Standards of Tax Practice,
Young Lawyers Panel

Representing Practitioners in Ethics
and
Disciplinary Actions

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

A. Sources of Referrals

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

B. The Three Part Screening Process

1. Determine Jurisdiction

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

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

2. Determine whether alleged misconduct is actionable

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

3. Determine whether alleged misconduct is timely

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

C. Gathering The Evidence

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

D. The Changes Concerning Appraiser Cases

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

II. POTENTIAL SANCTIONS

A. General

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

a. Reprimand

The least severe sanction available is the Reprimand. This sanction can be issued unilaterally against a practitioner by the Director of OPR. Essentially, a Reprimand is a letter from the Director of OPR to a practitioner stating that the Director has found that the practitioner has committed some misconduct under Circular 230. What differentiates a Reprimand from all of the other sanctions is that a Reprimand is private and never becomes a matter of public record.

b. Public Censure

A Public Censure is a Reprimand that is made public. When a practitioner receives a Public Censure, his or her name is published in the Internal Revenue Bulletin (“I.R.B.”). A Public Censure does not stop the practitioner from practicing before the IRS.

c. Suspension

A practitioner who receives a Suspension is prohibited from practicing before the IRS for a specified period of time. The length of the Suspension can be agreed upon by the practitioner and the Director or it can be determined by an Administrative Law Judge. The practitioner’s name will be published in the I.R.B. along with the fact that he or she was suspended from practice before the IRS. The reason for the Suspension is also published in the I.R.B. During a Suspension the practitioner is not allowed to practice before the IRS.

d. Disbarment

Generally, practitioners are only disbarred for egregious violations of Circular 230. In most situations, the Disbarment of a practitioner only results from the final decision of an Administrative Law Judge. When a practitioner is disbarred, he or she is permanently prohibited from practicing before the IRS. A practitioner may petition the Director of OPR for reinstatement after a period of five years has passed.
2. Monetary Sanctions

a. The American Jobs Creation Act of 2004 expanded OPR’s authority by permitting it to impose monetary penalties on any representative that engages in misconduct. The monetary penalties were given greater clarification in Notice 2007-39. OPR can seek to impose a monetary penalty either in lieu of or in addition to the Public Censure, Suspension, or Disbarment of the practitioner.

b. OPR has the ability to impose a monetary penalty on an individual practitioner, but it can also impose the penalty on the practitioner’s employer, firm, or other related entity if the employer, firm, or entity knew, or reasonably should have known, of the conduct giving rise to the penalty.

c. OPR will consider the existence of aggravating and mitigating factors when determining the monetary penalty. The penalty cannot exceed the gross income derived (or to be derived) from the conduct that gave rise to the penalty.

B. Factors

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

1. The nature and severity of the offense(s) in question;

2. The repetitiveness of the conduct (i.e., a pattern rather than an isolated incident);

3. The practitioner’s prior disciplinary history, if any, with the office;

4. Any aggravating or mitigating factors which may be present (see list below); and

5. The impact that not adequately disciplining the practitioner would have on tax administration, the confidence of the practitioner community and the taxpaying public in enforcement efforts, etc.

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

1. Sum of money at issue.
2. Impact on public's perception of tax system's fairness if practitioner's actions were to go unsanctioned.

3. Degree of frequency with which practitioner engages in practice before the Service.

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

1. Age of the allegations (not the age of the practitioner).

2. Practitioner's good-faith reliance on faulty information furnished by his or her client or a third party.

3. Degree of contrition expressed by practitioner.

4. Health problems, extenuating circumstances or personal hardships experienced by practitioner.

E. Potential ALJ Reaction

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

III. ISSUANCE OF ALLEGATION LETTERS

A. Factors

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

1. The weight of the evidence.

2. The framing of the charges (i.e., which sections of Circular No. 230 to move under).

3. Possible defenses the practitioner could raise.

4. The range of acceptable penalties that might be appropriate if the allegations are proven true.
5. The potential impact of the case (is it high-profile or likely to break new ground for the office).

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

B. The Allegation Letter

1. Preparation of the Allegation Letter

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

2. Service

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

3. Monitoring the Practitioner's Response

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

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

A. The Initial Response

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

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

B. OPR Reaction

1. OPR sometimes conducts supplemental reviews to determine if it can rebut the practitioner’s defenses before determining whether the case should be "Closed Without Action."

2. If the practitioner's response is sufficient to overcome all of the stated allegations, the Enforcement Attorney issues a "Close Without Action" letter.

3. If the practitioner’s response is sufficient to overcome some, but not all, of the allegations, the Enforcement Attorney contacts the practitioner or his or her representative by telephone, and explains why the other charges remain unresolved.

4. If the response is inadequate, OPR matter will proceed.

C. Conferences

1. When a practitioner so requests, OPR will afford the practitioner or his/her representative a conference.

2. Section 10.61 (a) does not specify the manner in which the conference may be held. The Enforcement Attorney offers the following three options to practitioners:

   a. A face to face meeting with the practitioner and his or her representative at OPR office in Washington;

   b. A telephone conference call with the practitioner and his or her representative from the respective offices of all parties; or

   c. In exceptional circumstances and after consultation with General Legal Services (GLS), a face to face meeting with the
practitioner and his or her representative with a GLS attorney at the office of the Area Counsel that would litigate the case.

V. ANATOMY OF A DISCIPLINARY PROCEEDING

A. ALJ Proceeding

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

1. GLS will file a complaint on behalf of the Director, OPR. The complaint is filed with the Chief ALJ and served upon the practitioner at his or her last known residential address as reflected on their 1040 return. For practical purposes, GLS will serve the complaint at another place if the practitioner or his or her representative have so requested.

2. The practitioner will either file a responsive pleading (such as an answer or motion to dismiss), or fail to respond, in which case GLS can move for a decision by default.

3. The Chief ALJ will designate him or herself or another ALJ to preside over the case, and send out an Order of Designation to the parties notifying them of same.

4. The ALJ will send out a Pre-hearing Order, which usually requires the parties to report on the progress of settlement discussions (without disclosing the terms of such discussions to the ALJ). Should a settlement result prior to a hearing, an "acceptance letter" acknowledging receipt of the practitioner's settlement offer and accepting the practitioner's offer of consent to the sanction in question will be prepared. This letter must be approved and signed by the Director of OPR prior to being sent. If there has been no settlement, the parties are usually required to exchange witness lists and copies of documentary evidence they intend to offer at the hearing.

5. The parties may, in rare instances, move for leave to take the deposition of a witness in advance of the hearing. In such instances, the party would need to demonstrate to the ALJ that simply having the witness testify at the hearing is not sufficient, either because the witness would be unavailable at the hearing or because having the deposition testimony in advance of the hearing is critical for the preparation of the party’s case.

6. The parties may move for summary judgment. § 10.68(a)(2).
7. The hearing is held in the presence of a Certified Court Reporter. These hearings are closed to the public unless the practitioner requests that it be opened. When proceedings are opened to the public, care is taken to safeguard confidential taxpayer information from unauthorized disclosure.

8. The parties may be required to submit post-hearing briefs and/or proposed findings of fact and conclusions of law. Some ALJs prefer oral closing arguments at the conclusion of the hearing.

9. The ALJ issues an Initial Decision, first determining whether misconduct occurred and then evaluating the misconduct for determination of the appropriate sanction.

B. Disposition of ALJ Decisions and Processing of Appeals

1. Should an Administrative Law Judge (ALJ) issue a decision authorizing any sanction at all, the practitioner has thirty days to appeal this decision to the Secretary of the Treasury. If the ALJ issues a decision dismissing the complaint or if the sanction is considered by OPR to be too lenient, OPR will request that GLS file an appeal with the Secretary of the Treasury. Cases that do not result in an appeal are returned to the Paralegal for processing and closure.

2. Many injunctions issued by the District Courts include relief that has the effect of barring practitioners from representing clients before the Service. This is tantamount to disbarment. That said, not every injunction obtained by the Department of Justice renders a parallel Circular 230 proceeding moot. For example, an injunction that only proscribes certain abusive practices but still allows a practitioner to represent clients before the Service not only fails to moot out the Circular 230 proceeding, but could actually prove helpful in the Circular 230 case, since the findings of fact by the District Court could be cited in the complaint by GLS. Additionally, preliminary injunctions barring representation of clients before the Service are, by their very nature, temporary. Thus, at least one ALJ has ruled that they fail to render the Circular 230 proceeding moot.

C. Disclosure of Result to State Licensing Authority

Notice of the fact that a practitioner has been disbarred, suspended or censured is currently published in the Internal Revenue Bulletin, as is a brief reason for the sanction. OPR can disclose this information to state licensing authorities.
Table of Contents

Paragraph 1 ......................................................................................................................... 4

10.0 Scope of part ..................................................................................................................... 4

Subpart A — Rules Governing Authority to Practice ............................................................ 4

10.1 Director of the Office of Professional Responsibility ......................................................... 4
10.2 Definitions ......................................................................................................................... 4
10.3 Who may practice .............................................................................................................. 5
10.4 Eligibility for enrollment as an enrolled agent or enrolled retirement plan agent ............. 6
10.5 Application for enrollment as an enrolled agent or enrolled retirement plan agent ............ 7
10.6 Enrollment as an enrolled agent or enrolled retirement plan agent .................................... 8
10.7 Representing oneself; participating in rulemaking; limited practice; special appearances; and return preparation .............................................................................................................. 14
10.8 Customhouse brokers ..................................................................................................... 15

Subpart B — Duties and Restrictions Relating to Practice Before the Internal Revenue Service .... 15

