

2006

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Repository Citation

Namorato, Cono R., "Overview of OPR and Circular 230 Cases" (2006). *William & Mary Annual Tax Conference*. 147.
<https://scholarship.law.wm.edu/tax/147>

OVERVIEW OF OPR AND CIRCULAR 230 CASES

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I. ORIGIN OF A CIRCULAR 230 CASE - HOW OPR DEVELOPS REFERRALS

A. Sources of Referrals

Referrals concerning Attorneys, Certified Public Accountants (CPA), and Enrolled Agents (EA) are received by the Office of Professional Responsibility (OPR) and processed by the Enforcement Unit. Referrals come to the office through internal IRS sources, as well as from external sources such as taxpayers, state licensing authorities, and other tax professionals.

B. The Three Part Screening Process

1. Determine Jurisdiction

OPR must first determine whether it has jurisdiction over the practitioner. In the past, the office had jurisdiction over attorneys, Certified Public Accountants, Enrolled Agents and Appraisers. At the advice of Chief Counsel, the office historically exercised jurisdiction over those individuals who it could show actually practiced before the Internal Revenue Service. Enrolled Actuaries, while cited in the regulations, actually come under the jurisdiction of the Joint Board for Enrollment of Actuaries, an entity under the auspices of the Department of Labor and the Internal Revenue Service.

With the passage of the Jobs Act in 2004, the OPR's jurisdiction has been clarified by the Act's interpretation of what exactly practice before the IRS encompasses. As a result, the range of cases that OPR has jurisdiction to investigate unequivocally includes practitioners who provide written advice to clients. Further, the Jobs Act has provided the Office with the ability to impose civil monetary penalties against individual practitioners, firms and other entities.

2. Determine whether alleged misconduct is actionable

Not every type of wrongdoing is a matter that should come before the office. For example, the office would not open a case on a practitioner who had been sued by a former employee for sexual harassment, or who received a series of parking tickets. The misconduct must be of a type contemplated by Circular 230. Section 10.51 defines "disreputable conduct" as including, but not limited to, certain enumerated actions. However, this should not be read as a "catch-all" provision; the conduct, even if not covered by the subsequent paragraphs in Section 10.51, should be of the same general type as the conduct described therein.

3. Determine whether alleged misconduct is timely

As a matter of policy, OPR generally will not pursue allegations of which the IRS knew or should have known of the misconduct more than five years before the date upon which a proceeding can reasonably be expected to be instituted. In cases involving relatively minor allegations, the Chief of Enforcement may, in his or her discretion, employ an even more stringent timeliness standard.

C. Gathering The Evidence

An Enforcement Attorney and a Paralegal will identify and take action to collect the appropriate types of evidence. The Enforcement Attorney, together with the Team Chief, will review the evidence and determine if it supports the allegations of misconduct. For example, in a case involving the submission of false or misleading information (Section 10.51 (d)), the Enforcement Attorney would likely secure the returns at issue, as well as any audit work papers or Revenue Agent Reports.

D. The Changes Concerning Appraiser Cases

In the past, the OPR was unable to pursue allegations of misconduct against appraisers until the IRS assessed a section 6701(a) penalty under the Internal Revenue Code. But with the recent passage of the Pension Protections Act of 2006, this requirement was eliminated. As a result, the OPR now has the authority to suspend or disbar from practice an appraiser who is found to have violated Circular 230.

II. POTENTIAL SANCTIONS

A. General

If a case is referred for litigation, OPR recommends the appropriate sanction to be sought in the disciplinary proceeding. This is important, because OPR is required to state what sanction that they are seeking in the complaint (see Section 10.62(b)). Administrative Law Judges will apply a heightened burden of proof ("clear and convincing evidence") to cases in which OPR seeks disbarment or a suspension of six months or greater. The goal is to recommend a penalty that is commensurate with the misconduct at issue (i.e., the punishment should fit the "crime").

B. Factors

Circular No. 230 provides no hard and fast formula for determination of the appropriate sanction in each case. Generally, OPR looks at the following factors:

1. The nature and severity of the offense(s) in question;
2. The repetitiveness of the conduct (i.e., a pattern rather than an isolated incident);
3. The practitioner's prior disciplinary history, if any, with the office;
4. Any aggravating or mitigating factors which may be present (see list below); and
5. The impact that not adequately disciplining the practitioner would have on tax administration, the confidence of the practitioner community and the taxpaying public in our enforcement efforts, etc.

