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| 2017

Keeping Up With Your Due Diligence



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Statutory Authority

- 31 U.S.C. §330 (1884)
- Regulate the practice of representatives of persons before the Department of the Treasury
- Authorizes determinations of practitioner “fitness” to practice



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“Practice”

- All matters under laws or regulations **administered** by the IRS relating to a taxpayer’s rights, privileges, or liabilities
- Preparing, filing, corresponding, communicating, written advice (including emails), advocating/representing, giving appraisals for tax positions
- Not mere tax return preparation



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Liability Under § 10.36

- A responsible practitioner must take reasonable steps to ensure adequate procedures for compliance with Circular 230 are in place, **and properly followed.**
 - Liable for failure to take steps if violations occur, or
 - For failing to act if knew or should have known of violations



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Diligence as to Accuracy – § 10.22

- 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.
- Reliance on Another's Work Product? Only With Reasonable Care



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Standards for Tax Returns - § 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 (sec. 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



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

- May not advise taking positions that are frivolous
- 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

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



Disreputable Conduct – § 10.51(a)(4)

- No participating in any way in the giving of false/misleading info to the Department of the 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





Disreputable Conduct (Cont.) - § 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



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Conflicting Interests - § 10.29

- 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**



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Conflicting Interests (Cont.)

- May represent if:
 - **You** have a reasonable belief in your ability to provide competent, diligent representation to each affected client; and,
 - Not legally prohibited; and,
 - EACH affected client waives conflict, by giving **informed** consent – in writing at the time conflict is known.



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Due Diligence for Written Advice - § 10.37

- Reasonable factual and legal assumptions
- Reasonably consider all relevant facts
- Reasonable efforts to identify and ascertain the relevant facts
- No unreasonable reliance on representations, statements, findings, or agreements. Unreasonable = you know or should know the information is based on incorrect, incomplete, inconsistent representations or assumptions



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Due Diligence for Written Advice (Cont.)

- Apply applicable law to relevant facts
- No positions or advice based on audit lottery
- Reliance on advice of others? Ok, if the advice was reasonable and the reliance is in good faith
- Applies to ALL “Federal tax matters”



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Due Diligence for Written Advice (Cont.)

- Reasonable practitioner standard applies
- Facts & circumstances considered – Scope, type, specificity
- Advice used for marketing/promo of tax avoidance/evasion planning – heightened scrutiny for practitioner's lack of knowledge of the intended audience



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Competence - § 10.35

- 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.
- Be competent
- Become competent
- Hire/consult competence



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Oral or Written Opinions – § 10.51(a)(13)

- Disreputable/Incompetent Conduct
 - False opinions-knowingly, recklessly, through gross incompetence;
 - Intentional or recklessly misleading opinions;
 - Pattern of Incompetent Opinions.



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Oral or Written Opinions (Cont.)

- False Opinion =
 - Knowing misstatements of fact/law;
 - Assertion of unwarranted positions;
 - Counseling/assisting conduct known to be illegal/fraudulent;
 - Concealing matters required by law to be revealed.



Oral or Written Opinions (Cont.)

- Reckless conduct=
 - Highly unreasonable omission/misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances
- Gross Incompetence=
 - Gross indifference, grossly inadequate preparation, consistent failure to perform obligations to client
- Patterns matter



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Resources Available on IRS.gov

- Treasury Department Circular No. 230 (Rev. 6-2014) Regulations Governing Practice before the Internal Revenue Service
- Subscribe to News and Updates from the Office of Professional Responsibility
- Guidance to Practitioners Regarding Professional Obligations Under Treasury Circular No. 230
- Rights and Responsibilities of Practitioners in Circular 230 Disciplinary Cases
- Guidance on Restrictions During Suspension or Disbarment from Practice Before the Internal Revenue Service



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