



IRS Nationwide TaxForum | 2019

Understanding the Circular 230 Disciplinary Process

The Office of Professional Responsibility



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Learning Objectives

Gain an understanding of the:

- Rules that apply to disciplinary proceedings—how the proceedings are conducted and decided
- Applicable sanctions
- Evidentiary matters
- Other factors and considerations



Fitness to Practice

- Under 31 U.S.C. § 330, a practitioner should possess:
 - Good character
 - Good reputation
 - Necessary qualifications to provide valuable service to clients
 - Competency to advise and assist persons in presenting their cases



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Disciplinary Proceedings In General

- The rules for disciplinary proceedings are in Subpart D of Circular 230 (§ 10.60 *et seq.*)
- Those who are subject to disciplinary proceedings:
 - Circular 230 practitioners: attorneys, CPAs, enrolled agents, enrolled retirement plan agents
 - Appraisers
 - Firms or other entities that knew or should have known of misconduct in violation of Cir. 230



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Disciplinary Proceedings – The Why?

- OPR commences a disciplinary proceeding:
 - To prove violations of the regulations in Circular 230
 - To obtain a sanction commensurate with the proven violations, based on all of the relevant facts and circumstances, including any aggravating or mitigating factors

Disciplinary Proceedings - When

- Normally only after OPR concludes its investigation
- Avenue of last resort
 - Settlement is always preferable
 - Result may be a lesser sanction (or, more rarely, no sanction)
 - Practitioner's actions are very much determinative



Disciplinary Proceedings - Sanctions

A practitioner may be sanctioned in a disciplinary proceeding for:

- Incompetence and disreputable conduct described in § 10.51(a)
- Willfully violating any of the regulations in Circular 230 (In particular, the *Duties and Restrictions* in Subpart B (§§ 10.20 – 10.31 and §§ 10.34 – 10.37))
- Recklessly or through “gross incompetence” violating §§ 10.34, 10.35, 10.36, or 10.37



Disciplinary Proceedings - Sanctions

- **Censure**
- **Suspension** from practice (1 – 59 months)
- **Disbarment** (for at least 5 years)
- **Disqualification** (appraisers)
- **Monetary Penalty**





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Disciplinary Proceedings In Detail

- If OPR determines a disciplinary proceeding is necessary, there is a prescribed process
- Stages of the process:
 - Start of the proceeding
 - Conducting it
 - Decision
 - Appeal

Disciplinary Proceedings – Initiation

- OPR initiates a proceeding (under § 10.60) by filing a complaint with an Administrative Law Judge (ALJ)
- A complaint's elements are described in § 10.62
 - Director OPR = Complainant
 - Affected Practitioner = Respondent



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Disciplinary Proceedings In Detail

A complaint must:

- Provide a clear and concise description of the facts and law that constitute the basis for the proceeding
 - Typically phrased as “Counts” for each separate alleged violation of Circular 230
- Specify a sanction



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Disciplinary Proceedings In Detail

Hypothetical Example

OPR initiates a disciplinary proceeding, via a complaint, against a practitioner, Jane A. Jones, who is a CPA and who regularly practices before the IRS.



Complaint Caption

**THE DEPARTMENT OF THE TREASURY
OFFICE OF PROFESSIONAL RESPONSIBILITY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C.**

**DIRECTOR,
OFFICE OF PROFESSIONAL
RESPONSIBILITY,**

Complainant,

v.

JANE A. JONES,

Respondent.

COMPLAINT NO. 2019-0000X



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Violations Pled in the Complaint

- I. Failure to exercise due diligence (§ 10.22(a)), and willfully attempting to understate tax on taxpayers' income tax returns (§ 10.34(a)(1)) – Seven Counts

- II. Willful failure to file Federal income and employment tax returns (§ 10.51(a)(6)) – Five Counts

- III. Conflict of interest (§ 10.29) – One Count



Violations Pled in the Complaint

I. Counts 1 thru 7

- Advised clients to claim on their individual income tax returns:
 - Deductions for personal expenses as unreimbursed business expenses
 - Deductions for medical expenses incurred but not paid
 - EIC, when the practitioner should have known taxpayers were ineligible for the credit because a child was not a “qualifying child” or because earned income was too high

Violations Pled in the Complaint

II. Counts 8 thru 12

- Unfiled returns:
 - Form 1040 – Tax Years 2015 – '18
 - Form 1120-S – Tax Years 2015 – '17
 - Form 941 – TY 2015, 2Q – 4Q; TY 2016 1Q, 3Q and 4Q
 - Form 940 – TY 2016

