The Ethics of Tax Practice
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I. Introduction

This paper focuses on attorneys practicing primarily in the field of Federal taxation. Such lawyers are subject to a web of ethical rules. They are bound by the rules of the States in which they are admitted, the rules of the courts in which they practice, and in many instances, the rules promulgated by the Treasury Department, known as Circular 230, which also govern non-lawyers. This paper focuses on the pronouncements of the American Bar Association, which issued the Model Rules of Professional Conduct and issues formal opinions interpreting those rules, which serve as the ethics rules for most States, and Circular 230.¹ Below I examine these rules, as well as the implications for practitioners who breach those rules. In conclusion, I attempt to synthesize the various pronouncements into Ten Commandments for Tax Lawyers.

II. Pronouncements by the American Bar Association Standing Committee on Ethics and Professional Responsibility

A. Formal Opinion 314 – Duty of candor to the IRS

In 1965, the Committee on Ethics issued its first formal opinion dealing with matters before the Internal Revenue Service. The committee recognized that the IRS is an adversary,

not a judicial tribunal. A lawyer, however, has a “duty not to mislead the Service, either by misstatement, silence, or through his client, but is under no duty to disclose the weaknesses of his client’s case. He must be candid and fair, and his defense of his client must be exercised within the bounds of the law and without resort to any manner of fraud or chicane.”

The committee quickly disposes of the notion that the IRS is a judicial tribunal to which a high duty of candor is owed:

While its procedures provide for ‘fresh looks’ through departmental reviews and informal and formal conferences procedures, few will contend that the service provides any truly dispassionate and unbiased consideration to the taxpayer. Although willing to listen to taxpayers and their representatives and obviously intending to be fair, the service is not designed and does not purport to be unprejudiced and unbiased in the judicial sense.”

The mere fact that the IRS is not a judicial tribunal does not, as the committee points out, relieve the lawyer of all ethical obligations. The committee recognizes, however, that “[n]egotiation and settlement procedures of the tax system do not carry with them the guarantee that a correct tax result necessarily occurs. The latter happens, if at all, solely by reason of chance in settlement of tax controversies just as it might happen with regard to other civil disputes.”

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3 Opinion 314 at 689.
4 Id. at 690-691.
committee goes on to say that a “wrong, or indeed sometimes an unjust, tax result in the settlement of a controversy is not a crime.” The lawyer’s obligation is to represent his client with “warm zeal” and to not mislead either affirmatively or through silence.

B. Formal Opinion 346 (Revised) – Tax Shelter Opinions

With the prevalence of tax shelters in the 1980s, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal opinion advising tax practitioners on the ethical considerations associated with tax shelter opinions. “Because the successful marketing of tax shelters frequently involves tax opinions issued by lawyers, concerns have been expressed by the organized bar, regulatory agencies, and other over the need to articulate ethical standards applicable to a lawyer who issues an opinion which the lawyer knows will be included among the tax shelter offering materials and relied upon by offerees.”

The committee concluded that a lawyer cannot, of course, render a “false opinion,” which “is one which ignores or minimizes serious legal risks or misstates the facts of the law,

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5 Id. at 691.
6 Id. at 692.
knowingly or through gross incompetence."\textsuperscript{8} While canon 7 of the Model Code of Professional Responsibility stated that “A lawyer should represent a client zealously within the bounds of the law,” providing a false opinion “clearly ... exceeds [that] duty....”\textsuperscript{9}

In language that presaged standards later found in Circular 230, the committee noted that “[t]he lawyer who accepts as true the facts which the promoter tells him, when the lawyer should know that a further inquiry would disclose that these facts are untrue, also gives a false opinion.”\textsuperscript{10} The committee quoted United States v. Benjamin in stating that a lawyer cannot “escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen.”\textsuperscript{11}

1. Lawyer as advisor

Ethical Consideration 7-22 provides that “a litigant or his lawyer may in good faith and within the framework of the law, take steps to test the correctness of a ruling of tribunal.”\textsuperscript{12} The committee concluded that similar principles are to be applied when a lawyer represents a client in adversarial proceedings before the IRS. “In that case the lawyer has duties not to mislead the service by any misstatements, not to further

\textsuperscript{8} Id. at 801:102.
\textsuperscript{9} Id. at 801:102.
\textsuperscript{10} Id. at 801:102.
\textsuperscript{11} 328 F.2d 854, 863 (2d Cir. 1964).
\textsuperscript{12} Opinion 346 (rev.) at 801:103.
any misrepresentations made by the client, and to deal candidly and fairly."\textsuperscript{13}

The committee recognized that the lawyer writing a tax shelter opinion is acting more akin to an advisor than an advocate. The distinction is phrased as follows: "As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system."\textsuperscript{14}

Tax shelter opinions, at least back then, involved a lawyer’s evaluation for the use of third persons other than the client. In such a context, the committee concluded that the legal duty of the lawyer "goes beyond the obligations a lawyer normally has to third persons."\textsuperscript{15}

2. Establishing lawyer’s relationship

The opinion addresses the scope of the engagement letter. The committee advises that the terms of engagement should "mak[e] it clear that the lawyer requires from the client a full disclosure of the structure and intended operations of the venture and complete access to all relevant information."\textsuperscript{16}

\textsuperscript{13} Id. at 801:103.
\textsuperscript{14} Model Rules of Professional Conduct, Preamble [2].
\textsuperscript{15} Opinion 346 (rev.) at 801:104.
\textsuperscript{16} Id. at 801:104.
3. Making factual inquiry

The committee relied on ABA Formal Opinion 335 (1974), which addresses furnishing advice based on assumed facts. Formal Opinion 335 states “the lawyer should … make inquiry of his client as to the relevant facts and receive answers. If any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect; or are suspect; or are inconsistent; or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry. The extent of this inquiry will depend in each case upon the circumstances….”

It goes on to conclude that where further inquiry does not give the lawyer “sufficient confidence”, “he should refuse to give an opinion.”

Formal Opinion 335 provides some comfort never found in Circular 230:

The essence of this opinion ... is that, while a lawyer should make adequate preparation including inquiry into the relevant facts that is consistent with the above guidelines, and while he should not accept as true that which he should not reasonably believe to be true, he does not have the responsibility to ‘audit’ the affairs of the client or to assume, without reasonable cause, that the client’s statement of the facts cannot be relied upon.

Formal Opinion 346 amplifies this point. The committee concludes that where information such as an appraisal or financial projection does not make sense or where the reputation

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17 Id. at 801:104.
18 Id. at 801:104.
19 ABA Formal Opinion 335 at 3, 5–6 (emphasis added).
or expertise of the person who has prepared it is “dubious,” then “further inquiry may result in a false opinion.” If however, the appraisal “is reasonably well supported and complete” the lawyer may rely upon it.\textsuperscript{20}

4. Relating law to facts

No one should be surprised that the committee advises that the lawyer should relate the law to the actual facts, to the extent the facts are ascertainable. A lawyer should not, however, issue an opinion “which disclaims responsibility for inquiring as to the accuracy of the facts, fails to analyze the critical facts, or discusses purely hypothetical facts.”\textsuperscript{21} A lawyer may “assume facts which are not currently ascertainable, such as the method of conducting future operations,” so long as it is clear which facts are assumed.\textsuperscript{22}

5. Nontax legal issues

The committee concluded that, even if not expressly asked to do so, “the lawyer should make reasonable inquiries to ascertain that a good faith effort has been expended to comply with laws other than tax laws.”\textsuperscript{23} The tax lawyer need not reexamine the conclusions of the counsel in specialized areas of law (patent law and securities law are provided as examples),

\textsuperscript{20} Opinion 346 (rev.) at 801:104-105.
\textsuperscript{21} Id. at 801:105.
\textsuperscript{22} Id. at 801:105.
\textsuperscript{23} Id. at 801:105.
but she should be satisfied that competent professional advice has been obtained.\textsuperscript{24}

6. Material tax issues

Tax opinions should, according to the committee, consider all “material” tax issues. A material issue is “any income or excise tax issue relating to the tax shelter that would have a significant effect in sheltering from federal taxes income from other sources by proving deductions in excess of the income from the tax shelter investment in any year or tax credits which will offset tax liabilities in excess of the tax attributable to the tax shelter investment in any year.”\textsuperscript{25} The determination of materiality should be made in good faith. According to the committee, the opinion should “fully and fairly address each material tax issue respecting which there is a reasonable possibility that the Internal Revenue Service will challenge the tax effect proposed in the offering materials.”\textsuperscript{26} If the lawyer has not been retained to consider all material tax issues, the opinion must clearly announce its limited scope.\textsuperscript{27}

\textsuperscript{24} Id. at 801:105.
\textsuperscript{25} Id. at 801:105.
\textsuperscript{26} Id. at 801:105.
\textsuperscript{27} Id. at 801:106.
7. Opinion as to outcome

An opinion should “state the lawyer’s opinion of the probable outcome on the merits of each material tax issue.”28 Where it is not possible to reach a conclusion as to the outcome, “the lawyer should so state and give the reasons for this conclusion.”29

Where an opinion questions the validity of a revenue ruling or lower court decision the opinion must contain a complete explanation of the issue, including the position the Service is likely to take and why the lawyer has concluded that the position is wrong. “The opinion also should set forth the risks of an adversarial proceeding if one is likely to occur.”30

8. Over-all evaluation of realization of tax benefits

Disclosure of tax risks in the offering materials should include an opinion “of the extent to which the tax benefits, in the aggregate, which are a significant feature of the investment to the typical investor, are likely to be realized as contemplated by the offering materials.”31 The committee counseled that “the lawyer should state that the significant tax benefits, in the aggregate, probably will be realized or probably will not be realized, or that the probabilities of

28 Id. at 801:106.
29 Id. at 801:106.
30 Id. at 801:106.
31 Id. at 801:106.
realization and nonrealization of the significant tax benefits are evenly divided.”  

