

2017 Updates on Tax Ethics

Frank J. Rooney, Esquire
Rooney Law Firm
Offices in CO, MD and VA
303-534-1690 Colorado
703-527-2660 Virginia
301-984-7505 Maryland
703-636-4445 Fax
www.irsequalizer.com

Course Overview

- IRS OPR Overview
- Due Diligence
- Due Diligence to Client
- Due Diligence to IRS
- IRS Preparer Representation

IRS OPR Overview



OPR Function

OPR Responsibility:

- Practice Standards Oversight
- Independent Investigations
- Propose/Negotiate Discipline
- Administrative Hearings & Appeals

Oversight of IRS “Practice”

All matters connected with a presentation to the IRS relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations **administered by the IRS**

Preparing or filing documents, corresponding and communicating with the IRS, rendering written advice, and representing a client at conferences, hearings and meetings

Practice = All Tax Return Preparation

Form 2848 Attestation of Circular 230

Part II Declaration of Representative

Under penalties of perjury, I declare that:

- I am not currently under suspension or disbarment from practice before the Internal Revenue Service;
- I am aware of regulations contained in Circular 230 (31 CFR, Part 10), as amended, concerning practice before the Internal Revenue Service;
- I am authorized to represent the taxpayer identified in Part I for the matter(s) specified there; and
- I am one of the following:
 - a Attorney—a member in good standing of the bar of the highest court of the jurisdiction shown below.
 - b Certified Public Accountant—duly qualified to practice as a certified public accountant in the jurisdiction shown below.
 - c Enrolled Agent—enrolled as an agent under the requirements of Circular 230.
 - d Officer—a bona fide officer of the taxpayer's organization.
 - e Full-Time Employee—a full-time employee of the taxpayer.
 - f Family Member—a member of the taxpayer's immediate family (for example, spouse, parent, child, grandparent, grandchild, step-parent, step-child, brother, or sister).
 - g Enrolled Actuary—enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242 (the authority to practice before the Internal Revenue Service is limited by section 10.3(d) of Circular 230).
 - h Unenrolled Return Preparer—Your authority to practice before the Internal Revenue Service is limited. You must have been eligible to sign the return under examination and have signed the return. See Notice 2011-6 and Special rules for registered tax return preparers and unenrolled return preparers in the instructions.
 - i Registered Tax Return Preparer—registered as a tax return preparer under the requirements of section 10.4 of Circular 230. Your authority to practice before the Internal Revenue Service is limited. You must have been eligible to sign the return under examination and have signed the return. See Notice 2011-6 and Special rules for registered tax return preparers and unenrolled return preparers in the instructions.

How Does OPR Conduct Business?

- Referrals
- Evaluate for 230 violation and willful conduct
- Consider Alternative Discipline Options or Pre- allegation Letter
- Investigation
- Dispute - Due Process
- Final Agency Decision (“FAD”)

Key Circular 230 Targeted Areas

Diligence as to Accuracy (10.22)

Due Diligence Standards – Returns/Docs (10.34)

Negotiation of Taxpayer Checks – (10.31)

Fees – (10.27)

Giving False or Misleading Info (10.51(a)(4))

Willfully Assisting, Counseling or Encouraging a Client to Evade Taxes or Payment Thereof (10.51(a)(7))

Conflicting Interests (10.29)

Circular 230 Potential Sanctions:

- Reprimand (private, unless ALJ imposed)
- Censure (public reprimand)
- Suspension
- Disbarment
- Monetary Penalty

OPR Penalty Options

Reprimand (Private)

Censure (Public Reprimand)

Suspension

Disbarment

Monetary Sanction (Individuals and Firms)

§10.36 Compliance Procedures

Any practitioner with principle authority (or have or share authority) for a firm's practice preparing tax returns, claims for refunds or other documents for submission to IRS:

Must take reasonable steps to ensure the firm has adequate procedures in effect for all members for complying with Circular 230 Will be subject to discipline for failing to comply IF-

§10.36 Compliance Procedures Cont'd.

Practitioner willfully fails to take prompt action and

- One or more individuals engage in pattern or practice in violation of Circular 230 or

- The practitioner knows or should have known of the pattern or practice and willfully fails to correct the noncompliance

Due Diligence

- ABA Model Ethics Rule 1.3: Diligence
 - Lawyer Act with Reasonable Diligence and Promptness With Client Representation
- Circular 230 Section 10.22 Diligence with Client and the IRS

Due Diligence as to Accuracy (10.22)

Must exercise Due Diligence in: Preparing, approving and filing tax returns, documents, affidavits etc. relating to IRS matters.

Determining correctness of oral/written representations made to the client or to Treasury personnel.

