

Legal Ethics for EO Counsel

Introduction

The **Office of Professional Responsibility (OPR)** at the Internal Revenue Service (IRS) is responsible for all matters related to "tax practitioner" misconduct, discipline and practice before the IRS under 31 C.F.R. Subtitle A, Part 10 (Circular 230, Regulations Governing Practice before the Internal Revenue Service).

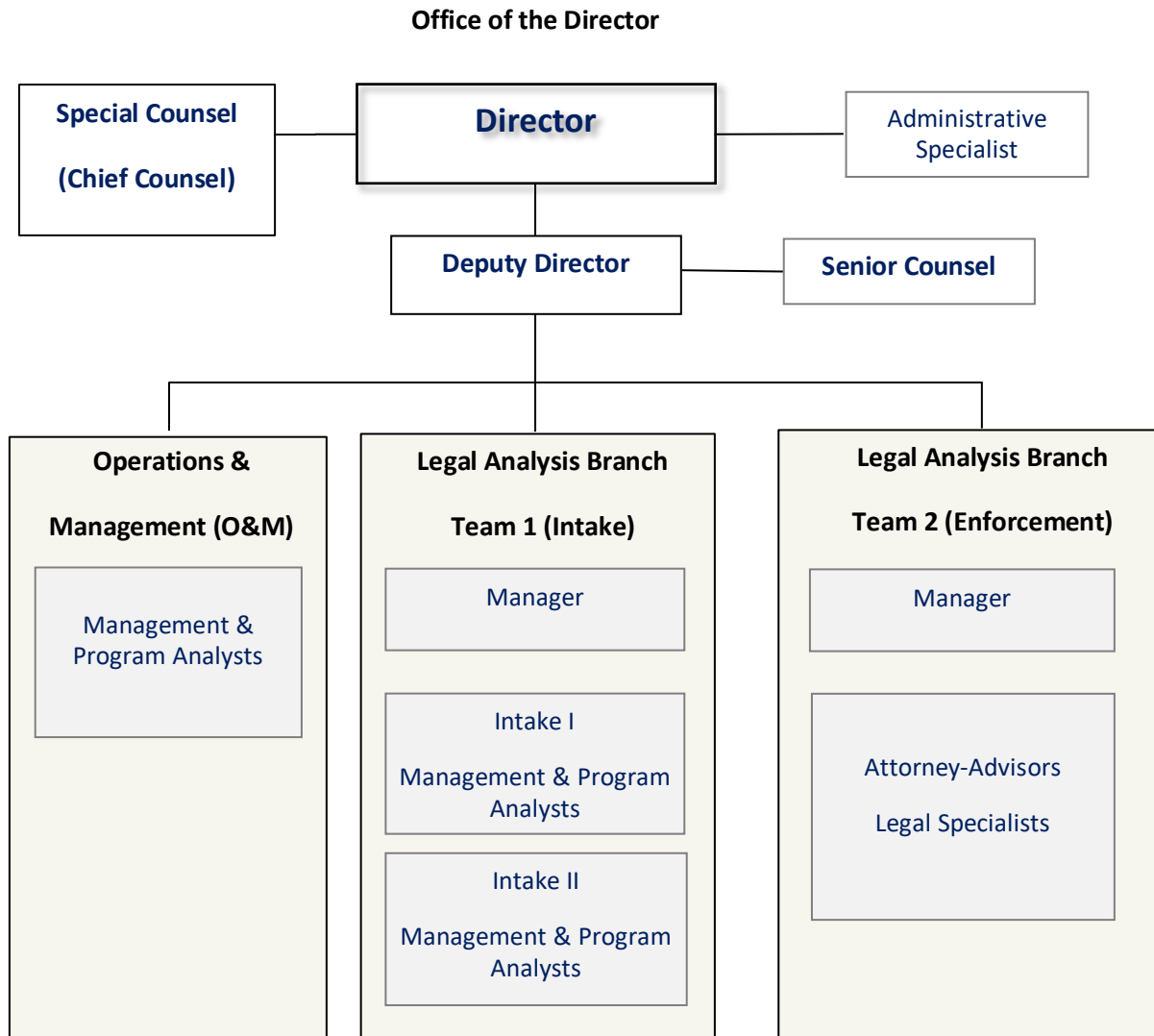
The OPR's vision, mission, strategic goals and objectives support effective tax administration by ensuring all tax practitioners, tax return preparers, and other third parties in the tax system adhere to professional standards and follow the law.