In the “rare instances” in which the lawyer concludes that it is not possible to form a conclusion as to the extent to which the expected tax benefits will be realized, the “lawyer should fully explain why the judgment cannot be made and assure full disclosure in the offering materials of the assumptions and risks which the investors must evaluate.”

9. Accuracy of offering materials

According to the committee, the lawyer should review all offering materials to assure that the offering materials accurately represent the nature and extent of the lawyer’s opinion. Where the offering materials do not accurately reflect the lawyer’s opinion and the disagreement cannot be resolved, “the lawyer should withdraw from the employment and not issue an opinion.”

C. Formal Opinion 85-352 – Return Reporting Positions

In 1985 the ABA Standing Committee on Ethics and Professional Responsibility issued its opinion on when a lawyer may advise on a tax return reporting position. Opinion 85-352 revisited Opinion 314 (Apr. 27, 1965) in which the committee

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32 Id. at 801:106.
33 Id. at 801:106.
34 Id. at 801:107.
35 39 TAX LAW. 631 (1986).
opined that “a lawyer who is asked to advise his client in the
course of the preparation of the client’s tax returns may freely
urge the statement of positions most favorable to the client
just as long as there is a reasonable basis for this position.”36
According to the Opinion “[t]he Committee is informed that the
standard of ‘reasonable basis’ has been construed by many
lawyers to support the use of any colorable claim on a tax
return to justify exploitation of the lottery of the tax return
audit selection process.”37

The committee makes clear that “[t]he ethical standards
governing the conduct of a lawyer in advising a client on
positions that can be taken in a tax return are no different
from those governing a lawyer’s conduct in advising or taking
positions for a client in other civil matters.”38 The Opinion
recognizes that the attorney advising on a tax return reporting
position plays the role of both an advisor and an advocate and
that the lawyer “must realistically anticipate” that the filing
of the return may be the first step in an adversarial
proceeding.39 Demonstrating a lack of understanding of the IRS
audit process, the committee adds that an adversary relationship

36 Id. at 631.
37 Id. at 631. See also Rowen, When May a Lawyer Advise a Client
that He May Take a Position on a Tax Return?, 29 Tax Lawyer 237
(1976).
38 Id. at 632.
39 Id. at 632.
with the IRS “normally occurs in situations when a lawyer advises an aggressive position on a tax return, not when the position taken is a safe or conservative one that is unlikely to be challenged by the IRS.”\textsuperscript{40}

The committee relies in part on Rule 3.1 of the Model Rules which provides that a lawyer should not bring or defend a proceeding or assert or controvert an issue “unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”\textsuperscript{41} The committee concludes that on the basis of the model rules that

\begin{quote}
A lawyer, in representing a client in the course of the preparation of the client’s tax return, may advise the statement of position most favorable to the client if the lawyer has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law. A lawyer can have a good faith belief in this context even if the lawyer believes the client’s position probably will not prevail. However, good faith requires that there be some realistic possibility of success if the matter is litigated.\textsuperscript{42}
\end{quote}

Thus, the Opinion states that where the lawyer has a good faith belief in the position, he or she “has no duty to require as a condition of his or her continued representation that riders be attached to the client’s tax return explaining the

\textsuperscript{40} Id. at 632.
\textsuperscript{41} Id. at 632.
\textsuperscript{42} Id. at 632-633.
circumstances surrounding the transaction or the expenditures."  

As an advisor, however, the lawyer should counsel the client on the likelihood that the position will be sustained and the potential for penalties if the position is taken without disclosure. (Now presumably counsel should advise that disclosure will not necessarily relieve the taxpayer from penalties.) The committee reminds us that in the preparation of returns and negotiating administrative settlements, a lawyer may not "mislead the Internal Revenue Service deliberately, either by misstatements or by silence or by permitting the client to mislead."  

In conclusion, the Opinion states that so long as there is some realistic possibility of success if the matter is litigated "a lawyer may advise reporting a position on a return even where the lawyer believes the position probably will not prevail, there is no 'substantial authority' in support of the position, and there will be no disclosure of the position in the return."

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43 Id. at 633.  
44 Id. at 633.  
45 E.g., IRC § 6662(d)(2)(C).  
46 Id. at 633 (citing Rules 4.1 and 8.4(c); DRs 1-102(A)(4), 7-102(A)(3) and (5)).  
47 Id. at 633-634.
D. Report of the Special Task Force on Formal Opinion 85-352\textsuperscript{48}

Opinion 85-352 was not without controversy. A task force of the Tax Section of the ABA was convened to examine Opinion 85-352. It issued a report concluding that “Opinion 85-352 properly rejects a low standard of tax reporting, reduces some of the potential for misuse of the governing ethical standard, and, properly interpreted and implemented, should work to improve the reliability of tax advice furnished by members of the bar.”\textsuperscript{49}

The task force report explains that the same principles in Opinion 85-352 “should apply to all aspects to tax practice to the extent tax return positions would be involved. For example, it should govern the lawyer’s duty as to tax advice in the course of structuring transactions that will involve tax return positions, including tax advice in the course of preparing legal documents such as employee benefit trusts, wills, and business buy-sell agreements.”\textsuperscript{50} The task force was quick to point out that Opinion 85-352 addresses neither the lawyer’s obligations to the Internal Revenue Service nor in tax litigation.\textsuperscript{51}

The task force goes on to examine the relationship of


\textsuperscript{49} Id. at 635.

\textsuperscript{50} Id. at 636.

\textsuperscript{51} Id. at 636.
Opinion 85-352 to Opinion 346 governing tax shelter opinions. The task force concludes that “the minimum ethical standard of Opinion 85-352 applies to advice as to positions that can be taken in a tax return, whether such advice is transmitted to third parties or given directly to clients; Opinion 346 imposes additional requirements in tax shelter opinions.”

As you will recall, Opinion 85-352 says that a lawyer can advise a client to take a tax position if she believes in good faith that the position is warranted, even if the lawyer also believes the position ultimately will not prevail. The task force emphasizes that “good faith” is determined by an objective standard – Opinion 85-352 explains that “good faith requires that there be some realistic possibility of success if the matter is litigated.” The task force views this as an objective standard “which can be enforced.”

The task force also looked to the relationship between the “good faith” standard in Opinion 85-352 and the tax preparer penalty as it then existed. Section 1.6694-1(a)(4) of the Treasury Regulations stated that the penalty was not applicable if the preparer takes a return reporting position “in good faith and with reasonable basis.” Another (now revoked) section of the regulations explained that “reasonable basis” describes a

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52 Id. at 637.
53 Id. at 637.
54 Id. at 637.
position that is “arguable but fairly unlikely to prevail in court.”  

The task force also addressed the so-called “audit lottery.” According to the task force, the standard adopted in Opinion 85-352 “does not permit taking into account the likelihood of audit or detection in determining whether the ethical standard is met. Whether the return will be audited or not is simply of no consequence to the application of the new standard.” The practitioner should assume “that the issue is in court and to be decided.”

The task force then compared two different standards: (1) “some realistic possibility of success if litigated” and (2) “reasonable basis.” The task force noted that some practitioners viewed “reasonable basis” as a relatively high standard, while others viewed it as a low standard. “To many it had come to permit any colorable claim to be put forth; to permit almost any words that could be strung together to be used to support a tax return position.” The task force makes clear that such a standard must be rejected.

The task force attempts to flesh out the meaning of “realistic possibility of success.” According to the task force

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55 Treas. Reg. § 1.6661-3(a)(2).
56 Id. at 638.
57 Id. at 638.
58 Id. at 638.
“[a] possibility of success cannot be ‘realistic’ if it is only theoretical or impracticable. This clearly implies that there must be a substantial possibility of success, which when taken together with the assumption that the matter will be litigated, measurably elevates what had come to be widely accepted as the minimum ethical standard.”\(^59\)

Like good tax lawyers, the task force members attempt to quantify (or at least reject the quantification by others) of a “realistic possibility of success.” The task force says that “[a] position having only a 5% or 10% likelihood of success, if litigated, should not meet the new standard. A position having a likelihood of success closely approaching one-third should meet the standard.”\(^60\) The task force does not tell us where to draw the line between 11 percent and 33.33 percent. The task force concludes, however, that merely believing that “something” could be obtained by concession in settlement negotiations does not establish a realistic possibility of success.\(^61\) The task force also warns that disclosure on the return is not a substitute for a realistic possibility of success.\(^62\)

What is the taxpayer to do who wants to assert a position that does not have a “realistic possibility of success”? The

\(^{59}\) Id. at 638.

\(^{60}\) Id. at 638-639.

\(^{61}\) Id. at 639.

