REGULATIONS

CONDUCTING BUSINESS UNDER CIRCULAR 230

BY SHELDON H. SMITH, ESQ., APM

Rules governing practice before the IRS are prescribed by Treasury Department Circular No. 230 and the IRS's Statement of Procedural Rules. Circular 230 is a regulation at 31 CFR, Subtitle A, Part. 10 last published on May 31, 2011 to be effective on August 2, 2011.

"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; 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." *31 CFR § 10.2(a)(4).*

PERSONS QUALIFIED TO PRACTICE BEFORE THE IRS

Circular 230 identifies the following persons as qualified to practice before the IRS:

- An attorney who is a member in good standing of the bar of the highest court of any state, U.S. possession, or the District of Columbia. *31 CFR §§ 10.3(a).*

- A person qualified to practice as a certified public accountant (CPA) in any state, possession, or the District of Columbia. *31 CFR §§ 10.3(b).*

- A person not automatically admitted as an attorney or CPA can qualify to practice before the IRS as an "enrolled agent," "enrolled retirement plan agent," "enrolled actuary," or "registered tax return preparer." *31 CFR §§ 10.3(c), 10.3(d), 10.3(e)* and *10.3(f).*

An enrolled actuary is an individual who is enrolled as an actuary by the Joint Board for the Enrollment of Actuaries. *31 CFR § 10.3(d)(1).* ASPPA members who are actuaries must follow the Code of Professional Conduct for Actuaries.

An enrolled retirement plan agent (ERPA) is someone who demonstrates special competence in tax matters by written examination in qualified retirement plans. *31 CFR § 10.4(a)* and *(b).* TPAs who are not ERPAs or who are not otherwise practitioners do not fall under the supervision of OPR and Circular 230 unless they participate in the preparation of a return as described below.

Practice before the IRS is regulated by the Office of Professional Responsibility (OPR). *31 CFR § 10.1.* Early on, the IRS distinguished the preparation of returns from the role of an "advocate," who is "one who acts in behalf of the taxpayer in urging particular determinations with respect to issues or controversies." *Rev. Proc. 68-29, 1968-2 CB 913.* The 2007 edition of Circular 230 provided that preparation of returns is not, by itself, practice before the IRS and was not regulated by Circular 230. The 2011 restated Circular 230, however, provides that "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 [Circular 230], as well as subject to the sanctions for violation of the regulations in [Circular 230]."

In other words, many individuals who are not lawyers, accountants, ERPAs, actuaries, or enrolled agents who are participating in the preparation of returns (including the Form 5500) fall under the jurisdiction of the OPR for some purposes. In every instance, Circular 230 is directly or indirectly imposing ethical conduct on practitioners.

STANDARDS OF PROFESSIONAL CONDUCT

Circular 230 imposes many duties on "practitioners," *i.e.*, persons qualified to practice before the IRS, that bear on proper ethical conduct, including the following:

Response to IRS requests for records or information.
A practitioner must submit records or information promptly upon proper request by the IRS unless the representative "believes in good faith and on reasonable grounds" that the information is privileged. *31 CFR § 10.20(a)(1).* Privilege, and the determination of its application, is typically a determination to be made by an attorney. The law of privilege is complex. Generally, communications between a client and counsel are privileged communications. In certain circumstances having to do with tax advice, a privilege also applies with respect to communications between a client and other Circular 230 practitioners. *Internal Revenue Code § 7525.*

A privilege, when extant, belongs to the client, not to the practitioner, and only the client can waive it. Therefore, it's very important that the practitioner not inadvertently, or through lack of understanding of the law of privilege, do so. A practitioner who causes a waiver without the client's consent may well find himself or herself to be a defendant in a civil action. An ethical (and wise) practitioner who is not an attorney will consult with one when issues of privilege exist.

If the IRS requests records or information not within the possession or control of a practitioner or his or her client, the practitioner must "promptly notify" the requesting officer or employee and provide any information that he or she has "regarding the identity of any person who the practitioner believes may have possession or control of the requested records or information."

