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Professional Responsibility: Beyond Pure Ethics and Circular 230 (Outline)

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OFFICE OF DIRECTOR OF PRACTICE

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I. Basic Responsibility of Director of Practice

A. The basic responsibility of the Director of Practice is the administration and enforcement of the regulations governing practice before the Internal Revenue Service. This responsibility emanates from legislation enacted in the year 1884, sec. 3 of the Act of July 7, 1884, 23 Stat. 258. Recodification of the legislation is found at 31 U.S.C. 330 and provides:

"(a) Subject to section 500 of title 5, the Secretary of the Treasury may --

(1) regulate the practice of representatives of persons before the Department of the Treasury; and

(2) before admitting a representative to practice, require that the representative demonstrate--

(A) good character;
(B) good reputation;
(C) necessary qualifications to enable the representative to provide to persons valuable service; and
(D) competence to advise and assist persons in presenting their cases.

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[1] The views expressed herein are those of the author and do not necessarily reflect the views of the Department of the Treasury.

(b) After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department a representative who--

(1) is incompetent;
(2) is disreputable;
(3) violates regulations prescribed under this section; or
(4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented."

B. For a number of years, regulations implementing the statute addressed practice before the entire Treasury Department. As our Federal tax laws became more complex and sophisticated, the efforts of the Department were concentrated on practice before the Internal Revenue Service. Consequently, the regulations promulgated under 31 U.S.C. 330 were modified over the years to address tax practice. Those regulations are found at 31 C.F.R. Part 10 and have been reprinted as Treasury Department Circular No. 230.

II. Practice Before the Internal Revenue Service

Practice before the Internal Revenue Service is defined as that comprehending all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Presentations include the preparation and filing of necessary documents, correspondence with and communications to the Internal Revenue Service, and the representation of clients at conferences, hearings, and meetings. 31 C.F.R. 10.2(a). Representation should not be confused with either appearing before the Internal Revenue Service as a witness for a taxpayer or furnishing information at the request of the Internal Revenue Service or any of its officers or employees. These acts are not considered practice before the Internal Revenue Service (31 C.F.R. 10.7(c)) and may be performed by anyone who is able to assist the Internal Revenue Service to promptly handle the examination of a tax return.

III. Eligibility to Practice Before the Internal Revenue Service

Eligibility to practice before the Internal Revenue Service is limited to the following:

A. Attorneys. Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia. 31 C.F.R. 10.2(b) and 10.3(a).

B. Certified Public Accountants. Any person who is duly qualified to practice as a certified public accountant in any State, possession, territory, Commonwealth, or the District of Columbia. 31 C.F.R. 10.2(c) and 10.3(b).

C. Enrolled Agents. Any person who is enrolled by the Treasury Department to practice before the Internal Revenue Service. 31 C.F.R. 10.3(c).

D. Enrolled Actuaries. Any individual who is enrolled as an actuary pursuant to 29 U.S.C. 1242 (practice limited to identified provisions of the Internal Revenue Code). 31 C.F.R. 10.3(d).

IV. Entry of Appearance

The entry of a representative's appearance before the Internal Revenue Service is evidenced by a declaration filed by the practitioner and a power of attorney running to him or her.

A. A power of attorney and declaration are filed at the time an appearance is entered and "ride" with the file. 26 C.F.R. 601.503(a). In addition, the power of attorney is entered into the Centralized Authorization File at the appropriate Service Center of the Internal Revenue Service. 26 C.F.R. 601.502(b)(2).

B. The declaration is mandated by the Agency Practice Act, with respect to attorneys and certified public accountants. 5 USC 500(d)(2). It is a signed statement that the practitioner is qualified (as an attorney or certified public accountant) and is authorized to represent the particular party on whose behalf he or she acts. The requirement for a declaration has been extended to enrolled agents and enrolled actuaries as well. 26 C.F.R. 601.502(b)(iii),(iv).

C. The power of attorney is required under the Commissioner's Conference and Practice Requirements, 26 C.F.R. Part 601, Subpart E.

D. The power of attorney is signed by the taxpayer and authorizes the practitioner to act in behalf of the taxpayer with respect to the areas delineated on the power of attorney.