The OPR Office of the Director provides all policy and operational decisions and implementation with executive-level oversight and direction and is the final decision-maker on all disciplinary recommendations. The Director, who reports jointly to the Commissioner and the Deputy Commissioner, Services and Enforcement, has primary supervisory responsibility for the OPR, conducts outreach and education activities, and is the subject matter expert on Circular 230 ethics issues.

The OPR is composed of two branches: Operations and Management (O&M) and the Legal Analysis Branch (LAB). O&M is responsible for providing support to the organization's mission through strategic planning, employee training, information technology, stakeholder outreach and communication, performance measures, human capital planning and execution, and finance. O&M also collects and analyzes business performance data to develop operational improvement recommendations and ensure strategic distribution of financial resources.

The LAB interprets and applies the standards of practice for tax professionals in a fair and equitable manner and applies the principles of due process to the analysis, investigation and disciplinary process involving allegations of practitioner misconduct. The LAB branch is organized into two groups: **Intake** receives and process all referrals to the OPR and provides data gathering and initial case development. **Enforcement** manages the OPR's mission execution capabilities, including all due process, appeals/protests, reinstatements and FOIA requests. Enforcement develops and investigates allegations of Circular 230 misconduct, conducts settlement negotiations, proposes levels of discipline, and prepares and drafts relevant materials for Administrative Hearings or Appellate Authority reviews. Enforcement also provides subject matter expertise on issues related to privacy and FOIA disclosures specific to Circular 230 and identifies additional areas of conduct for potential case development.

OPR Organizational Structure



Statutory and Regulatory Authority

The OPR's statutory authority to address the conduct of taxpayers' representatives before the IRS is found in 31 U.S.C. § 330 (1884), not Title 26, the Internal Revenue Code. This statute was initially enacted in 1884 as part of a War Department appropriation for "horses and other property lost in the military service." Act of July 7, 1884, ch. 334, sec. 3, 23 Stat. 258. The original language states:

[T]he Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases.

Id. at 258-59.

The current statute authorizes the Treasury to regulate the practice of representatives of persons before the Treasury Department, including the IRS, and to make determinations about "fitness to practice."

For purposes of practice before the IRS, "fitness to practice" means good character, good reputation, the necessary qualifications to provide a valuable service to clients, and competence to advise and assist clients in presenting their cases.

Section 10.2(a)(4) of Circular 230 defines the term "practice" broadly. Practice before the IRS contemplates all matters relating to a presentation to the IRS with respect to a taxpayer's rights, liabilities, and privileges under laws and regulations administered by the IRS. This includes but is not limited to preparing, filing, corresponding, communicating, written advice (including emails), advocating/representing, and appraisals for tax positions. However, "practice" does not include paid tax return preparation.

The OPR has a separate role in determining whether unenrolled return preparers may represent with respect to tax returns they prepared and signed, under two revenue procedures related to limited practice: Revenue Procedure 81-38, 1981-35, I.R.B.12, 1981-2 C.B. 592 (unenrolled return preparer representation) and Revenue Procedure 2014-42, 2014-29 I.R.B. 192 (voluntary Annual Filing Season Program) which superseded and modified Rev. Proc. 81-38 and allows unenrolled preparers to represent on returns prepared/signed after December 31, 2015.

In 2011, the IRS issued a new rule (See Regulations Governing Practice Before the Internal Revenue Service, 76 Fed Reg 32,286 (June 3, 2011), that defined a "tax return preparer" as a person who "prepares for compensation, or who employs one or more persons to prepare for compensation, all or a substantial portion of any return of tax or any claim for refund of tax under the Internal Revenue Code." See 26 C.F.R. § 301.7701-15(a). Under this rule, all paid tax return preparers were required to register with the IRS,

pass a competency exam, pay an annual fee, and complete at least 15 hours of continuing education classes each year.