10.20 Information to be furnished ............................................................................................ 15
10.21 Knowledge of client’s omission ......................................................................................... 16
10.22 Diligence as to accuracy .................................................................................................. 16
10.23 Prompt disposition of pending matters ............................................................................ 16
10.24 Assistance from or to disbarred or suspended persons and former Internal Revenue Service employees .................................................................................................................. 16
10.25 Practice by former government employees, their partners and their associates ............... 16
10.26 Notaries .......................................................................................................................... 17
10.27 Fees ............................................................................................................................... 17
10.28 Return of client’s records ............................................................................................... 18
10.29 Conflicting interests ....................................................................................................... 19
10.30 Solicitation ..................................................................................................................... 19
10.31 Negotiation of taxpayer checks ....................................................................................... 20
10.32 Practice of law ............................................................................................................... 20
10.33 Best practices for tax advisors ........................................................................................ 20
10.34 Standards with respect to tax returns and documents, affidavits and other papers .......... 21
10.35 Requirements for covered opinions ................................................................................. 21
10.36 Procedures to ensure compliance ..................................................................................... 26
10.37 Requirements for other written advice ............................................................................ 27
10.38 Establishment of advisory committees ........................................................................... 27

Page 2
Treasury Dept. Circular 230
Table of Contents (cont’d)

Subpart C — Sanctions for Violation of the Regulations ........................................... 27
10.50 Sanctions ........................................................................................................... 27
10.51 Incompetence and disreputable conduct ......................................................... 28
10.52 Violations subject to sanction ......................................................................... 29
10.53 Receipt of information concerning practitioner .............................................. 29

Subpart D — Rules Applicable to Disciplinary Proceedings ..................................... 30
10.60 Institution of proceeding .................................................................................. 30
10.61 Conferences ..................................................................................................... 30
10.62 Contents of complaint ...................................................................................... 31
10.63 Service of complaint; service of other papers; service of evidence in support of complaint; filing of papers ................................................................. 31
10.64 Answer; default ............................................................................................... 32
10.65 Supplemental charges ..................................................................................... 33
10.66 Reply to answer ............................................................................................... 33
10.67 Proof; variance; amendment of pleadings ....................................................... 33
10.68 Motions and requests ....................................................................................... 33
10.69 Representation; ex parte communication ....................................................... 34
10.70 Administrative Law Judge ............................................................................... 34
10.71 Discovery .......................................................................................................... 35
10.72 Hearings ........................................................................................................... 36
10.73 Evidence .......................................................................................................... 37
10.74 Transcript ......................................................................................................... 38
10.75 Proposed findings and conclusions ................................................................ 38
10.76 Decision of Administrative Law Judge ............................................................ 38
10.77 Appeal of decision of Administrative Law Judge ........................................... 39
10.78 Decision on review ........................................................................................ 39
10.79 Effect of disbarment, suspension, or censure ................................................ 40
10.80 Notice of disbarment, suspension, censure, or disqualification .................... 40
10.81 Petition for reinstatement ............................................................................... 40
10.82 Expedited suspension ...................................................................................... 40

Subpart E — General Provisions ................................................................................. 42
10.90 Records ............................................................................................................ 42
10.91 Saving provision .............................................................................................. 42
10.92 Special orders ................................................................................................... 42
10.93 Effective date .................................................................................................... 43

Addendum to Treasury Department Circular No. 230 ................................................ 43
Subparts A & B (Pages 4-26) Not Included
§ 10.37 Requirements for other written advice.

(a) Requirements. A practitioner must not give written advice (including electronic communications) concerning one or more Federal tax issues if the practitioner bases the written advice on unreasonable factual or legal assumptions (including assumptions as to future events), unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person, does not consider all relevant facts that the practitioner knows or should know, or, in evaluating a Federal tax issue, takes into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised. All facts and circumstances, including the scope of the engagement and the type and specificity of the advice sought by the client will be considered in determining whether a practitioner has failed to comply with this section. In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner’s firm) in promoting, marketing or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the determination of whether a practitioner has failed to comply with this section will be made on the basis of a heightened standard of care because of the greater risk caused by the practitioner’s lack of knowledge of the taxpayer’s particular circumstances.

(b) Effective date. This section applies after June 20, 2005.

§ 10.38 Establishment of advisory committees.

(a) Advisory committees. To promote and maintain the public’s confidence in tax advisors, the Director of the Office of Professional Responsibility is authorized to establish one or more advisory committees composed of at least five individuals authorized to practice before the Internal Revenue Service. The Director should ensure that membership of an advisory committee is balanced among those who practice as attorneys, accountants, and enrolled agents. Under procedures prescribed by the Director, an advisory committee may review and make general recommendations regarding professional standards or best practices for tax advisors, including whether hypothetical conduct would give rise to a violation of §§10.35 or 10.36.

(b) Effective date. This section applies after December 20, 2004.

Subpart C — Sanctions for Violation of the Regulations

§ 10.50 Sanctions.

(a) Authority to censure, suspend, or disbar. The Secretary of the Treasury, or delegate, after notice and an opportunity for a proceeding, may censure, suspend, or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable (within the meaning of §10.51), fails to comply with any regulation in this part (under the prohibited conduct standards of §10.52), or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. Censure is a public reprimand.

(b) Authority to disqualify. The Secretary of the Treasury, or delegate, after due notice and opportunity for hearing, may disqualify any appraiser for a violation of these rules as applicable to appraisers.

(1) If any appraiser is disqualified pursuant to this subpart C, the appraiser is barred from presenting evidence or testimony in any administrative proceeding before the Department of the Treasury or the Internal Revenue Service, unless and until authorized to do so by the Director of the Office of Professional Responsibility pursuant to §10.81, regardless of whether the evidence or testimony would pertain to an appraisal made prior to or after the effective date of disqualification.
(2) Any appraisal made by a disqualified appraiser after the effective date of disqualification will not have any probative effect in any administrative proceeding before the Department of the Treasury or the Internal Revenue Service. An appraisal otherwise barred from admission into evidence pursuant to this section may be admitted into evidence solely for the purpose of determining the taxpayer’s reliance in good faith on such appraisal.

(c) Authority to impose monetary penalty —

(1) In general.

(i) The Secretary of the Treasury, or delegate, after notice and an opportunity for a proceeding, may impose a monetary penalty on any practitioner who engages in conduct subject to sanction under paragraph (a) of this section.

(ii) If the practitioner described in paragraph (c)(1)(i) of this section was acting on behalf of an employer or any firm or other entity in connection with the conduct giving rise to the penalty, the Secretary of the Treasury, or delegate, may impose a monetary penalty on the employer, firm, or entity if it knew, or reasonably should have known of such conduct.

(2) Amount of penalty. The amount of the penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty.

(3) Coordination with other sanctions. Subject to paragraph (c)(2) of this section —

(i) Any monetary penalty imposed on a practitioner under this paragraph (c) may be in addition to or in lieu of any suspension, disbarment or censure and may be in addition to a penalty imposed on an employer, firm or other entity under paragraph (c)(1)(i) of this section.

(ii) Any monetary penalty imposed on an employer, firm or other entity may be in addition to or in lieu of penalties imposed under paragraph (c)(1)(i) of this section.

(d) Sanctions to be imposed. The sanctions imposed by this section shall take into account all relevant facts and circumstances.

(e) Effective/applicability date. This section is applicable to conduct occurring on or after September 26, 2007, except paragraph (c) which applies to prohibited conduct that occurs after October 22, 2004.

§ 10.51 Incompetence and disreputable conduct.

(a) Incompetence and disreputable conduct. Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to —

(1) Conviction of any criminal offense under the Federal tax laws.

(2) Conviction of any criminal offense involving dishonesty or breach of trust.

(3) Conviction of any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service.

(4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term “information.”

(5) Solicitation of employment as prohibited under §10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the Internal Revenue Service or any officer or employee thereof.

(6) Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.

(7) Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.

(8) Misappropriation of, or failure properly or
promptly to remit, funds received from a client for the purpose of payment of taxes or other obligations due the United States.

(9) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of an advantage or by the bestowing of any gift, favor or thing of value.

(10) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant, or actuary by any duly constituted authority of any State, territory, or possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.

(11) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment or ineligibility of such other person.

(12) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language, making false accusations or statements, knowing them to be false, or circulating or publishing malicious or libelous matter.

(13) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph (a)(13) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading. For purposes of this paragraph (a)(13), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client.

(14) Willfully failing to sign a tax return prepared by the practitioner when the practitioner’s signature is required by Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

(15) Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code, contrary to the order of a court of competent jurisdiction, or contrary to the order of an administrative law judge in a proceeding instituted under §10.60.

(b) Effective/applicability date. This section is applicable to conduct occurring on or after September 26, 2007.

§ 10.52 Violations subject to sanction.

(a) A practitioner may be sanctioned under §10.50 if the practitioner —

(1) Willfully violates any of the regulations (other than §10.33) contained in this part; or

(2) Recklessly or through gross incompetence (within the meaning of §10.51(a)(13)) violates §§10.34, 10.35, 10.36 or 10.37.

(b) Effective/applicability date. This section is applicable to conduct occurring on or after September 26, 2007.

§ 10.53 Receipt of information concerning practitioner.

(a) Officer or employee of the Internal Revenue Service. If an officer or employee of the Internal Revenue Service has reason to believe that a practitioner has violated any provision of this part, the officer or employee will promptly make a written report to the
Director of the Office of Professional Responsibility of the suspected violation. The report will explain the facts and reasons upon which the officer’s or employee’s belief rests.

(b) Other persons. Any person other than an officer or employee of the Internal Revenue Service having information of a violation of any provision of this part may make an oral or written report of the alleged violation to the Director of the Office of Professional Responsibility or any officer or employee of the Internal Revenue Service. If the report is made to an officer or employee of the Internal Revenue Service, the officer or employee will make a written report of the suspected violation to the Director of the Office of Professional Responsibility.

(c) Destruction of report. No report made under paragraph (a) or (b) of this section shall be maintained by the Director of the Office of Professional Responsibility unless retention of the report is permissible under the applicable records control schedule as approved by the National Archives and Records Administration and designated in the Internal Revenue Manual. The Director of the Office of Professional Responsibility must destroy the reports as soon as permissible under the applicable records control schedule.

(d) Effect on proceedings under subpart D. The destruction of any report will not bar any proceeding under subpart D of this part, but will preclude the Director of the Office of Professional Responsibility’s use of a copy of the report in a proceeding under subpart D of this part.