C. General Aggravating Factors (this list is not exhaustive):

1. Sum of money at issue
2. Impact on public's perception of tax system's fairness if practitioner's actions were to go unsanctioned.
3. Degree of frequency with which practitioner engages in practice before the Service.

D. General Mitigating Factors (this list is not exhaustive):

1. Age of the allegations (not the age of the practitioner)
2. Practitioner's good-faith reliance on faulty information furnished by his or her client or a third party.
3. Degree of contrition expressed by practitioner.
4. Health problems, extenuating circumstances or personal hardships experienced by practitioner.

E. Potential ALJ Reaction

The Administrative Law Judges have been receptive to this mode of analysis and have incorporated it into their decisions. If the penalty sought is disbarment, the ALJ's will often consider whether the practitioner is "capable of rehabilitation," thus warranting a less severe sanction such as a lengthy suspension. Thus, disbarment should be reserved for those practitioners for whom the evidence indicates that a less severe sanction would likely have little or no deterrent effect.

III. ISSUANCE OF ALLEGATION LETTERS

A. Factors

Among the factors that are considered in determining whether to issue an allegation letter are:

1. The weight of the evidence.
2. The framing of the charges (*i.e.*, which sections of Circular No. 230 to move under).
3. Possible defenses the practitioner could raise.
4. The range of acceptable penalties that might be appropriate if the allegations are proven true.
5. The potential impact of case (is it high-profile or likely to break new ground for the office).

Either the case will move forward for the issuance of an allegation letter, held for further consideration, or closed without action.

B. The Allegation Letter

1. Preparation of the Allegation Letter:

The Enforcement Attorney summarizes the allegations based upon the evidence provided. The allegations will cite specific sections and paragraphs of Circular 230. The practitioner generally is not informed of the exact sanction that may be imposed; the letter may simply state that OPR is considering instituting a proceeding for the practitioner's "disbarment or suspension from practice before the Internal Revenue Service." An appropriate sanction may reveal itself during settlement discussions, and, ultimately, must be specified in the complaint.

2. Service:

While the allegation letter may be sent to the practitioner at his or her work address, home address, or Post Office box, the complaint must be served upon the practitioner at his or her last known address, as reflected on the most recent Form 1040 return filed with the IRS, pursuant to Section 10.63(a)(2). Thus, this is an appropriate time to secure the practitioner's home address.

3. Monitoring the Practitioner's Response:

Each Enforcement Attorney maintains a tickler system to monitor practitioner responses. The allegation letter states that a response is due within thirty days, but the practitioner may request an extension of time to gather evidence and / or retain a representative. Further extensions may be granted with appropriate approval.

IV. EVALUATION OF RESPONSES, SETTLEMENT NEGOTIATIONS AND PRE-LITIGATION PROCEDURES

A. The Initial Response

Affording the practitioner an opportunity to respond to the allegations before the issuance of a complaint is a "win-win" situation - it is often in the practitioner's interest to avoid a disciplinary proceeding by affirmatively responding to the allegations, and it is likewise in the interests of OPR not to pursue allegations that are unlikely to be substantiated. The practitioner's response is evaluated according to the following factors:

1. The sufficiency of the defense (taken as true).
2. The persuasiveness of the defense (*i.e.*, the probability that the defense will be believed).
3. The availability of documentary evidence and the credibility of witnesses that the OPR anticipates the practitioner will utilize in his or her defense.

B. OPR Reaction

1. OPR sometimes conducts supplemental reviews to determine if it can rebut the practitioner's defenses before determining whether the case should be "Closed Without Action."
2. If the practitioner's response is sufficient to overcome all of the stated allegations, the Enforcement Attorney issues a "Close Without Action" letter.
3. If the practitioner's response is sufficient to overcome some, but not all, of the allegations, the Enforcement Attorney contacts the practitioner or his or her representative by telephone, and explains why the other charges remain unresolved.
4. If the response is inadequate, the OPR matter will proceed.

C. Conferences

1. When a practitioner so requests, OPR will afford the practitioner or his/her representative a conference.
2. Section 10.61 (a) does not specify the manner in which the conference may be held. The Enforcement Attorney offers the following three options to practitioners:
 - a. A face to face meeting with the practitioner and his or her representative at the OPR office in Washington;
 - b. A telephone conference call with the practitioner and his or her representative from the respective offices of all parties;
or
 - c. *In exceptional circumstances and after consultation with General Legal Services (GLS)*, a face to face meeting with the practitioner and his or her representative with a GLS attorney at the office of the Area Counsel that would litigate the case.