The case of *Loving vs. the Internal Revenue Service*, 742 F.3d 1013 (D.C. Cir. 2014), was a challenge to the agency's efforts in the 2011 revision to set competence and ethical standards for the previously unregulated tax-return preparation industry. The Circuit Court of Appeals in the District of Columbia concluded that 31 U.S.C. § 330 did not provide the authority for the IRS to impose regulatory controls over tax return preparation. The Court held that tax return preparers are not agents as they do not possess legal authority to act on behalf of the taxpayer and cannot legally bind the taxpayer.

In addition, the act of preparing a return is not representative. Under 26 C.F.R. § 601.504(a), "representation" of a taxpayer before the IRS requires a formal power of attorney. Also, use of a tax-return preparer is not representative as the taxpayer signs and submits the return in his or her own name. Representation or practice before the IRS generally encompasses interactions with the IRS during an investigation, adversarial hearing, or other adjudicative proceeding. Therefore, unenrolled return preparers who merely prepare tax returns, are not subject to the provisions in Circular 230. However, an unenrolled return preparer may be subject to Circular 230, if the practitioner engages in representation authorized through the IRS's Annual Filing Season Program (AFSP).

Established in Rev. Proc. 2014-42, the AFSP is a voluntary IRS program designed to provide limited representation rights for non-credentialed tax return preparers by incentivizing participation in continuing education courses, including ten hours on federal tax law topics, two hours on ethics and a six-hour refresher course that include a comprehensive test. Participants receive an Annual Filing Season Program - Record of Completion, which is effective for one calendar year beginning January 1 (or from the date of issuance to December 31 of the calendar year of issuance). For example, if an application is submitted on February 15, 2018, and a Record of Completion is issued on February 25, 2018, the tax return preparer's 2018 Record of Completion will be effective for tax returns and claims for refund prepared and signed from February 25, 2018 through December 31, 2018.

The AFSP allows tax return preparers who obtain the Record of Completion to represent taxpayers before the IRS during an examination of a tax return or claim for refund that they prepared and signed (or prepared if there is no signature space on the form), provided the individual: (1) had a valid Annual Filing Season Program Record of Completion for the calendar year in which the tax return or claim for refund was prepared and signed; and (2) has a valid AFSP Record of Completion for the year or years in which the representation occurs.

Under Rev. Proc. 2014-41, § 4.05(4), program participants must consent to be subject to the duties and restrictions relating to practice before the IRS in subpart B and section 10.51 of Circular 230 for the entire period covered by the Record of Completion.

However, the representation permitted by AFSP, does not allow the individual record of completion holder to represent the taxpayer before appeals officers, revenue officers, Chief Counsel, or similar officers or employees of the IRS.

Guidance on Administrative Practice before the IRS

Circular 230 is composed of four (4) subparts:

- Subpart A – Rules governing authority to practice (licensing, renewals, continuing education) addresses "Authority to Practice," including all the definitions such as who is a practitioner, who may practice before the agency, what does "practice" mean.
- Subpart B - Duties and restrictions relating to practice before the IRS contains 19 regulations that identify ethical behavior and professional responsibility that the IRS believes are appropriate to monitor and oversee with respect to individuals who represent before the IRS. There are provisions about solicitation of business and advertising; unconscionable fees; conflicts of interest; and multiple rules regarding due diligence.
- Subpart C - Sanctions for violations of Circular 230 lists the sanctions that can be imposed for violations and describes numerous forms of disreputable and incompetent conduct.
- Subpart D – Rules applicable to disciplinary proceedings (due process) provides the rules for administrative litigation that OPR, the defending practitioner, and the presiding administrative law judge must follow; notably reflecting the fact that the practitioner is entitled to due process throughout the disciplinary process.

Who May Practice Before the IRS – Circular 230, § 10.3

Generally, Attorneys, Certified Public Accountants (CPAs), Enrolled Agents (EAs), Enrolled Retirement Plan Agents (ERPAs), Enrolled Actuaries, and Appraisers may practice before the IRS.

