

# BEYOND CIRCULAR 230; THE DISBARMENT STORY

by

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# A PATENTAX® PRESENTATION

Disclaimer: Educational Only: This outline is Educational Only and no part of this presentation can be considered as federal or state tax advice, opinion, or position and is not intended or written to be used, and may not be used, for the purpose of (I) avoiding tax-related penalties under the internal revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein, nor (iii) constituting guidance on any tax or intellectual property matter.

- I. CIRCULAR 230:
  - A. The Office of Professional Responsibility (OPR) administers and enforces the regulations governing practice before the IRS. In very general terms, individuals who are eligible to "practice" are eligible to represent taxpayers before the IRS. The regulations governing practice are set out in title 31, Code of Federal Regulations, part 10, and are published in pamphlet form as Treasury Department Circular No. 230. The enabling legislation for the Circular 230 regulations appears in title 31, United States Code, section 330. (Generally § 10.0 to § 10.93)
  - B. However, Circular 230 is only a small part of the legislative and rules system which control the procedures that practitioners are subject to for violations of the standards of Circular 230
- II. EXPANSION: TAKEOVER OF TAX PREPARERS
  - A. Prop. Reg. 1.6109-2
  - B. Facts from the December 2009 Return Preparer Review (well before the proposed changes to Circular 230 from OPR coming late 2010):

“California has been regulating return preparers since the 1970s.<sup>42</sup> California requires individuals who prepare or assist in the preparation of tax returns for a fee to register unless exempted. Individuals exempted from this requirement include attorneys who are active members of the State Bar of California, certified public accountants who are licensed by the California Board of Accountancy, enrolled agents, and the employees of these categories of individuals. To register, an individual must post a \$5,000 surety bond and complete not less than 60 hours of instruction in basic personal income tax law education by an approved provider within the previous 18 months. Registrants also must pay a registration fee of \$25 and complete at least 20 hours of continuing education, including 12 hours in Federal taxation, 4 hours in California taxation, and additional 4 hours in either Federal or California taxation from an approved provider annually.
- III. TRADITIONAL POWER OF CIRCULAR 230 OVER INDIVIDUALS
  - A. "Practitioners," which is Circular 230's collective term for individuals who are eligible to practice before the IRS: attorneys, certified public accountants, enrolled agents, enrolled actuaries, and enrolled retirement plan agents. Practitioners who fail to comply with any of Circular 230's regulations are subject to the sanctions of private reprimand, public censure, suspension or disbarment from practice before the IRS, and imposition of a monetary penalty.
  - B. Appraisers, who are individuals who present evidence or testimony in administrative proceedings before the IRS or the Department of the Treasury. Appraisers who violate applicable Circular 230's rules are subject to disqualification from presenting testimony or evidence.
  - C. Enrolled Agents and the more recent Enrolled Retirement Plan Agents who have been granted practice privileges directly from OPR.
- IV. EXPANSION: EXPANSION OF "PRACTITIONER" STATUS UNDER CIRCULAR 230 & POSSIBILITY OF § 10.60 DISCIPLINARY PROCEEDINGS

- A. Treasury is expanding Circular 230 to apply **DIRECTLY** to the preparation of tax returns and tax return preparers, thereby expanding OPR's jurisdiction over practitioner conduct. See IRS Publication 4832, Return Preparer Review (Rev. 12-2009). Currently, a tax return preparer who engages in limited practice as permitted by Circular 230, section 10.7(c)(1)(viii), is subject to applicable rules of Circular 230.
  - B. The definition of "practice" has also been expanded beyond the formal existence of the submission of the form 2848 power of attorney. Practice includes acts which occur:
    - 1. When advising taxpayers on filing positions or transactions.
    - 2. During Taxpayers representation before the IRS
    - 3. On practitioners own return (traditionally the source of 80% of the disbarments over the past 15 years)
- V. **OTHERS WHO CAN REPRESENT BEFORE IRS IN A LIMITED FASHION**
- A. An individual. An individual can represent himself before the IRS and does not have to file a written declaration of qualification and authority.
  - B. A family member. An individual can represent members of his or her immediate family. Immediate family means a spouse, child, parent, brother, or sister of the individual.
  - C. An officer. A bona fide officer of a corporation (including a parent, subsidiary, or other affiliated corporation), association, or organized group can represent the corporation, association, or organized group.
  - D. A partner. A general partner can represent the partnership before the IRS.
  - E. An employee. A regular full-time employee can represent his or her employer. An employer can be, but is not limited to, an individual, partnership, corporation (including a parent, subsidiary, or other affiliated corporation), association, trust, receivership, guardianship, estate, organized group, governmental unit, agency, or authority.
  - F. A fiduciary. A fiduciary (trustee, executor, administrator, receiver, or guardian), stands in the position of a taxpayer and acts as the taxpayer, not as a representative.
- VI. **LOSS OF ELIGIBILITY TO PRACTICE.** Generally, individuals lose their eligibility to practice before the IRS in the following ways:
- A. Not meeting the requirements for renewal of enrollment (such as continuing professional education).
  - B. Requesting to be placed in an inactive retirement status.
  - C. Being suspended or disbarred by state authorities.
  - D. Individuals authorized to practice before the IRS are subject to disciplinary

proceedings and may be suspended or disbarred for violating any regulation governing practice before the IRS. This includes committing acts of disreputable conduct.

