Chapter 5: Ethical Considerations

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Corrections were made to this workbook through January of 2015. No subsequent modifications were made.

Communication with IRS personnel regarding a taxpayer's rights or liabilities under federal tax law constitutes practice before the IRS.[1] Such communication includes the following items.[2]

- Preparing or filing of documents
- Corresponding or otherwise communicating with the IRS
- Providing written advice regarding an entity or transaction
- Representing a taxpayer at a conference or meeting

Circular 230 provides many of the rules essential for the tax practitioner to adhere to in connection with practicing before the IRS and outlines the disciplinary sanctions that can be imposed on the tax practitioner for failure to abide by these rules. Although the tax practitioner may believe that the various rules in Circular 230 are clearly stated, several gray areas arise when some of these rules are applied to real-life situations. Frequently, a tax practitioner's conduct also involves laws outside of Circular 230, such as sections of the Code or state laws. This chapter addresses some of these areas.

CONFLICTS OF INTEREST

Circular 230, §10.29, indicates that a tax practitioner should not represent a client before the IRS if the representation involves a conflict of interest. A conflict of interest exists in the following situations.

- The representation of one client will be directly adverse to another client.
- There is a significant risk that a client representation will be materially limited by the tax practitioner's responsibilities to another client, former client, or third person.
- There is a significant risk that the representation of a client will be materially limited by the tax practitioner's own personal interests.

However, even if there is a conflict of interest, the tax practitioner may still represent a client if all of the following requirements are met.

1. The tax practitioner reasonably believes that competent and diligent representation can be provided to each affected client despite the conflict.
2. The representation is lawful.
3. Each affected client is informed of the practitioner's conflict of interest and provides **informed consent** at the time the practitioner knows of the conflict. Written consent must be provided no later than 30 days after the informed consent.

1. Circular 230, §10.2(a)(4).
2. Ibid.

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Scenario 1. Lucy and Desi are a married couple. They have been Carolyn's tax clients for 15 years. Lucy comes to Carolyn's office during the 2014 tax preparation season and announces she is divorcing Desi. She also lets Carolyn know that Desi is not yet aware that she is going to file for divorce and that Carolyn should refrain from mentioning that to him when she prepares their 2014 tax returns. Lucy indicates that they will split their assets and asks Carolyn for advice on which particular assets she should request in the divorce.

Analysis. Carolyn's continued representation of both Lucy and Desi has implications under §10.29. Representation of either client would arguably be directly adverse to the other client and/or limited by Carolyn's responsibilities to the other client, even for the tax advice associated with preparing their tax returns. For example, if Carolyn advises them to file as married filing jointly (MFJ), each divorcing spouse is jointly and severally liable for any tax owed for that tax year. If Carolyn advises them to file as married filing separately (MFS), this may result in a higher tax liability for one or both spouses.

Carolyn's representation of one spouse is arguably compromised (or "materially limited") by the continued representation of the other spouse. Accordingly, Carolyn may wish to withdraw from representing one or both spouses. Withdrawing her representation of both spouses is the best option to ensure that §10.29 is not violated.

Note. Withdrawing representation may require revocation of Form 2848, *Power of Attorney and Declaration of Representative.* For further details on how a tax practitioner must revoke Form 2848, see IRS Pub. 947, *Practice Before the IRS and Power of Attorney.* Failure to properly revoke this form may result in continued obligations to a former client under Circular 230.

Section 10.29 permits Carolyn to continue representing one or both spouses if Carolyn reasonably believes that she can continue to do so competently and diligently. This is only permitted, however, if she fully informs Lucy and Desi of the conflict and **obtains their written consent to the continued representation** of either or both of them. As the situation evolves, Carolyn must continue to monitor the conflict and her ability to remain objective and to competently and diligently represent both clients.

Carolyn should probably decline to advise Lucy on the particular assets to pursue in the course of the divorce proceedings because of the conflict. Any strategy Carolyn devises for Lucy may harm Desi, which violates the conflict-of-interest rules. Although informed consent is an option under the rules, it is certainly not the most prudent course of action for Carolyn to advise either or both spouses about specific assets. In addition, advice of this nature may constitute the unauthorized practice of law in Carolyn's state. Advice on specific assets transcends ordinary tax preparation and consulting services and may constitute legal advice.

Observation. Many states, including Illinois, have a statute[3] specifically prohibiting the practice of law by nonattorneys. In Illinois, the practice of law is defined as the giving of advice when that advice requires the use of any degree of legal knowledge or skill.[4]

3. The Illinois statute on this subject is 705 ILCS 205/1.

4. *Continental Casualty Co. v. Cuda*, 715 N.E. 2.d 663 (Ill.App. 1 Dist. 1999).

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Scenario 2. Clark and Clara were married clients of Sarah, who prepared their tax returns for many years. The last tax return Sarah completed for them was for 2013. Clark and Clara were divorced in early 2014. Clark is still Sarah's client, but Clara found another tax professional after they were divorced.

Clark and Clara received an audit letter in connection with their 2012 return. When the audit letter came, both taxpayers stormed into Sarah's office demanding that she handle the audit. The audit is a result of $20,000 of unreported gambling income that Clark received in 2012. He did not tell Clara or his divorce attorney about this income.

Analysis. Sarah must consider the Circular 230 conflict-of-interest rules when considering whether to represent Clark and Clara in the audit. Although the conflict-of-interest rules permit Sarah to represent Clark and Clara as long as they both are informed of the conflicts and sign appropriate consents, the existence of the gambling income, known only to Clark, may prevent Sarah from providing Clara with informed consent about all the conflicts, including the tax ramifications of the gambling income. However, fully informed consent may be possible if Clark tells Sarah and Clara about the gambling income before Sarah makes a decision about whether to represent them. Even if informed consent is possible, Sarah's best option is to advise Clara to obtain representation from her own tax professional in connection with the audit, especially because Clara may have an innocent spouse claim in connection with Clark's unreported gambling income.

Scenario 3. James is an experienced tax professional. Orville, a current client, visits James and announces that he is forming a partnership with two other individuals, Sam and Gordon, with Gordon's LLC as a fourth partner. He asks James to establish the partnership and be the partnership's tax professional.

Analysis. Generally, under partnership law, partners may be liable for the actions of other partners. All partners are liable for the debts and obligations of the partnership. In addition, under partnership law in many states, partners must make decisions in many different areas, including the following.

- Initial contribution of capital
- Each partner's share of profits or losses
- Guaranteed payment amounts to which each partner is entitled
- Management rights of each partner
- Each partner's right to use and/or possess partnership property
- Each partner's right to access partnership records

Note. A partner's rights and obligations in most states are found in the state's version of the Uniform Partnership Act (UPA). States that have adopted the UPA — which include Illinois, Iowa, Arkansas, Missouri, and most other states — may have made some amendments to the uniform version before adopting the UPA as the legislated partnership rules that prevail within their respective jurisdictions. Therefore, the rules in some sections of the UPA vary from state to state. Many of the UPA rules are default rules that the partners may override with their own partnership agreement.

Because establishing the partnership and each partner's rights and obligations requires detailed legal knowledge and involves each partner's legal rights, James should not represent all the partners or draft the partnership agreement. He should advise Orville that each of the partners should retain independent legal advice in the course of establishing the partnership and drafting a partnership agreement that outlines the rights and duties of each partner in accordance with what the new partners desire. This action prevents James from engaging in the unauthorized practice of law. Based on the objectives of the partners, the attorneys may recommend a different organizational structure for the partners.

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In order to maintain an ongoing relationship with the partnership and the partners, James should obtain informed, written consent from all three partners after advising them about potential conflicts that may arise. James should also clarify his role related to the LLC if the LLC becomes a fourth partner in the partnership.

Because partners are jointly liable for partnership obligations, including tax obligations, any advice James provides to one partner may be directly adverse to the other partners. James can choose to represent one partner and advise the others to obtain their own tax advisor. Alternatively, §10.29 of Circular 230 permits James to represent all partners if informed, written consents are obtained.

James also needs to discuss with the partners the fact that one of them may need to be designated as the tax matters partner (TMP) under IRS rules because an LLC is a partner. He must explain the additional duties and potential conflicts that are associated with the role of TMP. James must advise the other partners that a TMP may bind all the other partners in an agreement with the IRS unless the other partners file a statement with the IRS indicating that they do not wish to be bound to the agreement.[5]

Note. For further details on the TMP rules, see IRC §6231(a)(7) and the underlying regulations.

Note. Changes to Circular 230, originally proposed September 17, 2012, and finalized June 12, 2014, created a new definition of **competency** for purposes of Circular 230. If advice to a client is compromised due to a conflict that exists for the practitioner, not only may the conflict-of-interest rules be violated, but a violation of the new competency requirement may occur. It appears that the competency rule may be violated even if the practitioner obtains the written consent necessary to prevent a violation of the §10.29 conflict rules. Further details on the new competency rule is covered later.

A tax practitioner can easily violate the conflict-of-interest provisions of Circular 230, which require the practitioner to exercise professional judgment. A practitioner's judgment cannot be compromised by other loyalties and influences, such as their personal interests or loyalty to other clients. Although a practitioner may be contacted by third parties who request information about the client, their duty is to the client. In addition, a practitioner is bound by the confidentiality requirement of IRC §7216 (which is discussed later).

Note. Practitioners with clients who have business entities may represent both the entity and the client. The practitioner may have conflicts regarding the dual representation of the entity and the client because advice to the entity may be adverse to the client or vice versa. This is especially true if there are taxpayers other than the client with ownership interests in the entity.