Reliance on another's work product? With reasonable care.

Due Diligence to Client

Competence

- ABA Rule 1.1: Competence
 - Lawyer Shall Provide Competent Representation i.e. Knowledge, Skill, Thoroughness, and Preparation Needed for Representation
 - Circular 230-Rule 10.35 Requires Knowledge, Skill, Thoroughness, and Preparation Needed for Representation

Standards for Tax Returns Section 10.34(a)

May not sign a tax return or advise a position on a tax return, willfully, recklessly, or through gross incompetence if:

- Lacks reasonable basis
- Unreasonable position (6694(a)(2))
- Willful attempt to understate liability (6694(b)(2)(A))
- Reckless, intentional disregard of rules and regulations (6694(b)(2)(B))
- Patterns matter

Penalties and Client Reliance- 10.34(c), (d)

Must advise client of potential penalties and their avoidance through disclosure (10.34(c))

Reliance on client information in good faith, without verification, is Ok, but...Cannot ignore implications of other information furnished

Cannot ignore actual knowledge

Must make reasonable inquiries for incorrect, inconsistent or incomplete information (10.34(d))

No willful blindness.

No Don't ask, don't tell.

Negotiation of Taxpayer Checks (10.31)

Anyone subject to Circular 230 may not endorse, or otherwise negotiate, any refund check—No cashing

- No endorsing

- No depositing to trust account

- No split electronic transfers

- Client concurrence is irrelevant

- IRC 6695(f) penalty

Fees (Section 10.27)

No Unconscionable Fees

Contingency Fee Restrictions Refer to
Circular 230 § 10.27(b)(1) – (4)

Circular 230 Section 10.37 Requirements for written advice.

- The practitioner must:
 - (i) Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);
 - (ii) Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;
 - (iii) Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;
 - (iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;

Conflicts

- ABA Rule 1.7 and 1.8 No Representation of Multiple Clients if Conflicts or Enter Business Relationship Unless Full Disclosure and No Other Potential Conflict Issues Exist
- Circular 230 Section 10.29 Conflicts in IRS Representation

Conflicting Interests (10.29) Prohibits Representation Where:

One Client's Interest is Directly Adverse to Another

Significant risk of material limitation By Responsibilities to Another Client, Former Client or Third Person

Or, by the **personal interests of the practitioner**

Conflicting Interests (10.29) Cont'd.

May represent
if:

You have
reasonable
belief in ability
to provide
competent,
diligent
representation
to each
affected client

Not legally
prohibited

EACH affected
client waives
conflict, by
giving
informed
consent – in
writing at the
time conflict is
known

Handling Potential Conflicts Under Section 10.29

If Conflict May Exist or May Develop,
IRS Representative Must Decline
Unless:

Informed Consent

From Each of the
Parties When
Representative
Knows of Conflict

Written Confirmation
within a Reasonable
Time but No later 30
Days 10.29(b)

Hold Consents for 36
Months 10.29(c)

Examples of Potential Conflict Scenarios

Divorcing Couple

Business Partners with Trust Fund Liability

Innocent Spouse

Practitioner Represents Client Before the IRS with Penalty Issues

Advertising

- ABA Rule 7.2 Legal Services Restrictions on Advertising and Rule 7.3 Direct Solicitation of Clients

- Circular 230 Section 10.30 Advertising and Solicitation Restrictions

Due Diligence to IRS

- Duties to IRS

Disreputable Conduct – Giving False or Misleading Info (10.51(a)(4))

No participating in any way in the giving of false/misleading info to the Dept. of Treasury or any officer/employee thereof

Includes: Testimony

Federal tax returns

Financial statements

Applications

Affidavits, declarations, and any other document or statement, written or oral

18 USC 1001 Criminal Felony

jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

➔ (2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section [2331](#)), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110₃₀, or

Disreputable Conduct – Willfully Assisting an illegal plan to Evade Taxes or Payment (10.51(a)(7))

Willfully assisting, counseling, encouraging, suggesting to a client/prospective client: An illegal plan to evade Federal taxes or payment thereof

Violation of any Federal tax law

“You do need to pay attention”

Preparer Representation

TIGTA Preparer Penalty Recommendations

WHAT TIGTA RECOMMENDED

TIGTA recommended that the IRS update the Internal Revenue Manual and implement improvements to ensure that managers and employees adhere to internal procedures for documenting actions and results in the preparer penalty case files. TIGTA also recommended that the IRS develop procedures to expedite assigning I.R.C. §6694 preparer penalty tax accounts to a revenue officer as well as to give more consideration before suspending collection actions on these types of accounts.

IRS officials agreed with all of our recommendations and plan to take appropriate corrective actions.