\(^{62}\) Id. at 639.
task force says (clearly in the days before Section 6676)\(^{63}\) that the position may be advanced in a refund claim setting forth in detail the grounds upon which the refund is sought.\(^{64}\) "A position may be advanced in litigation if it is not frivolous. The lawyer may bring a proceeding, and assert an issue therein, if there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. In such a context good faith does not require that there be a possibility of success that is

\(^{63}\) Section 6676 provides:
(a) Civil penalty. If a claim for refund or credit with respect to income tax (other than a claim for a refund or credit relating to the earned income credit under section 32) is made for an excessive amount, unless it is shown that the claim for such excessive amount has a reasonable basis, the person making such claim shall be liable for a penalty in an amount equal to 20 percent of the excessive amount.
(b) Excessive amount. For purposes of this section, the term "excessive amount" means in the case of any person the amount by which the amount of the claim for refund or credit for any taxable year exceeds the amount of such claim allowable under this title for such taxable year.
(c) Noneconomic substance transactions treated as lacking reasonable basis. For purposes of this section, any excessive amount which is attributable to any transaction described in section 6662(b)(6) shall not be treated as having a reasonable basis.
(d) Coordination with other penalties. This section shall not apply to any portion of the excessive amount of a claim for refund or credit which is subject to a penalty imposed under part II of subchapter A of chapter 68.

\(^{64}\) The task force does not consider that a refund claim is a "return" (see Treas. Reg. § 301.6402-3) nor address the apparent conflict in the position that a lawyer cannot advise on the preparation of a tax return position that does not have a "realistic possibility of success," but that the same lawyer would be permitted to litigate that very same position.
‘realistic.’”⁶⁵ However, if the client persists in taking a return position that does not have a realistic possibility of success the lawyer may not prepare the return and “must withdraw from further representation involving advice as to the position taken on the return.”⁶⁶

The task force addressed the lawyer’s duty to counsel clients. As stated in Opinion 85-352, the lawyer has a duty to counsel the client as to whether the position is likely to be sustained in court if challenged. “The lawyer should express a prediction of outcome, to the extent possible.”⁶⁷ The evaluation should not be limited to whether the position has a realistic possibility of success or is or is not likely to be sustained, but rather “should include the lawyer’s complete assessment of the prospects for success to the extent it is practicable to do so.”⁶⁸ (The task force does not tell whether we may consider whether the client will pay for the analysis in determining whether the assessment is practicable.)

The lawyer should counsel the client on the possibility of penalties and whether the penalty may be avoided by disclosure.⁶⁹ As Opinion 85-352 states, competent representation demands that the lawyer advise the client as to whether there is substantial

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⁶⁵ *Id.* at 639 (citing Model Rule 3.1; DR 7-102(A)(2)).
⁶⁶ *Id.* at 639.
⁶⁷ *Id.* at 639.
⁶⁸ *Id.* at 639.
⁶⁹ *Id.* at 639-640.
authority for the position. According to the task force “[t]his may or may not require that a formal written opinion be rendered. In appropriate circumstances, this obligation may consist of oral advice to the client.”

Neither Opinion 85-352 nor the task force tell us when “formal written advice” as opposed to oral advice is required.

The task force does explain, as does Opinion 85-352, that the obligation is to inform the client about the effect of return disclosure, but the lawyer does not have an obligation to withdraw if the client decides to proceed without disclosure. The task force reminds us, however, that the lawyer has a duty not to mislead the Service deliberately, either by misstatement or by silence. “Thus, although a lawyer has no obligation under [Opinion 85-352] to flag doubtful positions of law as such if they meet the ethical standard, the lawyer has an obligation to counsel that the entries on tax return must not be misleading. Since many return entries involve explicit or implicit representations of fact, this requirement may result in disclosure obligations beyond those that might be imposed under section 6661.”

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70 Id. at 640.
71 Presumably the answer to this question would be different where disclosure is required, such as with Schedule UTP.
72 Id. at 640. Section 6661 was repealed in 1989. Before repeal, it imposed a 25 percent penalty on any “substantial understatement” of Federal income tax. A similar provision
such disclosure obligations or any other guidance in this regard.

The task force does reiterate the statement in Opinion 85-352 that tax returns are not adversarial proceedings, although they are certainly in some instances the gateway to adversarial proceedings. The task force notes that “a tax return initially serves a disclosure, reporting, and self-assessment function. It is the citizen’s report to the government of his or her relevant activities for the year.”\textsuperscript{73} The task force states that because some returns may result in adversary proceedings that “there is a place for consideration of the ethical considerations regarding advocacy.”\textsuperscript{74} Neither the task force nor Opinion 85-352 provide any meaningful guidance as to that interplay.

\textbf{E. Standards of Tax Practice Statement 1999-1}

The Committee on Standards of Tax Practice of the Section of Taxation from time to time publishes Standards of Tax Practice Statements.\textsuperscript{75} Statement 1999-1\textsuperscript{76} addresses the issue of imposing a 20 percent penalty is now found in Section 6662(b)(2) and (d).

\textsuperscript{73} Id. at 641.
\textsuperscript{74} Id. at 641.
\textsuperscript{75} These statements are, at least theoretically, only guidance and not binding. The disclosures to the Standards provide language similar to what follows: “The following Standards of Tax Practice Statement is issued for the guidance of tax practitioners. It was prepared by the Committee on Standards of Tax Practice of the Section of Taxation of the American Bar
a lawyer’s responsibility on discovery of a computational error made by the Internal Revenue Service in a client’s favor that is not caused by any affirmative representation or omission of either the lawyer or the client.

The statement identifies a number of applicable provisions of the ABA Model Rules of Professional Conduct:

- Rule 1.6 prevents a lawyer from revealing confidential information without client consent.
- Rule 4.1(a) precludes a lawyer from knowingly making a false statement of material fact to a third person.
- Rule 4.1(b) prevents a lawyer from failing to disclose a material fact to a third person, but only where

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Association. The Statement was reviewed before issuance by the Council of the Section of Taxation. The Statement has not been approved by the Section or by the American Bar Association and should not be construed as policy of those entities. The ABA Standing Committee on Ethics and Professional Responsibility has indicated that it has no objection to the issuance of this Statement." At least one commentator has taken issue with this precatory language: David M. Richardson, Statement of Standards of Tax Practice: Letter to a Former Student, TAX NOTES TODAY (May 22, 2000) ("Of greater concern is the emerging pattern of heavy-handed control by the American Bar Association over the section's efforts to endorse practice standards for tax lawyers. The conditions imposed on the section by the American Bar Association in connection with the publication of Statement 1999-1, and which apparently will be imposed in connection with the publication of Statement 2000-1, inhibit the development of standards of practice for tax lawyers, are demeaning to the section, and should be embarrassing to the association.")

76 American Bar Association, Section of Taxation, Committee on Standards of Tax Practice, Statement 1999-1, 53 TAX LAW. 733 (1999).
77 Id. at 734.
disclosure is necessary to avoid assisting a fraudulent act by the client and then only if the disclosure is allowed under Rule 1.6(a).

- Rule 1.2(d) forbids a lawyer from knowingly counseling a client to engage in or assisting a client to engage in criminal or fraudulent conduct.
- Rule 3.3(a) provides that a lawyer may not knowingly make a false statement of material fact to a tribunal or fail to disclose a fact to a tribunal necessary to avoid assisting a client in a fraudulent act.
- Rules 1.4(a) and (b) require a lawyer to keep a client reasonably informed about the status of a matter and to explain the matter to the client so that the client may make informed decisions.
- Rule 1.16(a) requires a lawyer to withdraw from a matter if called upon to act in violation of the rules of professional conduct.

The Statement describes the situations in which a computational error might arise.\textsuperscript{78} Some computational errors arise from mathematic or clerical errors, while others stem from the application or interpretation of the Internal Revenue Code. The committee notes that mathematical errors are subject to

\textsuperscript{78} Id. at 734.
correction by the Service without the need for a statutory notice of deficiency.\textsuperscript{79} Conceptual errors are not subject to the same ease of correction.\textsuperscript{80} In the case cited by the committee, \textit{Stamm International Corp.},\textsuperscript{81} the Tax Court refused to allow the Commissioner to correct a stipulated settlement upon discovery of his unilateral error in applying a Code section to the computation. The Tax Court concluded that the silence of the taxpayer’s counsel was misleading, but was not the equivalent of a misrepresentation. The committee notes that the Chicago and Dallas Bar Associations have issued opinions in which they conclude that a lawyer may not disclose a computational error in his client’s favor because of the rule against disclosure of client confidences.\textsuperscript{82}

The Statement begins its analysis with the statement that “[w]hen counsel learns that the Service has made a computational error of tax, penalty, or interest in the client’s favor, the

\textsuperscript{79} IRC § 6213(b)(1), (g)(2).
\textsuperscript{80} 53 TAX LAW. at 734 (citing \textit{Stamm Int’l Corp. v. Commissioner}, 90 T.C. 315 (1988) in which the Tax Court refused to allow the Commissioner to correct a stipulated settlement upon discovery of his unilateral error in applying a Code section to the computation).
\textsuperscript{81} \textit{Stamm Int’l Corp. v. Commissioner}, 90 T.C. 315 (1988).
\textsuperscript{82} 53 TAX LAW. at 734 (citing Chicago Bar Ass’n Op. 86-4 and Dallas Bar Ass’n Op. (8-23-89)). One commentator has suggested that the issuance of Statement 1999-1, contrary to the findings of these local bars, was intended to provide “cover” for tax practitioners who correct errors without client consent. David M. Richardson, \textit{Statement of Standards of Tax Practice: Letter to a Former Student}, TAX NOTES TODAY (May 22, 2000).
information gained is a client confidence under Rule 1.6(a), which generally may not be disclosed without the client’s consent unless otherwise provided in the Rules or by other law.”  