(e) Effective/applicability date. This section is applicable on September 26, 2007.

Subpart D — Rules Applicable to Disciplinary Proceedings

§ 10.60 Institution of proceeding.

(a) Whenever the Director of the Office of Professional Responsibility determines that a practitioner (or employer, firm or other entity, if applicable) violated any provision of the laws governing practice before the Internal Revenue Service or the regula-

tions in this part, the Director of the Office of Professional Responsibility may reprimand the practitioner or, in accordance with §10.62, institute a proceeding for a sanction described in §10.50. A proceeding is instituted by the filing of a complaint, the contents of which are more fully described in §10.62.

(b) Whenever the Director of the Office of Professional Responsibility is advised or becomes aware that a penalty has been assessed against an appraiser under section 6701(a) of the Internal Revenue Code, the Director of the Office of Professional Responsibility may reprimand the appraiser or, in accordance with §10.62, institute a proceeding for disqualification of the appraiser. A proceeding for disqualification of an appraiser is instituted by the filing of a complaint, the contents of which are more fully described in §10.62.

(c) Except as provided in §10.82, a proceeding will not be instituted under this section unless the proposed respondent previously 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 (including an explanation or description of mitigating circumstances).

(d) Effective/applicability date. This section is applicable on September 26, 2007.

§ 10.61 Conferences.

(a) In general. The Director of the Office of Professional Responsibility may confer with a practitioner, employer, firm or other entity, or an appraiser concerning allegations of misconduct irrespective of whether a proceeding has been instituted. If the conference results in a stipulation in connection with an ongoing proceeding in which the practitioner, employer, firm or other entity, or appraiser is the respondent, the stipulation may be entered in the record by either party to the proceeding.

(b) Voluntary sanction —

(1) In general. In lieu of a proceeding being instituted or continued under §10.60(a), a practitioner or appraiser (or employer, firm or other entity, if app
may offer a consent to be sanctioned under §10.50.

(2) Discretion; acceptance or declination. The Director of the Office of Professional Responsibility may, in his or her discretion, accept or decline the offer described in paragraph (b)(1) of this section. In any declination, the Director of the Office of Professional Responsibility may state that he or she would accept the offer described in paragraph (b)(1) of this section if it contained different terms. The Director of the Office of Professional Responsibility may, in his or her discretion, accept or reject a revised offer submitted in response to the declination or may counteroffer and act upon any accepted counteroffer.

(c) Effective/applicability date. This section is applicable on September 26, 2007.

§ 10.62 Contents of complaint.

(a) Charges. A complaint must name the respondent, provide a clear and concise description of the facts and law that constitute the basis for the proceeding, and be signed by the Director of Office of Professional Responsibility or a person representing the Director of the Office of Professional Responsibility under §10.69(a)(1). A complaint is sufficient if it fairly informs the respondent of the charges brought so that the respondent is able to prepare a defense.

(b) Specification of sanction. The complaint must specify the sanction sought by the Director of the Office of Professional Responsibility against the practitioner or appraiser. If the sanction sought is a suspension, the duration of the suspension sought must be specified.

(c) Demand for answer. The Director of the Office of Professional Responsibility must, in the complaint or in a separate paper attached to the complaint, notify the respondent of the time for answering the complaint, which may not be less than 30 days from the date of service of the complaint, the name and address of the Administrative Law Judge with whom the answer must be filed, the name and address of the person representing the Director of the Office of Professional Responsibility to whom a copy of the answer must be served, and that a decision by default may be rendered against the respondent in the event an answer is not filed as required.

(d) Effective/applicability date. This section is applicable to complaints brought on or after September 26, 2007.

§ 10.63 Service of complaint; service of other papers; service of evidence in support of complaint; filing of papers.

(a) Service of complaint.

(1) In general. The complaint or a copy of the complaint must be served on the respondent by any manner described in paragraphs (a) (2) or (3) of this section.

(2) Service by certified or first class mail.

(i) Service of the complaint may be made on the respondent by mailing the complaint by certified mail to the last known address (as determined under section 6212 of the Internal Revenue Code and the regulations thereunder) of the respondent. Where service is by certified mail, the returned post office receipt duly signed by the respondent will be proof of service.

(ii) If the certified mail is not claimed or accepted by the respondent, or is returned undelivered, service may be made on the respondent, by mailing the complaint to the respondent by first class mail. Service by this method will be considered complete upon mailing, provided the complaint is addressed to the respondent at the respondent’s last known address as determined under section 6212 of the Internal Revenue Code and the regulations thereunder.

(3) Service by other than certified or first class mail.

(i) Service of the complaint may be made on the respondent by delivery by a private delivery service designated pursuant to section 7502(f) of the Internal Revenue Code to the last known address (as determined under section 6212 of the Internal Revenue Code and the regulations thereunder) of the respondent. Service by this method will be considered complete, provided the complaint is addressed to the respondent at the respondent’s last known address as determined under section 6212 of the Internal Rev-
(ii) Service of the complaint may be made in person on, or by leaving the complaint at the office or place of business of, the respondent. Service by this method will be considered complete and proof of service will be a written statement, sworn or affirmed by the person who served the complaint, identifying the manner of service, including the recipient, relationship of recipient to respondent, place, date and time of service.

(iii) Service may be made by any other means agreed to by the respondent. Proof of service will be a written statement, sworn or affirmed by the person who served the complaint, identifying the manner of service, including the recipient, relationship of recipient to respondent, place, date and time of service.

(4) For purposes of this section, respondent means the practitioner, employer, firm or other entity, or appraiser named in the complaint or any other person having the authority to accept mail on behalf of the practitioner, employer, firm or other entity or appraiser.

(b) Service of papers other than complaint. Any paper other than the complaint may be served on the respondent, or his or her authorized representative under §10.69(a)(2) by:

(1) mailing the paper by first class mail to the last known address (as determined under section 6212 of the Internal Revenue Code and the regulations thereunder) of the respondent or the respondent’s authorized representative,

(2) delivery by a private delivery service designated pursuant to section 7502(f) of the Internal Revenue Code to the last known address (as determined under section 6212 of the Internal Revenue Code and the regulations thereunder) of the respondent or the respondent’s authorized representative, or

(3) as provided in paragraphs (a)(3)(ii) and (a)(3)(iii) of this section.

(c) Service of papers on the Director of the Office of Professional Responsibility. Whenever a paper is required or permitted to be served on the Director of the Office of Professional Responsibility in connection with a proceeding under this part, the paper will be served on the Director of the Office of Professional Responsibility’s authorized representative under §10.69(a)(1) at the address designated in the complaint, or at an address provided in a notice of appearance. If no address is designated in the complaint or provided in a notice of appearance, service will be made on the Director of the Office of Professional Responsibility, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224.

(d) Service of evidence in support of complaint. Within 10 days of serving the complaint, copies of the evidence in support of the complaint must be served on the respondent in any manner described in paragraphs (a)(2) and (3) of this section.

(e) Filing of papers. Whenever the filing of a paper is required or permitted in connection with a proceeding under this part, the original paper, plus one additional copy, must be filed with the Administrative Law Judge at the address specified in the complaint or at an address otherwise specified by the Administrative Law Judge. All papers filed in connection with a proceeding under this part must be served on the other party, unless the Administrative Law Judge directs otherwise. A certificate evidencing such must be attached to the original paper filed with the Administrative Law Judge.

(f) Effective/applicability date. This section is applicable to complaints brought on or after September 26, 2007.

§ 10.64 Answer; default.

(a) Filing. The respondent’s answer must be filed with the Administrative Law Judge, and served on the Director of the Office of Professional Responsibility, within the time specified in the complaint unless, on request or application of the respondent, the time is extended by the Administrative Law Judge.

(b) Contents. The answer must be written and contain a statement of facts that constitute the respondent’s grounds of defense. General denials are not permitted. The respondent must specifically admit or deny each allegation set forth in the complaint, except that the respondent may state that the respondent is without sufficient information to admit or deny a specific allegation. The respondent, nevertheless,
may not deny a material allegation in the complaint that the respondent knows to be true, or state that the respondent is without sufficient information to form a belief, when the respondent possesses the required information. The respondent also must state affirmatively any special matters of defense on which he or she relies.

(c) **Failure to deny or answer allegations in the complaint.** Every allegation in the complaint that is not denied in the answer is deemed admitted and will be considered proved; no further evidence in respect of such allegation need be adduced at a hearing.

(d) **Default.** Failure to file an answer within the time prescribed (or within the time for answer as extended by the Administrative Law Judge), constitutes an admission of the allegations of the complaint and a waiver of hearing, and the Administrative Law Judge may make the decision by default without a hearing or further procedure. A decision by default constitutes a decision under §10.76.

(e) **Signature.** The answer must be signed by the respondent or the respondent’s authorized representative under §10.69(a)(2) and must include a statement directly above the signature acknowledging that the statements made in the answer are true and correct and that knowing and willful false statements may be punishable under 18 U.S.C. §1001.

§ 10.65 **Supplemental charges.**

(a) **In general.** The Director of the Office of Professional Responsibility may file supplemental charges, by amending the complaint with the permission of the Administrative Law Judge, against the respondent, if, for example —

(1) It appears that the respondent, in the answer, falsely and in bad faith, denies a material allegation of fact in the complaint or states that the respondent has insufficient knowledge to form a belief, when the respondent possesses such information; or

(2) It appears that the respondent has knowingly introduced false testimony during proceedings against the respondent.

(b) **Hearing.** The supplemental charges may be heard with other charges in the case, provided the respondent is given due notice of the charges and is afforded a reasonable opportunity to prepare a defense to the supplemental charges.

(c) **Effective/applicability date.** This section is applicable on September 26, 2007.

§ 10.66 **Reply to answer.**

The Director of the Office of Professional Responsibility may file a reply to the respondent’s answer, but unless otherwise ordered by the Administrative Law Judge, no reply to the respondent’s answer is required. If a reply is not filed, new matter in the answer is deemed denied.

