the consequences as

provided under the Code and regulations of the noncompliance, error, or omission. This change requires practitioners to provide information that taxpayers who consult tax professionals typically expect to receive.

Diligence as to Accuracy 10.22

The final regulations state that a practitioner is presumed to have exercised due diligence if the practitioner relies on the work product of another person and the practitioner uses reasonable care in engaging, supervising, training, and evaluating such person, taking proper account of the relationship between the practitioner and the person. It is expected that practitioners will use common sense and experience in guiding their conduct under this section. The section applies both in the context of a firm and in circumstances involving a practitioner's engagement of an outside practitioner. For example, in circumstances in which a practitioner must hire another practitioner for a specialized or complicated matter, such practitioner's duty under the section will be more focused on the reasonable care taken in the engagement of the specialist. Supervising and training are not part of a practitioner’s engagement of a specialist. Conversely, in the context of a firm, the sections application will focus more on supervising and training, if there is an issue with regard to a supervisory practitioner's reliance on a subordinate. Finally, the presumption of due diligence provided by this section does not apply for purposes of '10.33 and '10.34, governing tax shelter opinions and standards for advising with respect to tax return positions, respectively, which have their own rules concerning due diligence.

Practice By Former Government Employees, Their Partners and Their Associates

The final regulations adopt rules found in '10.25 (former '10.26) governing the restrictions on the practice of former Government employees, their partners, and their associates with respect to matters that the former Government employees participated in during the course of their Government employment. This section reflects changes to the Federal statutes governing post-employment restrictions applicable to former Government employees. The former '10.25, governing the practice of partners of former Government employees, is removed, because the statutory prohibition implemented by the provision was repealed.

Return of Client's Records 10.28

The final regulations adopt amendments to '10.28 that requires a practitioner to return a client's records upon the client's request, regardless of a fee dispute. As recommended by one commentator, the section's application is restricted by paragraph (a) to the client's records that are necessary for the client to comply with his or her Federal tax obligations. Further, as recommended by a number of commentators, the term records of the client is defined to exclude items such as returns or other documents prepared by the practitioner that the practitioner is withholding pending the client's payment of fees for those documents. These changes are incorporated to protect practitioners from being disadvantaged or compromised by clients seeking to obtain an unfair advantage under this section. In consideration of various state laws that may permit liens on a client's records in favor of practitioners during the course of fee disputes, the regulations provide that a practitioner must only return those records that must be attached to the client's return if a fee dispute has triggered an applicable state lien provision. The practitioner, however, must provide the client access to review and copy any of the client's records retained by the practitioner under state law that are necessary for the client to comply with his Federal tax obligations.

Avoiding Conflicts of Interest while Representing Clients before IRS

The following summary covers the issues involved in a potential conflict of interest as was discussed by the Honorable Robert N. Armen, Jr., U.S. Tax Court Special Trial Judge in the matter of J.L. Weist, TC Docket Nos. 6294-00S and 6302-00S (Apr. 2, 2002). Robert Schriebman[1] represented both Mr. and Mrs. Wiest who had divorced prior to the institution of the Tax Court proceedings. Mrs. Wiest argued with success that she was an innocent spouse. Before Judge Armen heard any evidence, he wanted to make certain that there were no conflicts of interest. Mr. Schriebman paraphrases Judge Armen's important "on the record" points below. In drafting a disclosure for clients who wish joint representation in similar circumstances, he suggests these points be included in a letter to the clients in order to avoid a potential malpractice issue or an accusation of ethical violations.

- Explain joint and several liability when filing a joint federal or state income tax return. When a husband and wife file a joint return, any liability on that return or any liability that may subsequently develop because of a shortfall or a deficiency in income tax, any liability with respect to that income tax is joint and several.

- Explain what joint and several liability means. Each spouse is 100-percent liable for that tax liability, even though it's a joint return. If there is a failure to full pay either the amount on the return or some deficiency that may be determined in the future, either the IRS or the state taxing agency may look to one spouse and one spouse only and ask that spouse to fully pay the tax.

- Explain right of contribution. Under state law, the spouse that pays may have rights of contribution against the other spouse, but the IRS or the state taxing agency as a creditor has the right to look to

1 Robert S. Schriebman, Collection Column, *Avoiding Conflicts of Interes*t, Journal of Tax Practice and Procedure, December 2003-January 2004 CCH INC, A Wolter Klewers Business © 2004.

one spouse or the other spouse and ask that spouse to fully pay. This is what's known as joint and several liability. Rights of contribution most likely will have to be adjudicated in a state divorce court.

- Make reference to the innocent spouse provisions in the Internal Revenue Code and your state taxation code as well. There is a provision in the Internal Revenue Code popularly known as the innocent spouse provision. It is found in Code Sec. 6015 and it provides that if certain conditions are satisfied, then the joint and several liability may no longer apply to one spouse and that one spouse may be relieved of liability. Should this happen, the liability for the tax, the penalties, and interest becomes the complete liability of the other spouse.

- A tax liability may be determined as the result of a pending audit or Tax Court proceeding. If the IRS or the Tax Court determines that there is a tax deficiency as well as penalties, each spouse is jointly and severally liable --the IRS can look to either spouse and ask that one or both pay the amount ultimately determined to be due.

- Asserting the defense of innocent spouse. Your letter should state that the purpose of asserting the claim of innocent spouse is to relieve one of the spouses from joint and several liability pursuant to Code Sec. 6015 and the state equivalent. If those efforts are successful, it means that one spouse, the noninnocent spouse, would be 100-percent responsible for the payment of the tax, penalties, additions and interest.