Effective February 12, 2016, the IRS no longer offers the ERPA Special Enrollment Examination (ERPA SEE) to become an ERPA. Any current ERPAs will continue to hold the ERPA designation, allowing them to practice before the IRS. ERPAs can represent their clients before the IRS with respect to issues involving the following programs: Employee Plans Determination Letter program; Employee Plans Compliance Resolution System; and Employee Plans Master and Prototype and Volume Submitter program. In addition, ERPAs are generally permitted to represent taxpayers with respect to IRS forms under the 5500 series and can practice before Appeals, Collection, Counsel and other IRS offices with respect to the above listed matters.

An Enrolled Actuary is any individual who has satisfied the standards and qualifications as set forth in the [regulations](#) of the Joint Board for the Enrollment of Actuaries and who has been approved by the Joint Board to perform actuarial services required under the Employee Retirement Income Security Act of 1974 (ERISA). The Joint Board, which was established pursuant to section 3041 of ERISA, is responsible for the enrollment of individuals who wish to perform actuarial services under ERISA. The Joint Board is composed of five members, three appointed by the Secretary of the Treasury and two appointed by the Secretary of Labor. In addition, the Pension Benefit Guaranty

Corporation has one representative with no voting power. The Executive Director of the Joint Board for the Enrollment of Actuaries is responsible for administering the Enrolled Actuary program and conducting disciplinary proceedings.

OPR may disqualify Appraisers who have been assessed a penalty for preparing an appraisal on property he/she knew or reasonably should have known would be used with a return or claim for refund and that appraisal resulted in a substantial valuation misstatement.

How does the disciplinary process work?

The OPR's authority and case determinations are separate and independent from the enforcement functions of the IRS, e.g. LB&I, TEGE, and SBSE, which administer the Internal Revenue Code under Title 26.

Referrals to the OPR alleging violations of Circular 230 are received from a variety of sources both internal and external. Section 10.53 of Circular 230 requires mandatory referrals from all IRS personnel whenever employees suspect that there has been a violation of the Circular. In addition, if an IRC 6694(b) penalty is assessed, this is a mandatory referral to the OPR. Other penalties under IRC 6694(a), 6695, 6700 and 6701 may warrant a referral to the OPR.

The OPR also works with IRS Criminal Investigation (CI) as well as the Department of Justice (DOJ) on criminal convictions and civil injunctions. As an administrative agency, the OPR receives notices and information from state licensing agencies, such as the state bar and state board of accountancy. With board and bar notices, the OPR can exercise reciprocal jurisdiction and proceedings. Finally, the OPR receives referrals or complaints about a practitioner from current or former clients of the practitioner or from the practitioner's peers. As part of the investigative process, the OPR also routinely checks the practitioner's tax compliance to ensure that the practitioner has filed their own personal tax returns and returns for any entity over which the practitioner has some control, and whether both have paid all of their taxes.

The OPR can initiate its own projects to identify specific issues for investigation. When a referral is received, OPR independently determines, based on all available facts and circumstances, if a violation has occurred, whether the violation is one which calls into question a practitioner's fitness to continue to practice, and if so, what an appropriate sanction for the conduct is.

Following a preliminary investigation, the OPR renders an independent determination as to the likelihood that a violation of Circular 230 has occurred. If a violation is identified, the OPR communicates with the practitioner, providing the practitioner with information regarding the conduct alleged, and the fact that the OPR has initiated a disciplinary investigation. This notice gives the practitioner an opportunity to provide any evidence or documentation he or she believes is relevant to the OPR's determination. After a thorough investigation of the facts and an analysis/consideration of aggravating and mitigating

circumstances, the OPR determines the lowest level of discipline warranted for the violation(s).

Due process protections are incorporated throughout the disciplinary process. If the OPR fails to reach agreement with the practitioner as to an appropriate sanction, a complaint is drafted and the case is referred to the Office of Chief Counsel, General Legal Services (GLS). GLS offers a final opportunity to the practitioner to resolve the matter without hearing. If settlement is not reached, GLS files the complaint to commence a proceeding before an Administrative Law Judge (ALJ). The ALJ proceeding is a civil hearing during which the government and respondent present their evidence. The proceeding is conducted according to the provisions of the Administrative Procedures Act (5 U.S.C. § 500 et seq.). The case may be settled by concurrence of both parties at any time prior to the hearing.