Circular 230 does not define or provide guidance on what should be in a conflict-of-interest consent. However, the consent must be voluntary, and the client must be advised of the nature of the practitioner's conflict of interest.

5. See IRC §§6224(c)(1), (3).

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When creating a conflict-of-interest consent (waiver), the practitioner should consider including, at a minimum, the following information.

1. The practitioner's name and address
2. A description of the possible conflict
3. The names of the individuals or entities that could be involved in the conflict
4. Signatures and dates of the individuals or entities with possible conflicts

It may also be helpful for the waiver to mention Circular 230 requirements, including the requirement to retain the waiver for at least 36 months after the possible conflict of interest ends.

In the course of developing an appropriate Circular 230 consent letter, the following sample correspondence may be helpful. The tax practitioner should modify this sample letter in order to fit the client's particular circumstances and point out specific conflicts of interest.

Letter of Consent Regarding Conflicts Under Circular 230

Date ______________________

It is our desire to retain ____ to prepare our personal and business income tax returns and other required returns and filings, represent us and our business entity before the IRS, and to provide us with tax advice.

We hereby confirm that no disagreement or dispute currently exists within our tax situation and that we understand that all information contained in or used to prepare our tax returns (or those of our business) is available to all of us at all times.

We understand that because of differing or conflicting interests inherent in our personal or business affairs, your advice and any agreements reached by us may benefit one of us over the other or benefit the business entity over us and that at such times, advice and agreements between us may be necessary. All of us wish to enter into this agreement, even though our interests are or may become adverse, including in situations not presently known or anticipated.

We have determined that the benefits of entering into this agreement to retain your professional services outweigh any adverse implications or consequences of doing so.

Each of us expressly and forever waives the conflict of interest on your part that may arise during the performance of tax preparation, tax advising, and related or ancillary services.

We understand that you, as a tax practitioner, will disclose to us any conflict that arises that may jeopardize the ability to provide competent and diligent representation of all of us.

If this occurs, you may withdraw from representation of any of us immediately. We have read this agreement and fully understand it. ______________ ____________ ___________________ _____________

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EXAMPLE OF §10.29 VIOLATION

In the following public announcement, the Office of Professional Responsibility's (OPR) decision in the case (emphasis added) denotes the importance of providing informed consent. It also illustrates problems associated with multiple engagements on the part of the practitioner that can lead to violations of the conflict-of-interest rules.

> **Note.** The disciplinary role of the OPR is discussed later.

Media Relations Office	Washington, D.C.	Media Contact: 202.622.4000
www.IRS.gov/newsroom		Public Contact: 800.829.1040

Attorney Censured by the Office of Professional Responsibility for Mishandling Conflicts of Interest

IR-2012-63, June 22, 2012

WASHINGTON —The Internal Revenue Service's Office of Professional Responsibility (OPR) has censured an attorney for his failure to disclose multiple conflicts of interest as required by section 10.29 of Circular 230.

In 1998, the attorney wrote several short form tax opinions for prospective plan participants concerning the qualification of a benefit plan under section 419A of the Internal Revenue Code while at the same time maintaining an attorney-client relationship with the promoter of the plan, and eventually becoming a co-trustee of the plan. During this entire period, the attorney was compensated by the promoter. When the scheme was challenged by the IRS, the attorney advised and represented individual plan participants before the IRS with respect to their individual tax disputes while continuing to serve as co-trustee of the plan.

Throughout this period, and the multiple engagements and roles played by the attorney, he failed to advise any of his clients that there were conflicts of interest with respect to his multiple adverse representations and because of his personal interests, and he failed to obtain their informed consents to continue with the representations. In agreeing to perform multiple services for parties who did not have mutuality of interests; in agreeing to become a co-trustee of the plan; in accepting compensation from the promoter; and in representing individual plan participants with their respective tax disputes before the IRS without explaining the conflicts of interest, the attorney created the risk, if not the reality, that his representation of any one of his clients would be materially limited by his responsibilities to his other clients, and by his own personal interests. Because the attorney did not advise his various clients of the conflicts of interest present in their relationships with him, these clients were not afforded the opportunity to seek other counsel, or to give informed consent for the attorney's continuing representation of them, notwithstanding the conflict.

"Whenever a tax practitioner represents more than one client with respect to the same transaction, that practitioner must think through the ramifications of what she or he is doing," said OPR Director Karen L. Hawkins. "The conflict of interest provision in Circular 230 is not a mere nicety: taxpayers who pay handsomely for tax advice and representation have a fundamental right to expect competent and diligent representation unfettered by a practitioner's responsibilities or obligations to someone else, or by the practitioner's self-interest.".

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The IRS provided the following additional details regarding the settlement agreement reached with the attorney in this case.

> *The level of sanction imposed in this case reflects that the attorney cooperated with OPR's inquiry into his conduct, acknowledged the violations, and agreed to take additional tax ethics continuing education for the next two years. The settlement agreement includes authorization for the disclosures made in this press release.*

CONFLICTS WITHIN THE SAME FIRM

When one tax advisory or preparation firm represents two or more clients that are in a potentially adversarial situation, the conflict-of-interest risk increases. It may be best for the firm to decide which client to retain and withdraw representation from the remaining clients. At the very least, all clients should be informed and written consents obtained if more than one of the clients is to be retained by the firm. However, even with written consents, continued representation of clients in a potentially adverse situation is generally not the best course of action for the firm. In addition, even when a tax professional such as a CPA or tax attorney meets the Circular 230 requirement by obtaining consents, other professional rules from their governing professional organization may impose stricter requirements than Circular 230 when representing clients in conflict-of-interest circumstances.

Scenario 4. Fedder, Ringer, and Lingham is a law firm that specializes in representing clients in complex matters. Pietro is a longtime client of the firm. Ms. Fedder is the firm's partner who provides Pietro with tax and related legal advice regarding his annual tax return and his businesses. Pietro reveals to Ms. Fedder that he plans to sell his shoemaking business. Another partner of the law firm, Mr. Lingham, meets with a new client, Roderigo, to discuss a business purchase. On their Friday morning partners' meeting the following week, Fedder and Lingham realize that Roderigo is purchasing Pietro's shoemaking business. The partners realize that representing both Pietro and Roderigo would place the firm in a conflict-of-interest situation because the firm is representing both buyer and seller.

Analysis. Advice to either party will likely be adverse to the other and will compromise the firm. Circular 230 does not directly address the firm's representation of Pietro and Roderigo. Although it would be prudent for the lawyers to inform Pietro and Roderigo and obtain written conflict-of-interest consents, Fedder and Lingham are attorneys who must also adhere to the ethics rules of their state bar, which may be more strict regarding representation of clients in conflict-of-interest situations.

> **Note.** For Illinois attorneys, the Illinois Rules of Professional Conduct, Rules 1.7, 1.8, and 1.9, provide the relevant rules of conduct.

DUE DILIGENCE AND RELATED STANDARDS

The due diligence requirement for tax practitioners is mandated by §10.22 of Circular 230. Section 10.22(a) indicates that the practitioner must exercise due diligence in the following areas.

- Preparing tax returns and other federal tax documents
- Ensuring the practitioner's oral and written communications to the IRS are correct
- Ensuring the practitioner's oral and written communications to clients regarding IRS-administered matters are correct

A tax practitioner is presumed to have exhibited due diligence if the work product of another practitioner is relied on, and the tax practitioner used reasonable care in engaging, supervising, training, and evaluating the person. In making this determination, the nature of the relationship between the practitioners is considered.

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STANDARDS FOR TAX RETURNS AND OTHER DOCUMENTS

Due diligence is important in all areas of tax preparation. However, the following areas are currently subject to increased IRS scrutiny.

- Charitable contributions
- Travel and entertainment
- Repair versus capitalization
- Reasonable compensation for S corporation shareholders
- Affordable Care Act provisons
- Earned income credit (EIC)
- Basis for S corporation shareholders

Both the Code and Circular 230 provide accuracy-related standards to which tax return preparers must adhere. The following two provisions are closely related to the due-diligence requirement and should be considered in conjunction with §10.22 of Circular 230.

- IRC §6694
- Circular 230, §10.34

Circular 230, §10.34 incorporates select features of IRC §6694. Under §10.34, a practitioner may not willfully, recklessly, or through gross incompetence **sign a return** or **provide advice** known to contain a position that lacks a **reasonable basis** (or that contains an unreasonable position as defined in IRC §6694(a)(2)).

In addition, §10.34 is also violated if the practitioner signs a return or provides advice that willfully attempts to understate tax liability or which was prepared with reckless or intentional disregard for tax rules or regulations as outlined in §6694(b)(2).

Note. Presumably, the term "gross incompetence" incorporates the new definition of competence found in Circular 230, §10.35 and described later.

Under the terms of §10.34, the practitioner's **pattern of conduct** is a factor considered in determining whether they acted with the requisite willfulness, recklessness, or gross incompetence.

Section 10.34 also prohibits the practitioner from **taking frivolous positions** in advice or on a document submitted to the IRS. Additionally, submitting a document to the IRS that omits information in a manner that demonstrates an intentional disregard for tax rules or regulations violates a §10.34.

Observation. The preparer tax identification number (PTIN) registry gives the OPR an ability to focus on returns prepared by a specific tax return preparer. This may provide an effective mechanism for the OPR to establish a pattern of conduct.