However, the Statement observes that Rule 8.4(c) does not allow a lawyer to engage in conduct that is dishonest.  

The Statement concludes that “[a] client should not profit from a clear unilateral arithmetic or clerical error made by the Service and a lawyer may not knowingly assist the client in doing so. This is not the case, however, if the computational error is conceptual, such that a reasonable dispute still exists concerning the calculation.”  

Where there is a docketed case (i.e., a case pending in court), and the parties are required to document the amount of the taxpayer’s liability or refund, the Statement is unequivocal that “counsel must disclose an error to the court.” The reason for this is that because counsel knows that the computation is not correct, counsel cannot submit a document to the court that

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83 53 Tax Law. at 735.
84 Id. at 735. Rule 8.4(c) states “It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation....”
85 The statement does not illuminate what the scope of “clerical error” is. Does the lawyer have any obligation to alert the Service that a statute of limitations is about to expire when the lawyer knows the agent has incorrectly computed the statute or incorrectly drafted the extension request?
86 Id. at 735.
87 Id. at 735 (citing Model Rule 3.3(a)(1) (duty of candor to the tribunal)).
contains an incorrect deficiency or overpayment without making a false statement to the tribunal.\(^8\) Even though this is a client confidence, disclosure is permitted under Rule 3.3(b).

Even where a document is not filed with the court specifying the amount of deficiency or overpayment, as is generally the case in the U.S. district courts and the U.S. Court of Federal Claims, the Statement states that disclosure should be made because “the rules of conduct should not vary depending on the particular forum.”\(^9\) According to the Statement, the lawyer need not consult with the client before making such disclosure.\(^0\)

With respect to a non-docketed case (such as a case in exam or before the IRS Appeals Office), the Statement says that a lawyer must disclose a clerical or arithmetic error “the amount of which is not de minimis to the Service” if there is actual or implied authority from the client.\(^1\) According to the Statement “[i]mplied authority will generally exist where the terms of a settlement have been reached and the Service then commits a unilateral arithmetic or clerical error in the computation of the tax, penalty or interest owe, or refund due.”\(^2\) There is some authority that the cashing of an erroneous refund check can

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8. Id. at 735-736.
9. Id. at 736.
0. Id. at 736.
1. Id. at 736.
2. Id. at 736.
be a criminal violation;\textsuperscript{93} therefore, the Statement concludes that the lawyer who is aware of a computational error that will give rise to an erroneous refund could become an instrumentality to a crime.

Because the disclosure of a client confidence generally cannot be made without client consent, the Statement says that “in non-docketed cases involving refunds or deficiencies, if the client refuses to consent [to disclosure] where there is no implied authorization, counsel must withdraw from the engagement….” Counsel need not withdraw, however, if the client withholds its consent and the error is conceptual, rather than arithmetic or clerical.\textsuperscript{94} The Statement includes several interesting illustrations of these principles.

In conclusion, the Statement summarizes its findings as follows:

A lawyer must disclose a clear arithmetic or clerical error in the client’s favor in a case docketed in court. In a non-docketed case, a lawyer must disclose a clear unilateral arithmetic or clerical error if there exists express or implied consent. If the client refuses express consent where there is no implied authorization, counsel must withdraw.

\textsuperscript{93} E.g., United States v. McRee, 7 F.3d 976 (11th Cir. 1993).
\textsuperscript{94} 53 TAX LAW. at 736.
F. **Standard of Tax Practice Statement 2000-1**  

Standard of Tax Practice Statement 2000-1 prepared by the Committee on Standards of Tax Practice of the Section of Taxation of the ABA addresses the question of whether “differences between the income tax return accuracy standards for taxpayers and the lawyers who advise them results in conflicts of interest between clients and their lawyers.”  

Section 6662 of the Internal Revenue Code imposes an accuracy-related penalty on underpayments of tax attributable to, among other things, (1) disregard of rules and regulations, (2) negligence, or (3) a substantial understatement of income tax. In certain instances, the penalty will not be imposed if the position is adequately disclosed on the return. The accuracy-related penalty will not apply, with some exceptions, to an underpayment if the taxpayer can establish reasonable cause and good faith. Reliance on the advice of counsel is a factor in assessing whether reasonable cause and good faith exist.  

Opinion 85-352 states that “[a] lawyer may advise reporting

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95 Standard of Tax Practice 2000-1 is the first of the ABA pronouncements to discuss Circular 230 at any length, probably in light of significant attention to proposed amendments to Circular 230 that were then pending.

96 54 TAX LAW. 185, 185 (2000).

97 IRC § 6662(b)(1), (2).

98 IRC § 6662(d)(2).

99 IRC § 6664(c).

100 Treas. Reg. § 1.6664-4(c).
a position on a return even where the lawyer believes the position probably will not prevail, there is no ‘substantial authority’ in support of the position, and there will be no disclosure of the position in the return, so long as the realistic possibility standard is satisfied.”

The Statement references Rule 1.7(b), which provides that a lawyer may not represent a client if the representation may be materially limited by the lawyer’s representation of another client or the lawyer’s own interest unless the lawyer reasonably believes the representation will not be adversely affected and the client consents.

The Statement then considers a number of hypotheticals weighing these two sometimes competing considerations. One of the assumptions is a hierarchy of return accuracy standards, from highest to lowest: more likely than not, substantial authority, realistic possibility, reasonable basis, and not frivolous. In one of the examples, the client plans to adopt a return position that disregards rules and regulations, does not have a reasonable basis and is not frivolous. Here, the client is not shielded from the penalty by disclosure, but the lawyer will violate professional standards if the position is

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102 Id. at 188.
103 Id. at 188.
not disclosed. The Statement concludes that there may be a conflict between the lawyer and the client.\textsuperscript{104}

The lawyer’s position is affected by whether he is acting only as an advisor/nonsigning preparer of the return or whether he is the signing preparer.\textsuperscript{105} Where the lawyer is an advisor/nonsigning preparer, he can meet his ethical obligations by simply advising the client that disclosure will not be effective to avoid penalty exposure.\textsuperscript{106} The Statement goes on to say that “[a]lthough Formal Opinion 85-352 does not explicitly permit the lawyer to advise in these circumstances, it is reasonable to construe it as allowing the lawyer to advise with respect to the position . . . . While less clear where there is taxpayer penalty exposure that will not be eliminated by disclosure . . . ., we believe the lawyer who does not act as a signing preparer of the return in these circumstances discharges his professional responsibility and satisfies the penalty standard by advising the taxpayer that adequate disclosure will not benefit the taxpayer.”\textsuperscript{107}

Where the lawyer is acting as signing preparer of the return and conflict exists between the client and lawyer, the lawyer should advise the client that the client’s decision

\begin{footnotes}
\item\textsuperscript{104} Id. at 189, 191-192.
\item\textsuperscript{105} Id. at 191.
\item\textsuperscript{106} Id. at 192.
\item\textsuperscript{107} Id. at 192.
\end{footnotes}
regarding disclosure will affect the lawyer’s ability to sign the return, as well as the reasons why the decision impacts the lawyer’s ability to act.\textsuperscript{108} The lawyer must fully advise the client about the penalty considerations and potential consequences of adopting the proposed return position, as well as the fact that disclosure will not relieve the client of penalty liability. According to the statement, the lawyer must "make it clear to the taxpayer that disclosure will not advance the client’s interests and may even be detrimental to those interests."\textsuperscript{109}

Finally, the statement advises the lawyer to tell the client that it may be in the client’s best interest to seek independent legal counsel on the question of whether to make a return disclosure.\textsuperscript{110} If the client seeks counsel, both the lawyer and the client may be guided by the opinion of that independent counsel. "If the client, after having been fully informed, declines to seek independent counsel and decides to make adequate disclosure, the lawyer may proceed with the representation. If the client, after having been fully informed, determines, either with or without the advice of independent counsel, not to make adequate disclosure, the lawyer must withdraw from further assisting the client with regard to

\textsuperscript{108} Id. at 192.
\textsuperscript{109} Id. at 192.
\textsuperscript{110} Id. at 192.
the tax return engagement in question."\textsuperscript{111} According to the statement "to proceed in situations where the taxpayer does not disclose the position in the position either disregard to rule or regulation or does not satisfy the realistic possibility standard and the taxpayer does not disclose the position would cause the lawyer to violate both professional standards and penalty standards."\textsuperscript{112}

III. Regulation of Practice by the Treasury Department

A. Statutory Authority to Regulate Practice

The statutory authority to regulate practice stems from the Administrative Procedures Act (APA).\textsuperscript{113} The APA was enacted in 1947 “[t]o improve the administration of justice by prescribing fair administrative procedure.”\textsuperscript{114} As originally enacted, it permitted any person compelled to appear before an agency “the right to be accompanied, represented, and advised by counsel, or, if permitted by the agency, by other qualified representative.”\textsuperscript{115} The APA further provided that “[n]othing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent

\textsuperscript{111} Id. at 192.
\textsuperscript{112} Id. at 192-193.
\textsuperscript{113} The Administrative Procedures Act is codified at 5 U.S.C. § 501 et seq.
\textsuperscript{114} P.L. 79-404.
\textsuperscript{115} P.L. 79-404, Sec. 6(a).
others before any agency or in any agency proceeding.” Each agency promulgated its own rules governing practice before it and, not surprisingly, the Internal Revenue Service established elaborate rules for enrollment of attorneys and accountants.