If a hearing is conducted, and after post-hearing briefs are submitted, the ALJ issues an Initial Decision and Order as to the alleged misconduct and the appropriateness of OPR's proposed sanction. The ALJ may accept the OPR's recommendations as to the fact of violation and as to the proposed sanction; may accept the fact of violation but increase or reduce the recommended sanction; or may reject the OPR's recommendations both as to facts and sanctions, and thus dismiss the case.

Following the ALJ's Decision and Order, either party may appeal the case to the Treasury Appellate Authority. For the OPR, a decision by the Appellate Authority is a final determination in the case. In addition, if neither party appeals within 30 days, the ALJ's Initial Decision and Order becomes the Final Agency Decision (FAD).

A practitioner who wishes may file a complaint in U.S. District Court to contest the FAD when rendered by the Treasury Appellate Authority. This proceeding is also conducted according to the Administrative Procedures Act during which the Federal district judge will review findings of facts based only on the administrative record and will set aside agency action only if arbitrary or capricious, contrary to law, or an abuse of discretion. The proceeding is not a trial de novo.

Circular 230 Misconduct

While practitioners should be familiar with all the provisions of Circular 230, the following are several provisions of the Circular that warrant special attention.

Liability Under Circular 230, § 10.36 - Procedures to Ensure Compliance

Section 10.36 provides that a principal person is subject to discipline under this provision if he or she has failed to take reasonable steps to ensure that the circular and its obligations are known to employees and are being properly followed. "Principal person" is defined as an individual who has principal authority and responsibility for overseeing a firm's practice.

This section holds that if an employee, an associate, an independent contractor violates Circular 230, that individual would be responsible for their own misconduct and liable for whatever discipline that may bring. However, under 10.36 the individual who should have assumed or did assume an oversight role will also be looked at to determine whether there should be some level of culpability attributed to that person because of the lack of effort to educate and ensure compliance. The responsible person who neglects that responsibility is accountable, with no requirement that he or she had actual knowledge of the misconduct. This holds true, even if the person with principal authority for compliance has taken “reasonable steps,” he or she can be held accountable, if a violation of Circular 230 occurs and that individual who was responsible for oversight failed to take steps to stop violations that he or she knew about or should know about. If no person is readily identified as a responsible person, the IRS may identify someone within the firm as being the responsible party. As a result, tax practitioners responsible for a tax practice or tax department should develop appropriate procedures and provide adequate staff supervision to ensure that all individuals they supervise comply with Circular 230.

The AICPA has long-standing and well-established principles of quality control for accounting and auditing practices, which are outlined in [AICPA Statement on Quality Control Standards No. 8, A Firm's System of Quality Control](#). Although Circular 230, § 10.36, does not require a quality-control system, it is considered a best practice to have one. The objective of a tax practice quality control system is to provide reasonable assurance of compliance with applicable statutory, regulatory, and professional requirements, including Circular 230, § 10.36. This is a critical factor in ensuring high quality services to clients.

Due Diligence as to Accuracy – Circular 230, § 10.22

Section 10.22 is the Circular 230 general due diligence provision, which provides that practitioners must exercise due diligence in preparing or approving for submission to the IRS or filing anything that relates to IRS matters such as tax returns, tax forms, documents, affidavits, protests. This section requires that due diligence must be exercised to ensure the accuracy of representations, oral or written, made to the client or to the Treasury Department. Practitioners have an obligation to the client to ensure that the advice or information provided is correct and accurate. Practitioners also have obligations to the IRS to ensure that the representations that the practitioner is making on behalf of the client are accurate and complete as well.

Under Circular 230, exercising due diligence requires a practitioner to know the relevant facts, ask questions, assess the facts and relate to the circumstances and situation and determine whether the information is material. Practitioners should not let the client determine which facts are pertinent or significant, and which are not. Practitioners should frame questions to solicit the relevant facts and information from the client. Also, practitioner should also ensure that they understand the applicable law by either educating themselves or finding a subject matter expert upon whom the practitioner can reasonably rely upon. If the application of the law to the facts does not yield the conclusion the client is seeking, then a practitioner's due diligence obligation is to provide

the truth of the matter; determining the accuracy of representations to the client. Due diligence under section 10.22 means practitioners should determine the correctness of the matter and make sure it is being expressed or presented correctly to both clients and to the Treasury Department.