Note. IRC §6694(a)(2) indicates that a position taken on a tax shelter or reportable transaction is deemed unreasonable unless it is reasonable to believe that the position would more likely than not be sustained on its merits. For purposes of this rule, a **tax shelter** is defined as an entity, investment plan, or arrangement with a significant purpose of tax avoidance or evasion. For the definition of a reportable transaction, see IRC §6707A(c).

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Substantial Authority

Only the following sources of law, IRS guidance, and other information are considered to be sources that provide substantial authority.[6]

- The Code and other statutes
- Treasury regulations (proposed, temporary, and final regulations)
- Revenue rulings and revenue procedures
- Tax treaties and underlying treaty regulations
- Treasury Department and other official explanations of treaties
- Court cases
- Congressional intent as reflected in committee reports
- General explanations of tax legislation prepared by the Joint Committee on Taxation
- Private letter rulings
- Technical advice memoranda issued after October 31, 1976
- Actions on decisions and general counsel memoranda issued after March 12, 1981
- IRS press releases, notices, announcements, and other administrative pronouncements

There is substantial authority for the item's treatment on a return if the weight of authorities in support of that treatment is considerable in relation to the weight of authorities supporting contrary treatment.[7] How much weight an authority is given depends on the type of document providing the authority, its relevance to the tax return preparer's position, and its persuasiveness (includes jurisdiction, timeliness, and other factors).

Note. For further guidance on what constitutes substantial authority, see Treas. Reg. §1.6662-4(d). The introduction to the 2014 *University of Illinois Federal Tax Workbook,* Volume B, Chapter 5: Rulings and Cases, includes useful information about substantial authority.

Caution. Substantial authority **does not include** IRS publications, forms and instructions, IRS audit guides, tax commentaries, and other nonauthoritative sources.

Adequate Disclosure of Positions with a Reasonable Basis

Generally, a tax return preparer makes adequate disclosure of a position or item on a return if it is shown on a properly completed Form 8275, *Disclosure Statement.* This form must be attached to the return or amended return.[8] If the position is contrary to a regulation, Form 8275-R, *Regulation Disclosure Statement,* is used instead of Form 8275.[9]

Note. Special disclosure rules exist for recurring items, carrybacks and carryovers, and pass-through entities. See Treas. Reg. §1.6662-4(f) for further guidance on adequate disclosure in these areas.

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6. Treas. Reg. §1.6662-4(d)(3)(iii).
7. Treas. Reg. §1.6662-4(d)(3)(i).
8. Treas. Reg. §§1.6694-2(d)(3) and 1.6662-4(f)(1).
9. Treas. Reg. §1.6694-2(d)(3).

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There is no guidance providing a clear definition of **reasonable basis.** However, guidance does indicate that the reasonable-basis standard may be met in instances that would not meet the stronger substantial-authority standard.[10] Merely having an arguable position is not sufficient to meet the reasonable-basis standard.[11] A reasonable basis generally exists if the position is based on one or more of the sources of information constituting substantial authority, provided that those authorities are sufficiently relevant and persuasive to the tax return preparer's position.[12]

> **Note.** Using adequate disclosure and reasonable basis or substantial authority as grounds for reducing a penalty does not apply if the penalty arises from a tax shelter position or item.

Reliance on Taxpayer Information

Under §10.34, a practitioner may rely in good faith on a client's information without further verification in the course of preparing a tax return or other document to be submitted to the IRS.[13] However, **if the information appears incorrect,** the tax practitioner may not ignore the implications of that information and must make reasonable inquiries.

With regard to a tax practitioner's reliance on taxpayer information, IRC §6694(a) and (b) generally use the **same** reliance standard that applies under Circular 230, §10.34(d).[14] Under IRC §6694, the tax practitioner may rely in good faith on information provided by the taxpayer. The tax practitioner is not required to verify, audit, or review such information. However, the tax practitioner may not ignore the implications of the information if it appears incorrect or incomplete. When the information appears incorrect or incomplete, the tax practitioner is expected to make reasonable inquiries.

Amount of the Penalty

Under IRC §6694(a), the amount of the tax return preparer's penalty is the **greater of:**

- $1,000, or
- Half the income received (or to be received) by the tax preparer from the client for preparing the tax return or claim for refund.[15]

Reasonable Cause and Good Faith Exception. The tax return preparer may avoid an IRC §6694(a) penalty if they can show that, under all the facts and circumstances, the understatement was due to reasonable cause and that the tax return preparer acted in good faith. Factors considered in this determination include the following.

1. **Nature of the error causing the understatement.** The error resulted from a provision that was complex, uncommon, or highly technical, and a competent tax return preparer reasonably could have made the error. However, the reasonable cause and good faith exception does not apply to an error or claim for refund that would have been apparent from a general review of the return by the tax return preparer.[16]
2. **Frequency of errors.** The understatement was a result of an isolated error (such as an inadvertent mathematical or clerical error) rather than a number of errors. Although the reasonable cause and good faith exception generally applies to an isolated error, it does not apply if the isolated error is so obvious, flagrant, or material that it should have been discovered during a review of the return or claim for refund. Furthermore, the reasonable cause and good faith exception does not apply if there is a pattern of errors on a return, even though any one error, in isolation, would have qualified for the reasonable cause and good faith exception.[17]

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10. Treas. Reg. §1.6662-3(b)(3).
11. Ibid.
12. IRC §6662(d)(2)(c).
13. Circular 230, §10.34(d).
14. Treas. Reg. §1.6694-1(e)(1).
15. IRC §6694(a)(1).
16. Treas. Reg. §1.6694-2(e)(1).
17. Treas. Reg. §1.6694-2(e)(2).

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3. **Materiality of errors.** The understatement was not material in relation to the correct tax liability. The reasonable cause and good faith exception generally applies if the understatement is relatively immaterial. Nevertheless, even an immaterial understatement may not qualify for the reasonable cause and good faith exception if the error or errors creating the understatement are sufficiently obvious or numerous.[18]

4. **Tax return preparer's normal office practice.** The tax return preparer's normal office practice, when considered together with other facts and circumstances (such as the knowledge of the tax return preparer), indicates that the error in question would occur rarely and the normal office practice was followed in preparing the return. Such a normal office practice must be a system for promoting accuracy and consistency in the preparation of returns and generally would include, in the case of a signing tax return preparer, checklists, methods for obtaining necessary information from the taxpayer, a review of the prior year's return, and review procedures. Notwithstanding these office practices, the reasonable cause and good faith exception does not apply if there is a flagrant error on a return, a pattern of errors on a return, or a repetition of the same or similar errors on numerous returns.[19]

5. **Reliance on advice of others.** For purposes of demonstrating reasonable cause, a tax return preparer may rely without verification upon advice, schedules, information, and other documents furnished by the taxpayer and information and advice furnished by another advisor, another tax return preparer, or other party. The tax return preparer may rely in good faith on the advice of, or schedules or other documents prepared by, the taxpayer, another advisor, another tax return preparer, or another party whom the preparer had reason to believe was competent to render the advice or other information. The advice may be written or oral; in either case, the tax return preparer has the burden of establishing that the advice or information was received. A tax return preparer is not considered to have relied in good faith if:

   a. The advice or information is unreasonable on its face;

   b. The tax return preparer knew or should have known that the other party providing the advice or information was not aware of all relevant facts; or

   c. The tax return preparer knew or should have known (given the nature of the tax return preparer's practice), at the time the return or refund claim was prepared, that the advice or information was no longer reliable due to developments in the law since the time the advice was given.

6. **Reliance on generally accepted administrative or industry practice.** The tax return preparer reasonably relied in good faith on generally accepted administrative or industry practice in taking the position that resulted in the understatement. A tax return preparer is not considered to have relied in good faith if the tax return preparer knew or should have known (given the nature of the tax return preparer's practice), at the time the return was prepared, that the administrative or industry practice was no longer reliable due to developments in the law or IRS administrative practice since the time the practice was developed.[20]

Willful or Reckless Conduct

Under IRC §6694(b), if the tax return preparer's conduct represents a willful attempt to understate the client's tax liability or involves reckless or intentional disregard of tax rules and regulations, the penalty is increased. For this type of conduct, the penalty is the **greater of:**

- $5,000, or
- Half of the income received by the tax preparer for preparing the client's return or refund claim.

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18. Treas. Reg. §1.6694-2(e)(3).
19. Treas. Reg. §1.6694-2(e)(4).
20. Treas. Reg. §1.6694-2(e)(6).

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A tax return preparer willfully attempts to understate tax liability if they disregard information furnished by the taxpayer or others.[21] Reckless or intentional disregard for tax rules and regulations occurs when the preparer takes a position on a tax return that is contrary to a tax rule or regulation that they either know about or are reckless in not knowing about. The tax return preparer is reckless in not knowing about a rule or regulation if they make little or no effort to determine whether a rule or regulation exists under circumstances that demonstrate a substantial deviation from the standard of conduct of a reasonable tax return preparer.

Note. The good faith exception, which may be used to avoid the IRC §6694(a) penalty, does not apply to an IRC §6694(b) penalty.

Scenario 5. Nora is Lonnie's tax return preparer.[22] Lonnie sold a large residential property in 2013 and pays Nora $10,000 to research the various tax issues related to the sale of the property, including whether he is entitled to claim any principal residence exclusion under IRC §121. Based on Nora's hourly rate, $5,000 of the $10,000 can be reasonably allocated to her research on the IRC §121 issue, $3,000 can be reasonably attributed to her preparation of Lonnie's return, and the remaining $2,000 is allocable to other issues that are unrelated to the property sale or return preparation.