V. ANATOMY OF A DISCIPLINARY PROCEEDING:

A. ALJ Proceeding

Circular No. 230 is not terribly specific with respect to the conduct of hearings. Individual ALJ's may set forth particular requirements for the conduct of such proceedings, but Circular 230 proceedings typically move forward in the following fashion:

1. GLS will file a complaint on behalf of the Director, OPR. The complaint is filed with the Chief ALJ and served upon the practitioner at his or her last known residential address as reflected on their 1040 return. For practical purposes, GLS will serve the complaint at another place if the practitioner or his or her representative have so requested.
2. The practitioner will either file a responsive pleading (such as an answer or motion to dismiss), or fail to respond, in which case GLS can move for a decision by default.
3. The Chief ALJ will designate him or herself or another ALJ to preside over the case, and send out an Order of Designation to the parties notifying them of same.
4. The ALJ's will send out a Pre-hearing Order, which usually requires the parties to report on the progress of settlement discussions (without disclosing the terms of such discussions to the ALJ). Should a settlement result prior to a hearing, an "acceptance letter" acknowledging receipt of the practitioner's settlement offer and accepting the practitioner's offer of consent to the sanction in question will be prepared. This letter must be approved and signed by the Director of OPR prior to being sent. If there has been no settlement, the parties are usually required to exchange witness lists and copies of documentary evidence they intend to offer at the hearing.
5. The parties may, in rare instances, move for leave to take the deposition of a witness in advance of the hearing. In such instances, the party would need to demonstrate to the ALJ that simply having the witness testify at the hearing is not sufficient, either because the witness would be unavailable at the hearing or because having the deposition testimony in advance of the hearing is critical for the preparation of the party's case.
6. Although not expressly provided for by Circular No. 230, the parties may move for summary judgment.

7. The hearing is held in the presence of a Certified Court Reporter. These hearings are closed to the public unless the practitioner requests that it be opened. When proceedings are opened to the public, care is taken to safeguard confidential taxpayer information from unauthorized disclosure;
8. The parties may be required to submit post-hearing briefs and / or proposed findings of fact and conclusions of law. Some ALJ's prefer oral closing arguments at the conclusion of the hearing.
9. The ALJ issues an Initial Decision, first determining whether misconduct occurred and then evaluating the misconduct for determination of the appropriate sanction.

B. Disposition of ALJ Decisions and Processing of Appeals

1. Should an Administrative Law Judge (ALJ) issue a decision authorizing any sanction at all, the practitioner has thirty days to appeal this decision to the Secretary of the Treasury. If the ALJ issues a decision dismissing the complaint or if the sanction is considered by OPR to be too lenient, OPR will request that GLS file an appeal with the Secretary of the Treasury. Cases that do not result in an appeal are returned to the Paralegal for processing and closure.
2. Many injunctions issued by the District Courts include relief that has the effect of barring practitioners from representing clients before the Service. This is tantamount to disbarment. That said, not every injunction obtained by the Department of Justice renders a parallel Circular 230 proceeding moot. For example, an injunction that only proscribes certain abusive practices but still allows a practitioner to represent clients before the Service not only fails to moot out the Circular 230 proceeding, but could actually prove helpful in the Circular 230 case, since the findings of fact by the District Court could be cited in the complaint by GLS. Additionally, preliminary injunctions barring representation of clients before the Service are, by their very nature, temporary. Thus, at least one ALJ has ruled that they fail to render the Circular 230 proceeding moot.

C. Disclosure of Result to State Licensing Authority

1. One initiative actively being pursued by OPR is increased sharing of information with state licensing authorities. Notice of the fact that a practitioner has been disbarred, suspended or censured is currently published in the Internal Revenue Bulletin. As such, the fact that discipline has been imposed is a matter of public record. However,

absent a request by the practitioner that the proceeding be made public, OPR does not have the ability to disclose the nature of the underlying allegations. This has proven frustrating to those state licensing authorities whose own rules require more information than is currently available from OPR before determining whether to take reciprocal action.

2. OPR is exploring the possibility of requiring consents to disclosure of such information as part of our settlement agreements, with due consideration to the need to sanitize third party taxpayer information.
3. OPR is also proposing that Circular 230 be revised to provide that disciplinary proceedings be presumed to be open to the public unless a practitioner requests otherwise, a reversal of the current policy.