V. Discipline Cases

A. Receipt of referrals

1. Matters raising questions of impropriety by tax practitioners are received from a variety of sources. They include:

   a. clients of practitioners
   b. other practitioners
   c. professional associations
   d. the Internal Revenue Service

2. The greatest number of referrals are received from field offices of the Internal Revenue Service. Each operational area of the Internal Revenue Service, e.g. examination, collection, criminal investigation, and appeals, has internal requirements established in their respective segments of the Internal Revenue Manual to make referrals to the Office of Director of Practice when there is a question of violation of the regulations in Circular 230. 31 C.F.R. 10.53 and HB 0735.1 217.4; IRM 4053.1; IRM 4053.3; IRM 4297.9; IRM 5155.5; IRM 8(11)34; IRM 8(23)23.3; IRM 9531.2 Form 1327; IRM 9558.1; HB 9781 691 General; IRM (10)363.1; IRM (10)365; HB (10)311 931; and HB(10)311 940.

B. Processing and disposition of referrals

1. Upon receipt of a referral, the matter is first reviewed to determine a) if the person who is the subject of the referral is an attorney, certified public accountant, enrolled agent or enrolled actuary, and b) if the reason for the referral raises, as a threshold matter, a question of misconduct by the practitioner. If such criteria are met, the referral is placed on the case inventory and assigned to a member of the legal staff.

2. The attorney to whom the case is assigned evaluates and analyzes the information, and performs any necessary research. The facts in many referrals are insufficient for a complete review to be made. In those instances, what is needed to provide the basis for an informed decision is identified and a request is made for investigation or for additional information. Investigatory work is conducted for the Office of Director of Practice by the Inspection Service of the Internal Revenue Service, which has offices throughout the country. In addition, requests for additional information (documents, etc.) are made of the Internal Revenue Service office which has such information.

3. If the attorney responsible for the case concludes a genuine question of violation of the regulations is raised and there is concurrence in that conclusion, the matter is first handled on an informal basis.

   a. The practitioner is notified by letter of the facts and provision(s) of the regulations in question, and is requested to furnish a response. The response may be in writing, at conference, or both.

   b. The purpose of the response is to ascertain the practitioner's position relative to the matter in issue, to determine whether or not there are relevant mitigating circumstances and to

provide him or her an opportunity to demonstrate or achieve compliance with the regulations in Circular 230.

4. The practitioner's position and any supporting documents are reviewed and evaluated together with the entire file. If additional information is needed, a supplementary investigation will be conducted.

5. A decision thereafter will be made regarding the appropriate disposition. The following alternatives are available.

   a. If the practitioner's explanations overcome the basis for the initial contact, the case will be removed from the case inventory without further action.

   b. If a violation of the regulations is found and such violation is not of sufficient seriousness to warrant the practitioner's suspension or disbarment from practice before the Internal Revenue Service, the Director of Practice is authorized to issue a reprimand. 31 C.F.R. 10.54. The reprimand is private and takes the form of a letter from the Director of Practice to the practitioner. It does not affect his or her eligibility to practice before the Internal Revenue Service; rather, it serves as an admonition not to engage in further conduct of the nature which occasioned the reprimand. The facts and circumstances of each case determine if the official action of the office will be limited to a reprimand.

   c. If an aggravated violation of the regulations is found, the Director of Practice is authorized to initiate a proceeding for the practitioner's suspension or disbarment from practice before the Internal Revenue Service. 31 C.F.R. 10.54. After due notice and opportunity for hearing, suspension or disbarment from practice before the Internal Revenue Service may be invoked against a practitioner.

d. A practitioner, in order to avoid the initiation or conclusion of a disciplinary proceeding, may offer his or her consent to voluntary suspension from practice before the Internal Revenue Service. In the case of an enrolled agent or an enrolled actuary, there also may be an offer of resignation of enrollment. The Director of Practice, in his discretion, may accept the offered resignation and may suspend a practitioner in accordance with the consent offered. 31 C.F.R. 10.55(b).

C. Public record. Disciplinary actions resulting in suspensions or disbarments are matters of public record. A roster of suspended and disbarred practitioners is maintained (31 C.F.R. 10.98(a)) and the name of a person listed thereon is disclosed upon request. In addition, notification of a suspension or disbarment action (or of a voluntary resignation) normally is published in the Internal Revenue Bulletin and in an Internal Revenue Service generated quarterly report of disciplinary and related actions. Pursuant to agreements with a number of state licensing authorities, notifications of suspension or disbarment actions concerning practitioners licensed with that state are furnished. The bases for suspensions or disbarments may be provided upon request in a manner consistent with the disclosure laws. The underlying reasons for voluntary suspensions are not furnished inasmuch as the allegations have not been proven. The identity of persons who are issued reprimands, which are private in nature, are not maintained on a public roster.