In 1965 Congress enacted the modern APA in part to eliminate agency-specific bars for attorneys and special enrollment requirements for certified public accountants in representing taxpayers in accounting matters before the IRS. Today, the APA provides:

An individual who is a member in good standing of the bar of the highest Court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

The APA also provides a special provision for certified public accountants:

An individual who is duly qualified to practice as a certified public accountant in a State may represent a person before the Internal Revenue Service of the Treasury Department on filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

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116 Id.
117 P.L. 89-332.
118 5 U.S.C. § 500(b).
119 5 U.S.C. § 500(c).
Title 31 of the U.S. Code provides specific rule making authority to the Secretary of the Treasury. Section 330 of Title 31 provides that

(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) competency to advise and assist persons in presenting their cases.

As can be seen, while the APA says who is qualified to practice, it says nothing about the ethical standard to which a practitioner may be held. For that, we turn to Circular 230.

B. Circular 230

Circular 230 first appeared in 1966 and it has been amended more than a dozen times since then.\textsuperscript{120} One article claims that “most tax practitioners really became aware of, or concerned with Circular 230” after the 2003 amendments, which were effective beginning December 20, 2004.\textsuperscript{121} Indeed, the first

\textsuperscript{121} Juan F. Vasquez, Jr. and Jaime Vasquez, Section 10.35(b)(4)(ii) of Circular 230 Is Invalid (But Just In Case It

Circular 230 is divided into five sections: (1) rules governing authority to practice;\textsuperscript{122} (2) duties and restrictions relating to practice before the Internal Revenue Service;\textsuperscript{123} (3) sanctions for violation of the regulations;\textsuperscript{124} (4) rules applicable to disciplinary proceedings;\textsuperscript{125} and (5) general provisions.\textsuperscript{126}

Circular 230 contains rules governing the recognition of attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, registered to return preparers, and other persons representing taxpayers before the Internal Revenue Service.\textsuperscript{127} "Practice before the Internal Revenue Service" is broadly defined. It includes all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing documents; filing documents; corresponding and communicating with the Internal Revenue Service; rendering written advice with respect to any entity, transaction, plan or

\textit{is Valid, Please Note That You Cannot Rely On This Article To Avoid The Imposition Of Penalties}, Houston Bus. & Tax J. 293, 298 (2007).
\textsuperscript{122} Subpart A; §§ 10.1-10.9.
\textsuperscript{123} Subpart B; §§ 10.20-10.38.
\textsuperscript{124} Subpart C; §§ 10.50-10.53.
\textsuperscript{125} Subpart D; §§ 10.60-10.82.
\textsuperscript{126} Subpart E; §§ 10.90-10.93.
\textsuperscript{127} § 10.0(a).
arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and representing a client at conferences, hearings, and meetings.\textsuperscript{128}

An attorney need not have any special qualifications to practice before the Internal Revenue Service. According to section 10.3, any attorney who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service simply by filing a written declaration that the attorney is currently qualified as an attorney and is authorized to represent the party.\textsuperscript{129}

1. Duty of Cooperation

Circular 230 imposes a duty of cooperation with the Internal Revenue Service. For example, section 10.20 imposes obligations on the attorney related to IRS requests for information. According to that section, "a practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged."\textsuperscript{130}

\textsuperscript{128} § 10.2(a)(4).
\textsuperscript{129} § 10.3(a). The declaration is found in Form 2848.
\textsuperscript{130} § 10.20(a)(1).
Where neither the attorney nor the client has the requested records or information "the practitioner must promptly notify the requesting Internal Revenue Service officer or employee and the practitioner must provide any information that the practitioner has regarding the identity of any person who the practitioner believes may have possession or control of the requested records or information. The practitioner must make reasonable inquiry of his or her client regarding the identity of any person who may have possession or control of the requested records or information, but the practitioner is not required to make inquiry of any other person or independently verify any information provided by the practitioner's client regarding the identity of such persons."\textsuperscript{131}

Circular 230 also imposes specific obligations on an attorney who has knowledge of a client's error or omission. According to section 10.21, when an attorney knows the client has not complied with the tax law or has made an error or omission from a return or other paper the client has submitted, the lawyer must advise the client "promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission."

Circular 230 imposes obligations on lawyers with respect to

\textsuperscript{131} § 10.20(a)(2).
accuracy. According to section 10.22 a lawyer must exercise due diligence in preparing or assisting in the preparation of returns, documents, or other papers relating to tax matters, in determining the correctness of oral or written representations made by the practitioner to the Department of Treasury, and determining the correctness of oral or written representations made by the practitioner clients with respect any matter administered by the Internal Revenue Service. The practitioner is considered to have exercised due diligence if the practitioner relies on the work product of another person and the attorney used "reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person." 

Like the ABA Model Rules, Circular 230 includes provisions related to conflicts of interest. The practitioner may not represent a client before the Internal Revenue Service if the representation involves a conflict of interest. Conflict of interest exists if representation of one client is directly adverse to another client or there is a significant risk that the representation of one or more clients will be materially limited by the practitioner’s responsibilities to another

\[ ^{132} \text{§ 10.22(a).} \]
\[ ^{133} \text{§ 10.22(b).} \]
client, a former client or third person, or by personal interest of the practitioner. The practitioner may still represent the client if the practitioner reasonably believes that she is able to provide competent and diligent representation to each client, representation is not prohibited by law, and each affected client waives the conflict of interest in writing. Circular 230 also imposes certain recordkeeping requirements with respect to client concerns that are not found in the ABA Model Rules.

Circular 230 also includes rules related to the prompt disposition of pending matters (section 10.23), giving or receiving assistance from disbarred or suspended persons or Internal Revenue Service employees (section 10.24), practice by former government employees (section 10.25), acting as a notary (section 10.26), the fees a practitioner may charge (section 10.27), return of client records (section 10.28); and solicitation (section 10.30).

2. Rules Concerning the Provision of Tax Advice

In 1984, the Treasury Department amended Circular 230 in response to ABA Formal Opinion 346, dealing with tax shelter offerings. In general, the 1984 amendments to Circular 230

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134 § 10.29(a).
135 § 10.29(b).
136 Circular 230 contains detailed rules concerning contingency fees. Of perhaps more widespread application is the rule that “[a] practitioner may not charge an unconscionable fee in connection with any matter before the Internal Revenue Service.” § 10.27.
required practitioners to exercise responsibility with respect to the accuracy of facts, to apply the particular facts to the law, ensure that all material Federal income tax issues were considered, to provide an opinion as to the likely outcome on the merits of each material tax issue, to evaluate the extent to which material tax benefits were likely to be realized, and to ensure that the nature and extent of the opinion was accurately described in offering materials.\textsuperscript{137}

3. The 2003 Amendments

On December 30, 2003, Treasury and the IRS published proposed changes to Circular 230 to include best practices for tax advisors and to modify standards for written tax advice.\textsuperscript{138}

Here is how the preamble to the amendment describes the reason for the changes to Circular 230:

Tax advisors play a critical role in the Federal tax

\begin{enumerate}
\item \textsuperscript{137} 49 F.R. 6719.
\item \textsuperscript{138} Because of questions about whether Treasury had the authority to impose standards for written tax advice, Congress amended 31 U.S.C. § 330 as part of the American Jobs Creation Act of 2004 to clarify that the Secretary of the Treasury could impose standards applicable to the rendering of written tax advice. P.L. 108-357, 118 Stat. 1418. That provision in relevant part states:
\begin{quote}
Nothing in this section or in any other provision of law shall be construed to limit the authority of the Secretary of the Treasury to impose standards applicable to the rendering of written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement, which is of a type which the Secretary determines as having a potential for tax avoidance or evasion.
\end{quote}
\end{enumerate}
system, which is founded on principles of compliance and voluntary self-assessment. The tax system is best served when the public has confidence in the honesty and integrity of the professionals providing tax advice. To restore, promote, and maintain the public’s confidence in those individuals and firms, these final regulations set forth best practices applicable to all tax advisors. These regulations also provide mandatory requirements for practitioners who provide covered opinions. The scope of these regulations is limited to practice before the IRS. These regulations do not alter or supplant other ethical standards applicable to practitioners.

a. Best Practices

One of the interesting additions to Circular 230 as part of the 2004 amendments was the addition of “best practices.” The preamble describes these best practices as “aspirational” and admits that there are no sanctions for failure to comply with them. However, the preamble goes on to state that “[a]lthough best practices are solely aspirational, tax professionals are expected to observe these practices to preserve public confidence in the tax system.”

As part of the best practices, Treasury says that “tax advisors should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service.” Best practices include (1) communicating clearly

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139 TD 9165.
140 § 10.33(a).
with the client regarding the terms of the engagement, (2) establishing the facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating the applicable law to the relevant facts, and arriving at a supported conclusion, (3) advising the taxpayer on the import of the conclusions reached, such as the client’s exposure to penalties, and (4) acting fairly and with integrity in practice before the Internal Revenue Service.  

b. Covered Opinions

The most controversial aspect of the 2003 amendments deals with complex rules related to providing written tax advice, found in section 10.35. One commentator reacted as follows: “No other state or federal body charged with setting practice standards during the past two centuries . . . has promulgated anything even remotely similar to the broad, detailed, and invasive rules contained in the new Circular 230 Regulations.”