III. Count 13

- Conflict of interest in representation of a taxpayer during an exam in 2017



Disciplinary Proceedings In Detail

A complaint must also:

- Inform the respondent of the responsibilities in answering the complaint
- Be validly served on the respondent
 - Acceptable methods of service include:
 - Certified mail
 - First-class, regular mail (if service by certified mail fails)
 - Private delivery service





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Disciplinary Proceedings In Detail

The complaint is filed by OPR's representative in the proceeding

- An attorney in the IRS's Office of Chief Counsel
- Specifically, a field attorney with the Office of the Associate Chief Counsel, General Legal Services (GLS)

Disciplinary Proceedings In Detail

- Respondent's answer to a complaint generally must be filed w/in 30 days of service of the complaint on the respondent
- Requirements:
 - Contain a statement of facts that are respondent's "grounds of defense" (§ 10.64(b))
 - Admission or denial of each allegation
 - Raise any affirmative defenses
 - Bear the respondent's (or representative's) signature attesting to the truth and accuracy of statements in the answer



Disciplinary Proceedings In Detail

Evidence

- The core of a proceeding
- There are procedural and substantive rules and issues regarding evidence
- Among the procedural:
 - Within 10 days of service of the complaint, copies of the evidence that supports the complaint must be served on the respondent
 - OPR assembles and delivers to the GLS attorney an evidentiary file for service on respondent





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Disciplinary Proceedings In Detail

- Respondent or complainant may put evidence into the record as exhibits to their initial pleadings, or as exhibits to a motion
- The parties may present evidence at a hearing (if one is held)
- They may obtain evidence through discovery

Disciplinary Proceedings In Detail

- Two methods of discovery:
 - (1) Depositions
 - (2) Requests for admissions
- Prerequisite is a motion demonstrating the relevance, materiality, and reasonableness of the requested discovery
- The opposing party may file objections to a discovery request



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Disciplinary Proceedings In Detail

- A party may raise objections to proffered evidence in other contexts, as well
- Formal rules of evidence that apply to court cases do not apply
- A substantive requirement, however, is that evidence must be relevant and material to the issues, and an ALJ can exclude evidence if it is irrelevant, immaterial, or unduly repetitious



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Disciplinary Proceedings In Detail

- Each party bears the burden of proof as to their respective allegations of fact
- OPR has the burden to prove the violations alleged in the complaint; the respondent has the burden to prove affirmative defenses
- The standard of proof that OPR must satisfy varies:
 - Preponderance of the evidence
 - Clear and convincing evidence



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Disciplinary Proceedings In Detail

Motions

- Can be procedural or substantive
- Must concisely specify the grounds for the motion and the relief sought
- When appropriate, the moving party should include a memorandum of facts and law in support of the motion



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Disciplinary Proceedings In Detail

Hearings

- Evidentiary hearings in which each party can examine and cross-examine witnesses, subject to objections and rulings on objections
- The parties may offer documentary evidence for admission
- Deposition transcripts may be used during a hearing
- The ALJ may allow for closing arguments



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Disciplinary Proceedings In Detail

Decision

- Except for default decisions, and unless a respondent failed to appear at a hearing, the ALJ must allow the parties to submit proposed findings and conclusions and supporting reasons, before issuing a decision
- A decision must:
 - State findings (absent summary adjudication) and conclusions
 - State the reasons or bases for the above
 - Include an order of a sanction imposed on the respondent or an order dismissing the complaint
- In imposing a sanction, the ALJ must “take into account all relevant facts and circumstances” (§ 10.50(e))



Disciplinary Proceedings In Detail

- The ALJ's decision is final unless appealed w/in 30 days
- Each party may appeal, by filing a notice of appeal, along w/ a brief that states the party's exceptions to the decision and supporting reasons
- The appellee may file a timely response brief
- The Treasury Appellate Authority decides the appeal
 - Standard for reversal is clearly erroneous
 - Legal issues are reviewed de novo
- The appellate authority's decision is the final agency decision





Disciplinary Proceedings In Detail

- Disciplinary announcements resulting from final agency decisions are published in the Internal Revenue Bulletin
- OPR also maintains a disciplinary look-up, available at: <https://www.irs.gov/tax-professionals/search-for-disciplined-tax-professionals>, which contains searchable information on over 3,000 OPR censures, suspensions, disbarments, and miscellaneous restrictions on practice



Contacting OPR

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- For more info on OPR and Circular 230, visit <http://www.irs.gov/>
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