D. Effect of suspension or disbarment. Suspension or disbarment prohibits the individual from practice before the Internal Revenue Service as defined in the regulations. 31 C.F.R. 10.2(a). Such individual may continue to prepare most tax returns and may furnish information to the Internal Revenue Service at its request. Other practitioners are prohibited, in practice before the Internal Revenue Service, from employing or accepting assistance from a person under suspension or disbarment or from accepting employment as associate, correspondent, or subagent from, or sharing fees with, any such person. 31 C.F.R. 10.24. In addition, maintaining a partnership for the practice of law, accountancy, or other related professional services with a person who is under disbarment from practice before the Internal Revenue Service is presumed to constitute aiding or abetting another person to engage in such practice during a period of ineligibility, an activity prohibited by the regulations. 31 C.F.R. 10.51(h).

VI. Formal Proceeding

A. Initiation of proceeding

1. Complaint. A formal disciplinary proceeding against a practitioner is initiated by a complaint which names the practitioner (respondent) and is signed by the Director of Practice (complainant). The complaint (a) describes the allegations which constitute the basis for the proceeding, and (b) notifies the respondent of the time within which to file an answer and the place of such filing. 31 C.F.R. 10.56. A complaint is deemed sufficient if it fairly informs the respondent of the charges in order to prepare a defense. 31 C.F.R. 10.56(a).

2. Answer.

   a. The practitioner may file an answer to the complaint. The time for answer may not be less than 15 days from the date of service of the complaint. A 30 day period normally is provided. The absence of an answer may result in a decision by default, a fact of which the respondent is advised in a notice accompanying the complaint. 31 C.F.R. 10.56(b).

   b. The answer is required to contain a statement of the facts which constitute the grounds of defense, and it must specifically admit or deny each allegation set forth in the complaint. However, a respondent may not deny a material allegation in the complaint which is known to be true or state that he or she is without sufficient information to form a belief when in fact the respondent possesses such information. Affirmative statements of defense also may be included in the answer. 31 C.F.R. 10.58(b). Every allegation in the complaint which is not denied in the answer is deemed to be admitted and may be considered proven. Similarly, failure to answer the complaint within the time prescribed in the notice to the respondent is considered admission of the complaint's allegations. The answer must be filed in duplicate in the Office of Director of Practice. 31 C.F.R. 10.58(a) and (c). A reply to an answer is not required. 31 C.F.R. 10.60. If it

appears that the respondent in his or her answer, falsely and in bad faith, denies a material allegation of fact in the complaint or states that the respondent has no knowledge sufficient to form a belief, when the respondent in fact possesses such information, or if it appears that the respondent has knowingly introduced false testimony during proceedings for disbarment or suspension, the Director of Practice may thereupon file supplemental charges against the respondent. Such supplemental charges may be tried with other charges in the case, provided the respondent is given due notice thereof and is afforded an opportunity to prepare a defense. 31 C.F.R. 10.59.

B. Proceeding

1. The presiding judicial officer at a disciplinary proceeding is an administrative law judge, who is appointed as provided by 5 U.S.C. 3105. 31 C.F.R. 10.64(a). The administrative law judge is authorized to do the following:

   a. administer oaths and affirmations, 31 C.F.R. 10.64(b)(1);

   b. make rulings upon motions and requests, which rulings may not be appealed from prior to the close of a hearing except at the discretion of the administrative law judge, in extraordinary circumstances, 31 C.F.R. 10.64(b)(2);

   c. determine the time and place of hearing and regulate its course and conduct, 31 C.F.R. 10.64(b)(3);

   d. adopt rules of procedure and modify the same from time to time as occasion requires for the orderly disposition of proceedings, 31 C.F.R. 10.64(b)(4);

   e. rule upon offers of proof, receive relevant evidence, and examine witnesses, 31 C.F.R. 10.64(b)(5);

f. take or authorize the taking of depositions, 31 C.F.R. 10.64(b)(6);

g. receive and consider oral or written argument on facts or law, 31 C.F.R. 10.64(b)(7);

h. hold or provide for the holding of conferences for the settlement or simplification of the issues by consent of the parties, 31 C.F.R. 10.64(b)(8);

i. perform such acts and take such measures as are necessary or appropriate to the efficient conduct of any proceeding, 31 C.F.R. 10.64(b)(9); and

j. make initial decisions, 31 C.F.R. 10.64(b)(10).