Section 10.22(b) provides a safe harbor, that a practitioner will be presumed to have exercised due diligence if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person's work. For example, with employees' work, to be able to rely on employees' work product, the practitioner needs to use care in selecting and hiring the individuals, ensure the employees are properly trained on the work and on their obligations under Circular 230. On at least a periodic basis, the practitioner should evaluate the work performance, to ensure that the employees continue to correctly understand duties and obligations.

For a practitioner to rely on another tax professional or other third-party prepared documents, a practitioner may rely on the work of another unless the practitioner has information that suggests the third-party information or document may be unreliable. If such a situation arises, the practitioner must verify the information before the practitioner can satisfy his/her due diligence obligation.

Standards for Tax Returns - Circular 230, § 10.34(a)

Section 10.34 (a) is the due diligence standard for tax return preparation, return advice, and the submission of other documents.

As mentioned earlier in the *Loving* case, tax return preparers are not deemed to be practitioners. However, if a practitioner is covered by Circular 230 by virtue of his/her representational activities and is subject to the regulations governing practice, then section 10.34 applies when the practitioner assists or advises clients in reporting items on tax returns.

The due diligence provision under 10.34(a) for tax returns applies the broad principles of 10.22 to the more specific activities related to tax returns. Section 10.34 has expanded on the general due diligence rule in the context of tax return preparation by pointing to the preparer penalty standards.

Section 10.34(a) states that a practitioner may not sign a tax return that lacks a reasonable basis, nor may the practitioner advise taking a position on a tax return that lacks a reasonable basis. The concept of reasonable basis in 10.34 is tied to the same concept of reasonable basis in the Internal Revenue Code under the accuracy-related penalty at IRC 6662, which states:

Substantial authority exists only when the weight of the authorities supporting the treatment of the tax item is substantial in relation to the weight of the authorities supporting contrary treatment.

What is the probability of success, if challenged by the IRS? The “Reasonable Basis” standard is approximately 25%, lower than substantial authority (sec. 1.6662-3(b)(3)). It falls above “not frivolous” or colorable (around 10%), but below realistic possibility of success (1 in 3 or 33%). Substantial Authority is approximately 40%. It is more precise than reasonable basis standard. It falls above realistic possibility of success standard (33%) but falls below the “More likely than not standard (which is more than 50%).

For purposes of Circular 230, a practitioner must engage in due diligence in order to meet these standards. Section 10.34(a) also says that practitioners may not sign or advise with respect to a tax return position that's a willful attempt to understate liability, either by the practitioner or the client, or that is a reckless or intentional disregard of the rules and regulations.

As with the general diligence standard in 10.22, this provision requires that the practitioner understand what the applicable law is with respect to the client's relevant facts. In this context, patterns are always going to matter. Generally, a single mistake is not what the OPR typically looks for when considering fitness under Circular 230. However, multiple mistakes, multiple demonstrations of recklessness, and multiple demonstrations of disregard or incompetence are significant facts that indicate on-going noncompliance.

Standards for Documents and Other Papers - § 10.34(b)

Subsection (b) of 10.34 provides the due diligence standards for documents and other papers. This is most applicable when the practitioner is representing someone in an examination or collection matter, or before Appeals.

When taking positions on documents that are submitted to the agency, a practitioner may not advise a position that is frivolous. This means, the probability of success, if challenged by the IRS is zero; it is patently improper. Section 10.34 also provides that practitioners may not advise making a submission that would be frivolous, or where the submission is intended to delay or impede tax administration. In addition, a practitioner may not advise making a submission that either contains or omits information that demonstrates an intentional disregard of the rules and regulations.