Nora decides that Lonnie should claim an exclusion under §121 even though her research shows that he did not meet both the necessary ownership and use tests required to claim this exclusion. The IRS subsequently challenges the §121 exclusion and assesses an IRC §6694(b) penalty against Nora. Because $8,000 ($5,000 for the §121 research and $3,000 for the preparation of the return) was the relevant fee received by Nora for penalty purposes, Nora's IRC §6694(b) penalty is the greater of $5,000 or $4,000 (half of $8,000). Nora's penalty is therefore $5,000.

Scenario 6. Use the same facts as **Scenario 5,** except Nora did not know about the required ownership and use tests under §121 and did not bother to research the Code or regulations to find out about those tests. Her conduct represents recklessness under IRC §6694(b), and she is liable for the same penalty.

Scenario 7. Matilda is a CPA who prepared Doug's 2013 tax return, including Doug's Schedule C, *Profit or Loss From Business,* for his consulting business. Matilda is representing Doug during an IRS audit of his 2013 tax return.

During the audit, the IRS examiner asks Matilda about Doug's home office deduction. Instead of using Form 8829, *Expenses for Business Use of Your Home,* Matilda used the simplified method to calculate the home office deduction for Doug and claimed the maximum $1,500 deduction based on 300 square feet of office space in Doug's home. The auditor asks Matilda whether Doug actually has 300 square feet of office space, which is required to claim the maximum $1,500 deduction using the simplified method. Matilda tells the auditor that she has seen Doug's office space numerous times and that the office space is at least 300 square feet. However, Matilda has never actually visited Doug's home.

Note. For more information about the simplified method for claiming a home office deduction, see the 2014 *University of Illinois Federal Tax Workbook,* Volume C, Chapter 4: Special Taxpayers.

21. Treas. Reg. §1.6694-3(b).

22. This scenario is adapted from Treas. Reg. §1.6694-1(f).

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Analysis. Circular 230, §10.22, requires Matilda to exercise due diligence in determining the correctness of oral or written representations made to the IRS.[23] Matilda violated this rule by telling the IRS examiner that she saw Doug's office space and is certain that it meets the size requirement for the maximum home office deduction under the rules for the simplified method.

Moreover, §10.22 requires Matilda to exercise due diligence in the course of tax return preparation. Because Matilda assumed Doug's office was at least 300 square feet, she violated this aspect of §10.22. During the course of preparing Doug's return, due diligence likely would require Matilda to ask Doug to confirm the square footage of his home office space to justify the maximum $1,500 deduction under the simplified method. Arguably, making an assumption about the square footage may constitute due diligence if that assumption is based upon knowledge or facts Matilda obtains from other aspects of preparing Doug's tax return, such as the calculation of a prior year's depreciation deduction for the office space (or perhaps an invoice claimed on the prior year's return for more than 300 square feet of new office carpet).

Matilda's failure to make the necessary inquiries about Doug's office space may also constitute recklessness in signing Doug's return as a preparer. It can be argued that Matilda's actions violate both §10.34 of Circular 230 and IRC §6694. If her reason for making the assumption about the size of his office space was to willfully understate Doug's tax liability, she may be subject to the higher penalty imposed by IRC §6694(b).

Scenario 8. Frank is an EA who prepares Adam's tax return each year. Adam, a single filer, is a truck driver who maintains a log of his driving hours and trips in order to meet Department of Transportation requirements. Adam furnishes his driving logbook to Frank along with his other tax information because Frank can use the logbook to determine some of Adam's deductions for 2014. The driving logbook indicates that Adam drove an average of 42 hours per week during 2014.

Adam also has eight 2014 Schedules K-1 from various businesses that are formed as partnerships, limited partnerships, and S corporations. Frank asks Adam about the income and activities in connection with these Schedules K-1. Adam indicates that he participated in each of the eight activities in excess of 500 hours during the year.

Frank enters all the income from the Schedules K-1 as business income and completes Adam's 2014 return. Adam's adjusted gross income exceeds $200,000 after taking into account his truck driving income plus the income from the Schedules K-1.

Analysis. If Adam's driving log is correct, he drove 2,184 hours (42 hours/week average × 52 weeks) in 2014. In addition, if Adam expended 500 hours in each of the eight activities for which a Schedule K-1 was issued, this would constitute an additional 4,000 hours (500 hours × 8 activities) that he worked during the year. The total number of hours from truck driving and involvement in the eight activities is 6,184. Based on this information, Frank should realize that this means Adam worked an average of nearly 119 hours per week (6,184 hours ÷ 52 weeks) during 2014, which seems unlikely.

Due diligence requires Frank to make further inquiries about the hours in the logbook and Adam's degree of participation in the activities. This is especially important in light of the net investment income tax, which includes material participation as a central issue for the Schedule K-1 income reported to Adam.

Note. For additional details regarding material participation, see the 2014 *University of Illinois Federal Tax Workbook,* Volume B, Chapter 4: Passive Activities. For details about the net investment income tax, see the 2014 *University of Illinois Federal Tax Workbook,* Volume A, Chapter 3: Affordable Care Act Update.

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23. Circular 230, §10.22(a)(2).

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If Frank fails to make such inquiries, he would likely violate §10.22 of Circular 230. Frank is required to exercise due diligence in the course of preparing a tax return.

Scenario 9. Aidan has a lawn care business. He brings his 2014 tax information to Guido, his tax return preparer. Aidan's information consists of a sheet of paper on which he has written the amount of his income for the year. The paper also indicates that he has receipts for $5,000 of supplies and materials, $900 of gasoline, and $3,000 of repairs. He also has 2,000 miles of business travel. No other information is given. Aidan asks Guido whether the information he provided about his income and expenses is going to result in the maximum EIC for the year.

Analysis. Under §10.34 of Circular 230 and IRC §6694, Guido may rely on Aidan's information without further verification. However, when Aidan asks whether the income and expense information will result in the maximum EIC, this should cause Guido to question the correctness of that information. Guido should ask more questions of Aidan to corroborate that information. Although Guido can advise Aidan on the EIC rules, Guido may not advise Aidan to overstate or understate income or expenses in order to obtain the maximum EIC.

Anti-Stacking Provision

If a tax return preparer's conduct results in both an IRC §6694(a) penalty and an IRC §6694(b) penalty, the §6694(b) penalty is reduced by the amount of any §6694(a) penalty. This prevents the same conduct from triggering a maximum penalty under both IRC §§6694(a) and (b).[24]

INFORMATION DISCLOSURES

Under IRC §7216, a compensated tax return preparer generally may not provide a taxpayer's return information to another party.[25] In addition, the information provided by the taxpayer must be used only for return preparation purposes.[26] Violation of these rules constitutes a misdemeanor and is subject to a fine of up to $1,000 or incarceration for up to one year, or both. The tax return preparer who violates these rules must also pay the costs of prosecution.[27]

However, the tax return preparer may provide the taxpayer's tax information to another party with the taxpayer's consent.[28] Under limited circumstances, disclosure of information to a third party is permissible without the taxpayer's consent. These limited circumstances include the following.

- Disclosure pursuant to a Code or regulatory provision
- Disclosure to the IRS
- Disclosure to another preparer of the same firm within the United States in order to obtain assistance in the preparation of the return or services related to return preparation
- Disclosure pursuant to a court order or an administrative order or request by a professional association ethics committee or board

Note. For detailed information on what constitutes consent and the requirements for valid consent, see Treas. Reg. §301.7216-3(a)(3). Further guidance on disclosure of taxpayer information can be found in Treas. Reg. §§301.7216-2 and 301.7216-3.

24. Treas. Reg. §1.6694-3(f).
25. IRC §7216(a)(1).
26. IRC §7216(a)(2).
27. IRC §7216(a).
28. Treas. Reg. §301.7216-3(a)(1).

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Section 10.20 of Circular 230 also requires that a practitioner provide records or information to the IRS after the IRS lawfully requests the information, unless the practitioner believes in good faith and on reasonable grounds that the records requested are privileged. In addition, if the IRS requests records or other information that is not in the tax practitioner's or client's possession or control, the tax practitioner must promptly provide the IRS with any information that is known about the records or other documents.[29]

Scenario 10. Desi from **Scenario 1** is now aware that Lucy is divorcing him. Desi contacts Carolyn and informs her that Lucy's attorney wants a copy of their 2011, 2012, and 2013 returns. Desi asks Carolyn to refrain from providing copies of the returns to the attorney. The next day, Lucy's attorney calls Carolyn and requests the three returns, and Carolyn mails copies of the three returns to the attorney.

Analysis. Under IRC §7216, Carolyn cannot provide Lucy's attorney with copies of the returns without Desi's informed consent. Although Circular 230 may require a practitioner to furnish information to the IRS, it does not require a practitioner to provide information to third parties. However, if the attorney obtains a court order requiring Carolyn to provide copies of the returns, Carolyn must comply with the order in accordance with §7216. Of course, Carolyn may provide a copy of the three returns to Lucy or Desi. They, in turn, may furnish the tax information to their respective attorneys in connection with the divorce proceedings.

ATTORNEY-CLIENT PRIVILEGE

Privilege regarding client information generally refers to the **attorney-client privilege.** The nature of the attorney-client privilege is as follows.

- The privilege belongs to the **client** and is exercised by the client, not the attorney.
- The information was communicated by the client to the **attorney or a subordinate** of the attorney.
- The information was furnished in order to obtain **legal advice.**
- The client did not communicate the information for the purpose of committing a **crime.**
- The client has not committed any acts that could be construed as **waiving** the privilege.

