IRS Nationwide Tax Forum 2021

Common Issues Presented to OPR and Best Practices to Address Them

Wednesday, July 28th, 2021

Start Time: 11:00am Eastern / 10:00am Central
9:00am Mountain / 8:00am Pacific

Note: You should be hearing music while waiting for webinar to start.

Having Technical Issues?

View the "Technical Issues" troubleshooting guide in the Materials drop-down menu on the left side of this page

Today our webinar will help you:

- Recognize when you have a conflict of interest and best practices to avoid these risks,
- Identify tax standards and best practices to meet these standards,
- Avoid due diligence issues and remedies and best practices to address these issues, and
- Learn to avoid incompetence and disreputable conduct issues through best practices.

Statutory Authority

- 31 USC § 330 (1884) authorizes:
  - Regulation of the practice of representatives of persons before the Department of the Treasury, including the IRS, and determinations of practitioner "fitness" to practice. (31 USC § 330(a)).
  - Types of disciplinary action, to include monetary penalties. (31 USC § 330(b)).
  - Regulation of certain appraisers. (31 USC § 330(c)).
  - Standards for certain written advice. (31 USC § 330(d)).

Treasury Circular No. 230

- Circular 230 is the document containing the statute and regulations detailing a tax professional's duties and obligations while practicing before the IRS
- It authorizes specific sanctions for violations of the duties and obligations
- It describes the procedures that apply to administrative proceedings for discipline

Regulated Community

- The regulated community under Circular 230 is principally:
  - Attorneys
  - CPAs
  - All Enrolled Agents, Enrolled Retirement Plan Agents, Enrolled Actuaries
  - Annual Filing Season Program Record of Completion Holders
  - Appraisers who submit appraisals supporting tax positions

What is Fitness to Practice?

Fitness to Practice

- Good character
- Good reputation
- Necessary qualifications to provide valuable service to the client
- Competency to advise and assist persons in presenting their cases

Top Practitioner Quandaries & Mistakes

The fundamental issue in all Circular 230 disciplinary cases is the practitioner's "fitness to practice" before the IRS. The top common Circular 230 issues for practitioners include:

Conflicts of Interest (10.29)	Standards for Tax Returns (10.34)	Diligence as to Accuracy (10.22)	Competence (10.35) vs Incompetence & Disreputable Conduct (10.51)

"Acting fairly and with integrity in practice before the Internal Revenue Service." Cir. 230, Sec. 10.33

Adhere to "best practices" in practicing before the IRS to avoid common practitioner quandaries and mistakes under Circular 230.

§ 10.33 Best Practices

Tax advisors should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service.

§ 10.29 Conflicting Interests

- A conflict of interest exists if:
  - One client's interest directly adverse to another
  - Significant risk of material limitation by responsibilities to
    - another client,
    - former client,
    - third person, *OR*
    - by the personal interest of the practitioner

§ 10.29 Conflicting Interests (contd.)

- May represent if:
  - You have a reasonable belief in your ability to provide competent, diligent representation to each affected client,
  - Such representation is not legally prohibited; and,
  - Each affected client waives conflict, by giving informed consent *in writing at the time (i.e., within 30 days) conflict is known.*
    - Must retain consents for 36 months after representation ceases and provide the consents to the IRS upon request.

Conflicting Interests Examples

- Examples where conflicting interests may arise when a practitioner:
  - Represents a married couple in the IRS examination of their MFJ returns. During the examination, one of spouses seeks innocent spouse relief.
  - Handled a tax matter for a partnership. Several years later, one of the partners seeks to retain the practitioner to do an accounting of the partnership as part of the partner's suit against the partnership.
  - Promotes a transaction, prepares the return reporting that transaction, provides an opinion on the merits of the transaction, and defends the transaction in an IRS examination of the taxpayer's return.

Best Practices to Avoid Conflicting Interests

- Best practices that can assist in avoiding conflicting interest can include:
  - Conduct conflict checks before accepting an engagement
  - Know who your client is (e.g., managing partner or partnership?)
  - Communicating clearly with the client regarding the terms of the engagement
  - Be cognizant that a conflict may arise after engagement
  - In considering whether there is a significant risk of material limitation due to your personal interest, apply a reasonable person standard -- would a reasonable practitioner in your position reasonably believe they could provide competent, diligent representation to each affected client?