Penalties and Client Reliance - Circular 230, § 10.34(c) and (d)

Under this section, if a practitioner prepared the tax return, signed the return, advised the position taken on the return, or advised a position on another submission or filed it aware of the problematic position claimed on the submission and there is a potential that the client might incur a penalty, then, it is the practitioner's obligation, under section 10.34, to advise the client of that penalty exposure and their opportunity to avoid the penalty by making a disclosure on the tax return. Clients can avoid the penalty by not taking the position, especially once the client has been advised that it is likely subjecting them to a penalty.

There is no Circular 230 requirement addressing documentation of the advice a practitioner provides regarding penalty exposure. However, it is a best practice to have information in the files that indicates when the conversation occurred, what was said, and documenting the client's response and decision. This is particularly important for example, if an issue arises during an examination, the client may not recall the advice provided and the warning about penalty exposure, and the client may attempt to shift the blame.

Section 10.34(d) provides that the practitioner, "may rely, in good faith and without verification, on client information . . ." Practitioners are not required to audit the client information, but the practitioner cannot and should not ignore the implications of other information that the practitioner has been given, whether by the client or by someone else. With actual knowledge, practitioners must make reasonable inquiries regarding the information especially if it appears to be incorrect or inconsistent or incomplete. Practitioners must be able to distinguish between information or data and the characterizations or decisions. It is practitioner's responsibility, as part of due diligence, to ask the questions that lead to the characterization issues. Practitioners as the professional determines the characterization of the information.

Finally, under section 10.34, practitioners may not engage in willful blindness. Practitioners should ask relevant questions and clients need to give you answers.

Practitioners must know all the relevant facts and must know all the relevant law and apply the facts to reach a conclusion.

Disreputable Conduct – Circular 230, § 10.51(a)(4)

Circular 230 Subpart C describes Sanctions for Violations of the Regulations. Under section 10.51, the regulation lists 18 types of incompetence and disreputable conduct. Section 10.51(a)(4) prohibits practitioners from giving false or misleading information or participating in any way in giving false or misleading information to the Department of the Treasury, to any officer or employee, or to any tribunal authorized to pass on Federal tax law matters. This section takes the diligence rules from section 10.34 on return preparation and other documents to another level. The scope of this prohibition covers anything submitted to the IRS including but not limited to: testimony; tax returns; financial statements; any applications you might be filing, whether it be for PTINs or your enrollment as an enrolled agent or other enrolled practitioner; it includes affidavits, declarations, protests that you might submit to Appeals.

Disreputable Conduct – Circular 230, § 10.51(a)(7)

Section 10.51 (a)(7) identifies as disreputable and incompetent conduct willfully assisting or in some way counseling, encouraging, or suggesting to a client or a prospective client an illegal plan to evade federal taxes or the payment of the taxes, or a violation of any federal tax law. Practitioners need to consider the legitimate steps that can be taken to assist a client but assisting the client by transferring the assets to hide them from the revenue officer isn't one of them.'

Conflicting Interests – Circular 230, § 10.29

Section 10.29 addresses a different form of diligence, when a practitioner may not represent a client due to a conflict of interest. The basic rule in 10.29 aligns with the Model Rules of Professional Conduct of the American Bar Association.

To comply with Section 10.29, a practitioner must make two determinations:

- (1) Determine whether a conflict exists.
- (2) Determine what to do about the conflict.

Circular 230 describes two classes of conflicts:

1. One client whose interests are directly adverse to another client.
2. Significant risk that the practitioner's representation of one client will be materially limited by the practitioner's representation of another client, the practitioner's

responsibilities to a former client, or a third party, or by the practitioner's own personal interests.

A practitioner may represent if the practitioner has a reasonable belief in his/her ability to provide competent, diligent representation to each affected client; the practitioner is not legally prohibited; and each affected client waives conflict, by giving informed consent, in writing at the time conflict is known.

Due Diligence for Written Advice – Circular 230, § 10.37

Section 10.37 addresses due diligence in the context of written tax advice, which is a set of principles that should be applied to all written tax advice, based on the facts and circumstances surrounding that written advice. Practitioners must make reasonable efforts to determine the relevant facts, reasonably consider those relevant facts, and make reasonable factual and legal assumptions in situations where the actual facts are not known. It is not reasonable for practitioners to rely on representations or statements or agreements or anything else given to or told to the practitioner, if the practitioner knows or should know that the information is based on incorrect or incomplete or inconsistent representations or assumptions.