The purpose of the attorney-client privilege is to protect and encourage confidential communications between a client and the client's attorney. It encourages the client to openly and fully communicate with the attorney on legal matters. Full communication is necessary to obtain accurate legal advice and proper, effective legal representation.

FEDERALLY AUTHORIZED TAX PRACTITIONER PRIVILEGE

The "privilege" referred to in §10.20 of Circular 230 refers to another type of privilege available to certain tax practitioners under the Code. Under IRC §7525, a **federally authorized tax practitioner** is an individual who is authorized to practice before the IRS under the provisions of Circular 230.[30] Such practitioners are generally provided with the same common law protections of confidentiality as those for an attorney but with the following significant limitations.[31]

- This privilege does not extend to criminal tax matters before the IRS.
- This privilege does not extend to criminal tax proceedings in federal court that are brought by the United States or the IRS.
- This privilege only covers tax **advice** provided by the practitioner regarding a tax matter within the scope of the practitioner's ability to practice before the IRS under Circular 230.
- This privilege may not be used in connection with advice regarding tax shelters.

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29. Circular 230, §10.20(a)(2).

30. IRC §7525(a)(3)(A).

31. IRC §7525.

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The communication must be made in the context of a professional relationship between the taxpayer and the practitioner. The practitioner must be acting as a tax professional, not merely as an acquaintance or business advisor.

The taxpayer and the practitioner should behave as if they intend the communication to be confidential. If the taxpayer divulges the information to a third party, the communication is not confidential and is not covered by the privilege. Also, the practitioner may breach the confidentiality of any communication that may be privileged by engaging in conduct that waives the privilege, such as communicating the privileged information to a third party.

Scenario 11. Steven is in the process of selling his small manufacturing business. He meets with his tax attorney, Karen, who is advising him on the sale. After taking into account a number of tax planning considerations, Karen advises Steven about how to structure the transaction and allocate the sale price to various assets of the business. The business is sold in 2013.

Steven's tax return included the required Form 8594, *Asset Acquisition Statement,* which was filed in 2014 with the tax return for both the buyer and the seller. After reviewing the Form 8594, an IRS examiner issues a letter to Steven requesting details about why the proceeds were allocated in the manner indicated on Form 8594. Steven brings the letter to Karen, indicating that it appears that all the tax planning considerations must be disclosed to the IRS.

Analysis. Under §10.20 of Circular 230, Steven does not need to disclose the tax planning information about why the proceeds were allocated among the assets in the manner Karen recommended because it was privileged information. Karen advises Steven that the privilege is his to invoke. Steven agrees with Karen that it is best not to furnish the tax planning information to the IRS and Karen advises the examiner that the information is privileged and will not be disclosed under the terms of §10.20 of Circular 230.

COMMUNICATIONS ABOUT TAX RETURN PREPARATION

Generally, case law indicates that communications from the taxpayer to the practitioner regarding information for the preparation of a tax return are not covered by the attorney-client privilege. Accordingly, the 9th Circuit Court of Appeals accepted the argument that communication that is relevant merely for the purpose of tax return preparation does not involve giving or receiving legal advice and is therefore not privileged.[32] In addition, it has been held that a tax return itself is not privileged information because its purpose is disclosure to a third party (the IRS).[33]

There are contrary cases holding that the attorney-client privilege might apply to a communication concerning what to report or deduct on a return[34] or that communications regarding tax preparation should be considered legal advice protected by the attorney-client privilege.[35] However, the overall weight of authority indicates that the attorney-client privilege does not apply to communications regarding tax returns.

ACCOUNTANT-CLIENT PRIVILEGE

Many states, including Illinois,[36] have laws that provide an accountant-client privilege. In some states, this rule is an evidentiary rule: it can be used to exclude evidence in a court proceeding in the same way that the attorney-client privilege may be used. In other states, the accountant-client privilege is more limited. Federal law does not recognize any accountant-client privilege.[37]

Note. Many tax practitioners, such as CPAs or attorneys, may have other rules within their professional codes of conduct that should also be consulted in connection with a situation involving §10.20 of Circular 230 or IRC §7525.

32. *U.S. v. Gurtner*, 474 F.2d 297 (9th Cir. 1973).

33. *U.S. v. Cote,* 456 F.2d 142 (8th Cir. 1972).

34. *U.S. v. Abrahams*, 905 F.2d 1276, 1283 (9th Cir. 1990).

35. *Colton v. U.S.,* 306 F.2d 633 (2nd Cir. 1962).

36. See 225 ILCS 450/27.

37. *Couch v. U.S.*, 409 U.S. 322 (1973).

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FEES

Circular 230 provides rules regarding fees to which tax practitioners must adhere. There are rules regarding unconscionable fees and rules regarding contingent fees.

UNCONSCIONABLE FEES

A practitioner may not charge an **unconscionable fee** for representing a client in a matter before the IRS.[38] Circular 230 does not define "unconscionable" and provides no guidance on what steps might be taken to determine whether a practitioner's fee is unconscionable. However, it is likely that a facts and circumstances analysis of each case will be used as part of the determination.

Scenario 12. Ozzie is an noncredentialed preparer with one year of experience as a tax practitioner. In that one year, he built a thriving tax practice. In 2014, his new client, Harriett, asks Ozzie to handle a tax refund issue.

When Harriett's previous preparer completed her 2013 return, he did not ask her for various expenses relating to her residential real estate activity. She did not know that she could deduct depreciation, the costs of advertising to find a new tenant, insurance, mortgage interest, and property taxes. There were only a few expenses claimed on her 2013 Schedule E, *Supplemental Income and Loss,* that included items documented with receipts.

Ozzie added up the additional deductible rental expenses and determined that Harriett could obtain an additional tax refund of approximately $8,000 by filing an amended return. Harriett agrees that Ozzie can prepare the amended return for a flat fee of $3,600.

Analysis. A facts and circumstances analysis would likely conclude that Ozzie's fee, which represents 45% of the anticipated refund amount ($3,600 ÷ $8,000) is unconscionable. This is especially true because filing an amended return is not a highly technical or complex task. In addition, Ozzie has only one year of experience as a tax preparer.

Scenario 13. Use the same fact as **Scenario 12,** except Ozzie is a highly regarded CPA and attorney with 32 years of experience representing clients before the IRS on tax avoidance issues. The IRS sent Harriett a notice informing her that she would not receive her anticipated refund of $8,000; the IRS disallowed substantial deductions in connection with her return because she invested in a complex tax shelter scheme. The IRS indicated that it recharacterized the transaction under the economic substance doctrine.

Harriett brings the IRS notice to Ozzie, who assesses the IRS response and position. He tells Harriett that he believes he can persuade the IRS to change their position and obtain her refund without litigation. He agrees to do this for a flat fee of $3,600.

Analysis. Although Ozzie's fee of $3,600 is 45% of the refund amount that Harriett was anticipating, Ozzie's fee in this case could arguably be considered reasonable under these circumstances. Ozzie's vast experience, professional education, and reputation, along with the complexity of the issue, likely justifies the fee he is charging Harriett.

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[38] Circular 230, §10.27(a).

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CONTINGENT FEES

Contingent fees are generally disallowed for services related to any matter before the IRS.[39] This restriction is designed to ensure independent judgment by the practitioner in the course of representing clients with tax issues. However, a contingent fee may be allowed for services related to the following.

- An IRS examination of or challenge to an original tax return, or an amended return or claim for refund or credit if the taxpayer filed the amended return or claim for refund within 120 days after receiving a written notice of such examination or challenge[40]
- A claim for a credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the IRS[41]
- A judicial proceeding arising under the Code[42]

A fee is deemed **contingent** if it is based, in whole or in part, on whether the position taken on a tax return or other filing avoids challenge by the IRS.[43] This includes fees based on a percentage of a refund or of the taxes saved or otherwise dependent on a specific result. Also, a fee is contingent if the practitioner agrees to reimburse any portion to the client if the IRS challenges a position on a tax return or other filing or if a position is not sustained.[44]

Examples of **prohibited contingent fee arrangements** include the following.

- The client will pay the practitioner an additional amount if the IRS does not challenge a position on the client's tax return before the statute of limitations expires.
- The client will pay the practitioner an additional amount if the position challenged by the IRS is eventually allowed by an administrative or judicial appeal.
- The practitioner will refund all or part of a fee if the IRS challenges the position on the client's return.
- The client will pay the practitioner a fee determined as a percentage of the refund requested on the client's tax return or as a percentage of a promised reduction in tax liability.

The rules in connection with contingent fees apply to all matters before the IRS, including tax planning and advice, preparing or filing returns or claims for refund or credit, and all matters connected with presentations to the IRS.[45] Examples of such presentations include preparing and filing documents; corresponding and communicating with the IRS; providing written advice regarding any entity, transaction, plan, or arrangement; and representing a client at conferences, hearings, and meetings.

Scenario 14. Dennis purchased a condominium as investment property for $110,000 on December 31, 2013. In late 2014, it was announced that a developer would be investing $200 million to build a major skiing and conference resort on vacant property immediately adjacent to the building in which Dennis's investment condominium is located. The developer approached Dennis and offered $200,000 for the condominium. Dennis accepted the offer and sold the condominium, with a closing date of December 27, 2014. Dennis did not meet the 1-year holding requirement for the $90,000 capital gain to be reported and taxed as long term.

His tax return preparer, Geraldine, agrees to report the gain on Dennis's 2014 tax return as a long-term gain as long as Dennis pays her $2,500 in April 2018 if the IRS has not challenged how the gain was reported within this 3-year limitations period. Geraldine's fee arrangement constitutes a contingent fee arrangement that is prohibited by Circular 230, §10.27(b).