1. Practitioners who are suspended in a disciplinary proceeding are not allowed to practice before the IRS during the period of suspension.
2. Practitioners who are disbarred in a disciplinary proceeding are not allowed to practice before the IRS.
3. However, a practitioner can seek reinstatement from the Office of Professional Responsibility five years after disbarment.

VII. EXPANSION: PROPOSED DEFINITION OF §10.2(a)4

A. § 10.2 Definitions.

(a) As used in this part, except where the text provides otherwise —

(1) Attorney means any person who is a member in good standing of the bar of the highest court of any state, territory, or possession of the United States, including a Commonwealth, or the District of Columbia.

(2) Certified public accountant means any person who is duly qualified to practice as a certified public accountant in any state, territory, or possession of the United States, including a Commonwealth, or the District of Columbia.

(3) Commissioner refers to the Commissioner of Internal Revenue.

(4) Practice before the Internal Revenue Service comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing documents; [and] filing documents;[,] corresponding and communicating with the Internal Revenue Service;[,] rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion;[,] and representing a client at conferences, hearings and meetings.

- B. Comment: By eliminating the term “preparing and filing”, a disjunctive is eliminated so that a presentation is made by either preparing a document or filing a document. This is consistent with more recent rule making that makes even verbal advice given, where it is known to eventually end up on a tax return, is “practice”.

VIII. §10.8 Return preparation and application of rules to other individuals.

- A. (b) Application of Rules to other individuals. Any individual who for compensation prepares, or assists in the preparation of, all or a substantial portion of a document pertaining to any taxpayer's tax liability for submission to the Internal Revenue Service is subject to the duties and restrictions relating to practice in subpart B, as well as subject to the sanctions for violation of the regulations in subpart C. Unless otherwise a practitioner, however, an individual may not prepare, or assist in the preparation of, all or substantially all of a tax return or claim for refund, or sign tax returns and claims for refund. For purposes of this paragraph, an individual described in 26 CFR 301.7701-15(f) is not treated as having prepared all or a substantial portion of the document by reason of such

assistance.

- B. Note: 26 CFR 301.7701-15(f) excludes from the definition of return preparers:
1. IRS Employee
  2. Individual Vita Volunteer but only as to Vita Returns
  3. Organization sponsoring VITA.
  4. Individual Volunteer for Tax Counseling for the Elderly
  5. Organization sponsoring Volunteer for Tax Counseling for the Elderly
  6. Individual of a Low Income Tax Clinic.
  7. Sponsors of a Low Income Tax Clinic.
  8. Mechanical copy maker or typist
  9. Person preparing a return for person's corporation, partnership, etc.
  10. Individual preparing a return in a fiduciary capacity.
  11. Preparer of claim for refund after a notice of deficiency or after a waiver on notice of restriction.
  12. A preparer who prepares a return with no explicitly or implicit agreement for compensation even if the person receives an insubstantial gift, return service or favor.
  13. Examples are given in the regs.

IX. OPR Complaint Process

- A. Complaint Referral: From IRS divisions and employees, other government agencies, tax practitioners and private citizens
- B. Determine OPR Jurisdiction
- C. Evaluate Potential of a Violation of Circular 230 & Alternative Discipline Options.

X. Alternative Disciplinary Approaches

- A. Issuance of a "Soft Letter" (compliance and conduct)
- B. Issuance of a "Soft 60-Day Letter" (compliance)
- C. Deferred Disciplinary Agreement (both)
- D. Issuance of a Notice of Allegation
  1. Investigation
    - (a) Documentation
    - (b) Database Searches
    - (c) Witnesses
    - (d) Other Evidence
  2. Identification and Development of the Bases for a Dispute
    - (a) Conference Opportunity
    - (b) Settlement Opportunity
  3. Sanctions
    - (a) Letter of Reprimand (private-includes "soft letter")
    - (b) Censure
    - (c) Suspension
    - (d) Disbarment
    - (e) Monetary Penalty