- Discuss the potential conflict of interest. For example, if you represent Mr. and Mrs. Jones before the IRS and you argue that Mrs. Jones is an innocent spouse, you are no longer representing Mr. Jones. You are representing Mrs. Jones because you are trying to take Mrs. Jones off the hook with the consequences that Mr. Jones would be 100-percent completely liable for the payment of both the IRS and state deficiencies. You must make it crystal clear that if you are going to raise the argument that Mrs. Jones is the nonliable spouse, the consequences will be that Mr. Jones will be completely liable for any deficiency ultimately determined. You must inform your client that this type of representation creates a conflict of interest as you are representing one spouse for one purpose and the other spouse for another purpose.

- Advise your clients that if they waive the potential conflict of interest, they will not be allowed to appeal to the IRS administratively or to an Appellate Court that they were victims of a conflict of interest. This waiver was extremely important to Judge Armen during the Tax Court case. The judge continuously stressed to both litigants that once a waiver is made to a conflict in the Tax Court, the issue cannot be taken up on appeal.

- Explain that both husband and wife will be required to acknowledge and waive the conflict. It is imperative that both husband and wife sign a written waiver indicating that they waive the fact that you are not 100-percent committed to their cause. The execution of a written acknowledgement of this fact and a waiver of a potential conflict is absolutely essential.

- Advise your clients that they have the right to seek independent counsel for advice as to the conflict and even separate representation. This option is absolutely imperative and is perhaps the single most important provision that protects you, the practitioner.

- Put it all in writing. All of the above points must be put into a letter that a six-year-old child will be able to understand. Printed above the signature line should be these words: "READ, UNDERSTOOD, AGREED TO, AND COPY RECEIVED."

Solicitation 10.30

Under the final regulations, a practitioner is prohibited from making written and oral solicitations of employment in matters related to the Internal Revenue Service if such solicitations would violate Federal or State statutes or other rules applicable to the practitioner regarding the uninvited solicitation of prospective clients. For example, if an attorney is prohibited under that attorney's governing State bar rules from making a certain type of uninvited solicitation, the attorney's uninvited solicitation with respect to a matter related to the Internal Revenue Service will constitute a violation of '10.30. Conversely, if such a solicitation is permissible under the relevant State bar rule, the making of the solicitation with respect to a matter related to the Internal Revenue Service is permissible under '10.30.

Section 10.30 also expands the prohibition of deceptive and other improper solicitation practices to cover private, as well as public, solicitations. The final regulations provide that a practitioner may not, in matters related to the Internal Revenue Service, assist, or accept assistance from, any person or entity who, to the knowledge of the practitioner, obtains clients, or otherwise practices in a manner forbidden under this section. In consideration of the comments received, the final regulations do not adopt the change that would have prohibited enrolled agents from using the term licensed in describing their professional designation. The Department of Treasury and the Internal Revenue Service recognize the valuable services provided by the over thirty-thousand enrolled agents in the United States, but want to ensure that the respective roles of enrolled agents, attorneys and certified public accountants are understood by taxpayers.

Sanctions 10.50
The final regulations adopt the additional sanction of censure, which is defined as a public reprimand. The sanction of censure is not listed with disbarment or suspension in 31 U.S.C. 330(b), but the authority of the Secretary to regulate practice before the Internal Revenue Service is not limited to those specific sanctions. A censure sanction is authorized by the general grant of authority to regulate the practice of representatives of persons before the Department of the Treasury as provided in 31 U.S.C. 330(a). Additionally, the final regulations are modified in '10.79 to clarify that suspended representatives may be subject to conditions and the conditions placed upon suspended or censured practitioners may only be imposed for a period that is reasonable in light of the gravity of a practitioner's violations.

Disreputable Conduct
Section 10.51 defines disreputable conduct for which a practitioner may be censured, suspended, or disbarred. Such disreputable conduct includes the filing of a complaint against Internal Revenue Service personnel under section 1203 of the Internal Revenue Service Restructuring and Reform Act of 1998, if the practitioner knows the complaint is false. Similarly, disreputable conduct also includes knowingly advancing frivolous arguments in collection due process hearings, or in connection with offers in compromise, installment agreements, or the appeals process. Additionally, the definition of disreputable conduct is amended, to include conviction of any felony involving conduct that renders the practitioner unfit to practice before the Internal Revenue Service.

Receipt of Information Concerning Practitioner
The final regulations incorporate provisions for the destruction of documents by the Director of Practice. Section 10.53 of the final regulations requires the Director of Practice to destroy reports as soon as permissible under the applicable record control schedules approved by the National Archives and Records Administration and designated in the Internal Revenue Manual.

Evidence that alleges practitioner misconduct, but which is on its face without merit, should not be maintained in a manner that falsely conveys a willingness of the Director of Practice to use such evidence at an indefinite time in the future. This same principle applies to evidence that merits investigation, but is eventually determined to be insufficient to justify the initiation of disciplinary proceedings. If the currently applicable records control schedule proves to be unsuitable in assuring fairness to practitioners, or if it proves to be unworkable given the demands placed upon the Director of Practice, the Internal Revenue Service will initiate the public process required to request a change of the records control schedule through the National Archives and Records Administration.

Consolidation of Appraiser Disqualification Rules
The final regulations adopt without change the consolidation of the virtually identical rules applicable to disciplinary proceedings against practitioners and appraisers that

heretofore have been separately set out in separate subparts. The final regulations consolidate the rules regarding sanctions of practitioners and appraisers under subpart D.

Various Aspects of Disciplinary Proceedings

The final regulations adopt the rules of subpart D regarding the conduct of disciplinary proceedings largely without change. In response to the request of a commentator, '10.76 has been modified to specifically provide that the standard of proof in Circular 230 proceedings is that of a preponderance of the evidence, if the sanction sought by the Director of Practice is censure or a suspension of less than six months duration. If the Director of Practice seeks a sanction of disbarment or a suspension of six months or longer or the disqualification of an appraiser, the standard of proof is clear and convincing evidence. The Treasury Department and Internal Revenue Service conclude that the preponderance of evidence standard is justified in the case of the less severe sanctions of censure and suspension of a short duration. When the Director of Practice seeks a more significant sanction, the clear and convincing evidence standard is adopted to protect the interests of the practitioner.