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39. Circular 230, §10.27(b)(1).
40. Circular 230, §10.27(b)(2).
41. Circular 230, §10.27(b)(3).
42. Circular 230, §10.27(b)(4).
43. Circular 230, §10.27(c)(1).
44. Ibid.
45. Circular 230, §10.27(c)(2).

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Scenario 15. Roger is a CPA who agrees to prepare Maria's tax return. Roger knows that each year Maria, a single mother, can claim exemptions for herself and her four dependent children. These exemptions allow Maria to obtain a refund of nearly all the income tax withheld from her employment income each year. Roger also knows that Maria always qualifies for an EIC. Roger agrees to complete Maria's return for 30% of the refund amount shown on her return. This is a prohibited contingent fee arrangement that violates §10.27(b) of Circular 230. Roger cannot charge a contingent fee to prepare a tax return.

Scenario 16. Use the same facts as **Scenario 15,** except Maria received an IRS correspondence audit letter covering three years of tax returns. She responded to the letter and sent the requested documentation. The examiner subsequently determined that she owed $12,000. Roger agrees to represent her and request either an informal conference with the examiner's manager or an appeals conference. He agrees to represent Maria in the audit for 30% of any amount by which he can reduce her $12,000 tax liability. This is a **contingent fee arrangement that is allowed** under §10.27(b)(2)(i) of Circular 230. Roger may charge a contingent fee in connection with audit representation.

Scenario 17. Gerald, a CPA, meets with his client Doug. After reviewing Doug's tax return for the previous tax year, Gerald determines that Doug overpaid his federal income tax last year. Gerald and Doug agree that a refund claim should be filed to recover the overpayment and that Gerald will receive 30% of the refunded amount as compensation for completing the claim. Gerald completes and files the refund claim.

Section 10.27 of Circular 230 indicates that a practitioner may not charge a contingent fee for services rendered in connection with any matter before the IRS. Although §10.27 allows a contingent fee arrangement in connection with an IRS challenge to or examination of a refund claim, this exception does not apply to Gerald's refund claim preparation for Doug.

The U.S. District Court for the District of Columbia considered challenges to the legality of Circular 230's prohibition of contingent fees in connection with preparation and filing of refund claims with the IRS.[46] The case was brought by Ryan, LLC, a major global tax services firm; G. Brint Ryan, the firm's founder and chairman; and Gerald Lee Ridgely. Their complaint argues that the ban on contingent fees is invalid for the following reasons.

- The rule violates due process rights under the Fifth Amendment to the Constitution by depriving a taxpayer of the ability to obtain a refund for a tax overpayment.
- The rule infringes on the right of a taxpayer to petition the government for redress of grievances under the First Amendment through a claim for refund.
- The IRS exceeded its statutory authority in promulgating Circular 230, in violation of the Administrative Procedure Act.[47]

The court dismissed the allegation of a Fifth Amendment violation, holding that Mr. Ryan lacked standing to pursue this claim for denial of due process because he did not establish that the restriction on contingent fees would result in a sufficiently concrete and particularized injury to him. It also dismissed the First Amendment assertion, holding that the minor restriction on contingent fees is a constitutionally permissible limitation that does not violate the petition clause. However, the complaint regarding violation of the Administrative Procedure Act (APA) was not dismissed and that part of the case was allowed to proceed.

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46. *Ryan, LLC et al. v. Lew et al.,* No. 1:12-cv-00565 (D.C. Cir., Mar. 29, 2013).

47. 5 USC §§701 et seq.

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In *Ryan, LLC,* it was Gerald Lee Ridgely who obtained permission to proceed with the APA part of the case. This case, *Ridgely v. Lew,*[48] was ruled on by the court on July 16, 2014. Similar to **Scenario 17,** Ridgely entered into a contingent fee arrangement with his client in connection with the preparation of an "ordinary refund claim." An ordinary refund claim is a refund claim that is filed after the original tax return but before any IRS audit is initiated.

Note. Generally, if a federal agency acts outside the bounds of its statutory authority or jurisdiction, the APA requires a court to hold that such excessive agency actions are unlawful.

Gerald Ridgely argued that a CPA does not engage in legal representation of a taxpayer by assisting with the preparation and filing of a refund claim. He argued that representation does not begin until the IRS subsequently responds to the claim and the CPA submits the required power of attorney form to engage in client representation. The IRS took the position that current law, consisting of the Horse Act of 1884,[49] provided the IRS with authority to regulate aspects of practice such as Gerald Ridgely's contingent fee arrangement. The IRS further argued the regulation of contingent fee arrangements was essential because of concerns about ensuring the tax advisor's professional independence, and such independence is jeopardized if the tax advisor and taxpayer have aligned their financial interests through a contingent fee arrangement. Circular 230, §10.27, therefore, regulates this conduct.

Note. The Horse Act of 1884 was signed into law by President Chester Arthur on July 7, 1884, to regulate claims against the U.S. government in connection with property that was confiscated for use in the Civil War. This legislation included regulation of the individuals who represented citizens with claims. To help reduce fraudulent claims against the U.S. government, "enrolled agents" were appointed to represent individuals with their claims.

The court reviewed the Horse Act statute that the IRS cited as its source of regulatory authority and noted that the *Loving*[50] case served as precedent. *Loving* is the case in which the previously mandated registered tax return preparer (RTRP) program was set aside. *Loving* indicated that the Horse Act definition of a "representative" that the IRS may regulate was limited to persons with the authority to bind others in the course of representation. *Loving* distinguished "representatives" from tax return preparers, noting that tax return preparers cannot be regulated by the IRS because a tax return preparer has no authority to bind the taxpayer in the course of their work. Therefore, the court concluded, the Horse Act of 1884 did not provide the IRS with the authority to regulate Gerald Ridgely in his role as a tax preparer for the contingent fee arrangement used in preparation of an ordinary refund claim. The court concluded it was compelled under the APA to hold that the attempted IRS regulation of Ridgely's contingent fee arrangement was beyond the scope of statutory IRS regulatory authority and was unlawful.

Observation. The lack of IRS authority to regulate tax preparers is likely to continue to be the subject of future litigation. Some groups are concerned that IRS regulation of tax preparers or representatives may exceed their regulatory authority.

48. *Ridgely v. Lew,* No. 1:12-cv-00565 (DC Cir., 2014).

49. This law, in its present form, is currently codified at 31 USC 330.

50. *Loving v. IRS,* 742 F.3d 1013 (D.C. Cir. 2013).

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INCOMPETENCE AND DISREPUTABLE CONDUCT

Section 10.51 of Circular 230, provides tax practitioners with a list of 18 items that constitute incompetence and disreputable conduct.

1. Conviction of any criminal offense under the federal tax laws
2. Conviction of any criminal offense involving dishonesty or breach of trust
3. Conviction of any felony under federal or state law for which the conduct involved renders the practitioner unfit to practice before the IRS
4. Giving false or misleading information, or participating in any way in giving false or misleading information to the Treasury Department
5. Solicitation of employment as prohibited under §10.30 of Circular 230, the use of false or misleading representations with intent to deceive a client or prospective client to procure employment, or intimating that the practitioner is able to improperly obtain special consideration from the IRS or any employee of the IRS
6. Willfully failing to make a federal tax return or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of federal tax
7. Willfully assisting, counseling, or encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any federal tax law, or knowingly counseling or suggesting to a client an illegal plan to evade federal taxes
8. Misappropriation of, or failure to properly or promptly remit, funds received from a client for purposes of payment of taxes or other obligations due to the United States
9. Directly or indirectly attempting to influence, or offering or agreeing to influence, the official action of the IRS by use of threats, false accusations, duress, or coercion or any special inducement or promise of an advantage, or by the bestowing of any gift, favor, or thing of value
10. Disbarment or suspension from practice as an attorney, CPA, public accountant, or actuary
11. Knowingly aiding or abetting another person to practice before the IRS during a period of suspension, disbarment, or ineligibility of such person
12. Contemptuous conduct in connection with practice before the IRS, including the use of abusive language, knowingly making false accusations or statements, or circulating or publishing malicious or libelous matter
13. Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion that is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the federal tax laws
14. Willfully failing to sign a tax return prepared by the practitioner when the practitioner's signature is required by federal tax laws, unless the failure is due to reasonable cause and not due to willful neglect
15. Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Code, contrary to the order of an administrative law judge or a court of competent jurisdiction
16. Willfully failing to file in magnetic or other electronic media a tax return prepared by the practitioner when the practitioner is required to do so by the federal tax laws, unless the failure is due to reasonable cause and not due to willful neglect
17. Willfully preparing all or substantially all of, or signing, a tax return or claim for refund when the practitioner does not possess a current or otherwise valid tax identification number or other prescribed identifying number
18. Willfully representing a taxpayer before an officer or employee of the IRS unless the practitioner is authorized to do so

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Scenario 18. Grace Period is very upset with the individual mandate of the Affordable Care Act. She does not have health insurance and does not want to obtain the new required coverage. She asks her tax preparer Fran Chise for advice. Fran explains the new law. She tells Grace that if she reduces her tax withholdings, she could avoid the shared responsibility payment because the IRS can only recover the payment through excess income tax withholdings.