A practitioner must make "reasonable inquiry" of a client about the possession or control of the records or information but is not required to "make inquiry of any other person or independently verify any information provided by the… client regarding the identity of such persons." *31 CFR § 10.20(a)(2).* A practitioner may not "interfere, or attempt to interfere, with any proper and lawful effort" of the IRS to "obtain" any record or information unless the practitioner, "in good faith and on reasonable grounds," believes that the record or information is privileged. *31 CFR § 10.20(c).*

Return preparation and client errors.
A practitioner is required to exercise due diligence in preparing returns and other papers relating to IRS matters and in determining the "correctness" of his or her oral or written representations to the Treasury and clients with respect to IRS matters. *31 CFR § 10.22(a).* A practitioner may

rely on the work of another where the practitioner uses reasonable care in engaging, supervising, and training that person. *31 CFR § 10.22(b)*. It is unethical, in a pure sense, to hire employees who do not possess the requisite skills and then fail to supervise and train them properly. The moral duty to both the new employee and the clients would be violated.

Upon learning that a client has not complied with the tax laws or has made an error in or omission from a return, document, or affidavit that the client has submitted or executed, a practitioner must promptly advise the client of the noncompliance, error, or omission and of the legal consequences of the noncompliance, error, or omission. *31 CFR § 10.21*. This duty, however, does not include an obligation to advise the client to amend a previously filed return or other document to correct an inadvertent error. The moral obligation that one has to the tax system goes only so far, but the line is not clear. Never forget that the federal income tax system is an adversarial one. Finding the line and knowing when it can be crossed can impose moral uncertainty with respect to the system, your colleagues, and, of course, your client.

Client records.
At a client's request, a practitioner must "promptly return" records of the client that the client needs to comply with his or her federal tax obligations. *31 CFR § 10.28(a)*. This responsibility is "generally" not obviated by the "existence of a dispute over fees," but if "applicable state law" permits a practitioner to retain records of a client with which he or she has a fee dispute, the practitioner is only required to return records that the client must attach to his or her return. Even in this case, however, a practitioner must allow the client a "reasonable" opportunity to "review and copy" any records retained by the practitioner that the client needs to comply with federal tax obligations. A practitioner may retain copies of records returned to a client. *31 CFR § 10.28(a)*.

Conflicting interests.
The problems of actual, inherent, and potential conflicts of interest and the difficulty in discovering and handling these conflicts present some simple and some not so simple issues for most consulting professionals. Not knowing who the client is will lead the consultant to potentially serious conflicts of interest. Identifying your client, having a proper engagement letter or administrative services agreement with that client, and then identifying conflict concerns will help the professional avoid a conflict of interest.

It's best, of course, to avoid even the appearance of a conflict of interest. Transparency and disclosure are more and more the required tenets of practice in the benefits arena, and failure to disclose potential conflicts of interest could lead to litigation whenever someone incurs a loss that may or may not be the result of the conflict itself.

Generally, a practitioner may not represent a client before the IRS if "the representation involves a conflict of interest." *31 CFR § 10.29(a)*. Such a conflict exists if representation of one client "will be directly adverse to another client" or if there is "a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner."

A representation involving a conflict of interest is allowed, however, if the practitioner "reasonably believes" that he or she "will be able to provide competent and diligent representation to each affected client," the representation is not "prohibited by law," and "[e]ach affected client gives informed consent, confirmed in writing." *31 CFR § 10.29(b)*.

Fees.
A practitioner may not "charge an unconscionable fee" for representing a client in a matter before the IRS. *31 CFR § 10.27(a)*. "Unconscionable" is not defined in Circular 230 and is subject to interpretation. With the advent of Department of Labor regulations on fee disclosure, standards may arise that would set certain baselines for reasonable fees. It may, therefore, be more readily determined if a fee is "unconscionable." The rules on fees focus heavily on contingent fees, not typically used in the benefits arena and, therefore, not addressed here.

Most complaints received by ASPPA from third parties that involve an ASPPA member deal with fee issues. Occasionally, but rarely, these border on inappropriate charges, but many involve failure by the member to communicate fees well and properly. Good ethical conduct would impose on the member a duty to communicate with a client about fees well and properly. That would be consistent with a moral obligation.

Advertising and solicitation.
A practitioner may not, "with respect to any" IRS "matter," use "any form of public communication or private solicitation" containing a "statement or claim" that is "false, fraudulent, … coercive[,] misleading or deceptive" and may not "participate in the use of" that type of communication or solicitation. *31 CFR § 10.30(a)(1)*.