Use of disclosures in tax practice will soon become common place.

In an attempt to strengthen taxpayers' control over their tax information now in the hands of tax preparers or tax software companies, IRS issued amendments to IRC Sec. 7216 and a revenue procedure to provide examples of required consent format. The rule says the taxpayers should receive proper warnings and consent notices that allow them to make an informed decision over the disclosure or use of their tax information by their preparer.

Federal law prohibits tax return preparers from disclosing information given to them by their customers except in limited circumstances. This rule (set forth in section 7216 of the Internal Revenue Code) applies to private return preparers and is in addition to the strong protection provided by section 6103 against disclosure of return information by the government.

Current regulations under section 7216, largely unchanged since 1974, permit return preparers to disclose their customers' tax return information to third parties if the customer gives consent. The current regulations also set forth, in summary terms, the form of the consent the customer must give.

Since 1974, the manner in which tax returns are prepared has changed dramatically and the rules governing customer consent are in dire need of updating. For example, internet-based return preparation was non-existent in 1974, so an updated rule needs to be published to address customer consent in that context.

Under the rules, if a return preparer wants to obtain consent, it must give the customer a strong warning. The mandated language for the warning is attached. Existing rules contain no such warning.

The rules add a number of limitations on the customer's consent, including limiting the time period over which the customer's consent is valid, and mandate that the provision of return preparation services cannot be conditioned on giving a consent. These limitations do not exist under the current rules.

The rules have a separate customer consent provision that applies to return preparers who outsource their work overseas.

Mandatory taxpayer consent language:

> We (tax preparers) generally are not authorized to disclose your tax return information for purposes other than the preparation and filing of your tax return. We may disclose your tax return information for other purposes only if you consent to each specific disclosure. Your consent is valid for one year.
>
> Warning: Once your tax return information is disclosed to a third party per your consent, we have no control over what that third party does with your tax return information. If the third party uses or discloses your tax return information for purposes other than the purpose for which you authorized the disclosure, under Federal tax law, we are not responsible for that subsequent use or disclosure, and Federal tax law may not protect you from that disclosure.
>
> If you believe that your rights have been violated:
>
> If you have any questions or concerns about your rights regarding the use or disclosure of your tax return information, visit www.irs.gov/advocate for more information, or contact the Taxpayer Advocate Service of the Internal Revenue Service at 1-877-777-4778.
>
> If you believe we have used or disclosed your information without your permission, you may contact the Treasury Inspector General for Tax Administration at 1-800-366-4484.

IRC Section 7216 - Privacy Restrictions on Disclosure of Client Information by Tax Return Preparers

Disclosure of return information by a preparer to third parties can have severe consequences. Both civil and criminal penalties may be imposed, and the preparer may also be liable for damages. IRC 7216 provides rules and sanctions for inappropriate disclosure of client information. Persons engaged in the business of preparing income tax returns or providing services connected with the preparation of returns or who prepare any return for compensation may not knowingly or recklessly disclose any information provided by, or on behalf of, the taxpayer for the preparation of a return. They also may not use any information provided by or on behalf of the taxpayer for any purpose other than to prepare, or assist in preparing, the return. Anyone who discloses or improperly uses tax return information is guilty of a misdemeanor and subject to a fine of not more than $1,000, imprisonment of not more than one year, or both.

Permissible Disclosures

Disclosures permitted by the Code and specified other types of disclosures are legal. Tax return preparers may disclose and use taxpayer return information in a number of ways without fear of penalty (Code Sec. 7216(b); Reg. § 301.7216-2), including:

- disclosure and use in preparing the returns of a related taxpayer if the taxpayer does not bar disclosure or use and if the related taxpayer does not have a tax interest that is adverse to the taxpayer;

- disclosure as ordered by a court, grand jury or administrative agency;

- disclosure to a preparer's attorney, a court officer or an IRS employee for use in an investigation of, or court proceeding against, the preparer;

- use of the information by the preparer to provide legal or accounting services to the taxpayer or other clients;

- disclosure to specified fiduciaries in the ordinary course of providing services to the taxpayer;

- disclosures to another officer or employee of the preparer to aid in the preparation of the taxpayer's return;

- disclosure to a tax return processor for the purpose of computing the taxpayer's tax liability;

- disclosure or use of tax return information that was not obtained through preparation of tax returns;

- disclosure in an audit of a state or local tax return;

- retaining information for use in preparing other tax returns of the taxpayer;

- compiling names and addresses of taxpayers for whom the preparer prepared returns to offer additional tax return preparation services to the taxpayers

- disclosure to government officials of activities that violate or may violate any criminal law;

- disclosure made to allow peer review of the preparer, but only for peer review conducted by an attorney, CPA, enrolled agent or enrolled actuary who is eligible to practice before the IRS; and

- disclosure to assist persons who operate the preparer's business after his death or incapacity.

Disclosures Consented to by Taxpayer
A tax return preparer can make several types of disclosures only with the consent of the taxpayer. These disclosures include:

- Disclosures to solicit from the taxpayer additional business not related to the IRS. The information can be used to solicit business only by the preparer or a member of its affiliated group.

- Disclosure to third persons at the direction of the taxpayer.

- Disclosure or use of information in preparing the return of another taxpayer. 8

The consent must be written and signed by the taxpayer or his authorized agent. The consent must contain:

- the name of the taxpayer and the tax return preparer;

- the purpose for which the consent is being furnished and a statement that the consent cannot be used for any other purpose, other than a purpose for which the taxpayer's consent is not needed;

- the date on which the consent is signed; and

- a statement that the taxpayer consents to the disclosure or use of the information for the purposes described in the consent.