§ 10.67 **Proof; variance; amendment of pleadings.**

In the case of a variance between the allegations in pleadings and the evidence adduced in support of the pleadings, the Administrative Law Judge, at any time before decision, may order or authorize amendment of the pleadings to conform to the evidence. The party who would otherwise be prejudiced by the amendment must be given a reasonable opportunity to address the allegations of the pleadings as amended and the Administrative Law Judge must make findings on any issue presented by the pleadings as amended.

§ 10.68 **Motions and requests.**

(a) **Motions —**

(1) **In general.** At any time after the filing of the complaint, any party may file a motion with the Administrative Law Judge. Unless otherwise ordered by the Administrative Law Judge, motions must be in writing and must be served on the opposing party as provided in §10.63(b). A motion must concisely specify its grounds and the relief sought, and, if appropriate, must contain a memorandum of facts and law in support.

(2) **Summary adjudication.** Either party may move for a summary adjudication upon all or any part of the legal issues in controversy. If the non-moving party opposes summary adjudication in the moving party’s favor, the non-moving party must file a writ-
ten response within 30 days unless ordered otherwise by the Administrative Law Judge.

(3) Good Faith. A party filing a motion for extension of time, a motion for postponement of a hearing, or any other non-dispositive or procedural motion must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection.

(b) Response. Unless otherwise ordered by the Administrative Law Judge, the nonmoving party is not required to file a response to a motion. If the Administrative Law Judge does not order the nonmoving party to file a response, and the nonmoving party files no response, the nonmoving party is deemed to oppose the motion. If a nonmoving party does not respond within 30 days of the filing of a motion for decision by default for failure to file a timely answer or for failure to prosecute, the nonmoving party is deemed not to oppose the motion.

(c) Oral motions; oral argument —

(1) The Administrative Law Judge may, for good cause and with notice to the parties, permit oral motions and oral opposition to motions.

(2) The Administrative Law Judge may, within his or her discretion, permit oral argument on any motion.

(d) Orders. The Administrative Law Judge should issue written orders disposing of any motion or request and any response thereto.

(e) Effective/applicability date. This section is applicable on September 26, 2007.

§ 10.69 Representation; ex parte communication.

(a) Representation.

(1) The Director of the Office of Professional Responsibility may be represented in proceedings under this part by an attorney or other employee of the Internal Revenue Service. An attorney or an employee of the Internal Revenue Service representing the Director of the Office of Professional Responsibility in a proceeding under this part may sign the complaint or any document required to be filed in the proceeding on behalf of the Director of the Office of Professional Responsibility.

(2) A respondent may appear in person, be represented by a practitioner, or be represented by an attorney who has not filed a declaration with the Internal Revenue Service pursuant to §10.3. A practitioner or an attorney representing a respondent or proposed respondent may sign the answer or any document required to be filed in the proceeding on behalf of the respondent.

(b) Ex parte communication.

The Director of the Office of Professional Responsibility, the respondent, and any representatives of either party, may not attempt to initiate or participate in ex parte discussions concerning a proceeding or potential proceeding with the Administrative Law Judge (or any person who is likely to advise the Administrative Law Judge on a ruling or decision) in the proceeding before or during the pendency of the proceeding. Any memorandum, letter or other communication concerning the merits of the proceeding, addressed to the Administrative Law Judge, by or on behalf of any party shall be regarded as an argument in the proceeding and shall be served on the other party.

§ 10.70 Administrative Law Judge.

(a) Appointment. Proceedings on complaints for the sanction (as described in §10.50) of a practitioner, employer, firm or other entity, or appraiser will be conducted by an Administrative Law Judge appointed as provided by 5 U.S.C. 3105.

(b) Powers of the Administrative Law Judge. The Administrative Law Judge, among other powers, has the authority, in connection with any proceeding under §10.60 assigned or referred to him or her, to do the following:

(1) Administer oaths and affirmations;

(2) Make rulings on motions and requests, which rulings may not be appealed prior to the close of a hearing except in extraordinary circumstances and at the discretion of the Administrative Law Judge;

(3) Determine the time and place of hearing and regulate its course and conduct;

(4) Adopt rules of procedure and modify the same
from time to time as needed for the orderly disposition of proceedings;

(5) Rule on offers of proof, receive relevant evidence, and examine witnesses;

(6) Take or authorize the taking of depositions or answers to requests for admission;

(7) Receive and consider oral or written argument on facts or law;

(8) Hold or provide for the holding of conferences for the settlement or simplification of the issues with the consent of the parties;

(9) Perform such acts and take such measures as are necessary or appropriate to the efficient conduct of any proceeding; and

(10) Make decisions.

(c) Effective/applicability date. This section is applicable on September 26, 2007.

§ 10.71 Discovery.

(a) In general. Discovery may be permitted, at the discretion of the Administrative Law Judge, only upon written motion demonstrating the relevance, materiality and reasonableness of the requested discovery and subject to the requirements of §10.72(d)(2) and (3). Within 10 days of receipt of the answer, the Administrative Law Judge will notify the parties of the right to request discovery and the timeframe for filing a request. A request for discovery, and objections, must be filed in accordance with §10.68. In response to a request for discovery, the Administrative Law Judge may order —

(1) Depositions upon oral examination; or

(2) Answers to requests for admission.

(b) Depositions upon oral examination —

(1) A deposition must be taken before an officer duly authorized to administer an oath for general purposes or before an officer or employee of the Internal Revenue Service who is authorized to administer an oath in Federal tax law matters.

(2) In ordering a deposition, the Administrative Law Judge will require reasonable notice to the opposing party as to the time and place of the deposition. The opposing party, if attending, will be provided the opportunity for full examination and cross-examina-

(3) Expenses in the reporting of depositions shall be borne by the party at whose instance the deposition is taken. Travel expenses of the deponent shall be borne by the party requesting the deposition, unless otherwise authorized by Federal law or regulation.

(c) Requests for admission. Any party may serve on any other party a written request for admission of the truth of any matters which are not privileged and are relevant to the subject matter of this proceeding. Requests for admission shall not exceed a total of 30 (including any subparts within a specific request) without the approval from the Administrative Law Judge.

(d) Limitations. Discovery shall not be authorized if —

(1) The request fails to meet any requirement set forth in paragraph (a) of this section;

(2) It will unduly delay the proceeding;

(3) It will place an undue burden on the party required to produce the discovery sought;

(4) It is frivolous or abusive;

(5) It is cumulative or duplicative;

(6) The material sought is privileged or otherwise protected from disclosure by law;

(7) The material sought relates to mental impressions, conclusions, of legal theories of any party, attorney, or other representative, or a party prepared in the anticipation of a proceeding; or

(8) The material sought is available generally to the public, equally to the parties, or to the party seeking the discovery through another source.

(e) Failure to comply. Where a party fails to comply with an order of the Administrative Law Judge under this section, the Administrative Law Judge may, among other things, infer that the information would be adverse to the party failing to provide it, exclude the information from evidence or issue a decision by default.

(f) Other discovery. No discovery other than that specifically provided for in this section is permitted.

(g) Effective/applicability date. This section is applicable to proceedings initiated on or after September 26, 2007.
§ 10.72 Hearings.

(a) In general —

(1) Presiding officer. An Administrative Law Judge will preside at the hearing on a complaint filed under §10.60 for the sanction of a practitioner, employer, firm or other entity, or appraiser.

(2) Time for hearing. Absent a determination by the Administrative Law Judge that, in the interest of justice, a hearing must be held at a later time, the Administrative Law Judge should, on notice sufficient to allow proper preparation, schedule the hearing to occur no later than 180 days after the time for filing the answer.

(3) Procedural requirements.

(i) Hearings will be stenographically recorded and transcribed and the testimony of witnesses will be taken under oath or affirmation.

(ii) Hearings will be conducted pursuant to 5 U.S.C. 556.

(iii) A hearing in a proceeding requested under §10.82(g) will be conducted de novo.

(iv) An evidentiary hearing must be held in all proceedings prior to the issuance of a decision by the Administrative Law Judge unless —

(A) The Director of the Office of Professional Responsibility withdraws the complaint;

(B) A decision is issued by default pursuant to §10.64(d);

(C) A decision is issued under §10.82(e);

(D) The respondent requests a decision on the written record without a hearing; or

(E) The Administrative Law Judge issues a decision under §10.68(d) or rules on another motion that disposes of the case prior to the hearing.

(b) Cross-examination. A party is entitled to present his or her case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination, in the presence of the Administrative Law Judge, as may be required for a full and true disclosure of the facts. This paragraph (b) does not limit a party from presenting evidence contained within a deposition when the Administrative Law Judge determines that the deposition has been obtained in compliance with the rules of this subpart D.

(c) Prehearing memorandum. Unless otherwise ordered by the Administrative Law Judge, each party shall file, and serve on the opposing party or the opposing party’s representative, prior to any hearing, a prehearing memorandum containing —

(1) A list (together with a copy) of all proposed exhibits to be used in the party’s case in chief;

(2) A list of proposed witnesses, including a synopsis of their expected testimony, or a statement that no witnesses will be called;

(3) Identification of any proposed expert witnesses, including a synopsis of their expected testimony and a copy of any report prepared by the expert or at his or her direction; and

(4) A list of undisputed facts.

(d) Publicity —

(1) In general. All reports and decisions of the Secretary of the Treasury, or delegate, including any reports and decisions of the Administrative Law Judge, under this Subpart D are, subject to the protective measures in paragraph (d)(4) of this section, public and open to inspection within 30 days after the agency’s decision becomes final.

(2) Request for additional publicity. The Administrative Law Judge may grant a request by a practitioner or appraiser that all the pleadings and evidence of the disciplinary proceeding be made available for inspection where the parties stipulate in advance to adopt the protective measures in paragraph (d)(4) of this section.