XI. OVERALL EXAMPLE PROCEDURE

- A. Complaint Referral: From IRS divisions and employees, other government

- agencies, tax practitioners and private citizens
- B. Determine OPR Jurisdiction
  - C. Evaluate Potential of a Violation of Circular 230 & Subsequent Alternative Discipline Options.
  - D. Attempted NEGOTIATED SANCTIONS ROUTE
    - 1. Circular 230 requires OPR, prior to the issuance of a complaint instituting a formal disciplinary proceeding, to give the practitioner written notice of the law, facts, and conduct warranting such action.
    - 2. Further cooperation from the practitioner
    - 3. Receipt and evaluation of practitioner provided proof and practitioner mitigating documentation and evidence. Circular 230 also requires OPR to accord the practitioner an opportunity to dispute facts, assert additional facts, and make arguments, including an explanation or description of mitigating circumstances. Upon receipt of OPR's notice, usually referred to as an "allegation letter, the practitioner may submit a written response, may request a conference, or both.
    - 4. Practitioner-Agreed conclusion & final action. If OPR finds the practitioner's response insufficient, Circular 230 authorizes OPR to accept the practitioner's offer of consent to a sanction in settlement of the disciplinary matter.
    - 5. More Recent Innovations. In early 2010, OPR's new Director, Karen L. Hawkins, introduced innovations to the informal, pre-proceeding stage, which are designed to give practitioners earlier notice of possible misconduct, to resolve disciplinary matters more expeditiously, and to improve future compliance.
      - (a) Currently, if OPR is conducting an investigation in a "conduct" case, i.e., possible misconduct other than tax non-compliance, OPR's first contact with a practitioner is not the traditional allegation letter, but rather a "pre-allegation notice letter," which notifies the practitioner of the investigation and invites the practitioner to submit any relevant information. If the practitioner's information does not resolve the matter, OPR sends an allegation letter specifying suspected violations of Circular 230. The practitioner may submit an additional response and may request a conference to be conducted in OPR's Washington, DC, office or by telephone.
      - (b) If these actions do not revolve the matter, OPR may suggest that the practitioner offer a consent to censure, suspension, or disbarment in settlement of the matter. OPR may accept the offered consent or may open settlement negotiations with the practitioner. In some cases, OPR will conclude the matter by reprimanding the practitioner.
      - (c) Ms. Hawkins' innovations include alternate disciplinary approaches for the informal, pre-proceeding stage. One new

approach applies when the practitioner has been referred to OPR for tax non-compliance, i.e., failure to meet his or her Federal tax responsibilities, but has self-corrected before OPR's contact. In that situation, OPR's first contact with the practitioner will be a letter of reprimand acknowledging the practitioner's self-correction and admonishing the practitioner to remain compliant in the future. A second new approach applies when the practitioner's tax non-compliance involves a balance due or unfiled tax returns. In that situation, OPR will send the practitioner a reprimand that calls for the practitioner to come into compliance within 60 days or face a more severe sanction.

- (d) Pursuant to a third alternative approach involving both tax non-compliance cases and conduct cases, when the practitioner's appearances before the IRS have been infrequent or nominal and the practitioner has expressed an intention to refrain from practice in the future, OPR will consider the practitioner's offer of a deferred disciplinary agreement whereby a consent sanction will become effective only in the event of the practitioner's continued misconduct.
- (e) Formal proceeding stage, service of complaint, respondent's answer, evidentiary hearing, ALJ's decision. If a disciplinary matter is not resolved at the informal, pre-proceeding stage, OPR refers the matter to the Office of the Associate Chief Counsel (General Legal Services) ("GLS"), which will represent OPR in formal disciplinary proceedings conducted before an administrative law judge ("ALJ"). GLS will give the practitioner an additional opportunity to offer an acceptable consent to sanction, and if such an offer is not forthcoming, GLS will serve the practitioner with a complaint containing a statement of the facts and law constituting the basis for the proceeding. The practitioner must file an answer within the time specified in the complaint unless the practitioner receives the ALJ's approval to extend the time. If the practitioner fails to file a timely answer, the ALJ may issue a default decision against the practitioner without a hearing. After the filing of the complaint, either party may file motions with the ALJ, including a motion for discovery.
- (f) In the absence of a settlement, the matter will progress to an evidentiary hearing presided over by the ALJ. The location of the hearing will be determined by agreement between the practitioner and OPR with the approval of the ALJ, but in the absence of agreement and approval, the hearing will be held in Washington, DC. Hearings are stenographically recorded and transcribed. The testimony of witnesses is taken under oath or affirmation. Within 180 days of the conclusion of the hearing, the ALJ will issue a decision containing findings and conclusions, as well as an order of censure, suspension, disbarment, or monetary penalty against

the practitioner, disqualification of an appraiser, or dismissal of the complaint. In the absence of an appeal to the Secretary of the Treasury, the decision of the ALJ becomes the final agency decision after 30 days.