Practitioners may not play the audit lottery; that is, practitioners may not give advice that is based on an assumption that the return will not be examined, or if it's examined, the issue won't be noticed. Practitioners should take into account the opportunity that a settlement may be feasible but not rate the likelihood of an audit.

In the written-advice area, practitioners may rely on the advice of other as long as the advice is reasonable and reliance is in good faith, considering all the facts and circumstances. Reliance is not reasonable if the practitioner has knowledge that the person is incompetent or unqualified to be giving advice, or the other party has an unresolved conflict of interest under section 10.29 of Circular 230.

Competence – Circular 230, § 10.35

This section provides that a practitioner must be competent to practice before the Internal Revenue Service. Like the 10.22 general diligence standard, competence under this section is described in general terms to provide for flexibility. Under this provision, a practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law.

Oral or Written Opinions – Circular 230, § 10.51(a)(13)

The general competence rule in 10.35 has a parallel provision in 10.51(a)(13), which addresses false opinions that are knowing or reckless or grossly incompetent in some way. This provision applies to both oral and written opinions. Like the due diligence provisions, the 10.51 competence and false opinion rule applies whether the practitioner is giving an opinion to the client or to the Treasury. Under this provision, “false opinion,” is defined as one that contains knowing misstatements of fact or law, that asserts unwarranted positions, that counsels or assists in conduct known to be illegal or fraudulent, or that conceals matters that are required by law to be revealed. “Reckless conduct” means a highly unreasonable omission or misrepresentation that involves an extreme departure from the standards of ordinary care. The measure is the reasonably prudent practitioner, and 10.51 addresses recklessness as something that would constitute a deviation to the extreme, something that falls far below the ordinary, reasonable practitioner standard. “Gross incompetence” is described as gross indifference or grossly inadequate preparation or consistently failing to perform your obligations to your clients.

With this provision, the pattern of misconduct is going to be significant. In this area as with most of Circular 230, it's very difficult to prove violations with a single instance of behavior, unless that behavior is particularly egregious. It is also disreputable and incompetent conduct to give intentional or recklessly misleading opinions.

Conclusion

Contacting the OPR:

- E-fax: (855) 814-1722
- Main: (202) 317-6897

Office of Professional Responsibility
1111 Constitution Ave., N.W.
SE:OPR Rm. 7238
Washington, DC 20224

Resources

As tax professionals, there are several resources available to practitioners on the IRS website that relate to practice before the IRS.

- [Treasury Department Circular No. 230 \(Rev. 6-2014\)](#)
- [Publication 947, Practice Before the IRS and Power of Attorney](#)
- [Form 2848, Power of Attorney and Declaration of Representative](#)
- [Submit Forms 2848 and 8821 Online](#)
- [Loving v. IRS](#), 742 F.3d 1013 (DC Cir. 2014)
- [Annual Filing Season Program \(AFSP\)](#) (Rev. Proc. 2014-42)
- [The OPR Website](#)
- [News & Updates from the Office of Professional Responsibility](#)
- [Rights and Responsibilities of Practitioners in Circular 230 Disciplinary Cases](#)
- [Guidance on Restrictions During Suspension or Disbarment from Practice Before the Internal Revenue Service](#)
- OPR Look-Up: <https://www.irs.gov/tax-professionals/search-for-disciplined-tax-professionals>

The documents, or links to them, can be found at [irs.gov](https://www.irs.gov) under Tax Pros, Circular 230 Tax Professionals, Information for Tax Professionals.

See the IRS website for information related taxpayer data and data security.

- [Publication 4557, Safeguarding Taxpayer Data](#)
- [Publication 5293, Data Security Resource Guide](#)

Additional Resources

[TIGTA Audit Report 2018-40-062 Improved Procedures are Needed to Prevent the Fraudulent use of Third-Party Authorization Forms to Obtain Taxpayer Information](#)

[TIGTA Audit Report 2020-40-067 Improvements are Needed to Address Continued Deficiencies in Ensuring the Accuracy of the Centralized Authorization File](#)