A separate consent must be obtained for each separate use of or disclosure of return information. A request for the taxpayer's consent to use return information to solicit additional business may not be made after the taxpayer receives his completed return from the preparer (Reg. § 301.7216-3(a)(1).

EXHIBITS

Scenarios for Trouble

Scenario 1

Tax return preparer prepares an income tax return that shows $50000 in gross income from a consulting business on a Schedule c. Deductions are $35000. Preparer delivers the unextended return on April 14 of the year following the income year to the taxpayer's home. Client lives in a 5000 square foot home in an affluent suburb. There is a late model Jaguar sitting in the driveway. The preparer had never been to the taxpayer's home before delivering the return. How might OPR handle this situation? Is this a situation where §10.22 might come into play?

Scenario 2

ABC Security Service Inc. has had financial problems as a result of the economic downturn. As a result it currently owes three quarters of unpaid withholding taxes totaling $150,000 to the Internal Revenue Service. It has received three notices of Intent to Levy (CDP Notices) from the Internal Revenue Service and has not responded to any of those letters. On March 15, 2022 the owner of ABC Security Service, George Jones, engages you to represent the company with respect to his collection problems. At the time of your engagement the client provides you with a copy of a Notice of Levy on Last National Bank which was served by the Internal Revenue Service two weeks prior to your engagement. Your client tells you that all of the company funds are in the bank account and that the approximate balance at the time of levy was $20,000. Jones states that he cannot make payroll unless he can secure these funds. The client also states that he is about to receive a large payment from an account receivable in the amount of $50,000. He asks if it would be wise to put the monies in the same bank account that has been levied by the Internal Revenue Service or should he open a new bank account at a different bank so that the IRS might not be able to levy it.

<u>Queries</u>

1. May you advise the taxpayer to open a new bank account so that the newly acquired funds from the account receivable will not be easily levied by the Internal Revenue Service?

2. May you take the engagement with respect to the already levied funds and what courses of action may you take on behalf of the client?

Scenario 3

OPR receives a referral from an Examining Agent who determines that the preparer of an income tax return has given the taxpayer an opinion on the presence of substantial authority. The agent disagrees and finds the preparer/advisor did not follow §10.37 in writing the opinion. The agent's position is that the practitioner unreasonably relied on the facts presented by the taxpayer. The facts so presented were, in fact, incorrect, and the practitioner had accepted them without verification. How might OPR handle this situation?

Scenario 4
Samantha Smith engaged you in March, 2022 to represent her before the Internal Revenue Service with respect to income tax liabilities for the years 2018 through 2020. Samantha states she has minimal assets and earns approximately $80,000 per year as a mid-level manager for a large company. Her tax liabilities resulted because she had claimed too many dependents and had too little withholding taken out of her paychecks during the applicable periods. As part of your engagement, you gather financial information from the client and prepare a 433A, Collection Information Statement, on behalf of your client. That 433A lists a personal residence with a value of $300,000 with a $295,000 mortgage on it and a personal vehicle with a Kelly Blue Book value of $10,000 and a balance due on it of $14,000. The financial statement was submitted to the Revenue Officer and the Revenue Officer has been considering an appropriate amount for an installment agreement. On March 20, 2021, you receive a call from the Revenue Officer who states that she believes your client has failed to disclose all of her assets. She notes that when she pulled a credit bureau report on your client, the following items appeared which did not appear on the original 433A.

1. 2019 Corvette

2. 2019 Harley Davidson Motorcycle

3. Condominium located in Lake Geneva, WI with a valuation per the county tax assessor of $200,000 with a $125,000 mortgage on the property

Subsequent to the call from the Revenue Officer you call your client who confirms that in fact she has failed to disclose the assets listed above. She states that he believes the Corvette is worth about $30,000 and is paid for. The Harley Davidson is worth about $15,000 and has no encumbrances and that the approximate value stated by the Revenue Officer for the Wisconsin property is accurate.

<u>Queries</u>

1. What are your duties to the client now that you have determined that a 433A prepared by you is inaccurate?

2. What are your duties to the tax system with respect to an inaccurate financial statement?

Scenario 5
Sid and Mary Castle of Indianapolis, IN engaged you in December, 2022 to represent them with respect to unpaid joint income tax liabilities for the years 2019 through 2020. The total liability due from the Castles exceeds $250,000. Since your engagement you

have been engaged in negotiations with the IRS in an attempt to secure an installment agreement. As part of that negotiation you have secured a 433A from the parties and submitted it to the Revenue Officer. That 433A indicates that Sid is sole proprietor of Sid's Shoe Store which has a net profit of approximately $180,000 per year. Mary is a school teacher in the public school system and is paid approximately $60,000 per year. The Castles have joint assets that are fairly minimal other than their home. The home has a value of $300,000 and has a $150,000 mortgage on it. It is held in joint tenancy. On March 10, 2023, you receive a call from Mary stating that the parties have irreconcilable differences and that she has filed for divorce. She states that she really trusts you and would like you to continue negotiating with the Internal Revenue Service.

Queries:

1. What are your duties in an engagement for joint liability of husband and wife?
2. How do those duties change when the parties begin a divorce proceeding?
3. May you continue representing the parties subsequent to the filing of a divorce?
4. What, if any, actions must you take once you learn of the divorce?

Scenario 6

. An attorney advises two of your business clients of a plan for selling their businesses that involves a complex, multi-tier LLC structure to accomplish both estate and income tax savings as they enter retirement. The attorney drafts a research memorandum for you and the client, covering the plan's technical aspects. You review the memo and present your arguments to the attorney that the LLC may be deemed a related party or controlled group by the IRS, thereby negating any tax advantages of the plan. You agree that the plan may have some merits, but are concerned that IRS has issued recent rules requiring disclosure of such transactions and you are concerned about your client's willingness to participate in transactions that may not have a more likely than not probability of success if litigated.