- (g) Appeal stage & objections to the ALJ's decision. Within 30 of the date of the ALJ's decision, the practitioner, OPR, or both may file an appeal, which must be supported by a brief stating the objections to the ALJ's decision. If the practitioner appeals, the appeal should be sent to OPR, which will furnish a copy to the Secretary's delegate ("Appellate Authority"), who decides appeals. If OPR appeals, OPR will send a copy of the appeal to the practitioner. The Secretary's delegate will make the final agency decision and furnish copies to the practitioner and OPR. Upon

- E. ADJUDICATION ROUTE (from failure to complete negotiation or from failure of practitioner cooperation
- F. Unresolved case prepared and sent to General Legal Services with "charging instructions"
- G. GLS sends "last chance" letter to practitioner.
- H. GLS prepares and/or files complaint with Administrative law judge and serves complaint on the practitioner.
- I. Practitioner files Answer
  - 1. Failure to Answer results in Motion for Default Judgement
  - 2. Receipt of an Answer results in setting the controversy to "at issue" status.
- J. Discovery Period; Period for submission of Summary Judgement Motions
- K. Hearing is had before an Administrative Law Judge and held under the Administrative Procedure Act and with relaxed Rules of Evidence. Generally "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof."
- L. Administrative Law Judge renders decision (30 days to Appeal the Decision, else Judgement becomes Final Agency Decision) (Standard on Appeal is "clearly erroneous standard")
- M. Appeal is had to Treasury Delegate as "Appellate Authority". (Appeal the Decision to Federal District Court, else Judgement becomes Final Agency Decision)
- N. Final Agency Decisions in Disciplinary Cases (<http://www.irs.gov/taxpros/agents/article/0,,id=177688,00.html>)
- O. Final regulations issued under Circular 230 on September 26, 2007 allows the Office of Professional Responsibility (OPR) to publish decisions on its cases, once they become final agency decision. A decision becomes the final agency decision at one of two points:
  - 1. After an administrative law judge issues a decision and either party has not appealed the decision to the Secretary of the Treasury or his designee within 30 days, or;
  - 2. After the Secretary of the Treasury or his designee has issued his or her decision. Although the practitioner may further appeal the decision of the

Secretary of the Treasury to the Federal District Court, the decision may be made public, and the term of any suspension or disbarment will begin, at that point.

- P. Appeal standard is generally whether the administrative proceeding was “arbitrary and capricious”, a very difficult standard with which an administrative proceeding may be overturned.

XII. § 10.82 DISCIPLINARY PROCEEDINGS FOR EXPEDITED SUSPENSION

- A. These proceedings apply to practitioners (see above) who within five years:
1. Have had a license to practice as an attorney, CPA, or actuary suspended or revoked for cause;
  2. Have been convicted of any crime under title 26, United States Code, i.e., the Internal Revenue Code, any crime involving dishonesty or breach of trust, or any felony involving conduct that renders the practitioner unfit to practice before the IRS;
  3. After being subject to the sanction of censure or suspension, have violated conditions imposed by OPR on their future representations; or
  4. Have been sanctioned by a court 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 instituting or maintaining proceedings primarily for delay, advancing frivolous or groundless arguments, or failing to pursue available administrative remedies.

B. NO INFORMAL STAGE

1. Formal proceeding stage starts with service of complaint, respondent's answer, conference, expedited suspension. Because section 10.82 proceedings are based on prior final adjudications in judicial or administrative proceedings, there is no informal stage. Rather, OPR's first contact with the practitioner consists of a complaint stating the allegations constituting the basis for the expedited proceeding. Within 30 calendar days after the complaint is served, the practitioner must file an answer, and if the practitioner intends to request a conference, it must be requested in the answer. If the answer is not timely filed, OPR may issue a default decision suspending the practitioner from practice before the IRS.
2. A conference may be conducted in OPR's Washington, DC, office or by telephone. Following a conference, upon a finding that any of the section 10.82 criteria (license suspension or revocation, criminal conviction, etc.) apply to the practitioner, OPR may issue a decision suspending the practitioner. The suspension will remain in effect until OPR lifts the suspension after determining that the section 10.82 criteria no longer apply to the practitioner, or the suspension is lifted by an ALJ in a section 10.60 proceeding.
3. Section 10.60 proceeding stage. If OPR suspends a practitioner, the practitioner may ask OPR to issue a complaint under section 10.60. The request must be made in writing within two years from the effective date

of the expedited suspension. OPR must issue the complaint within 30 calendar days of receiving the request.