Analysis. Fran is arguably in violation of §10.51(a)(7) (item 7 on the preceding list) by counseling her client to avoid the tax in this manner, particularly if this avoidance constitutes tax evasion. The difference between tax avoidance and tax evasion is not always clear. A stronger argument may be made that Fran's advice constitutes tax evasion if it was given as part of a conversation between her and Grace regarding the intention to not pay the shared responsibility payment at all. Fran is not in violation by explaining the law. However, providing advice that is construed as tax evasion is a violation of §10.51(a)(7).

Scenario 19. Colin Mee, an enrolled agent, has failed to file his income tax returns for 2011, 2012, and 2013.

Analysis. Final regulations allow the OPR to initiate an expedited suspension proceeding against a tax practitioner for failure to file their own tax returns. Such procedures may be imposed for failure to file federal tax returns during four of the five tax years immediately prior to the initiation of the proceedings. If Colin fails to file his 2014 return, he will have failed to file for a 4-year period. This will expose Colin to a future expedited suspension proceeding.

Colin may still receive OPR disciplinary action for failure to file even one tax return under the terms of §10.51 of Circular 230. This section includes "willfully failing to [file] a federal tax return" (item 6 on the preceding list) as an action that constitutes disreputable conduct. Accordingly, when Colin failed to file his 2011 tax return, he exposed himself to the risk of OPR disciplinary measures.

Note. For a 2014 decision that suspended an EA for one year for failure to file three tax returns, see the *OPR v. Virgil M. Cummins* decision found at **www.irs.gov/Tax-Professionals/Enrolled-Actuaries/Final-Agency-Decisions.**

COMPETENCY

Although §10.51 of Circular 230 addresses both incompetence and disreputable conduct, the 13th item on the preceding list is the only item that mentions competence. Regulating competence is one of the purposes of Circular 230, but it has only recently included an actual definition of incompetence.

Changes to Circular 230 proposed on September 17, 2012, and finalized on June 12, 2014, include a specific provision regarding competency that became part of Circular 230 for the first time. Under this rule, a practitioner must possess the necessary competence to engage in practice before the IRS. This rule is meant to clarify that a practitioner may be sanctioned under Circular 230 for lack of competence in practicing before the IRS.

Competency is defined to include four elements that a tax practitioner must have when engaged in practice before the IRS. These elements are as follows.[51]

1. Knowledge
2. Skill
3. Thoroughness
4. Preparation

Note. Section 10.35 of Circular 230 contains the new competency standard. Under the previous version of Circular 230, §10.35 addressed the complex rules regarding covered opinions. As part of the changes that were finalized in June 2014, the covered opinion rules were eliminated.

[51] Circular 230, §10.35.

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Under the new standard, competence requires the practitioner to possess the necessary level of knowledge, skill, thoroughness, and preparation in the tax matter for which they are engaged. A practitioner may become competent in various ways, including consultation with an expert colleague or studying the relevant law.

Scenario 20. Floyd is an EA with five years of experience preparing individual income tax returns. Last year, he took a course in S corporation taxation and began completing S corporation tax returns.

Floyd recently met with a new potential client, Clive, who owns a large business with several hundred employees. Clive was recently notified by the IRS that the defined benefit pension plan that covers most of the business's employees will be audited. The IRS believes that the pension plan was not administered in a manner necessary to maintain deferred tax status. The IRS correspondence mentioned several complex Code sections and some provisions of the Employee Retirement Income Security Act (ERISA). Clive asks Floyd to represent him in the pension plan audit. Floyd has never represented a client in a pension plan audit. Although he has some knowledge about basic tax rules for pension plans, he is not well versed with other tax laws or the terms of ERISA mentioned in the IRS letter.

Analysis. Under the competence standard of Circular 230, Floyd must ensure that he has the necessary knowledge, skill, thoroughness, and preparation required for the pension plan audit. Floyd can enroll in a relevant course of study, but there may not be enough time to obtain the necessary level of competence before the audit begins. However, Floyd may contact a colleague, such as an attorney or CPA who works with pension plans and the ERISA rules. The colleague may provide Floyd with the necessary degree of information so that Floyd can meet the competency requirement.

If Floyd is unsure about whether he is competent to handle Clive's pension plan audit and whether he can meet the level of knowledge, skill, thoroughness, and preparation necessary to effectively represent Clive, he should decline the engagement. Contacting an experienced colleague may be a good way to ascertain whether the necessary level of competence may be achieved in the time available.

Note. Before the proposed rules for Circular 230 were finalized, consulting with a more experienced colleague was not mentioned as an acceptable means to obtain the necessary level of competence. However, permitting this method to achieve competency was included in the final version of §10.35.

Observation. Many tax practitioners are professionals who are bound by competency requirements under other applicable professional ethics rules. The relevant AICPA competency requirement is found in Rule 201-1 of the AICPA Code of Professional Conduct. A similar requirement applicable to Illinois attorneys is found in Rule 1.1 of the Illinois Rules of Professional Conduct. For practitioners bound by other competency rules, it is necessary to meet these rules as well as the new competency requirement under Circular 230 for practice before the IRS.

REQUIREMENTS FOR WRITTEN ADVICE

Effective June 12, 2014, new requirements apply to all written advice rendered by tax practitioners. These new requirements replace the covered opinion rules and are found in §10.37 of Circular 230. Under these requirements, the practitioner **must do** the following in connection with written advice on federal tax matters.

- Base the written advice on reasonable factual and legal assumptions
- Reasonably consider all the relevant facts and circumstances that the practitioner knows or reasonably should know
- Use reasonable efforts to identify and ascertain facts relevant to the written advice
- Relate the applicable law and authorities to the facts

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In addition, these rules indicate that the practitioner **must not do** the following in connection with written advice on federal tax matters.

- Rely on representations or statements of the taxpayer or anyone else if such reliance would be unreasonable
- In evaluating a **federal tax matter,** take into account the possibility that a tax return may not be audited or that a matter may not be raised in an audit

For purposes of these rules, a **federal tax matter** is one involving the interpretation or application of the following.[52]

- Federal tax laws
- Regulations
- Revenue rulings
- Revenue procedures
- Tax treaties
- Other published or unpublished guidance
- Any provision of law that affects a taxpayer's obligations under federal tax law
- Any other law or regulation administered by the IRS

The rules regarding reliance on the advice of others indicate that it is permitted if reasonable. Guidance regarding **unreasonable** reliance is specifically provided. Reliance is unreasonable in the following circumstances.[53]

- The practitioner knows or reasonably should know that the opinion of the other person should not be relied on.
- The practitioner knows or reasonably should know that the other person who provided the advice is not competent or does not have the necessary qualifications to provide the advice.
- The practitioner knows or reasonably should know that the other person has a conflict of interest.

Observation. These rules regarding the standards for written advice depend heavily on a reasonableness standard. It is a **reasonable practitioner** standard, under all the facts and circumstances, that the IRS indicates it will use in assessing whether the conduct of a practitioner meets the standard.[54] Facts and circumstances that are considered include the scope of the client engagement and the type and specificity of the advice sought. This suggests that a considerable gray area may exist in the application of the standard, at least until sufficient enforcement of this provision occurs to provide clarification of what conduct meets the reasonable practitioner standard.

52. Circular 230, §10.37(d).

53. Circular 230, §10.37(b).

54. Circular 230, §10.37(c).

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OPR DISCIPLINARY POSTINGS

Circular 230 standards of conduct for those engaged in practice before the IRS are enforced by the OPR. Its final agency decisions are listed at **www.irs.gov/Tax-Professionals/Enrolled-Actuaries/Final-Agency-Decisions.** During the first half of 2014, there were 53 decisions posted. They included several proceedings against practitioners for a wide variety of noncompliance issues, including the failure to file the practitioner's own income tax returns, expedited suspensions related to felony convictions and other grounds, and preparing returns without a PTIN.

Disciplinary actions appear in the Internal Revenue Bulletin. A summary of OPR disciplinary actions for the first half of 2014 follows.

Internal Revenue Bulletin	Due Diligence (§10.22)	Disreputable Conduct (§10.51)	Failure to File Tax Returns (§10.51)	Expedited Suspension (§10.82)	Total
2014-10 IRB 621		2	3	11	16
2014-20 IRB 1028		1	3	6	10
2014-26 IRB 1120	1	3	4	19	27
Total number of disciplinary actions	1	6	10	36	53

Note. Although the failure to file tax returns is listed as an action that constitutes disreputable conduct under §10.51, the preceding table provides a separate column for this particular action. In addition, some disbarments or suspensions were included under the column entitled "expedited suspensions" that were actually situations resembling an expedited suspension.

Notable Disciplinary Proceedings

As of the end of June 2014, two news releases regarding disciplinary proceedings within the preceding 12-month period were issued by the OPR. These news releases follow.

Note. Recent news releases are available at **www.irs.gov/uac/Latest-News.** Historical news releases are available at **www.irs.gov/uac/News-Release-and-Fact-Sheet-Archive.** Select disciplinary measures are discussed in IRS news releases to provide widespread publicity for particular decisions.

Former Lawyer/CPA Disbarred from Practice before the IRS for Filing False Powers of Attorney

IR-2014-58, May 1, 2014

WASHINGTON – The Internal Revenue Service today announced its Office of Professional Responsibility obtained the disbarment of Charles M. Edgar, which revokes his authority to practice before the IRS. Edgar is a former certified public accountant (CPA) and former attorney in Massachusetts. He was disbarred for having his CPA license revoked and for falsely claiming to be a CPA on power of attorney forms submitted to the IRS.

CPAs, duly qualified by a state, and lawyers, in good standing with a state, are permitted to represent taxpayers before the IRS. As a result of the proceedings, Edgar is barred from representing taxpayers before the IRS for a minimum of five years.