2. A respondent may appear in person or be represented at hearing. The complainant may be represented by an attorney or other employee of the Internal Revenue Service. 31 C.F.R. 10.63.

3. Hearings normally are held at a location convenient to the respondent. They are stenographically recorded (31 C.F.R. 10.65) and the government has the burden of proving its case by substantial evidence. See Washburn v. Shapiro, 409 F. Supp. 3 (SD Fla 1976). The rules of evidence prevailing in courts of law and equity are not controlling at a disciplinary hearing. However, an administrative law judge is required to exclude evidence which is irrelevant, immaterial or unduly repetitious. 31 C.F.R. 10.66(a). The regulations provide for the use of depositions at the administrative hearing, a matter which is within the discretion of the administrative law judge. 31 C.F.R. 10.67.

4. As soon as practicable after the conclusion of a hearing and the receipt of any proposed findings and conclusions timely submitted by the parties, the administrative law judge is required to make an initial decision in the case. The decision includes a statement of findings and conclusions and an order of disbarment, suspension, reprimand or of dismissal of the complaint. 31 C.F.R. 10.70.

C. Appeal and judicial review

1. Within 30 days from the date of the initial decision, either the complainant or respondent may appeal the initial decision to the Secretary of the Treasury. The appeal is required to include the exceptions to the initial decision and supporting reasons for the exceptions. The opposing party may file a reply brief to the appeal. 31 C.F.R. 10.71. The Secretary of the Treasury is required to make a decision on the appeal. Such decision, which is made on the record, constitutes the final agency action. 31 C.F.R. 10.72. In the absence of a timely appeal from the initial decision, such initial decision becomes the final agency action. 31 C.F.R. 10.70.

2. After the decision on appeal is issued, an aggrieved party may bring the matter into the Federal court system (district court) for review.

D. Expedited Proceeding

The Director of Practice may summarily suspend from practice before the Internal Revenue Service a practitioner who has been convicted of a crime under the revenue laws; has been convicted of a felony under Title 18 of the U.S. Code; or who has had his/her license suspended or revoked for cause by a court or other authorized body, including a State bar or a State board of accountancy. The practitioner may then request a full administrative hearing.

VII. Traditional Bases for Discipline

A. Duties and restrictions. The regulations in Circular 230 set forth duties and restrictions relating to practice before the Internal Revenue Service. 31 C.F.R. Part 10, Subpart B. A practitioner's violation of a duty or engaging in a restricted area of practice may form a basis for disciplinary action. The duties required of a practitioner are general in nature, and are available for use in the evaluation of most referrals of allegations of practitioner impropriety. In many instances, such duties do not relate to specific provisions of the Internal Revenue Code or regulations. The provisions of Circular 230 generally address basic precepts of professional conduct and fair dealings with the Internal Revenue Service, precepts that are considered traditional in nature. Violations include:

1. failing to furnish records or information to the Internal Revenue Service upon proper and lawful request, 31 C.F.R. 10.20;
2. upon learning of the client's noncompliance with the revenue laws or of having submitted a document to the Internal Revenue Service containing an error or omission, failure to advise the client promptly of the noncompliance, error or omission, 31 C.F.R. 10.21;
3. failure to exercise due diligence in oral or written representations made either to the Internal Revenue Service or to a client, 31 C.F.R. 10.22;
4. unreasonably delaying the prompt disposition of matters pending before the Internal Revenue Service, 31 C.F.R. 10.23;
5. accepting assistance from a practitioner who is under suspension or disbarment from eligibility to practice before the Internal Revenue Service, 31 C.F.R. 10.24;
6. charging unconscionable fees or charging contingent fees for return preparation or claims for refund (with exceptions), 31 C.F.R. 10.28;
7. representing conflicting interests without the parties' consent after full disclosure of the conflict, 31 C.F.R. 10.29;
8. engaging in unauthorized advertising or solicitation of employment in matters related to the Internal Revenue Service, 31 C.F.R. 10.30; and
9. negotiating or endorsing a client's check made in respect of income taxes, 31 C.F.R. 10.31.
10. failure to prepare a return or to give tax advice where a position on a return or to be taken on a return does not have a realistic possibility of success or where there is no disclosure.