### XIII. PUBLICLY AVAILABLE INFORMATION

- A. Announcements of disciplinary sanctions. These announcements, which appear in the Internal Revenue Bulletin, list: name; city and state, professional designation; disciplinary sanction (e.g., censure, expedited suspension, along with a brief description of the grounds for sanction); and effective dates. A sanction is included in the announcements when: (1) an ALJ or the Secretary's delegate on appeal has issued a final agency decision; (2) a disciplinary matter is concluded with a signed "consent to sanction," which must include one or more admitted violations of the regulations; or (3) OPR has issued a decision in an expedited proceeding for suspension. For a list of IRB issues containing announcements, see Announcements of Disciplinary Sanctions.
- B. Final agency decisions. Final agency decisions in Circular 230 disciplinary proceedings (unappealed ALJ decisions or decisions of the Appellate Authority), with identifying information of third party taxpayers redacted, can be accessed at Final Agency Decisions in Disciplinary Cases.

### XIV. ADMINISTRATIVE PROCEDURE ACT

- A. The Administrative Procedure Act (5 USC 551-559, 701-706), enacted in 1946, implemented many of the recommendations of the Attorney General's Committee. Passage of the act was followed in 1947 by the issuance of The Attorney General's Manual on the Administrative Procedure Act, which clarified some of the terms and procedures in the APA.
- B. The Administrative Procedure Act defined "rule" as: "[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . ."
- C. Rulemaking Versus Adjudication.
  - 1. rulemaking is: [A]gency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but because it is primarily concerned with policy considerations.
  - 2. Adjudication, on the other hand, is the quasi-judicial "determination of past and present rights and liabilities."

### XV. SUBCHAPTER I - GENERAL ADMINISTRATIVE PROVISIONS OF THE APA

- A. §500. Administrative practice; general provisions.
- B. §501. Advertising practice; restrictions.
- C. §502. Administrative practice; Reserves and National Guardsmen.
- D. §503. Witness fees and allowances.
- E. §504. Costs and fees of parties.
- F. §551. Definitions.
- G. §552. Public information; agency rules, opinions, orders, records, and

- proceedings.
- H. §552a. Records about individuals.
- I. §552b. Open meetings.
- J. §553. Rule making.
- K. §554. Adjudications.
- L. §555. Ancillary Matters

XVI. ADMINISTRATIVE PROVISIONS OF APA, 5 U.S.C. §555 - §559

- A. § 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.
- B. § 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record
- C. § 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.
  - (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
  - (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.
  - (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—
    - (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
    - (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

- D. § 559. Effect on other laws; effect of subsequent statute. This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or

the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

- E. ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS §571 - §584
  
- XVII. CHAPTER 7 - JUDICIAL REVIEW
  - A. §701. Application; definitions.
  - B. §702. Right of review.
  - C. §703. Form and venue of proceeding.
  - D. §704. Actions reviewable.
  - E. §705. Relief pending review.
  - F. §706. Scope of review.
  
- XVIII. MISCELLANEOUS PROVISIONS RELATING TO ADMINISTRATIVE LAW JUDGES
  - A. §1215. Disciplinary action.
  - B. §1305. Administrative law judges.
  - C. §3105. Appointment of administrative law judges.
  - D. §3323. Automatic separations; reappointment; reemployment of annuitants.
  - E. §3344. Details; administrative law judges.
  - F. §3502. Order of retention.
  - G. §4301. Definitions.
  - H. §5372. Administrative law judges.
  - I. §7521. Actions against administrative law judges.
  
- XIX. Appointment, Pay, and Removal of Administrative Law Judges, 5 CFR Part 930
  - A. §930.201 Coverage.
  - B. §930.202 Definitions.
  - C. §930.203 Examination.
  - D. §930.203a Appointment.
  - E. §930.203b Title of administrative law judge.
  - F. §930.204 Promotion.
  - G. §930.205 Reassignment.
  - H. §930.206 Transfer.
  - I. §930.207 Reinstatement.
  - J. §930.208 Restoration.
  - K. §930.209 Detail and assignment to other duties.
  - L. §930.210 Pay.
  - M. §930.211 Performance rating.
  - N. §930.212 Rotation of administrative law judges.
  - O. §930.213 Use of administrative law judges on detail from other agencies.
  - P. §930.214 Actions against administrative law judges.
  - Q. §930.215 Reduction in force.
  - R. §930.216 Temporary reemployment: senior administrative law judges.
  
- XX. Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (PART 18—OFFICE OF JUSTICE PROGRAMS HEARING AND APPEAL PROCEDURES). In General The Part 18

Rules are the baseline rules of practice in proceedings before the Office of Administrative Law Judges. Litigants, however, should also consult the procedural rules governing the matter in litigation for more specific rules. Where programmatic rules are inconsistent with Part 18, the programmatic rule governs. See 29 C.F.R. § 18.1(a).