Broadly speaking, Circular 230 divides written tax advice into “covered opinions” and “other written advice.” A “covered opinion” is written tax advice concerning any of the

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141 § 10.33(a).
142 As the rules now exist they are silent with respect to providing oral advice.
144 See §§ 10.35 and 10.37.
following:\(^{145}\)

- a listed transaction;\(^ {146}\)
- a plan or arrangement the principal purpose of which is tax avoidance or evasion;\(^ {147}\) or
- a plan or arrangement a significant purpose of which is tax avoidance or evasion if the written advice is a
  (1) “reliance opinion”,\(^ {148}\) (2) a “marketed opinion”,\(^ {149}\) (3) is subject to conditions of confidentiality,\(^ {150}\) or
  (4) is subject to contractual protection.\(^ {151}\)

The consequences of written advice being considered a

\(^{145}\) § 10.35(b)(2)(i)(C). It should be noted that the definition of “covered opinion” contains numerous exclusions. § 10.35(b)(2)(ii)(A)-(E). For example, a “covered opinion” does not include written advice if the practitioner expects to provide subsequent written advice that complies with § 10.35. § 10.35(b)(2)(ii)(A). The definition also excludes advice rendered after the filing of the tax return (§ 10.35(b)(2)(ii)(C)), advice provided in the capacity as an employee of the taxpayer (§ 10.35(b)(2)(ii)(D)), and advice that does not resolve a significant Federal tax issue in the taxpayer’s favor § 10.35(b)(2)(ii)(E). “Federal tax advice” is defined to mean “a question concerning the Federal tax treatment of an item of income, gain, loss, deduction, or credit, the existence or absence of a taxable transfer of property, or the value of property for Federal tax purposes.” § 10.35(b)(3). A “Federal tax issue” is “significant” “if the Internal Revenue Service has a reasonable basis for a successful challenge and its resolution could have a significant impact, whether beneficial or adverse and under reasonably foreseeable circumstances, on the overall Federal tax treatment of the transaction(s) or matter(s) addressed in the opinion.” Id.

\(^{146}\) § 10.35(b)(2)(i)(A).
\(^{147}\) § 10.35(b)(2)(i)(B).
\(^{148}\) Defined in § 10.35(b)(4).
\(^{149}\) Defined in § 10.35(b)(5).
\(^{150}\) Defined in § 10.35(b)(6).
\(^{151}\) Defined in § 10.35(b)(7).
“covered opinion” are real. Circular 230 contains a number of requirements if written advice is a “covered opinion,” all of which contribute to significant client expense and practitioner time. These requirements are summarized below.

With respect to factual matters in a “covered opinion,” “[t]he practitioner must use reasonable efforts to identify and ascertain the facts . . . .” The covered opinion must identify and consider all relevant facts.\footnote{152} The practitioner must not base the opinion on unreasonable assumptions, which includes any factual assumption the practitioner knows or should know is incorrect or incomplete. Circular 230 considers reliance on a projection, financial forecast or appraisal to be a “factual assumption.” All factual assumptions must be identified in a separate section of the written advice.\footnote{153}

Similarly, the practitioner may not base the opinion on any unreasonable factual representations by the taxpayer. “For example, a practitioner may not rely on a factual representation that a transaction has a business purpose if the representation does not include a specific description of the business purpose or the practitioner knows or should know that the representation is incorrect or incomplete.”\footnote{154} The covered opinion must identify all “factual representations, statements or finds of

\footnotesize{
152 § 10.35(c)(1)(i).
153 § 10.35(c)(1)(ii).
154 § 10.35(c)(1)(iii).
}
the taxpayer” in a separate section.\textsuperscript{155}

The “covered opinion” must relate the law to the facts, may not assume favorable resolution of any significant Federal tax issue, or contain internally inconsistent legal analyses or conclusions.\textsuperscript{156} It must consider \textit{all} significant Federal tax issues.\textsuperscript{157}

The written advice must provide a conclusion for all significant Federal tax issues on the likelihood that the taxpayer will prevail. “The opinion must describe the reasons for the conclusions, including the facts and analysis supporting the conclusions, or describe the reasons that the practitioner is unable to reach a conclusion as to one or more issues.”\textsuperscript{158} If the lawyer does not reach a “more likely than not” conclusion on each significant Federal tax issue, the opinion must contain specific disclosure language.\textsuperscript{159} In addition, the opinion “must provide the practitioner’s overall conclusion as to the likelihood that the Federal tax treatment of the transaction or matter that is the subject of the opinion is the proper treatment and the reasons for that conclusion.”\textsuperscript{160}

In addition to requirements as to the contents of the

\textsuperscript{155} § 10.35(c)(1)(iii).
\textsuperscript{156} § 10.35(c)(2).
\textsuperscript{157} § 10.35(c)(3).
\textsuperscript{158} § 10.35(c)(3)(ii).
\textsuperscript{159} § 10.35(c)(3)(ii).
\textsuperscript{160} § 10.35(c)(4)(i).
covered opinion, Circular 230 also imposes a competency standard. According to Section 10.35(d), the practitioner rendering the “covered opinion” “must be knowledgeable in all of the aspects of Federal tax law relevant to the opinion being rendered, except that the practitioner may rely on the opinion of another practitioner . . . .” If the practitioner relies on the opinion of another practitioner, the covered opinion “must identify the other opinion and set forth the conclusions reached in the other opinion.”\(^\text{161}\)

One of the most ridiculed aspects of the 2003 amendments to Circular 230 are the required disclosures that now accompany virtually every email from a tax professional. Unless an opinion is a covered opinion (such as a limited scope opinion), it must prominently disclose that:

(i) The opinion is limited to the one or more Federal tax issues addressed in the opinion;

(ii) Additional issues may exist that could affect the Federal tax treatment of the transaction or matter that is the subject of the opinion and the opinion does not consider or provide a conclusion with respect to any additional issues; and

(iii) With respect to any significant Federal tax issues outside the limited scope of the opinion, the opinion was not written, and cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer.\(^\text{162}\)

Finally, Circular 230 requires that any practitioner who

\(^{161}\) § 10.35(d)(1).

\(^{162}\) § 10.35(e)(3).
has principal authority and responsibility for a firm’s tax practice must take “reasonable steps” to ensure compliance with section 10.35. Failure to do so may subject the practitioner to discipline.

c. Other Written Tax Advice

Section 10.37 includes requirements for "other written advice." According to the regulation, "a practitioner must not give written advice . . . concerning one or more Federal tax issues if the practitioner bases the written advice and unreasonable factual or legal assumptions . . . , unreasonably relies upon representations, statements, findings or agreements of the tax payer or any other person, [or] does not consider all relevant facts of the practitioner knows or should know . . . ."\(^{163}\)

This section also explains whether a practitioner may consider the risk of audit. According to Circular 230, “other written tax advice” may not, “in evaluating a Federal tax issue, take[] into account the possibility that a tax return will not be audited,\(^{164}\) that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised."\(^{165}\)

\(^{163}\) § 10.37(a).
\(^{164}\) For a discussion of the ethical considerations in advising clients as to the risk of audit predating § 10.37, see Joel S. Newman, *The Audit Lottery: Don’t Ask, Don’t Tell?,* Tax Notes Today (March 6, 2000).
\(^{165}\) § 10.37(a).
Consequences for failure to comply with Circular 230 are discussed below.

4. The Current Proposed Amendments

The Treasury Department and Internal Revenue Service recently announced proposed changes to Circular 230.\textsuperscript{166} According to the Explanation of Provisions accompanying the proposed changes “[y]ears of practical experience … have shown that the covered opinion rules in current § 10.35 have produced some unintended consequences and should be reconsidered. Reconsideration of the covered opinion rules is appropriate in light of continued practitioner dissatisfaction due to the difficulty and cost of compliance with the rules.”\textsuperscript{167}

According to Treasury, practitioners have overwhelmingly concluded that the covered opinion rules are overbroad, difficult to apply and do not necessarily result in higher quality tax advice. Clients have difficulty understanding the rules with the result that “practitioners will provide oral advice to their clients when written advice is more appropriate because current § 10.35 does not govern oral advice.”\textsuperscript{168} Treasury also notes the “unrestrained use of disclaimers on nearly every practitioner communication regardless of whether the communication contains tax advice.” The overuse of

\textsuperscript{166} 77 Fed. Reg. 57,055 (Sept. 17, 2012).
\textsuperscript{167} Id. at 57,056.
\textsuperscript{168} Id. at 57,057.
disclaimers “causes clients to ignore the disclaimers altogether, and may render their use in some circumstances irrelevant.” 169

Accordingly, the proposed amendments will remove section 10.35 in its entirety and substitute a single standard for all written tax advice under new section 10.37. The removal of section 10.35 eliminates: (1) the requirement that practitioners fully describe the relevant facts; (2) the application of the law to the facts in the written advice itself; 170 and (3) the use of Circular 230 disclaimers in documents and transmissions, including emails. A new section 10.35 will include a general competence standard.