(3) Returns and return information —

(i) Disclosure to practitioner or appraiser. Pursuant to section 6103(l)(4) of the Internal Revenue Code, the Secretary of the Treasury, or delegate, may disclose returns and return information to any practitioner or appraiser, or to the authorized representative of the practitioner or appraiser, whose rights are or may be affected by an administrative action or proceeding under this subpart D, but solely for use in the action or proceeding and only to the extent that the Secretary of the Treasury, or delegate, determines that the returns or return information are or may be relevant and material to the action or proceeding.

(ii) Disclosure to officers and employees of the Department of the Treasury. Pursuant to sec-
tion 6103(l)(4)(B) of the Internal Revenue Code the Secretary of the Treasury, or delegate, may disclose returns and return information to officers and employees of the Department of the Treasury for use in any action or proceeding under this subpart D, to the extent necessary to advance or protect the interests of the United States.

(iii) **Use of returns and return information.** Recipients of returns and return information under this paragraph (d)(3) may use the returns or return information solely in the action or proceeding, or in preparation for the action or proceeding, with respect to which the disclosure was made.

(iv) **Procedures for disclosure of returns and return information.** When providing returns or return information to the practitioner or appraiser, or authorized representative, the Secretary of the Treasury, or delegate, will —

(A) Redact identifying information of any third party taxpayers and replace it with a code;

(B) Provide a key to the coded information; and

(C) Notify the practitioner or appraiser, or authorized representative, of the restrictions on the use and disclosure of the returns and return information, the applicable damages remedy under section 7431 of the Internal Revenue Code, and that unauthorized disclosure of information provided by the Internal Revenue Service under this paragraph (d)(3) is also a violation of this part.

(4) **Protective measures —**

(i) **Mandatory protection order.** If redaction of names, addresses, and other identifying information of third party taxpayers may still permit indirect identification of any third party taxpayer, the Administrative Law Judge will issue a protective order to ensure that the identifying information is available to the parties and the Administrative Law Judge for purposes of the proceeding, but is not disclosed to, or open to inspection by, the public.

(ii) **Authorized orders.**

(A) Upon motion by a party or any other affected person, and for good cause shown, the Administrative Law Judge may make any order which justice requires to protect any person in the event disclosure of information is prohibited by law, privileged, confidential, or sensitive in some other way, including, but not limited to, one or more of the following —

(1) That disclosure of information be made only on specified terms and conditions, including a designation of the time or place;

(2) That a trade secret or other information not be disclosed, or be disclosed only in a designated way.

(iii) **Denials.** If a motion for a protective order is denied in whole or in part, the Administrative Law Judge may, on such terms or conditions as the Administrative Law Judge deems just, order any party or person to comply with, or respond in accordance with, the procedure involved.

(iv) **Public inspection of documents.** The Secretary of the Treasury, or delegate, shall ensure that all names, addresses or other identifying details of third party taxpayers are redacted and replaced with the code assigned to the corresponding taxpayer in all documents prior to public inspection of such documents.

(e) **Location.** The location of the hearing will be determined by the agreement of the parties with the approval of the Administrative Law Judge, but, in the absence of such agreement and approval, the hearing will be held in Washington, D.C.

(f) **Failure to appear.** If either party to the proceeding fails to appear at the hearing, after notice of the proceeding has been sent to him or her, the party will be deemed to have waived the right to a hearing and the Administrative Law Judge may make his or her decision against the absent party by default.

(g) **Effective/applicability date.** This section is applicable on September 26, 2007.

§ 10.73 Evidence.

(a) **In general.** The rules of evidence prevailing in courts of law and equity are not controlling in hearings or proceedings conducted under this part. The Administrative Law Judge may, however, exclude evidence that is irrelevant, immaterial, or unduly repetitious.
(b) Depositions. The deposition of any witness taken pursuant to §10.71 may be admitted into evidence in any proceeding instituted under §10.60.

(c) Requests for admission. Any matter admitted in response to a request for admission under §10.71 is conclusively established unless the Administrative Law Judge on motion permits withdrawal or modification of the admission. Any admission made by a party is for the purposes of the pending action only and is not an admission by a party for any other purpose, nor may it be used against a party in any other proceeding.

(d) Proof of documents. Official documents, records, and papers of the Internal Revenue Service and the Office of Professional Responsibility are admissible in evidence without the production of an officer or employee to authenticate them. Any documents, records, and papers may be evidenced by a copy attested to or identified by an officer or employee of the Internal Revenue Service or the Treasury Department, as the case may be.

(e) Withdrawal of exhibits. If any document, record, or other paper is introduced in evidence as an exhibit, the Administrative Law Judge may authorize the withdrawal of the exhibit subject to any conditions that he or she deems proper.

(f) Objections. Objections to evidence are to be made in short form, stating the grounds for the objection. Except as ordered by the Administrative Law Judge, argument on objections will not be recorded or transcribed. Rulings on objections are to be a part of the record, but no exception to a ruling is necessary to preserve the rights of the parties.

(g) Effective/applicability date. This section is applicable on September 26, 2007.

§ 10.74 Transcript.

In cases where the hearing is stenographically reported by a Government contract reporter, copies of the transcript may be obtained from the reporter at rates not to exceed the maximum rates fixed by contract between the Government and the reporter. Where the hearing is stenographically reported by a regular employee of the Internal Revenue Service, a copy will be supplied to the respondent either without charge or upon the payment of a reasonable fee. Copies of exhibits introduced at the hearing or at the taking of depositions will be supplied to the parties upon the payment of a reasonable fee (Sec. 501, Public Law 82-137)(65 Stat. 290)(31 U.S.C. § 483a).

§ 10.75 Proposed findings and conclusions.

Except in cases where the respondent has failed to answer the complaint or where a party has failed to appear at the hearing, the parties must be afforded a reasonable opportunity to submit proposed findings and conclusions and their supporting reasons to the Administrative Law Judge.

§ 10.76 Decision of Administrative Law Judge.

(a) In general —

(1) Hearings. Within 180 days after the conclusion of a hearing and the receipt of any proposed findings and conclusions timely submitted by the parties, the Administrative Law Judge should enter a decision in the case. The decision must include a statement of findings and conclusions, as well as the reasons or basis for making such findings and conclusions, and an order of censure, suspension, disbarment, monetary penalty, disqualification, or dismissal of the complaint.

(2) Summary adjudication. In the event that a motion for summary adjudication is filed, the Administrative Law Judge should rule on the motion for summary adjudication within 60 days after the party in opposition files a written response, or if no written response if filed, within 90 days after the motion for summary adjudication is filed. A decision shall thereafter be rendered if the pleadings, depositions, admissions, and any other admissible evidence show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law. The decision must include a statement of conclusions, as well as the reasons or basis for making such conclusions, and an order of censure, suspension, disbarment, monetary penalty, disqualification, or dismissal of the complaint.
(3) Returns and return information. In the decision, the Administrative Law Judge should use the code assigned to third party taxpayers (described in §10.72(d)).

(b) Standard of proof. If the sanction is censure or a suspension of less than six months’ duration, the Administrative Law Judge, in rendering findings and conclusions, will consider an allegation of fact to be proven if it is established by the party who is alleging the fact by a preponderance of the evidence in the record. If the sanction is a monetary penalty, disbarment or a suspension of six months or longer duration, an allegation of fact that is necessary for a finding against the practitioner must be proven by clear and convincing evidence in the record. An allegation of fact that is necessary for a finding of disqualification against an appraiser must be proved by clear and convincing evidence in the record.

c) Copy of decision. The Administrative Law Judge will provide the decision to the Director of the Office of Professional Responsibility, with a copy to the Director’s authorized representative, and a copy of the decision to the respondent or the respondent’s authorized representative.

d) When final. In the absence of an appeal to the Secretary of the Treasury or delegate, the decision of the Administrative Law Judge will, without further proceedings, become the decision of the agency 30 days after the date of the Administrative Law Judge’s decision.

e) Effective/applicability date. This section is applicable to proceedings initiated on or after September 26, 2007.

§ 10.77 Appeal of decision of Administrative Law Judge.

(a) Appeal. Any party to the proceeding under this subpart D may file an appeal of the decision of the Administrative Law Judge with the Secretary of the Treasury, or delegate. The appeal must include a brief that states exceptions to the decision of the Administrative Law Judge and supporting reasons for such exceptions.

(b) Time and place for filing of appeal. The appeal and brief must be filed, in duplicate, with the Director of the Office of Professional Responsibility within 30 days of the date that the decision of the Administrative Law Judge is served on the parties. The Director of the Office of Professional Responsibility will immediately furnish a copy of the appeal to the Secretary of the Treasury or delegate who decides appeals. A copy of the appeal for review must be sent to any non-appealing party. If the Director of the Office of Professional Responsibility files an appeal, he or she will provide a copy of the appeal and certify to the respondent that the appeal has been filed.

e) Effective/applicability date. This section is applicable on September 26, 2007.

§ 10.78 Decision on review.

(a) Decision on review. On appeal from or review of the decision of the Administrative Law Judge, the Secretary of the Treasury, or delegate, will make the agency decision. The Secretary of the Treasury, or delegate, should make the agency decision within 180 days after receipt of the appeal.

(b) Standard of review. The decision of the Administrative Law Judge will not be reversed unless the appellant establishes that the decision is clearly erroneous in light of the evidence in the record and applicable law. Issues that are exclusively matters of law will be reviewed de novo. In the event that the Secretary of the Treasury, or delegate, determines that there are unresolved issues raised by the record, the case may be remanded to the Administrative Law Judge to elicit additional testimony or evidence.

e) Copy of decision on review. The Secretary of the Treasury, or delegate, will provide copies of the agency decision to the Director of the Office of Professional Responsibility and the respondent or the respondent’s authorized representative.

d) Effective/applicability date. This section is applicable on September 26, 2007.
§ 10.79 Effect of disbarment, suspension, or censure.

(a) Disbarment. When the final decision in a case is against the respondent (or the respondent has offered his or her consent and such consent has been accepted by the Director of the Office of Professional Responsibility) and such decision is for disbarment, the respondent will not be permitted to practice before the Internal Revenue Service unless and until authorized to do so by the Director of the Office of Professional Responsibility pursuant to §10.81.