- A. §18.1 Purpose.
- B. §18.2 Application.
- C. §18.3 Definitions.
- D. §18.4 Preliminary hearings.
- E. §18.5 Hearings.
- F. §18.6 Conduct of hearings.
- G. §18.7 Discovery.
- H. §18.8 Recommended decision.
- I. §18.9 Final agency decision.
- J. §18.10 Rehearing.

XXI. Miscellaneous provisions relating to Administrative Hearings

- A. Final Rule, Amendment of Filing and Service Requirements in Proceedings Before the Office of Administrative Law Judges, 60 Fed. Reg. 26970 (May 19, 1995)
- B. Interim Final Rule, Amendment of Filing and Service Requirements in Proceedings Before the Office of Administrative Law Judges, 59 Fed. Reg. 41874 (Aug. 15, 1994)
- C. Final Rule, Use of Settlement Judges in Proceedings Before the Office of Administrative Law Judges, 58 Fed. Reg. 38498 (July 16, 1993)
- D. Notice of Proposed Rulemaking, Use of Settlement Judges in Proceedings Before the Office of Administrative Law Judges, 58 Fed. Reg. 3822 (Jan. 11, 1993)  
HTML
- E. Audiovisual Coverage of Administrative Hearings, 29 C.F.R. Part 2, Subpart B
- F. Federal Rules of Civil Procedure (Dec. 1, 2007)
- G. Federal Rules of Civil Procedure (uscourts.gov 2007)
- H. Federal Rules of Evidence (uscourts.gov 2006)
- I. Federal Rules of Appellate Procedure (uscourts.gov 2007)

XXII. Internal Revenue Manual provisions: Part 1. Organization, Finance and Management; Chapter 25. Practice Before the Service; Section 1. Rules Governing Practice Before the IRS

- A. Main Headings:
  - 1. 1.25.1 Rules Governing Practice Before the IRS
  - 2. 1.25.1.1 Practice Before the IRS Overview
  - 3. 1.25.1.2 Authorities Governing the Rules of Practice
  - 4. 1.25.1.3 Referral to the Office of Professional Responsibility
  - 5. 1.25.1.4 Responsibilities of the Joint Board for the Enrollment of Actuaries (JBEA)
  - 6. Exhibit 1.25.1-1 How to Make a Referral to the Office of Professional Responsibility (OPR)
- B. Selected Practice Aspects of the IRM 1.25.1.1
  - 1. "Exchange of Information" is not practice. Individuals who are not

practitioners may appear before the IRS as a witness or communicate to the IRS on a taxpayer's behalf, and appear as a witness but they may not advocate.

2. Circular 230 provides the regulations governing the practice before the IRS and should be consulted regarding rules of practice. These rules also apply to persons who have limited practice privileges because of their relationship to the taxpayer.

C. Referral to the Office of Professional Responsibility: If you suspect a practitioner of misconduct, you should make a referral to the Office of Professional Responsibility (OPR). OPR is responsible for instituting disciplinary action against practitioners. Possible sanctions for violations include reprimand, censure, suspension or disbarment against a practitioner. OPR also may seek a monetary penalty against the practitioner and, under some circumstances, the practitioner's employer or firm. Finally, OPR may seek Department of Justice action to obtain an injunction.

1. Examples of Misconduct (that IRS personnel should be looking for):
  - (a) Failure to exercise due diligence in statements or representations to a client or to the IRS.
  - (b) Causing unreasonable delays.
  - (c) Demonstrating incompetence and disreputable conduct (e.g., giving false or misleading statements, or diverting payments intended for IRS)
  - (d) Failure to file a federal tax return
  - (e) Engaging in contemptuous conduct (e.g., abusive language, making false accusations, or circulating malicious or libelous matter)
  - (f) Attempting to influence the official action of an IRS employee (e.g., threats, coercion or gifts).
  - (g) Issuing written advice such as tax opinions, that fails to comply with applicable standards.
  - (h) Certain violations such as threats or evasion of taxes should also be referred to Treasury Inspector General for Tax Administration (TIGTA) or Criminal Investigation (CI)I.
  - (i-) Each referral should describe and document the practitioner's actions in order to support disciplinary action. Include a summary of the suspected misconduct that provides as much detail as possible regarding the misconduct in question and supporting documentation. Exhibit 1.25.1-1 provides instructions on how to make a referral that is "actionable", i.e., a referral that is complete and provides as much information about the alleged misconduct as reasonably possible.
  - (j) Once you make a referral, OPR will contact you within 30 days to acknowledge the referral and follow up with a request for information. As the case progresses, OPR may need additional information and cooperation from you, other field offices, or other parts of the Service.
  - (k) OPR's response to the referral will correspond to the seriousness

of the alleged misconduct. For example, under certain circumstances, OPR may simply contact a tax practitioner to discuss the matter informally. Such an informal contact may stop the offending behavior. In other cases, OPR will investigate the matter further, issue a more formal contact to the practitioners, attempt a formal settlement, and, if necessary, initiate an action for the practitioner's disbarment from practice before the IRS. Most cases are resolved at a point between those two extremes. To proceed on any case, OPR must have enough information to clearly frame the allegations, understand the severity of the action, and place it within the framework of Treasury Department Circular No. 230.