Interestingly, the Explanation of Provisions concludes that “[t]he elimination of the covered opinion rules in this notice of proposed rulemaking would, at a minimum, save tax practitioners $5,333,200. This burden reduction comes form the elimination of the provisions requiring practitioners to make

169 Id. at 57,057.
170 The Explanation of Provisions explains that “[t]his mechanical requirement of automatic inclusion of information will sometimes lead to awkward or unnecessary, highly technical discussions in the opinion that may hinder the practitioner’s ability to provide quality tax advice. Further, the inclusion of this particular detail almost always burdens the practitioner and the client with significant increased costs, without necessarily increasing the quality of the tax advice that the client receives.” 77 Fed. Reg. at 57,057.
certain disclosures in the covered opinion.”\textsuperscript{171} It does not explain how this figure was computed.

Let’s examine the specific proposals.

\textbf{a. Practice Before the IRS}

The proposed amendments add language that clarifies what is considered to be “practice before the Internal Revenue Service.” Practitioners have debated whether providing advice outside the return preparation context constitutes “practice before the Internal Revenue Service.” Revised section 10.3 makes clear that it is. Section 10.3 defines who may practice before the Service. The new rule states that while an attorney (or CPA) does not need to file a declaration that she is authorized to practice before rendering written tax advice, the “rendering of [written tax] advice is practice before the Internal Revenue Service.”\textsuperscript{172}

\textbf{b. Competence – New § 10.35}

Proposed new section 10.35 provides a general competence requirement. In its currently proposed form, Circular 230 would require that “[a] practitioner . . . possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the knowledge, skill, thoroughness, and preparation necessary for the matter for which

\textsuperscript{171} 77 Fed. Reg. at 57,057-57,058.
\textsuperscript{172} Proposed § 10.3 (a) (attorneys) and § 10.3(b) (certified public accountants).
the practitioner is engaged." In its current form, Circular 230 permits a practitioner to be sanctioned for incompetent conduct, even though there is no explicit competence requirement. This amendment, therefore, is intended, at least in part, to make Circular 230 more consistent.

c. Requirements for Written Advice

Proposed new section 10.37 provides five basic standards for providing written tax advice. Under the proposal, in providing written advice a practitioner must:

(i) Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);

(ii) Reasonably consider all relevant facts that the practitioner knows or should know;

(iii) Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;

(iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable; and

(v) Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

Unlike current § 10.37, under proposed § 10.37 there is no automatic obligation to describe the relevant facts and include

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173 Proposed § 10.35(a).
174 § 10.51; 77 Fed. Reg. at 57,059.
175 Proposed § 10.37(a)(2).
a written application of the law to the facts. The proposed rule takes a more practical approach. The preamble notes that “the scope of the engagement and the type and specificity of the advice sought by the client, in addition to all other appropriate facts and circumstances, are factors in determining the extent that the relevant facts, application of the law to those facts, and the practitioner’s conclusion with respect to the law and the facts must be set forth in the written advice.”\textsuperscript{176}

One noticeable difference between proposed new § 10.37 and current § 10.37 is with respect to audit risk. Current § 10.27 does not allow a practitioner to consider the possibility that an issue will be resolved through settlement if raised on audit, while proposed new § 10.37 does not contain such a prohibition. According to the preamble “Treasury and IRS conclude that the current rule may unduly restrict the ability of a practitioner to provide comprehensive written advice because the existence or nonexistence of legitimate hazards that may make settlement more or less likely may be a material issue for which the practitioner has an obligation to inform the client.”\textsuperscript{177}

\textbf{d. Procedures to Ensure Compliance}

Treasury proposes to retain the requirement that firms have

\textsuperscript{176} 77 Fed. Reg. at 57,058.
\textsuperscript{177} Id. at 57,058.
compliance programs. The wording of the regulation is virtually identical in the proposed rule (new § 10.36), with minor changes to account for the elimination of the covered opinion rules of current § 10.35. According to Treasury, “[t]he procedures to ensure compliance have produced great successes in encouraging firms to self-regulate, without the excessive burden often associated with a rigid one-size-fits-all approach.”

The scope of firm compliance programs is expanded, however, under the proposed new § 10.36. While under the current rule the head of a tax practice is responsible for compliance with the provisions regarding tax advice and tax return preparation, the new rule requires firm management with responsibility for the tax practice “to ensure compliance with all provisions of Circular 230, and not merely the provisions regarding tax advice and tax return preparation.”

IV. Consequences for Violations of Ethical Obligations

There are, of course, consequences for failure to comply with ethical obligations. The Internal Revenue Code provides civil and criminal penalties for certain acts, which can be viewed as sanctions for violation of ethical standards. Circular 230 permits the imposition of monetary sanctions,

\[\textit{Id. at 57,059.}\]
public censure and disbarment. Moreover, civil malpractice liability can be based on breach of ethical obligations. Each of these is considered below.

A. Penalties under the Internal Revenue Code

1. Preparer Penalty – IRC § 6694

The Internal Revenue Code imposes a penalty on “a tax return preparer” who prepares a return resulting in an understatement of tax liability due to certain positions.\textsuperscript{180} The penalty may be imposed where (1) the position was not disclosed and there is no substantial authority for the position,\textsuperscript{181} (2) the position was disclosed and there is not a reasonable basis for the position,\textsuperscript{182} or (3) the transaction is a tax shelter or reportable transaction, unless “it is reasonable to believe that the position would more likely than not be sustained on its merits.”\textsuperscript{183}

The penalty is the greater of $1,000 or 50 percent of the income derived with respect to the return or claim.\textsuperscript{184} The penalty is increased to the greater of $5,000 or 50 percent of the income derived with respect to the return or claim where the

\textsuperscript{180} IRC § 6694. A comprehensive discussion of the history of Section 6694 and the regulation is found in Richard M. Lipton and Robert S. Walton, Tax Return Preparer Penalty Final Regulations, 110 J. of Tax’n 229 (April 2009).
\textsuperscript{181} IRC § 6694(a)(2)(A).
\textsuperscript{182} IRC § 6694(a)(2)(B) (referencing IRC § 6662(d)(2)(B)(ii)(I)).
\textsuperscript{183} IRC § 6694(a)(2)(C).
\textsuperscript{184} IRC § 6694(a) (1) (flush language).
conduct by the tax return preparer was either a “willful attempt in any manner to understate the liability for tax on the return or claim” or (2) is a reckless or intentional disregard of rules or regulations.”\footnote{185}

A “tax return preparer” is “any person who prepares for compensation, or who employs one or more persons to prepare for compensation any return of tax imposed by this title or any claim for refund of tax imposed by this title. For purposes of the preceding sentence, the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund.”\footnote{186}

The regulations distinguish between signing and nonsigning return preparers.\footnote{187} A “signing return preparer” is the person who has the primary responsibility for the overall substantive accuracy of the preparation of such return or claim for refund.”\footnote{188} A “nonsigning return preparer” is someone who prepares all or a substantial portion of a return or claim for refund . . . with respect to events that have occurred at the time the advice is rendered. . . . Examples of nonsigning tax return preparers are tax return preparers who provide advice (written or oral) to a taxpayer (or to another tax return preparer) when that advice leads to a position or entry that

\footnote{185} IRC § 6694(b).
\footnote{186} IRC § 7701(a)(36); Treas. Reg. § 1.6694-1(b)(1).
\footnote{187} Treas. Reg. § 301.7701-15(b).
\footnote{188} Treas. Reg. § 301.7701-15(b)(1).
constitutes a substantial portion\textsuperscript{189} of the return . . . \textsuperscript{190}

The examples make clear that attorneys who are not return preparers in the sense that they do not complete the tax return form can be considered nonsigning preparers.

Example 1. Attorney A, an attorney in a law firm, provides legal advice to a large corporate taxpayer regarding a completed corporate transaction. The advice provided by A is directly relevant to the determination of an entry on the taxpayer’s return, and this advice leads to a position(s) or entry that constitutes a substantial portion of the return. A,  

\textsuperscript{189} “Substantial portion” is defined as:

Only a person who prepares all or a substantial portion of a return or claim for refund shall be considered to be a tax return preparer of the return or claim for refund. A person who renders tax advice on a position that is directly relevant to the determination of the existence, characterization, or amount of an entry on a return or claim for refund will be regarded as having prepared that entry. Whether a schedule, entry, or other portion of a return or claim for refund is a substantial portion is determined based upon whether the person knows or reasonably should know that the tax attributable to the schedule, entry, or other portion of a return or claim for refund is a substantial portion of the tax required to be shown on the return or claim for refund. A single tax entry may constitute a substantial portion of the tax required to be shown on a return. Factors to consider in determining whether a schedule, entry, or other portion of a return or claim for refund is a substantial portion include but are not limited to—

(A) the size and complexity of the item relative to the taxpayer's gross income; and

(B) the size of the understatement attributable to the item compared to the taxpayer's reported tax liability.

\textsuperscript{190} Treas. Reg. § 301.7701-15(b)(2)(i).
however, does not prepare any other portion of the taxpayer's return and is not the signing tax return preparer of this return. A is considered a nonsigning tax return preparer.

Example 2. Attorney B, an attorney in a law firm, provides legal advice to a large corporate taxpayer regarding the tax consequences of a proposed corporate transaction. Based upon this advice, the corporate taxpayer enters into the transaction. Once the transaction is completed, the corporate taxpayer does not receive any additional advice from B with respect to the transaction. B did not provide advice with respect to events that have occurred and is not considered a tax return preparer.