1. Should you prepare a return adopting the attorney's tax position to your client?
2. If so, how can you manage the clients' expectations about potential penalties to you and the taxpayer that may result from it?

Scenario 7

As you meet with a new client who had prepared his own return, you discover he has taken a loss deduction of a substantial amount that is inappropriate. You indicate that you expect the examiner to notice it during the course of the examination, and let him know how much additional tax to expect from it. You convincingly present the taxpayers' information when the Revenue Agent comes out, and he does not address the erroneous deduction. He requests additional substantiation for an expense you know your client will readily be able to provide; and he does. When the examination report comes to you, it reflects a disallowance of the appropriate expense, proposes a modest additional assessment, but does not mention the deduction for which you had initially raised concerns.

Should you have informed the RA of the client's inappropriate deduction?

Scenario 8
In the course of representing a client before IRS Exam, preparer realizes she has made a significant error in advice given the taxpayer relating to a position taken on the return. If the error is discovered, the taxpayer will certainly owe additional tax and most probably an accuracy related penalty. There is also a potential the IRS will invoke a preparer penalty against her. Further, the preparer must consider her obligation of due diligence and accuracy to both the tax system and the client.

Issues for discussion:
What must the preparer tell her client?
What if any conflicts may exist in this scenario?

Scenario 9
Long time clients Rob and Terri separated in 2020; the divorce was not final until 2022. Only Rob came in for the 2021 return preparation appointment, indicating they were separated. He had kept the family residence and Terri had moved to Arizona. Rob provided information about jointly paid property taxes and mortgage interest, and offered Terri's new address and contact information so preparer could contact her directly to obtain tax information needed to preparer the 2021 return. Upon doing so, Terri agreed to file jointly if it resulted in the lowest legal tax liability for each of them. Preparer briefly reviewed the information and roughly calculated the tax with filing separate returns vs. joint. Both Rob and Terri were in agreement they would split the larger refunds they would obtain if joint returns were filed, and it was their decision to do so. Preparer completed and filed the returns.

15 months later Rob walked into the preparer's office with a CP2000 letter addressed jointly to Rob and Terri. The notice revealed additional income and proposed additional income and SE tax as well as interest and penalties. Preparer reviewed the letter and determined the additional income was solely from 1099-MISC, non-employee compensation Janice had failed to disclose at the time the returns were prepared.

Preparer advised Rob to be sure the letter was forwarded immediately to Terri, and that to advise her to seek competent assistance where she currently lived in responding to the notice.

Preparer then suggested that since a joint return had been filed, IRS would likely make the final assessment against both Rob and Terri for the full amount of the tax. Since Rob reacted that it was not fair for that to happen, preparer then suggested she could file a request for innocent spouse relief, requesting separation of liability. He should easily qualify for relief.

Issues for discussion:
Where did preparer make his first mistake?
What were his choices at that time?
Presuming the clients would have still agreed and did to file jointly, what should have happened at the time Rob showed up with the CP2000 letter?
Why?

Scenario 10
Andrew, a Circular 230 sole practitioner, had sufficient income to trigger a filing requirement for the years in question. For 5 years, Andrew failed to file his personal income tax returns on time. When contacted by the Office of Professional Responsibility, Andrew responded by stating that he never intended to defraud the IRS by pointing out that his returns always showed a refund. Andrew also offered as mitigating factor the fact that his clients' returns were always filed timely and all stood up to audits.

Andrew also had compliance issues with his Quarterly Federal Tax Return (Form 941) for several quarters. He failed to timely file his 941 and had balances due and owing.

Circular 230 Issues:
Section 10.51 (f)
Willfully failing to make a Federal tax return in violation of the revenue laws of the United States.

Factors to consider:
1040 issues: A refund return does not relieve the practitioner from the duty to file timely all tax returns. Willfulness does not require proof of any motive other than an intentional violation of a known legal duty. The practitioner knew of his legal duty to file his tax returns on time but did not meet his legal requirement and established a pattern of filing late returns.

941 issues: The OPR views compliance and monies owing on 941's very seriously.

Scenario 11
A practitioner has prepared the corporate and personal returns for the owners of a corporation for several years. The owners are a married couple who filed joint returns since they became the practitioner's client several years ago. As with previous years, the practitioner met with both the husband and the wife to go over their tax information. During the meeting, they informed the practitioner that they are in the process of getting a divorce but that they agree on how their taxes should be filed, and that they would both like him to continue representing them individually.

Circular 230 issues:
Conflict of interest
Due Diligence

Factors to consider:
Does the divorce present an actual conflict of interest situation or is there a potential for a conflict of interest? What is proper due diligence in this situation and how is the divorce going to affect his ability to prepare the corporate and the personal returns for the past year and future tax years? Do they have any children? Who is going to be involved in the corporation? The current conflicts rules allow the clients to waive the conflict if the practitioner informs the clients of the conflict and the client gives informed consent, confirmed in writing. Under the rules, the practitioner is required to obtain the consents in writing "at the time the existence of the conflict of interest is known by the practitioner." Thus, under the rules, the practitioner is required to obtain the consents in writing prior to representing clients with conflicts of interest within 30 days. If the parties do not agree to the waiver, the practitioner must withdraw from representation for all returns.

Scenario 12
In year 1, Glen, a Circular 230 practitioner, has a client requesting return advice on whether to claim a loss on an activity that is subject to the passive activity rules. Glen has done work for the client in the past and knows that the client doesn't spend much time on this activity, and definitely not enough time to claim it as a loss. The client provides general information about her involvement in the activity. Despite knowing the client does not spend enough time on the activity to claim the loss, Glen prepares the return claiming an active loss from the activity. Glen does the same for the client in years 2 and 3 as well, despite the fact that the client's limited involvement in the activity has not changed.

Factors to consider:
Glen has done work for this client in the past and is familiar with the client's minimal involvement in the activity.

Glen should be familiar with the passive activity loss rules and the limitations the rules provide.