- (l) Contact your Area Return Preparer Coordinator (RPC) to assist you with OPR referral issues for they may be aware of other issues involving the same practitioner. Also provide a copy of your OPR referral to the Area RPC. See <http://nhq.no.irs.gov/opr/>.
2. "HELPFUL" suggestions to the IRS officer.
- (a) Practitioner Fail to exercise due diligence?
  - (b) Was the conduct more than a simple error but less than willful or reckless misconduct? Negligence?
  - (c) Cause an unreasonable delay in the prompt disposition of any matter before the IRS? Miss appointments?
  - (d) Not follow through on promised documentation?
  - (e) Hinder the Service in processing the case?
  - (f) Demonstrate incompetence and disreputable conduct?
  - (g) Did the practitioner fail to file a Federal tax return or evade the assessment of any Federal tax?
  - (h) Knowingly Counsel or suggest to a client or prospective client an illegal plan to evade Federal taxes or tax payment?
  - (I-) Omit income from his/her own or a client's Federal income tax return?
  - (j) Did the practitioner engage in contemptuous conduct? Use abusive language or any other inappropriate conduct?
  - (k) Make false accusations and statements knowing them to be false?
  - (l) Circulate or publish malicious or libelous matter?
  - (m) Directly or indirectly attempt to influence the official action of any officer or employee of the IRS? Use threats, false accusation, duress or coercion? Offer you a gift, favor or thing of value to influence the outcome of a case?

### XXIII. CIRCULAR 230 DUTIES OWED TO THE CLIENT

- A. Exercise Due Diligence (§10.22)
- B. Contingent Fees & Negotiating Checks (§10.27/10.31)
- C. No Conflicting Interests Without Consent (§10.29)
- D. Advertising and solicitation (§10.30)
- E. Advising of Errors and Omissions and their Consequences (§10.21)
- F. Unreasonable Delay of Matters Pending Before the IRS (§10.22)
- G. Assisting Suspended Practitioners in Practice Before the IRS (§10.24)

- H. Providing False or Misleading Information to the IRS (§10.51(a)(4))
- I. False or Misleading Opinions - oral or written (§10.51(a)(13))
- J. Signing Returns, Advising on Positions on Submissions in a Manner which Violates §10.34

XXIV. Proposed New §10.34 (a) (currently reserved)

- (a) Tax returns. (1) A practitioner may not willfully, recklessly, or through gross incompetence--
    - (ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that-
      - (A) Lacks a reasonable basis;
      - (B) is an unreasonable position as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance); or
      - (C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional regard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).
- (NOTE: Copy of document from OPR, and the outline format appears to be in error, but the section is reproduced as given.)

XXV. Compare: Existing §10.34. Standards with respect to tax returns and documents, affidavits and other papers.

- (a) [Reserved]
- (b) Documents, affidavits and other papers —
  - (1) A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.
  - (2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —
    - (i-) The purpose of which is to delay or impede the administration of the Federal tax laws;
    - (ii) That is frivolous; or
    - (iii) That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.
- (c) Advising clients on potential penalties —
  - (1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —
    - (i-) A position taken on a tax return if —
      - (A) The practitioner advised the client with respect to the position; or
      - (B) The practitioner prepared or signed the tax return; and
    - (ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.
  - (2) The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.
  - (3) This paragraph (c) applies even if the practitioner is not subject to a

penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.

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

(e) [Reserved]

(f) Effective/applicability date. Section 10.34 is applicable to tax returns, documents, affidavits, and other papers filed on or after September 26, 2007.

#### XXVI. Proposed §10.36 Procedures to ensure compliance.

A. Proposed §(b)

(b) Requirements for tax returns and other documents. Any practitioner who has (or practitioners who have or share) principal authority and responsibility for overseeing a firm's practice of preparing tax returns, claims for refunds, or other documents for submission to the Internal Revenue Service 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 Circular 230. Any practitioner who has (or practitioners who have or share) this principal authority will be subject to discipline for failing to comply with the requirements of this paragraph if-

- (1) The practitioner through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that the firm has adequate procedures to comply with Circular 230, 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 Circular 230; or
- (2) 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, who does not comply with Circular 230 and the practitioner through willfulness, recklessness, or gross incompetence fails to take prompt action to correct the noncompliance.