Best Practices to Avoid Conflicting Interests (cont.)

- In determining whether a conflict exists, don't be afraid to seek assistance from your state licensing authority, malpractice carrier, or an objective and knowledgeable third party
- In seeking a waiver from each affected client, make sure you have provided them with *informed* consent (balanced with confidentiality)
- Waivers must be obtained within 30 days from when conflict is known, kept for 36 months after representation ceases, and provided to the IRS upon request.
- If you cannot provide competent, diligent representation to each affected client, or the conflict is legally prohibited, you must withdraw from representation.

§ 10.34(a) Standards for Tax Returns

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
- Willful attempt to understate liability
- Reckless, intentional disregard of rules and regulations

❖ **Patterns matter!**

Tax Return Standards

Tax Return Position

Reasonable Basis (25%)

When a reasonable and well-informed analysis by a person knowledgeable in the tax law concludes there is at least a 25% likelihood a position would be upheld on its merits. MUST be paired with disclosure.

Realistic Possibility of Success (33%)

When a reasonable and well-informed analysis by a person knowledgeable in the tax law concludes there is at least an approximately one-in-three likelihood a position would be upheld on its merits.

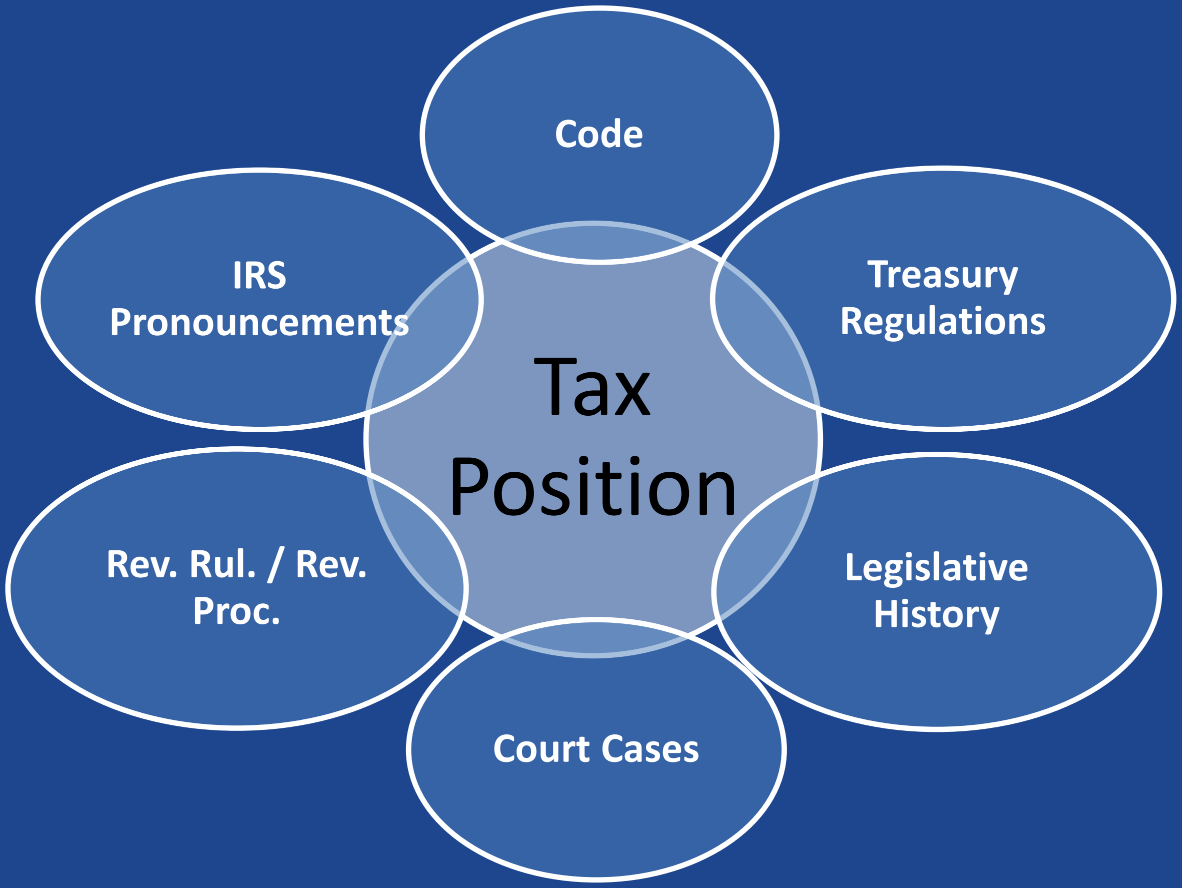
Substantial Authority

When a reasonable and well-informed analysis by a person knowledgeable in the tax law concludes there is at least a greater than 25% but less than 50% likelihood a position would be upheld on its merits.