(b) Suspension. When the final decision in a case is against the respondent (or the respondent has offered his or her consent and such consent has been accepted by the Director of the Office of Professional Responsibility) and such decision is for suspension, the respondent will not be permitted to practice before the Internal Revenue Service during the period of suspension. For periods after the suspension, the practitioner’s future representations may be subject to conditions as authorized by paragraph (d) of this section.

(c) Censure. When the final decision in the case is against the respondent (or the respondent has offered his or her consent and such consent has been accepted by the Director of the Office of Professional Responsibility) and such decision is for censure, the respondent will be permitted to practice before the Internal Revenue Service, but the respondent’s future representations may be subject to conditions as authorized by paragraph (d) of this section.

(d) Conditions. After being subject to the sanction of either suspension or censure, the future representations of a practitioner so sanctioned shall be subject to conditions prescribed by the Director of the Office of Professional Responsibility designed to promote high standards of conduct. These conditions can be imposed for a reasonable period in light of the gravity of the practitioner’s violations. For example, where a practitioner is censured because he or she failed to advise his or her clients about a potential conflict of interest or failed to obtain the clients’ written consents, the Director of the Office of Professional Responsibility may require the practitioner to provide the Director of the Office of Professional Responsibility or another Internal Revenue Service official with a copy of all consents obtained by the practitioner for an appropriate period following censure, whether or not such consents are specifically requested.

§ 10.80 Notice of disbarment, suspension, censure, or disqualification.

On the issuance of a final order censuring, suspending, or disbaring a practitioner or a final order disqualifying an appraiser, the Director of the Office of Professional Responsibility may give notice of the censure, suspension, disbarment, or disqualification to appropriate officers and employees of the Internal Revenue Service and to interested departments and agencies of the Federal government. The Director of the Office of Professional Responsibility may determine the manner of giving notice to the proper authorities of the State by which the censured, suspended, or disbarred person was licensed to practice.

§ 10.81 Petition for reinstatement.

The Director of the Office of Professional Responsibility may entertain a petition for reinstatement from any person disbarred from practice before the Internal Revenue Service or any disqualified appraiser after the expiration of 5 years following such disbarment or disqualification. Reinstatement may not be granted unless the Director of the Office of Professional Responsibility is satisfied that the petitioner, thereafter, is not likely to conduct himself contrary to the regulations in this part, and that granting such reinstatement would not be contrary to the public interest.

§ 10.82 Expedited suspension.

(a) When applicable. Whenever the Director of the Office of Professional Responsibility determines that a practitioner is described in paragraph (b) of this section, the Director of the Office of Professional Responsibility may institute a proceeding under this
section to suspend the practitioner from practice before the Internal Revenue Service.

(b) To whom applicable. This section applies to any practitioner who, within 5 years of the date a complaint instituting a proceeding under this section is served:

1. Has had a license to practice as an attorney, certified public accountant, or actuary suspended or revoked for cause (not including a failure to pay a professional licensing fee) by any authority or court, agency, body, or board described in §10.51(a)(10).

2. Has, irrespective of whether an appeal has been taken, been convicted of any crime under title 26 of the United States Code, any crime involving dishonesty or breach of trust, or any felony for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service.

3. Has violated conditions imposed on the practitioner pursuant to §10.79(d).

4. Has been sanctioned by a court of competent jurisdiction, whether in a civil or criminal proceeding (including suits for injunctive relief), relating to any taxpayer’s tax liability or relating to the practitioner’s own tax liability, for —
   i. Instituting or maintaining proceedings primarily for delay;
   ii. Advancing frivolous or groundless arguments; or
   iii. Failing to pursue available administrative remedies.

(c) Instituting a proceeding. A proceeding under this section will be instituted by a complaint that names the respondent, is signed by the Director of the Office of Professional Responsibility or a person representing the Director of the Office of Professional Responsibility under §10.69(a)(1), is filed in the Director of the Office of Professional Responsibility’s office, and is served according to the rules set forth in paragraph (a) of §10.63. The complaint must give a plain and concise description of the allegations that constitute the basis for the proceeding. The complaint must notify the respondent —
   1. Of the place and due date for filing an answer;
   2. That a decision by default may be rendered if the respondent fails to file an answer as required;
   3. That the respondent may request a conference with the Director of the Office of Professional Responsibility to address the merits of the complaint and that any such request must be made in the answer; and
   4. That the respondent may be suspended either immediately following the expiration of the period within which an answer must be filed or, if a conference is requested, immediately following the conference.

(d) Answer. The answer to a complaint described in this section must be filed no later than 30 calendar days following the date the complaint is served, unless the Director of the Office of Professional Responsibility extends the time for filing. The answer must be filed in accordance with the rules set forth in §10.64, except as otherwise provided in this section. A respondent is entitled to a conference with the Director of the Office of Professional Responsibility only if the conference is requested in a timely filed answer. If a request for a conference is not made in the answer or the answer is not timely filed, the respondent will be deemed to have waived his or her right to a conference and the Director of the Office of Professional Responsibility may suspend such respondent at any time following the date on which the answer was due.

(e) Conference. The Director of the Office of Professional Responsibility or his or her designee will preside at a conference described in this section. The conference will be held at a place and time selected by the Director of the Office of Professional Responsibility, but no sooner than 14 calendar days after the date by which the answer must be filed with the Director of the Office of Professional Responsibility, unless the respondent agrees to an earlier date. An authorized representative may represent the respondent at the conference. Following the conference, upon a finding that the respondent is described in paragraph (b) of this section, or upon the respondent’s failure to appear at the conference either personally or through an authorized representative, the Director of the Office of Professional Responsibility
may immediately suspend the respondent from practice before the Internal Revenue Service.

(f) Duration of suspension. A suspension under this section will commence on the date that written notice of the suspension is issued. A practitioner’s suspension will remain effective until the earlier of the following —

(1) The Director of the Office of Professional Responsibility lifts the suspension after determining that the practitioner is no longer described in paragraph (b) of this section or for any other reason; or

(2) The suspension is lifted by an Administrative Law Judge or the Secretary of the Treasury in a proceeding referred to in paragraph (g) of this section and instituted under §10.60.

(g) Proceeding instituted under §10.60. If the Director of the Office of Professional Responsibility suspends a practitioner under this section, the practitioner may ask the Director of the Office of Professional Responsibility to issue a complaint under §10.60. The request must be made in writing within 2 years from the date on which the practitioner’s suspension commences. The Director of the Office of Professional Responsibility must issue a complaint requested under this paragraph within 30 calendar days of receiving the request.

(h) Effective/applicability date. This section is applicable on September 26, 2007.

Subpart E—General Provisions

§10.90 Records.

(a) Roster. The Director of the Office of Professional Responsibility will maintain, and may make available for public inspection in the time and manner prescribed by the Secretary of the Treasury or delegate, rosters of —

(1) Enrolled agents, including individuals —
   (i) Granted active enrollment to practice;
   (ii) Whose enrollment has been placed in inactive status for failure to meet the requirements for renewal of enrollment;
   (iii) Whose enrollment has been placed in inactive retirement status; and

   (iv) Whose offer of consent to resign from enrollment has been accepted by the Director of the Office of Professional Responsibility under §10.61;

(2) Individuals (and employers, firms or other entities, if applicable) censured, suspended or disbarred from practice before the Internal Revenue Service or upon whom a monetary penalty was imposed;

(3) Disqualified appraisers;

(4) Enrolled retirement plan agents, including individuals —
   (i) Granted active enrollment to practice;
   (ii) Whose enrollment has been placed in inactive status for failure to meet the requirements for renewal of enrollment;
   (iii) Whose enrollment has been placed in inactive retirement status; and

   (iv) Whose offer of consent to resign from enrollment has been accepted by the Director of the Office of Professional Responsibility under §10.61;

(b) Other records. Other records of the Director of the Office of Professional Responsibility may be disclosed upon specific request, in accordance with the applicable law.

(c) Effective/applicability date. This section is applicable on September 26, 2007.

§10.91 Saving provision.

Any proceeding instituted under this part prior to July 26, 2002, for which a final decision has not been reached or for which judicial review is still available will not be affected by these revisions. Any proceeding under this part based on conduct engaged in prior to September 26, 2007, which is instituted after that date, will apply subpart D or E or this part as revised, but the conduct engaged in prior to the effective date of these revisions will be judged by the regulations in effect at the time the conduct occurred.

§10.92 Special orders.

The Secretary of the Treasury reserves the power to issue such special orders as he or she deems proper in any cases within the purview of this part.
Subpart E and Addendum for Subpart B
(Pages 43-46) Not Included
Subpart C — Sanctions for Violation of the Regulations

§10.50 Sanctions.

(a) Authority to censure, suspend, or disbar. The Secretary of the Treasury, or his or her delegate, after notice and an opportunity for a proceeding, may censure, suspend or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable, fails to comply with any regulation in this part, or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. Censure is a public reprimand.

(b) Authority to disqualify. The Secretary of the Treasury, or his or her delegate, after due notice and opportunity for hearing, may disqualify any appraiser with respect to whom a penalty has been assessed under section 6701(a) of the Internal Revenue Code.

(1) If any appraiser is disqualified pursuant to this 3145/863/part C, such appraiser is barred from presenting evidence or testimony in any administrative proceeding before the Department of Treasury or the Internal Revenue Service, unless and until authorized to do so by the Director of Practice pursuant to §10.81, regardless of whether such evidence or testimony would pertain to an appraisal made prior to or after such date.

(2) Any appraisal made by a disqualified appraiser after the effective date of disqualification will not have any probative effect in any administrative proceeding before the Department of the Treasury or the Internal Revenue Service. An appraisal otherwise barred from admission into evidence pursuant to this section may be admitted into evidence solely for the purpose of determining the taxpayer’s reliance in good faith on such appraisal.

§10.51 Incompetence and disreputable conduct.

Incompetence and disreputable conduct for which a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service includes, but is not limited to —

(a) Conviction of any criminal offense under the revenue laws of the United States;

(b) Conviction of any criminal offense involving dishonesty or breach of trust;

(c) Conviction of any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service;

(d) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing such information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, or any other document or statement, written or oral, are included in the term information.