B. Comment. This provision extends the "taint" of individuals practicing badly to their firm. This is not always simply a case of spreading liability to other practitioners. For example, where a licensed individual works for an unlicensed firm, and where the firm takes advantage of the license of the employee, this will enable pursuit of the firm as a whole, in addition to the "practitioner".

#### XXVII. Mandatory OPR Referral triggers

A. IRC §6694(b) Willful attempt to understate the liability for tax.

B. IRC §6700 Promoting abusive tax shelters

C. IRC §6701(a) Aiding and abetting understatement of tax liability (appraisers)

- D. IRC §7407 Action to enjoin Tax Return Preparers
- E. IRC §7408 Action to enjoin specific conduct re: tax shelters and reportable transactions.

XXVIII. Discretionary OPR Referral triggers

- A. IRC §6662 Accuracy related penalty with facts suggesting lack of due diligence.
- B. IRC §6694(a) Negligent or Intentional disregard of tax rules and regulations (with pattern)
- C. IRC §6695(a) Failure to furnish copy of return.
- D. IRC §6695(b) Failure to sign a tax return.
- E. IRC §6695(d) Failure to keep a copy of tax return or a list of taxpayers for three years.
- F. IRC §6702 Frivolous tax returns or submissions.
- G. IRC §7206 Fraud and false statements.
- H. IRC §6111 & §6112 Failure to comply with tax shelter registration requirements.

XXIX. TAKEOVER OF TAX PREPARERS

- A. Amendment Circular 230 to apply to the preparation of tax returns and tax return preparers, thereby DIRECTLY expanding OPR's jurisdiction over practitioner conduct.
- B. IRS Publication 4832, Return Preparer Review (Rev. 12-2009) outlines this change.

XXX. THE ADMINISTRATIVE LAW JUDGE

- A. Background: The Administrative Law Judge (ALJ) function was created by the Administrative Procedure Act (APA) in 1946 to ensure fairness in administrative proceedings before Federal Government agencies. ALJs serve as independent impartial triers of fact in formal proceedings requiring a decision on the record after the opportunity for a hearing. In general, ALJs prepare for and preside at formal proceedings required by statute to be held under or in accordance with provisions of the APA, codified, in relevant part, in sections 553 through 559 of title 5, United States Code (U.S.C.). ALJs rule on preliminary motions, conduct pre-hearing conferences, issue subpoenas, conduct hearings (which may include written and/or oral testimony and cross-examination), review briefs, and prepare and issue decisions, along with written findings of fact and conclusions of law. The Federal Government employs ALJs in a number of agencies throughout the United States. Cases may involve Federal laws and regulations in such areas as admiralty, advertising, antitrust, banking, communications, energy, environmental protection, food and drugs, health and safety, housing, immigration, interstate commerce, international trade, labor management relations, securities and commodities markets, social security disability and other benefits claims, and transportation.
- B. Qualifications: An applicant must meet both the licensure and experience requirements and pass the OPM administrative law judge competitive examination to qualify for an ALJ position.
- C. Licensure: Applicants must be licensed and authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or

any territorial court established under the United States Constitution throughout the selection process, including any period on the standing register of eligibles. Judicial status is acceptable in lieu of "active" status in States that prohibit sitting judges from maintaining "active" status to practice law. Being in "good standing" is acceptable in lieu of "active" status in States where the licensing authority considers "good standing" as having a current license to practice law.

- D. **Qualifying Attorney Experience:** Applicants must have a full seven (7) years of experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State or local level. Cases must have been conducted on the record under procedures at least as formal as those prescribed by sections 553 through 559 of title 5, U.S.C. Qualifying litigation experience involves cases in which a complaint was filed with a court, or a charging document (e.g., indictment or information) was issued by a court, a grand jury, or appropriate military authority, and includes:
1. participating in settlement or plea negotiations in advance of trial;
  2. preparing for trial and/or trial of cases;
  3. preparing opinions;
  4. hearing cases;
  5. participating in or conducting arbitration, mediation, or other alternative dispute resolution approved by the court; or
  6. participating in appeals related to the types of cases above.
- E. **Qualifying Administrative law Experience:** involves cases in which a formal procedure was initiated by a governmental administrative body and includes:
1. participating in settlement negotiations in advance of hearing cases;
  2. preparing for hearing and/or trial of cases;
  3. preparing opinions;
  4. hearing cases;
  5. participating in or conducting arbitration, mediation, or other alternative dispute resolution approved by the administrative body; or
  6. participating in appeals related to the types of cases above.

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