It should be noted that the tax return preparer penalty is an assessable penalty, meaning it is not subject to predeficiency challenge.\textsuperscript{191}

The return preparer may be relieved from the penalty if there is reasonable cause for the understatement and the return preparer acted in good faith.\textsuperscript{192} The regulations under Section 6694 contain their own definition of reasonable cause. Factors to be considered are the nature of the error (such as whether it was complex, uncommon, or highly technical), the frequency of errors, materiality of errors, the preparer’s normal office practice, reliance on the advice of others, and reliance on generally accepted administrative or industry practice.\textsuperscript{193}

\textsuperscript{191} IRC § 6694(c).
\textsuperscript{192} IRC § 6694(a)(3).
\textsuperscript{193} Treas. Reg. § 1.6694-2(e).
2. Aiding and Abetting

a. Criminal Penalty -- IRC § 7206

It is a crime to assist a taxpayer to attempt to evade tax. It is a felony for a taxpayer to willfully “make and subscribe” a return “which he does not believe to be true and correct as to every material matter . . . .” Similarly, it is a felony punishable by up to three years imprisonment, a fine, and costs of prosecution to:

Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.

Note that the advisor need not be considered a “return preparer” to be subject to prosecution under Section 7206.

b. Civil Penalty -- IRC § 6701

In addition to a criminal penalty, the Code imposes a civil penalty on anyone who “aids or assists in, procures, or advises with respect to” a return, who knows that it will be used in connection with a material matter under the internal revenue laws, and who knows that it would result in an understatement of

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194 Other nontax criminal statutes could also apply, including conspiracy to defraud the United States (18 U.S.C. § 371) and making false statements (18 U.S.C. § 1001).
195 IRC § 7206(1).
196 IRC § 7206(2).
tax liability. The penalty is $10,000 if it relates to the tax liability of a corporation and $1,000 for all other taxpayers.

B. Penalties under Circular 230

Circular 230 contains sanctions for the violation of its provisions. The Secretary of the Treasury (or his delegate) has the authority to censure, suspend, impose a monetary penalty on or disbar from practice before the Internal Revenue Service any practitioner who is found to be incompetent or disreputable, who fails to comply with Circular 210 or who with intent to defraud willfully and knowingly misleads or threatens a client or prospective client.

Incompetence and disreputable conduct includes a host of misdeeds. Just a few of the 18 enumerated offenses include: conviction of any criminal offense under Federal tax law, conviction of any crime involving dishonesty, conviction of any felony for which the “conduct involved render the practitioner unfit to practice before the Internal Revenue Service,” giving false or misleading information in connection with any tax matter, willingly failing to make a return, willfully assisting a client in violating Federal tax law, disbarment by a State or

197 IRC § 6701(a).
198 IRC § 6701(b).
199 A disbarred practitioner may petition for reinstatement after 5 years. § 10.81.
200 § 10.50(a), (c).
local bar, contemptuous conduct in connection with practice before the IRS, including the use of abusive language, and giving a false opinion.\textsuperscript{201}

Circular 230 also contains expedited suspension provisions for practitioners who have had their license suspended or revoked for cause by another body, who have been convicted of certain crimes, who have violated conditions previously imposed, or who have been sanctioned by a court related to the practitioner’s own tax liability.\textsuperscript{202}

If any officer or employee of the Internal Revenue Service believes a practitioner has violated Circular 230, he or she must promptly make a written report of the “suspected violation.”\textsuperscript{203} If it is determined that a practitioner has violated Circular 230 or law governing practice before the IRS, the practitioner may be reprimanded subject to a proceeding for

\textsuperscript{201} § 10.51(a).
\textsuperscript{202} § 10.82. Proposed amendments to Circular 230 would also permit expedited suspension procedures against practitioners who have willfully failed to comply with their personal Federal tax filing obligations. The new rules would permit expedited proceedings where the practitioner fails to make a an annual Federal tax filing during four of five tax years or failing to make a return required more frequently than annually during five of seven periods immediately before the institution of the expedited suspension proceeding. Unlike previously proposed regulations, the current proposal would not permit expedited proceedings against practitioners who have not paid their Federal taxes. 77 Fed. Reg. at 57,059.
\textsuperscript{203} § 10.53(a).
sanctions.\textsuperscript{204} No proceeding may be instituted unless the practitioner has been advised in writing of the law, facts and conduct warranting such action and has been accorded an opportunity to dispute facts, assert additional facts and make arguments.\textsuperscript{205} Circular 230 specifies the contents of a complaint and answer,\textsuperscript{206} service of papers and other procedural rules.\textsuperscript{207}

Proceedings are conducted by an Administrative Law Judge\textsuperscript{208} and the rules of evidence do not apply.\textsuperscript{209} All reports and decisions of proceedings are public and open to inspection within 30 days after they become final.\textsuperscript{210} Either party may appeal the decision of the Administrative Law Judge to the Secretary of the Treasury.\textsuperscript{211} The decision of the Administrative Law Judge will not be reversed unless it is determined that it was clearly erroneous in light of the evidence in the record and applicable law. Legal issues are reviewed de novo.\textsuperscript{212} Decisions since September 2007 are publicly available on the IRS website.\textsuperscript{213} Based on my review, virtually all of these decisions involve practitioners who failed to file tax returns. Only one

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{204} § 10.60(a).
\item\textsuperscript{205} § 10.60(c).
\item\textsuperscript{206} § 10.62, § 10.64.
\item\textsuperscript{207} §§ 10.63-10.68.
\item\textsuperscript{208} § 10.70.
\item\textsuperscript{209} § 10.73(a).
\item\textsuperscript{210} § 10.72(d).
\item\textsuperscript{211} § 10.77.
\item\textsuperscript{212} § 10.78(b).
\item\textsuperscript{213} \url{http://www.irs.gov/Tax-Professionals/Enrolled-Agents/Final-Agency-Decisions-in-Disciplinary-Cases}
\end{itemize}
\end{footnotesize}
The reported decision involved an allegation by the IRS Office of Professional Responsibility against John Sykes, a New York tax attorney. Mr. Sykes prepared five short-form tax opinions on leasing transactions in the *Long Term Capital Holdings* matter. The district court in the underlying tax dispute concluded that the transactions were tax shelters. OPR alleged that Mr. Sykes failed to exercise due diligence as to accuracy because his short-form opinions contained facts and conclusions, but not a detailed legal analyses. Mr. Sykes argued that, at the time he wrote the opinions, short form opinions were accepted practice in the profession. He also argued that the version of Circular 230 then in effect did not require an in-depth legal analysis to be included in the written advice. In a rare move, the Administrative Law Judge dismissed the complaint against Mr. Sykes, holding the OPR had failed to prove by clear and convincing evidence that Mr. Sykes had failed to exercise due diligence and rejected the notion that short form opinions were per se insufficient.

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C. Civil (Nontax) Liability

In addition to regulation by the State bar and the Internal Revenue Service, tax practitioners are, like all lawyers, subject to civil malpractice claims by dissatisfied clients (and sometimes even third parties). These issues may become even more acute as courts become less likely to excuse taxpayers from penalties based on reliance on professional advice.\textsuperscript{215}

An analysis of the various causes of action and damages available in a tax malpractice action are beyond the scope of this paper. However, it is worth considering the interplay between the ethical standards, particularly Circular 230, which is a set of Federal regulations, and civil malpractice cases.

An attorney commits legal malpractice when he fails to use the skill, prudence, and diligence that lawyers of ordinary skill and capacity commonly possess and exercise.\textsuperscript{216} The plaintiff in a malpractice action bears the burden of proving by a preponderance of the evidence that the attorney owed him a


duty of care, that the attorney breached the duty of care, and that the breach was the proximate cause of his damages.\textsuperscript{217}

The majority of courts that have considered the issue have concluded that ethical rules can be used to show the standard of care for attorneys. Some courts have held that violation of an ethical rule creates a rebuttable presumption of malpractice, thereby shifting the burden of proof from the client to the lawyer. In fact, some courts in California have determined that violation of an ethical standard is conclusive evidence of malpractice.\textsuperscript{218}

While there is no shortage of tax malpractice cases,\textsuperscript{219} there do not appear to be any reported decisions using Circular 230 as the basis for the professional care standard. With the fairly recent publication of opinions from OPR proceedings and the new, more general Circular 230 standards, it would seem that a malpractice action based on Circular 230 is simply a matter of time.

\textsuperscript{217}Id. at 229.
\textsuperscript{219}For a discussion of malpractice cases involving tax in New York, see Jacob L. Todres, \textit{New York’s Law of Tax Malpractice Damages: Balanced or Biased?), 86 St. John's L. Rev. 1 (2012)
V. Conclusions

Is Circular 230 much ado about nothing? As can be seen from above, Circular 230 is, in many instances, and particularly with the proposed amendments, nothing more than a restatement of long-standing principles of professional conduct. Based on a review of the principles discussed in this paper, I offer the following Ten Commandments for Tax Lawyers:

2. Define client obligations in writing (such as in the engagement letter).
3. Distinguish between the roles of advisor and advocate and act accordingly.
4. Be mindful of potential conflicts between lawyer and client.
5. Understand the facts – trust, but verify.
6. You may be a return preparer, even if you don’t prepare returns.
7. Do not misstate the facts or the law, either affirmatively or by omission.
8. Lawyers have a duty to their clients, but also to the legal system. These duties sometimes conflict.
9. Advise clients on the risk of penalties and the benefits/nonbenefits of return disclosure.
10. You can get rid of your Circular 230 email disclaimer (but not yet).