The client provided general information to Glen related to her involvement in the activity. Did Glen exercise due diligence and follow up with questions or request further documentation or proof regarding the client's involvement in the activity?

Suppose that in year 4, the client retains Susan, another Circular 230 practitioner, to prepare that year's returns. Susan requests documentation regarding the client's involvement in the activity and notices, given the information provided, that the prior 3 returns contain the incorrect claim for loss on the activity. Susan advised the client of the error in the prior years' returns and the consequences of such an error under the Code. The client decides not to amend the returns for years 1, 2 and 3. Susan does not inform the IRS of the errors. Susan prepares the client's return for year 4 and correctly, does not claim the loss under the passive activity rules. Later that year, an agent examining the client for years 1, 2, and 3 proposed audit adjustments for the passive activity claim and asserted penalties against the client.

Factors to consider:
Susan correctly advised the client of the error on returns 1, 2 and 3.

Susan has no obligation to inform the IRS of the error or to amend the returns for years 1, 2 and 3. However, she cannot perpetuate the error on the returns she prepares. Since Susan did not claim the passive activity loss on year 4's return, she did not perpetuate the error. Therefore, she exercised due diligence in this scenario.

Had the client refused to make the correction in year 4, Susan should not have prepared the return. If Susan had prepared the return with the passive activity loss claim, she could face a potential Circular 230 violation.

Scenario 13
Revenue Agent Jay requests support for a certain deductions taken on a taxpayer's return. Bob, a Circular 230 practitioner representing the taxpayer, submits a series of confusing and complex schedules to Jay. Jay still does not understand how the deduction was calculated, and he asks Bob to explain the calculation further in a face-to face meeting.

During the meeting, Bob states repeatedly and in a loud voice that Jay is "an idiot" and should be removed from the case.

During the meeting, Bob states that his client will sue the IRS for damages based on the way the IRS has treated the client in this matter.

During the meeting, Bob tells Jay that, if Jay does not approve the deduction, Bob will file a Section 1203 complaint against Jay, and Jay will lose his job. This is not the first time that Bob has used this tactic with IRS personnel, and Bob knows he has no real basis for such a complaint.

After the meeting, Bob contacts Jay's supervisor to complain that Jay is incompetent, and Bob demands that a different Revenue Agent be assigned to the case. Subsequently, Bob refuses to respond to Jay's telephone calls or requests for more information.

Circular 230 Issues:
False or misleading information

Abusive language
Unreasonable delay
Threats or coercion

Factors to consider:

Have Bob and Jay worked together on any prior cases?

Does Bob have a history of abusive behavior with IRS personnel

Did Bob go through proper channels to make his complaints known?

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]

Conflict of interest "Informed Consent" Letter/Separate Representation
<Date>

<Client A Name><Client A Address>

Dear <Client A Name>:

Our firm is currently/will be rendering the following services to you: ***<description of CPA services>***. During the course of rendering these services to you, our firm will also be rendering services to ***<Client B Name>***. This letter will discuss certain ramifications of our firm's proposed concurrent representation of both you and ***<Client B Name>***. You have the opportunity to have your own legal representative review and advise you on all matters related to the services, including this letter, prior to signing the acknowledgment that this letter contains.

Rendering services to both you and ***<Client B Name>*** at the same time presents a potential conflict of interest. The potential conflict of interest arises because your interests could become actually adverse to ***<Client B Name>***'s interests in the future. Therefore, our firm must perform its services in a manner furthering both of your interests, cannot favor one party to the detriment of the other, and cannot negotiate on behalf of either party with the other party.

Based upon both parties' current cooperation and the preexisting relationship of the parties, we feel that our firms' concurrent representation of both parties presents no actual conflict of interest and that as accountants and advisors, our firm can adequately represent both parties' interests.

Should an actual conflict of interest arise in the future, our firm will promptly apprise you of any such actual conflict so that you and ***<Client B Name>*** can jointly decide how to resolve the conflict and/or whether you wish to obtain separate representation. Further, if you become aware of an actual conflict of interest, you agree to inform our firm of that actual conflict immediately.

By signing below, you acknowledge that (1) the potential conflict of interest has been fully disclosed to you; (2) you understand and acknowledge the potential conflict of interest as described; and (3) you consent to the concurrent representation subject to the potential conflict of interest as disclosed.

____
<Accountant Name><Firm Name>
Approved:
____
<Client A Name> <Date>

New York State
Ethics

One of the cornerstones of the profession of public accountancy is the high ethical standards of its members. Such standards are set forth in the AICPA Code of Professional Conduct (the "Code"). While high ethical standards are essential in achieving public trust and confidence, such trust can be maintained only if the public is confident that the profession can regulate itself and discipline those members who violate or ignore the Code.

The AICPA adopted a revised Code that became effective December 15, 2014. The Conceptual Framework for Members in Business and the Conceptual Framework for Members in Public Practice will become effective December 15, 2015. The conceptual frameworks may be implemented early.

Effective May 16, 2013, the NYSSCPA Adopted the AICPA Code of Professional Conduct.

Although since replaced by the AICPA Code, the last version of the NYSSCPA Code of Professional Conduct was adopted in March 2013.

Statements on Standards for Tax Services American Institute of Certified Accountants

General Information on SSTSs

• Written simply & objectively
• Provides for an appropriate range of behavior
• Some rules are subjective & some terms are left undefined deliberately
• Terms & concepts are generally tax-based
• Many similarities to Circular 230
• Enforcement is undertaken with flexibility
• Recent revisions became effective 1/1/10

Relevant Terms

Will Generally 90% or greater probability of Generally 90% or greater probability of success if challenged by IRS success if challenged by IRS

Should Generally 70 Generally 70 -80% probability of success if 80% probability of success if challenged by IRS challenged by IRS

More Likely More Likely than Not than Not (MLTN) Greater than 50% probability of success if Greater than 50% probability of success if challenged by IRS challenged by IRS.