More Likely Than Not (>51%)

When a reasonable and well-informed analysis by a person knowledgeable in the tax law concludes there is at least a greater than 50% likelihood a position would be upheld on its merits.

Standards - Primary Sources



§10.34(b) Standards for Documents and Other Papers

- May not advise taking frivolous positions
- May not advise submissions:
  - To delay or impede tax administration;
  - That are frivolous;
  - Containing or omitting information that demonstrates an intentional disregard of rules or regulations.

Best Practices to Meet Standards

- Establish the facts and determine which facts are relevant,
- Evaluate the reasonableness of any assumptions or representations,
- Relate the applicable law (including potentially applicable judicial doctrines) to the relevant facts,
- Make a conclusion that is supported by the law and the facts, and
- Advise the client on the import of the conclusion reached, including, for example, whether the client may avoid penalties through disclosure.

§ 10.22 Diligence as to Accuracy

- Must exercise due diligence in:
  - Preparing, approving and/or filing tax returns, documents, affidavits etc. relating to IRS matters.
  - Determining correctness of oral/written representations made to the client or to Treasury personnel.

Diligence as to Accuracy - Reliance

- Reliance on information furnished by:
  - Client: May rely in good faith without verification upon information furnished by the client.
    - Must make reasonable inquiries if the information appears incorrect, incomplete, or inconsistent; can’t ignore implications of information furnished to or actually known by you.
  - Another’s Work Product: May rely on another professional’s work unless you have reason to question it.

Best Practices to Meet Due Diligence

- Best practices that can assist in meeting your due diligence responsibilities can include:
  - Ask questions of the client and make reasonable inquiries if the information being given appears incorrect, inconsistent, or incomplete.
  - Contemporaneously document questions and taxpayer responses.
    - No Cir. 230 requirement regarding documenting information receive from clients and others, however, it's good practice to maintain a written record of such communications.
  - Confirm the taxpayer has maintained appropriate books and records or substantiation to support deductions or tax treatments.

§ 10.21 Duty re: Client's Error/Omission

- Know that a client has not complied with US revenue laws or made an error in, or omission from, any return, affidavit, or other document client submitted or executed under US revenue laws? You have a duty under Circular 230, Sec. 10.21 to:
  - Promptly inform the client of the non-compliance, error or omission and
  - Advise the client about the consequences under the Code and regulations of that noncompliance, error, or omission.
- Practitioner is not required to inform the IRS, however, practitioner cannot perpetuate the noncompliance, error, or omission.

§ 10.35 Competence

- A practitioner must possess the necessary competence to engage in practice before the IRS. Requires:
  - Appropriate level of knowledge, skill, thoroughness, and preparation necessary for that matter for which the practitioner is engaged.
- A practitioner may become competent by researching the relevant law or by consulting with another tax professional who has established competence in the field.

§10.51 Incompetence and Disreputable Conduct

- A practitioner may be sanctioned for incompetence, to include:
  - Lacking the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner was engaged.
  - Failure to meet standards of professional care may prejudice a client’s rights (e.g., failing to meet important filing deadlines imposed by applicable tax statutes)

Best Practices regarding Competency

- Best practices that can assist in ensuring competency can include:
  - Know what you don't know!
  - Keep up with relevant continuing education.
  - To gain competency, research, consult with colleagues who have the requisite knowledge, bring in a consultant with the expertise and work with them to gain experience, attend conferences and seminars, etc.
- When a practitioner is not competent nor can become competent to provide advice requested on a matter within the scope of Circular 230, the practitioner is expected to advise clients to obtain other counsel.

Resources and Guidance

- 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*
- IRS Form 8275, *Disclosure Statement*
- IRS Form 8867, *Paid Preparer's Due Diligence Checklist*
- 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