A practitioner may not, directly or indirectly, make an "uninvited… solicitation of employment" in a matter "related to" the IRS if the solicitation "violates federal or state law or other applicable rule." *31 CFR § 10.30(a)(2)*. Moreover, a "lawful solicitation" by or on behalf of a practitioner must "clearly identify the solicitation as such and, if applicable, identify the source of the information

used in choosing the recipient."

"A practitioner may not persist in attempting to contact a prospective client [who] has made it known to the practitioner that he or she does not desire to be solicited." *31 CFR § 10.30(c).*

A practitioner may "publish… a written schedule of fees" and "disseminate… fee information," such as fixed fees for particular routine services, hourly rates, a range of fees for certain services, and the fee for an initial consultation. *31 CFR § 10.30(b)(1)(i).* Fee information may be communicated by, for example, professional lists, telephone directories, newspapers, magazines, mailings, emails, faxes, hand-delivered flyers, radio, or television, as long as the method chosen does not cause a communication to be untruthful, deceptive, or "otherwise in violation of" Circular 230. *31 CFR § 10.30(c).*

If "costs" may be incurred in a matter, fee information about the matter must indicate whether clients are responsible for the costs. *31 CFR § 10.30(b)(1)(ii).* A practitioner disseminating fee information may not charge more than the stated rate or rates for at least 30 calendar days after the information is last published. *31 CFR § 10.30(b)(2).* A practitioner who makes a solicitation or disseminates fee information by radio or television must retain "a recording of the actual transmission." *31 CFR § 10.30(c).*

Other Circular 230 obligations that bear on ethical responsibilities.

A practitioner must not "unreasonably delay the prompt disposition of any matter before the [IRS]." *31 CFR § 10.23.*

A practitioner may not, in any matter "constituting practice before" the IRS, "knowingly" accept assistance from, or provide assistance to, a person who has been disbarred or is under suspension from practice before the IRS. *31 CFR § 10.24(a).*

A practitioner may not "take acknowledgments, administer oaths, certify papers, or perform any official act as a notary public" with respect to a matter "administered by" the IRS if he or she is "employed as counsel, attorney, or agent" in the matter or "may be in any way interested." *31 CFR § 10.26.*

"A practitioner who prepares tax returns may not endorse or otherwise negotiate any check issued to a client by the government in respect of a federal tax liability." *31 CFR § 10.31.*

Best practices.

The provisions of Circular 230 on best practices are "solely aspirational," but "tax professionals are expected to observe these practices to preserve public confidence in the tax system." *TD 9165, 69 Fed. Reg. 75,839, 75,840* (Dec. 20, 2004). From a moral obligation, *i.e.*, ethical one, best practices should logically be more than aspirational. Under Circular 230, it's simply that violation of them would not directly lead to discipline. However, many of the more precise mandates of Circular 230 are subsumed by these best practices regardless.

"Best practices" include the following:

- "Communicating clearly with the client regarding the terms of the engagement." *31 CFR § 10.33(a)(1).*

- "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." *31 CFR § 10.33(a)(2).*

- "Advising the client regarding the import of the conclusions reached… " *31 CFR § 10.33(a)(3).*

- "Acting fairly and with integrity in practice before the Internal Revenue Service." *31 CFR § 10.33(a)(4).*

DISCIPLINARY PROCEEDINGS REGARDING PRACTITIONERS

The OPR may censure a practitioner or suspend or disbar him or her from practice before the IRS. *31 CFR § 10.50.* Discipline will result if the practitioner is "shown to be incompetent [or] disreputable," is convicted of a federal tax law violation or any criminal offense involving dishonesty or breach of trust or any federal or state law for which the conduct demonstrates that the practitioner is unfit to practice before the IRS. Providing false or misleading information to the IRS, improperly soliciting employment, willfully failing to file a federal tax return, or willfully evading tax or assisting someone else to do so will result in discipline.

Further, misappropriating client funds relevant to taxes, bribing or attempting to bribe an IRS official, state disbarment and acting contemptuously toward an IRS officer will all lead to discipline. *31 CFR § 10.51.*

The sanction of "censure" may be either a private or a public reprimand. *31 CFR § 10.50(a).* The Treasury may also "impose a monetary penalty" on an offending practitioner or the practitioner's firm. *31 CFR § 10.50(c).* The OPR, on learning of conduct justifying censure, suspension, or disbarment, may privately reprimand a practitioner without any formal proceeding. *31 CFR § 10.60(a).* PC

Sheldon H. Smith, Esq., APM, is a partner in Bryan Cave LLP in Denver.