In a formal disciplinary proceeding, an administrative law judge ("ALJ") determined that Edgar had engaged in misconduct in violation of Circular 230, Regulations Governing Practice before the IRS. Edgar appealed the order of disbarment. However, the Treasury Appellate Authority upheld the order of disbarment on April 18, 2014.

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"The representations made by practitioners on powers of attorney forms are not mere procedural niceties. The forms are signed under penalty of perjury. Claiming a nonexistent licensure status puts the IRS in the position of potentially discussing taxpayer information with an unauthorized or unqualified person," said Karen L. Hawkins, Director of the Office of Professional Responsibility. "We will not tolerate that type of abuse of the tax administration process by anyone."

Edgar was licensed as a CPA and lawyer in Massachusetts. In December 2010, the Massachusetts Board of Registration in Public Accountancy revoked his CPA license based, in part, on his 1995 federal conviction for making false statements to the government in connection with claims for disability benefits and mail fraud. Edgar's license to practice law in Massachusetts was suspended in 1995, based on the criminal convictions. His petition for reinstatement to the Massachusetts bar was denied in 2001.

Subsequent to the CPA license revocation, in May 2011, Edgar attempted to represent two individual taxpayers under audit by the IRS. He filed two powers of attorney (Form 2848) in which he claimed to be a CPA duly qualified to practice in Massachusetts.

In an Initial Decision and Order, the ALJ determined that Edgar's "conduct demonstrates he does not have the integrity or character to be trusted representing taxpayers before the IRS." The Decision further stated: "The only appropriate sanction therefore is disbarment."

The Treasury Appellate Authority concurred finding the disciplinary proceeding was brought within the statute of limitations; that Edgar had given false and misleading information to a Treasury employee during the IRS examination process; and, that submitting false powers of attorney to the IRS was a "serious violation[s] that warrants a severe sanction."

The text of the ALJ's Initial Decision and Order of disbarment and the Treasury Appellate Authority's Decision on Appeal can be found on OPR's Final Agency Decisions page.

CPA Disbarred for Stealing from Daughter's Trust Fund

IR-2013-76, Sept. 17, 2013

WASHINGTON — The Internal Revenue Service today announced that its Office of Professional Responsibility (OPR) has prevailed in seeking the disbarment of David O. Christensen after he was convicted of theft for misappropriating funds as the conservator of his daughter's trust account. Christensen's CPA licenses in Washington and Oregon were revoked previously as a result of his conviction.

In a Final Agency Decision the Administrative Law Judge (ALJ) declined to carve out a request by Christensen for limited practice as a tax return preparer, and instead, disbarred him from all practice before the IRS finding that Christensen's conviction for theft, and the revocation of his CPA licenses, constituted disreputable conduct under Circular 230. Christensen had argued that he should be permitted to continue to prepare tax returns because his theft conviction resulted from a family matter that had nothing to do with his tax return preparation practice before the IRS.

"OPR strives to protect the integrity of the tax system from unscrupulous and incompetent practitioners regardless of how those traits become known," said Karen L. Hawkins, Director of OPR.

Agreeing with OPR's proposed sanction, the ALJ held the seriousness of Christensen's offense warranted disbarment from practicing before the IRS finding that the "Respondent has displayed a lack of integrity, including in his testimony at trial, in attempting to distinguish his professional actions from his 'father-daughter' relationship."

Christensen is prohibited from any practice (including tax return preparation) before the IRS for a five year period.

The text of the ALJ Final Agency Decision can be found on IRS.gov.

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EXPEDITED SUSPENSION

Section 10.82 of Circular 230 provides that an **expedited suspension** proceeding may be initiated against a tax practitioner if any of the following actions occur within the 5-year period prior to OPR's filing the complaint against the practitioner.

- The practitioner's law or CPA license was revoked for cause (other than for failure to pay the required fees or dues) in the state(s) in which the practitioner practices.
- The practitioner was convicted of any crime under the Code that involved dishonesty or breach of trust or was convicted of any felony involving conduct that renders the practitioner unfit to practice before the IRS.
- The practitioner violated the terms of a past OPR disciplinary measure.
- In either a civil or criminal matter relating to either the practitioner's own tax liability or that of any taxpayer, the practitioner was sanctioned by any court for attempting to delay proceedings, making frivolous arguments, or failing to pursue available administrative remedies.
- Failing to file annual returns for four of the five tax years (or for returns due more frequently than annually, five of the previous seven years) immediately preceding the initiation of the expedited suspension proceeding against the practitioner by the OPR.

Note. Generally, if the OPR initiates a proceeding against a practitioner, the OPR must first advise the practitioner in writing of the law, facts, and conduct that support the proceeding and provide the practitioner with the opportunity to respond before any IRS action is initiated. However, this is **not a requirement with expedited suspension proceedings.**[55]

COMPLAINT AND RESPONSE

In an expedited suspension proceeding, the complaint issued by the OPR generally seeks either suspension or disbarment of the practitioner because of the severity of the noncompliance. The OPR initiates an expedited suspension proceeding by filing a complaint against the practitioner with an Administrative Law Judge (ALJ) and serving the practitioner with a copy of the complaint.[56] The complaint may be served either on the practitioner personally or on the practitioner's firm at the last known address. Proper service generally requires the use of certified mail, regular first class mail if certified mail is not claimed or accepted, or a private courier service. The practitioner may agree on the manner in which the complaint is served.

Note. These complaint rules are generally used with all OPR complaints against practitioners, including expedited suspension complaints.

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55. Circular 230, §10.60(c).

56. Circular 230, §10.63.

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The complaint must provide the practitioner with the following information.[57]

- The place at which the practitioner's response must be filed and the due date for the response
- That a default decision can be issued against the practitioner if the practitioner fails to respond
- That a conference may be requested by the practitioner to address the issues within the complaint and such a request can be made within the response sent by the practitioner
- That the practitioner's ability to practice before the IRS may be suspended either immediately after the due date for the response if the practitioner fails to respond or immediately after a requested conference

The practitioner generally has 30 days from the date the complaint is served to respond. The complaint provides the practitioner with the address of the ALJ with which the response is filed. The response is filed with the ALJ and a copy is sent to the IRS.

Caution. The complaint is typically drafted in a list format that outlines each specific IRS allegation against the practitioner. The practitioner must likewise be specific in either admitting or denying each allegation. Failure to deny an allegation is treated as an admission of that allegation. In addition, if the practitioner does not request a conference in the response, the right to a conference is waived. Accordingly, **responses to an OPR complaint should be drafted with great care and precision.**

CONFERENCE

The place of a requested conference is determined by the OPR and cannot be any earlier than 14 days after the response due date (unless the practitioner agrees to an earlier date). Details regarding the OPR grounds for expedited suspension are generally discussed at the conference. If the practitioner fails to appear for the conference, the OPR may immediately suspend the practitioner. In addition, suspension may also follow a conference at which the practitioner discusses the OPR allegations made against the practitioner but fails to refute such allegations.

Because the grounds for expedited suspension involve conduct on the part of the practitioner that are typically well documented, refuting OPR allegations in an expedited suspension proceeding is frequently difficult or impossible. One option available to the practitioner is to consent to be sanctioned by the OPR by forwarding a voluntary sanction offer.[58] This consent constitutes an offer by the practitioner to be sanctioned with perhaps lesser disciplinary ramifications than would result from allowing the proceedings to move forward. Although the OPR is not under any obligation to accept such an offer, it does have the authority to negotiate with and forward a counteroffer to the practitioner in an effort to settle.

SUSPENSION AND REQUEST FOR LIFTING SUSPENSION

Generally, once it is determined that the grounds for expedited suspension of the practitioner exist and the OPR allegations are true, the OPR issues a **notice of suspension.** The practitioner's suspension begins on the date that this suspension notice is issued, and the practitioner's suspension remains in effect until it is lifted by the OPR. However, within the 2-year period after the suspension begins, the practitioner may request a "regular" suspension proceeding, which is held by an ALJ. This regular suspension proceeding is generally used for suspensions that do not fall under the expedited suspension rules. The practitioner forwards the request for a regular suspension proceeding to the OPR. Upon receiving the request, the OPR has 30 days to issue the necessary complaint to initiate the regular suspension proceeding requested by the practitioner.

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57. Circular 230, §10.62.

58. Circular 230, §10.61(b).

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The regular suspension hearing is conducted as an entirely new hearing (a "hearing de novo") without regard to an expedited suspension that is currently in effect. It is also conducted without regard to any evidence that was originally used in the previous suspension. Procedurally, this means that this regular suspension hearing is not treated as an appeal (in which the original expedited proceedings are only reviewed and the ALJ must find error or other compelling grounds to overturn the expedited suspension). Rather, the practitioner is provided with the ability to enter any new evidence and make new arguments not previously used. The same, however, is true for the OPR. Any original evidence may be admitted by either the practitioner or the OPR in addition to any new evidence.

Note. For further information on appealing the decision of an ALJ, see Circular 230, §10.77.

PETITION FOR REINSTATEMENT

A practitioner suspended under the expedited suspension rules may apply for reinstatement to restore their ability to practice before the IRS. This request may not be made until five years after the suspension or disbarment was effective. Reinstatement is not granted unless the IRS is satisfied that **both** of the following apply.[59]

- The petitioner is not likely to engage in further conduct contrary to Circular 230.
- Granting the petitioner's request for reinstatement is not contrary to the public interest.

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59. Circular 230, §10.81.

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