(e) Solicitation of employment as prohibited under §10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the Internal Revenue Service or officer or employee thereof.

(f) Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.

(g) Misappropriation of, or failure properly and promptly to remit funds received from a client for the purpose of payment of taxes or other obligations due the United States.

(h) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor or thing of value.

(i) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant, or actuary by any duly constituted authority of any State, territory, possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.

(j) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

(k) Contemptuous conduct in connection with prac-
tice before the Internal Revenue Service, including the use of abusive language, making false accusations and statements, knowing them to be false, or circulating or publishing malicious or libelous matter.

(l) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph (l) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the tax opinion or offering material are false or misleading. For purposes of this paragraph (l), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client.

§10.52 Violation of regulations.

A practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service for any of the following:

(a) Willfully violating any of the regulations contained in this part.

(b) Recklessly or through gross incompetence (within the meaning of §10.51(l)) violating §10.33 or 10.34.

§10.53 Receipt of information concerning practitioner (June 2005).

(a) Officer or employee of the Internal Revenue Service. If an officer or employee of the Internal Revenue Service has reason to believe that a practitioner has violated any provision of this part, the officer or employee will promptly make a written report to the Director of Practice of the suspected violation. The report will explain the facts and reasons upon which the officer’s or employee’s belief rests.

(b) Other persons. Any person other than an officer or employee of the Internal Revenue Service having information of a violation of any provision of this part may make an oral or written report of the alleged violation to the Director of Practice or any officer or employee of the Internal Revenue Service. If the report is made to an officer or employee of the Internal Revenue Service, the officer or employee will make a written report of the suspected violation to the Director of Practice.

(c) Destruction of report. No report made under paragraph (a) or (b) of this section shall be maintained by the Director of Practice unless retention of such record is permissible under the applicable records control schedule as approved by the National Archives and Records Administration and designated in the Internal Revenue Manual. The Director of Practice must destroy such reports as soon as permissible under the applicable records control schedule.

(d) Effect on proceedings under subpart D. The destruction of any report will not bar any proceeding under subpart D of this part, but precludes the Director of Practice’s use of a copy of such report in a proceeding under subpart D of this part.
ABA Section of Taxation, 2010 Midyear Meeting, San Antonio
January 22, 2010

Standards of Tax Practice,
Young Lawyers Panel

Representing Practitioners in Ethics
and
Disciplinary Actions

Supplement to Main Materials

Matthew C. Hicks, Moderator
Karen L. Hawkins, Director of OPR, IRS
Ellen D. Marcus, Partner, Zuckerman Spaeder

Outline prepared by:

Caplin & Drysdale
Washington, DC
www.caplindrysdale.com

Supplement to main materials available on CD-ROM
Decision On Appeal

Authority

Under the Authority of General Counsel Order No. 9 (January 19, 2001) and the authority vested in her as Acting General Counsel of the Treasury who was the Acting Chief Counsel of the Internal Revenue Service, through a delegation order dated June 26, 2009, Clarissa C. Potter delegated to the undersigned the authority to decide disciplinary appeals to the Secretary of the Treasury filed under Subpart D of Part 10 of Title 31, Code of Federal Regulation 31 C.F.R. Part 10, *Practice Before the Internal Revenue Service* (reprinted in and hereinafter referred to as Treasury Department Circular No. 230). This is such an Appeal from a Decision entered in this proceeding against Juanita A. Gonzales by Administrative Law Judge Arthur J. Amchen (the ALJ) on August 29, 2008.1

Background

This proceeding was commenced on May 22, 2007, when Attorney 1, an attorney acting as the authorized representative of Michael R. Chesman, then the Director of the Office of Professional Responsibility, filed a complaint against Respondent-Appellant. The complaint alleges that Respondent-Appellant: (i) has engaged in practice before the Internal Revenue Service, as defined by 31 C.F.R. § 10.2(d) as an enrolled agent, (ii) had willfully failed to file Federal income tax returns as required by 26 U.S.C. §§ 6011, 6012, and 6072 for the years 2001 and 2002, (iii) had willfully failed to timely file Federal income tax returns as required by 26 U.S.C. §§ 6011, 6012, and 6072 for the years 2003,

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1 A copy of the ALJ's Decision Granting Complaint's Motion For Summary Judgment appears as Attachment 1.
2004, and 2005, (iv) that with respect to the year 2001 such willful failure constituted disreputable conduct with the meaning of 31 C.F.R. § 10.51 generally and a willful violation of § 10.51(d) (Rev. 1994) more particularly, and (v) that with respect to the years 2002, 2003, 2004, and 2005 each such willful failure constituted disreputable conduct within the meaning of 31 C.F.R. § 10.51 generally and a willful violation of § 10.51(f) (Rev. 2002) more particularly. The complaint recommends that Respondent-Appellant should receive as a sanction for her conduct a forty-eight (48) month suspension from practice before the Internal Revenue Service and further requiring that her suspension not be lifted until Respondent-Appellant has filed all of her tax returns and paid all outstanding Federal tax liabilities, or to have entered into an installment agreement or offer in compromise which has been accepted by the Service and with which the Respondent-Appellant has remained in compliance.

**ALJ’s Decision and Complainant-Appellee’s Motion to Dismiss Appellant’s Appeal**


By letter dated September 15, 2008, Respondent-Appellant requested copies of decisions referenced in the Decision of the Administrative Law Judge and required an extension of time to file an appeal from September 29, 2008 to a date no sooner than thirty (30) days from when the requested decisions were mailed. The requested decisions were mailed on September 26, 2008. By memorandum dated October 8, 2008, the Appellate Authority granted Respondent-Appellant an extension to November 10, 2008, to file an appeal.

Respondent-Appellant’s attorney indicates in the Opposition to Motion to Dismiss Appeal of Juanita A. Gonzales to Order Granting Motion For Summary Judgment that he called the attorney for Complainant-Appellee on November 12, 2008 and informed her that he intended to file the appeal late. On November 14, 2008, Respondent-Appellant’s attorney sent a letter to the Office of Professional Responsibility indicating that he would be filing the appeal late. While Respondent-Appellant’s attorney notified Complainant-Appellee that he would be filing the appeal late, he did not request an additional extension of time past the November 10, 2008 due date. No additional extension of time was granted.

Opposition to Motion to Dismiss Appeal of Juanita A. Gonzales to Order Granting Motion for Summary Judgment indicating that the Opposition would be filed that day or the following day. An Opposition to Motion to Dismiss Appeal of Juanita A. Gonzales to Order Granting Motion for Summary Judgment was submitted by letter dated December 21, 2008. By letter dated December 22, 2008, Complainant-Appellee submitted a Response to Respondent-Appellant’s Appeal since no decision had been issued in response to Complainant-Appellee’s Motion to Dismiss the Appeal. By letter dated January 21, 2009, Respondent-Appellant submitted a document captioned Reply of Juanita Gonzales to Complainant’s Opposition to Gonzales Appeal. There is no provision in Circular 230 for filing such Reply, nor did Respondent-Appellant request leave to file such Reply.

Respondent-Appellant argues that the letter dated September 15, 2008, sent to the Office of Professional Responsibility, constituted a Notice of Appeal which met the requirements of Circular 230 for filing a timely appeal. The September 15, 2008 letter was titled as a “Request for extension of time to appeal of Order granting summary judgment.” Pursuant to 31 C.F.R. § 10.77(a) (Effective September 26, 2007) “[t]he appeal much include a brief that states exceptions to the decision of the Administrative Law Judge and supporting reasons for such exceptions.” Furthermore, 31 C.F.R. § 10.77(b) states that “[t]he appeal and brief must be filed, in duplicate, with the Director of the Office of Professional Responsibility within 30 days of the date that the decision of the Administrative Law Judge is served on the parties.” The September 15, 2008 letter was not an appeal, and no brief was attached to that letter, as required by 31 C.F.R. § 10.77(a). The letter, as its title indicates, was a request for an extension of time to file and appeal and a request for certain unpublished decisions. Therefore, Respondent-Appellant’s September 15th letter does not meet the requirements of Circular 230 for timely filing an appeal.

Respondent-Appellant also argues alternatively that the untimely filing of the appeal was excusable. Respondent-Appellant requested an additional 30 days to file an appeal calculated from the date Respondent-Appellant was mailed copies of requested unpublished decision. The requested decisions were mailed on September 26, 2008. Therefore, based upon the request for an extension Respondent-Appellant’s appeal would have been due on October 27, 2008. An extension was granted to file the appeal to November 10, 2008, two weeks beyond the 30 days requested by Respondent-Appellant.

Respondent-Appellant’s attorney indicates that he was attending a Continuing Legal Education program from November 9-14, 2008, and that he intended to complete the Appeal during the evenings and mail it by the due date of November 10, 2008. Respondent-Appellant’s attorney contends that he became ill late during the evening of November 9, 2008, which prevented him from timely filing the appeal. Respondent-Appellant’s attorney attached his attendance

2 October 26, 2008 was a Sunday. Regardless, Respondent-Appellant was granted a longer extension to November 10, 2008.
record for the program as an exhibit to the December 21, 2008 opposition of the motion to dismiss. The attendance record demonstrates that Respondent-Appellant’s attorney attended three (3) sessions on Sunday, November 9, 2008, one (1) session, on November 10, 2008, one (1) session on November 11, 2008, and one (1) session on November 14, 2008. Respondent-Appellant has not established that the untimely filing of the appeal was excusable. Respondent-Appellant was granted an extension of time substantially in excess of the time requested. The Appeal in this case was inexcusably untimely, and therefore the Appeal is dismissed.