B. Disreputable conduct. The regulations in Circular 230 also delineate conduct which is characterized as disreputable in nature. 31 C.F.R. 10.51. Such conduct generally carries with it an element of willfulness or by its nature evidences, prima facie, aggravated misconduct by the practitioner. A finding that a practitioner has engaged in an act of disreputable conduct almost always forms the basis of a disciplinary action. Such conduct includes:

1. conviction of a crime under the Federal revenue laws or of an offense involving dishonesty or breach of trust, 31 C.F.R. 10.51(a);
2. giving false or misleading information to the Department of the Treasury or to any tribunal authorized to pass on Federal tax matters, knowing such information to be false or misleading, 31 C.F.R. 10.51(b);

3. false or misleading representations with intent to deceive a client or prospective client in order to procure employment, 31 C.F.R. 10.51(c);
4. intimating that special consideration from the Internal Revenue Service can be obtained by the practitioner, 31 C.F.R. 10.51(c);
5. willfully failing to make a Federal tax return in violation of the Revenue laws, 31 C.F.R. 10.51(d);
6. evading, attempting to evade or participating in evading any Federal tax or payment thereof, 31 C.F.R. 10.51(d);
7. misappropriating or failing to promptly remit funds received from a client for the payment of taxes or other obligations due the United States, 31 C.F.R. 10.51(e);
8. directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of an Internal Revenue Service officer or employee by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor or thing of value, 31 C.F.R. 10.51(f);
9. disbarment or suspension as an attorney, certified public accountant, public accountant or actuary by any licensing authority, Federal court of record or Federal agency, 31 C.F.R. 10.51(g);
10. knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of ineligibility of such other person, 31 C.F.R. 10.51(h);
11. engaging in contemptuous conduct in connection with practice before the Internal Revenue Service, 31 C.F.R. 10.51(i); and
12. giving a false tax shelter opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or a pattern of providing incompetent opinions on questions arising under the Federal tax laws, 31 C.F.R. 10.51(j).

AMENDMENTS TO CIRCULAR 230

The regulations governing practice before the IRS contained in Treasury Department Circular 230 have been amended. The following is a summary of the amendments.

I. Standard to be used in giving tax advice and in preparing returns

A. In order for a position to be taken on a return, it must have a realistic possibility of being sustained on its merits (realistic possibility standard). A practitioner may neither advise a taxpayer to take a position on a return nor prepare a return unless the realistic possibility standard has been met.

B. If the realistic possibility standard has not been met, the return may not be prepared unless there is disclosure of the aggressive position. A non-signing practitioner must advise a client of any opportunity to avoid a penalty by disclosure.

C. A taxpayer may not be advised to take a position on a return and a practitioner may not prepare a return if the position is frivolous (patently improper).

D. A taxpayer must be advised of any penalties likely to apply and of any appropriate manner of avoiding the penalty, e.g. through disclosure.

E. A realistic possibility exists if there is approximately a one-in-three or greater likelihood of success. In reaching that conclusion, the authorities permitted for consideration are those identified in the accuracy-related penalties regulations.

F. Only conduct that evidences willfulness, recklessness, or gross incompetence will subject a practitioner to a suspension or disbarment action.

II. Limited practice before the IRS

Circular 230 has been amended to clarify that individuals who engage in limited practice before the Service (in a permitted capacity other than that of attorney, certified public accountant or enrolled agent) are subject to the rules of conduct in Circular 230.

III. Contingent Fees

The amendment prohibits contingent fees for return preparation and certain claims for refund. Contingent fees may be charged for refund claims if the practitioner reasonably anticipates at the time the claim is filed that the claim will receive substantive review by the IRS.

IV. Expedited Suspensions

A. Unlike the current regulations requiring full administrative due process before the imposition of a suspension or disbarment from eligibility to practice before the Service, the Director of Practice is authorized to summarily suspend a practitioner. This can be done only if one of the following three circumstances has occurred:

1. The practitioner has been convicted of a crime under the revenue laws.

2. The practitioner has been convicted of a felony under Title 18 of the U.S. Code.

3. The practitioner has been suspended or disbarred for cause by a state bar or a state board of accountancy.

B. The practitioner then may request and receive a full administrative hearing.

V. Dual designations for enrolled agents

The amendment eliminated the previous prohibition on an attorney or a certified public accountant being an enrolled agent.