Substantial Authority

Weight of authorities in support of a position Weight of authorities in support of a position is substantial in relation to the weight of is substantial in relation to the weight of authorities in opposition to the position (40%) authorities in opposition to the position (40%)

Realistic Possibility of Possibility of Success 1 in 3 possibility of success if challenged by 1 in 3 possibility of success if challenged by IRS

Reasonable Basis Significantly higher than not frivolous and significantly higher than not frivolous and lower than realistic possibility of success lower than realistic possibility of success

Not Frivolous Not patently improper; some merit to position Not patently improper; some merit to position

Frivolous Patently improper

SSTS No. 1
Tax Return Positions

• Recommending tax return positions & preparing or signing tax returns
• Includes amended return, claims for refund, & information returns filed with any taxing authority
• Recognizes responsibility to both taxpayers and to the tax system
• Follow reporting standard in applicable jurisdiction
• Realistic possibility of success is floor for undisclosed positions
• Reasonable basis is floor for disclosed positions
• Advise taxpayer regarding potential penalty consequences

Suggested Due Diligence Steps

• Establish the relevant background facts
• Consider the reasonableness of the assumptions & representations
• Apply the pertinent authorities to the relevant facts
• Consider whether there is a business purpose & economic substance for the transaction
• Arrive at a conclusion supported by the authorities

SSTS No. 2, Answers to Questions on Returns

• Standards when one or more questions on the return have not been answered
• Make a reasonable effort to obtain the information necessary to provide appropriate answers to all questions
• Allows judgment to omit answers to a question if the answer is not readily available & the answer is not significant in terms of taxable income or loss or the tax liability

SSTS No. 3, Certain Procedural Aspects of Preparing Returns

• Standards for obligation to examine or verify supporting data or to consider information related to another taxpayer
• May in good faith rely, without verification, on information furnished by taxpayer or third parties
• Should not ignore the implications of information furnished

SSTS No. 3, Certain Procedural Aspects of Preparing Returns

• Make reasonable inquiries if the information furnished appears to be incorrect, incomplete, or inconsistent
• Refer to the taxpayer's returns for one or more prior years
• Make appropriate inquiries to determine whether tax requirements have been met; i.e. travel and entertainment documentation

SSTS No. 4, Use of Estimates

• Taxpayer's estimates may be used unless prohibited by statute or rule, provided the member determines the estimates are reasonable based on the facts known to the member
• Estimates should not imply greater accuracy than exists
• Disclosure of use of estimate is generally NOT required (unless due to unusual circumstances such as fire, illness or death)

SSTS No. 5, Departure From a Position Previously Concluded in an Administrative Proceeding or Court Decision

• May recommend a tax return position (or prepare or sign a tax return) that departs from the previous treatment; taxpayer facts may have improved, such as proper documentation available
• However, a taxpayer may be bound to a specified treatment in a later year
• When previous-year decision is binding, it may be the only position supported by the standards of SSTS No. 1

SSTS No. 6, Knowledge of Error: Return Preparation and Administrative Proceeding

• Become aware of an error in a taxpayer's previously filed tax return or of a failure to file
• Error includes any position, omission, or method of accounting that, at the time the return is filed, fails to meet the standards set out in SSTS No. 1
• Includes a position taken on a prior year's return that no longer meets these standards due to legislation, judicial decisions, or administrative pronouncements having retroactive effect

• An error does not include an item that has an insignificant effect on the taxpayer's tax liability
• Should promptly inform the taxpayer of the error and recommend corrective measures
• Recommendations may be given orally
• May not inform the taxing authority without the taxpayer's permission, except when required by law or court order
• Should advise client to seek legal counsel if the error could possibly lead to fraud or other criminal charges

SSTS No. 7, Form and Content of Advice to Taxpayers

• Standards concerning certain aspects of providing advice to a taxpayer
• Considers responsibility to communicate with client when subsequent developments affect advice previously provided
• Should use judgment to ensure that tax advice reflects professional competence & appropriately serves the taxpayers' needs
• Should always assume the advice given will affect the taxpayer's tax returns; consider Statement No. 1
• Not required to follow a standard format in communicating written or oral advice
• No obligation to communicate when subsequent developments affect advice previously provided except: While assisting taxpayer in implementing procedures or plans associated with the advice, or When a member undertakes this obligation by specific agreement

Effective May 16, 2013, the NYSSCPA Adopted the AICPA Code of Professional Conduct.
Although since replaced by the AICPA Code, the last version of the NYSSCPA Code of Professional Conduct was adopted in March 2013. Prior historical versions of the NYSSCPA Code of Professional Conduct are available upon request.

Fact Sheet
New York's First Tax Preparer Regulations
Effective December 11, 2013
Applicability
As a general rule, the new regulations apply to anyone who prepares a substantial portion of any tax return for compensation. Tax preparers who meet the eligibility criteria will be required to register with the New York State Tax Department.
The regulations impose additional requirements on "commercial tax return preparers," defined as persons who:

- prepared ten or more returns for compensation in the preceding calendar year; and
- will prepare at least one return for compensation during the present calendar year.

Some individuals who prepare returns are exempt from the regulations:

- attorneys, public accountants, enrolled agents, certified public accountants, and their employees
- volunteer tax preparers and employees of a business or partnership whose job is to only prepare that business's or partnership's returns

Professional standards

To ensure that New Yorkers receive quality tax preparation services, the department imposes the following requirements on commercial tax return preparers.

Continuing Professional Education (CPE) requirements

The regulations create two different continuing professional education requirements, depending on the experience of the preparer.

- Commercial tax return preparers with less than three years' experience are required to complete 16 hours of CPE coursework by the end of the first calendar year after the department has certified CPE providers. These individuals will have to complete four hours of CPE coursework each year thereafter.
- Commercial tax preparers with three or more years' experience must complete four hours of CPE coursework each year.