TIGTA Report on Preparer Penalty

Finally, TIGTA analyzed the Master File to determine if the IRS is effectively enforcing paid preparer penalties. It found that the IRS isn't treating this issue as a top priority, so it often goes by the wayside. Without increasing its emphasis on policing tax return preparers, TIGTA says it's unlikely the IRS can change its behavior and increase voluntary compliance.

Can a Preparer Rely Upon Documentation from the Taxpayer That Hasn't Been Verified?

Generally
Yes,
Provided:

- Reliance is In
Good Faith

Can a Preparer Rely on Information and Advice from Another Party without Verification?

Yes, Provided in Good Faith and:

Furnished by Another Advisor,

Another Preparer,

Whether Within or Outside the Firm

Mandatory Referral to OPR of Section 6694(b) Penalty

Internal Revenue Manual 8.11.3 Material Changes (6) and Consideration of return preparer cases 8.11.3.4.1

Background

The Appeals IRM 8.11 material has been completely restructured and reorganized to address organizational changes and responsibilities in Appeals. The material was reorganized in a logical manner along IRM and Appeals' core business processes. The final information was categorized into chapters, chapter and section titles were made descriptive, the material was written in a clear and concise manner using plain language writing style, and redundant and duplicative information was removed.

Material Changes

- (1) Made minor editorial changes throughout.
- (2) Updated citations and organizational names when needed.
- (3) Added that return preparer penalties have pre-assessment appeal rights.
- (4) Changed IRM 8.11.3.4, *Return Preparer Penalties as Appeals Coordinated Issues (ACI)*, to explain that review and concurrence is no longer required before finalizing any resolution for a return preparer penalty.
- (5) Added an exception of IRM 4752's return preparer penalty cases to IRM 8.11.3.4. Added that an IRM 4752 case is not a coordinated issue.

(6) Clarified that only asserted IRC 6694(b) penalties are a mandatory referral to the Office of Professional Responsibility. Discretion should be used in referring other penalties to OPR.

(7) Removed references to closed office files.

- (8) Revised IRM to reflect new organizational files resulting from the Appeals 2012 Alignment Project.

Effect on Other Documents

This supersedes IRM 8.11.3 dated October 19, 2007. This IRM also incorporates Appeals Interim Guidance Memorandum AP-08-0412-12, *Interim Guidance for Elimination of Appeals Closed Office Files*.

Audience

Appeals employees

Effective Date

(10-01-2012)

Susan L. Latham
Director, Policy, Quality and Case Support

8.11.3.1 (10-01-2012) Return Preparer Penalty Overview

1. This section addresses the procedures for return preparer penalties considered by Appeals. Return preparer penalties are imposed

Pay 15 Percent and Refund Action

NOTE: Must File Claim for Refund within 30 Days of Demand and Pay 15 Percent of Penalty

After 6 Months with No Denial of Claim for Refund, Practitioner has One Month to File in Appropriate Federal Court for Appeal

NOTE: If Appeal Not Filed in Federal Court, Must Pay 100 Percent of Penalty to Challenge the Preparer Penalty

OPR Misconduct Examples

Common Misconduct Subject to Disciplinary Action includes:

Failure to take care of his/her
personal, business, entity or
employment tax matters

Failure to exercise due diligence

Engaging in a pattern of
contemptuous conduct

Common Misconduct Subject to Disciplinary Action includes Cont'd.:

Unreasonably delaying the prompt disposition of a Tax Matter

Charging a contingent fee in violation of §10.27

Providing false or misleading information to the IRS

Knowingly or recklessly giving false oral or written Opinions or Advice

Criminal Case With Non-Filer

- **Alaska Attorney Sentenced for Failing to File Tax Returns**

On April 15, 2016, in Anchorage, Alaska, Paul D. Stockler, a criminal defense attorney, was sentenced to 14 months in prison, one year of supervised release and ordered to pay \$886,058 in restitution to the IRS. Stockler still has not paid the more than \$800,000 in income taxes that he owed for the years 2006, 2008 and 2009. At the same time that he failed to file his tax returns and pay the taxes due, Stockler made personal expenditures for gambling, cars, and property. Stockler also failed to file timely income tax returns for the years 2000 through 2004, 2007, 2010 and 2011, failed to file employment tax returns during the years 2004 through 2008 and failed to pay employment taxes to the IRS. Stockler also submitted a false Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, to the IRS in 2009. A Form 433-A is used by the IRS to obtain financial information from a taxpayer to determine his ability to pay an outstanding tax liability. On the Form 433-A, which he signed under the penalties of perjury, Stockler failed to disclose certain retirement assets.

Questions