Competency exam

- Commercial tax preparers must pass the IRS competency exam, if required for federal purposes.
- Commercial tax preparers must pass a New York State competency exam by the third calendar year after the exam is made available by the department.

Grounds for Denial of Tax Preparer Registration

The Tax Department can deny the registration application of any tax preparer who does not meet the registration requirements, who is not in compliance with certain laws and obligations, or who is otherwise not in compliance with the regulations.

Registration requirements

In order to successfully register, a preparer must:

- be at least 18 years of age, and possess a high school diploma or its equivalent
- fulfill continuing education and competency test requirements
- commercial tax return preparers must pay the registration fee

Compliance with laws and obligations

The department will deny the application of preparers under the following circumstances:

- criminal conviction where there is a direct relationship between the conviction and the preparation of tax returns
- noncompliance with tax obligations.
- failure to comply with child support obligations.
- willful violation of the Tax Law
- failure to satisfy IRS requirements.

- adverse disciplinary actions within five years. Discipline must relate to tax return preparation, violation of trust or fiduciary obligations, or the misuse of confidential information.

Other conduct warranting denial

The department may also deny registration applications for the following reasons:

- the issuance of a registration would involve an undue risk to property or the public welfare
- fraud or deceit as a preparer or with registration as a tax return preparer
- dishonest or unscrupulous behavior by a preparer

Discipline of Tax Return Preparers

Preparers who do not comply with the regulations are subject to discipline by the department. In addition, the department may coordinate with federal, state, and local taxing authorities; and professional licensing or other regulatory authorities to exchange information and make disciplinary referrals.

Conduct warranting discipline

As in the case of registration denials, the department can discipline preparers who do not meet the registration requirements, who are not in compliance with certain laws and obligations, or who are otherwise unfit.

Registration requirements

Preparers who fail to register, pay the registration fee, or complete educational requirements can be disciplined.

Compliance with laws and obligations

Preparers who violate any law, regulation, or obligation related to tax preparation are subject to discipline. In addition, the following conduct can result in discipline:

- criminal convictions involving an unreasonable risk to property, safety or welfare
- adverse disciplinary actions in connection with conduct relating to tax preparation, a violation of trust or fiduciary obligations, misuse of confidential information
- failure to comply with child support obligations
- willful noncompliance with tax obligations

Other conduct warranting discipline

Preparers can also be disciplined for engaging in the following conduct:

- engaging in contemptuous conduct in connection with a return prepared by the preparer or in practice before the department regarding that return
- giving a false opinion, knowingly, recklessly, or through gross incompetence or engaging in a pattern of providing incompetent opinions on questions arising under federal, state, or local tax laws
- willfully using false or misleading representations to procure employment or intimating that the preparer is able to improperly obtain special consideration or action from the department or any officer or employee thereof
- providing false or misleading information to the department

- assisting noncompliance or tax evasion
- misappropriating client funds
- improperly influencing official actions
- aiding the practice by non-registered preparers
- willfully refusing to sign a return
- disclosing confidential information
- willful violation of the law including the Consumer Bill of Rights

Duties and responsibilities of tax return preparers
The department imposes certain duties and responsibilities on preparers. A preparer that willfully, recklessly, or with gross incompetence fails to adhere to these duties and responsibilities may be subject to discipline.

Communication and interaction with the Tax Department
A tax return preparer ***must:***

- provide non-privileged available records to the department
- provide information concerning unavailable records
- promptly dispose of pending matters with the department where the preparer has prepared the subject return.

A tax return preparer ***must not:***

- interfere with lawful efforts by the department
- participate in false, fraudulent, deceptive or misleading solicitation and advertising.
- willfully, recklessly, or through gross incompetence submit returns, or advise their clients to submit returns to the department that lack a reasonable basis
- take an unreasonable position or willfully attempt to understate the tax liability or is in reckless or intention disregard of the rules or regulations
- take a frivolous position or advise a client to take a frivolous position on a tax return, affidavit, or other document submitted to the department, whether in paper form or electronically
- seek assistance from persons whose registration has been refused, cancelled, or suspended

Communication and interaction with clients
A tax return preparer ***must:***

- make reasonable efforts to learn of client's omissions
- act diligently to ensure filed returns are accurate
- not charge unconscionable fees
- return client's records
- advise their clients of potential penalties.

A tax return preparer ***must not:***

- endorse or otherwise negotiate any check or other form of payment issued to a client by the government in respect to a federal, state or local tax refund

- advise a client to submit a tax return, affidavit, or other paper or electronic document to the department, if the purpose is to delay or impede the administration of federal, state or local tax laws; the document or return contains a position that is frivolous; or the document or return contains or omits information in a manner that demonstrates an intentional disregard of a statute, regulation or established case law unless the preparer also advises the client to submit a document that evidences a good faith challenge to the statute, regulation or established case law.
- prepare a return for a client or represent a client before the department in a matter that would cause a conflict of interest with another of the preparer's clients unless both clients waive the conflict
- ignore the implications of information furnished to, or actually known by, the preparer, and must make reasonable inquiries if the information as furnished by the client appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete

In addition, any person, whether or not a tax return preparer, who has (or persons who have or share) principal authority and responsibility for overseeing a firm's practice of preparing tax returns, claims for refunds, or other documents by tax return preparers for submission to the department must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with the regulations.

Forms of discipline

The department may discipline noncompliant preparers in the following ways:

- refusal, suspension or cancelation of a registration application
- denial, limitation, or placement of conditions on the preparer's right to prepare or file

New York State tax returns. Such conditions may include placing the preparer on probation, or ordering the preparer to attend remedial educational classes before being allowed to prepare or file returns.

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FROM
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&
REPRESENTING THE AUDITED CLIENT BEFORE THE IRS

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