Merits of the Action Taken by the Office of Professional Responsibility


In her answer to the Complaint, Respondent-Appellant asserts that all required returns were filed, but that these returns were not filed until December, 2006. Internal Revenue Service records were part of the record reviewed on appeal. These records include Respondent-Appellant’s account information, updated in January 2009. This account information indicates the following regarding Respondent-Appellant’s 2001 through 2005 taxable years: ³

<table>
<thead>
<tr>
<th>Tax Year</th>
<th>Original Return Due Date</th>
<th>Extended Return Due Date</th>
<th>Date IRS Received The Return</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>April 15, 2002</td>
<td>October 15, 2002</td>
<td>June 12, 2007</td>
</tr>
<tr>
<td>2003</td>
<td>April 15, 2004</td>
<td>October 15, 2004</td>
<td>July 12, 2006</td>
</tr>
<tr>
<td>2004</td>
<td>April 15, 2005</td>
<td>October 15, 2005</td>
<td>March 29, 2006</td>
</tr>
</tbody>
</table>

The returns for 2001 and 2002 showed balances due. The returns for 2003, 2004, and 2005 showed overpayments due. All of the returns were filed after the extended due dates as Respondent-Appellant admits. Furthermore, I note that the returns for the taxable years 2001 through 2005 were all filed after Respondent-Appellant was contacted by the Office of Professional Responsibility.

³ Pursuant to section 7503 of Title 26, if the due date for filing a return is a Saturday, Sunday, or a legal holiday, the return is considered timely if filed on the next succeeding day which is not a Saturday, Sunday, or legal holiday. For purposes of this discussion, the due dates used are listed without regard to section 7503. Any differences in due dates because of section 7503 have no bearing on the result herein.
Section 10.51(f) of Treasury Circular 230 provides that incompetence and disreputable conduct includes “[w]illfully failing to make a Federal tax return in violation of the revenue laws of the United States . . . .” Pursuant to section 10.51 “a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service” for engaging in such misconduct. Section 10.52 of Treasury Circular 230 as in effect during the periods in issue provides that “[a] practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service” for “[w]illfully violating any of the regulations contained in this part.” The Appellate Authority has held that repeated failure of a practitioner to file his or her Federal income tax returns in a timely manner constitutes a willful violation of sections 10.51(f) and 10.52. See Director, OPR v. Martin M. Chandler, C.P.A., Complaint No. 2006-23 (Decision on Appeal, May 14, 2008) (In which the Appellate Authority increased the length of suspension determined by the Administrative Law Judge). In the instant case the parties are in agreement that the Respondent-Appellant did not file timely returns for the 2001 through 2005 taxable years.

Willfullness is not defined in Treasury Circular 230. The Appellate Authority previously has applied the definition of willfulness used in criminal cases, in particular Cheek v. United States, 498 U.S. 192 (1991) and United States v. Pompino, 429 U.S. 10 (1976). I question whether the criminal standard is the appropriate standard to apply in the context of a civil proceeding to determine whether disciplinary action should be taken for professional misconduct. For example, the California Supreme Court has determine that the term “willful” under the Rules of Professional Conduct of the State Bar of California means “simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.” Richards A. Phillips v. the State Bar of California, 782 P.2d 587, 591 (1989), (quoting Durbin v. State Bar, 590 P.2d 876 (1979)). Neither party has briefed the issue regarding the proper definition of willfulness under Treasury Circular 230. This is most likely because the Appellate Authority has previously adopted the standards defined in Cheek and Pomponio. Therefore, for the purposes of this case, I will apply the definition of willfulness as described in Cheek and Pomponio. I invite the parties in future cases to brief what the appropriate definition for willfulness should be under Treasury Circular 230.

As described in Cheek and Pomponio, willful means the voluntary, intentional violation of a known duty. It does not require any showing of motive. Respondent-Appellant contends that she was not willful because she did not know that her failure to file was considered to be disreputable conduct. I question whether she lacked such knowledge of her responsibilities under Circular 230. Regardless, the legal duty Respondent-Appellant violated was not

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4 As in effect July 26, 2002. While the specific provision dealing with willfully failing to file an income tax return under section 10.51 has changed designation, the language has not. For example, in the 1994 version, this was designated section 10.51(d). For simplicity, I will refer to this as section 10.51(f).
the consequences of her failure to file timely tax returns as described in Circular 230. Rather, it was her failure to file timely returns. As an enrolled agent, Respondent-Appellant was aware of the deadlines imposed by the Internal Revenue Code, and the legal obligation to file her returns timely. In fact, for each of the years in issue, she requested extensions of the time to file those returns, demonstrating she knew when her tax returns were due. Also, for five consecutive years, she failed to file a Federal income tax return by the extended due date.

Respondent-Appellant also argues that she was suffering from Diagnosis 1 that made her unable to file her returns timely. In support of this assertion, she submitted a statement from Ph.D. 1, on letterhead from an organization named Organization 1, indicating that she “did not have the emotional reserves to file her own taxes in a timely manner.” The statement indicates that Ph.D. 1 treated her from March 2005 through May 2006, with a follow-up visit in June 2007. Other than indicating that he is a Ph.D., the statement does not detail Ph.D. 1’s training, in what areas he received his degrees, the nature of treatment he was providing, or an explanation as to how he came to his conclusions. Respondent-Appellant was given the opportunity to provide her testimony and Ph.D. 1’s testimony regarding her treatment by means of a telephone conference call. The Administrative law Judge also indicated that Ph.D. 1 would have to testify from treatment records. During such call, counsel for Complainant-Appellee would have had the opportunity to question Ph.D. 1 regarding his conclusions. The parties did not have a conference call with the ALJ to discuss Ph.D. 1’s treatment. Also, I note that the 2001, 2002 and 2003 tax returns were due before Respondent-Appellant was Ph.D. 1’s patient. The Administrative Law Judge indicated that “he would not credit an unsupported opinion.” I concur that the opinion of Ph.D. 1 is unsupported. It is conclusory and of no value to consideration of this disciplinary action.

Throughout the period of time when she failed to file her income tax returns timely, Respondent-Appellant worked full time preparing returns for her clients and representing them before the Internal Revenue Service. By her own admission, no client was harmed by her alleged Diagnosis 1. I concur in the finding of the Administrative Law Judge that Respondent-Appellant’s failure to timely file returns was willful and constitutes a violation of Sections 10.51(f) and 10.52 of Treasury Circular 230.

**Appropriate Sanction**

Respondent-Appellant cites to two cases regarding disciplinary actions considered against members of the New York State Bar, *In The Matter of Kenneth Everett, Esq.*, 243 A.D. 2d 75 (1998) and *In the Matter of Howard Hornstein*, 232 A.D. 2d 134 (1997). In both of these cases, attorneys who failed to timely file tax returns were given a public censure. In both instances the Court found that public censure was the appropriate disciplinary action because of
mitigating circumstances. Both opinions are very sparse on details regarding the types of law in which the attorneys engaged. Specifically, here is no mention that the attorneys were engaged in the practice of tax law. Here, Respondent-Appellant has passed the enrolled agents examination and is engaged full time in a tax practice including tax return preparation and representing taxpayers before the Internal Revenue Service. In addition, as discussed above, she has not established any applicable mitigating circumstances. The two cited cases are distinguishable from Respondent-Appellant’s situation and are not helpful in determining the appropriate sanction.

Respondent-Appellant also cites two opinions of the United States Tax Court in which the taxpayers were found not liable for the failure to file addition to tax asserted by the Commission, Shaffer v. Commissioner, T.C. Memo. 1994-618, and Meyer v. Commissioner, T.C. Memo. 2003-12. In both of these cases, the Tax Court found that there was reasonable cause for not timely filing returns because the taxpayers were severely incapacitated to the point they were unable to work. In contrast, Respondent-Appellant has continuously engaged in a tax practice, which includes preparing and filing returns for her clients.

The Administrative Law Judge reduced the requested suspension from 48 months to 36 months because of Respondent-Appellant’s assertion of Diagnosis 1 and personal problems, even though as the Administrative Law Judge found “there is nothing for the record that would lead me to conclude that she was unable to file her returns on time.” Since I have found that the case should be dismissed because the Appeal was untimely, I do not have the authority to change the suspension determined by the Administrative Law Judge. I find the failure to timely file income tax returns for five consecutive years to be a very serious offense. If this case were not being dismissed, I would give serious consideration to imposing the 48 month suspension requested by the Director of the Office of Professional Responsibility.

I have considered all arguments made, and, to the extent not mentioned herein, I find them to be irrelevant or without merit.
Conclusion

Since the Appeal of the decision of the Administrative Law Judge was not timely filed, the administrative Law Judge’s decision suspending Respondent-Appellant became FINAL AGENCY ACTION on November 10, 2008. Respondent-Appellant is suspended for 36 months from November 10, 2008, and the conditions imposed by the Administrative Law Judge for reinstatement are in effect.

Ronald D. Pinsky
Appellate Authority
Office of Chief Counsel
Internal Revenue Service
(As authorized delegate of
Timothy F. Geithner,
Secretary of the Treasury)

December 9, 2009
Lanham, MD
OFFICE OF PROFESSIONAL RESPONSIBILITY  
INTERNAL REVENUE SERVICE  
DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C.

DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY  
Complainant

v.

JUANITA A. GONZALES  
Respondent

DECISION GRANTING COMPLAINANT’S MOTION FOR SUMMARY JUDGMENT

On May 22, 2007, the Director of the Office of Professional Responsibility (OPR) of the Internal Revenue Service filed a Complaint seeing to suspend Respondent, Juanita A. Gonzales, an enrolled agent, from practice before the IRS for a period of 48 months.

The Complaint alleges that Respondent failed to file her Federal Income Tax Returns for tax years 2001, 2002, 2003, 2004 and 2005 in a timely fashion. The Director further alleges that her failure to do so was willful and constitutes “disreputable conduct” pursuant to 31 C.F.R. section 10.51(f).

In her Answer filed July 9, 2007, Respondent, by counsel, admits that her Federal Income Tax returns for the years 2001-2005 were not timely filed and in fact were not filed until December 19, 2006. Respondent contends that her failure to timely file her returns were not willful due the fact that she was suffering from Diagnosis 1 and had many personal difficulties during the period in question. Respondent admits however, that during this period she continued to operate her tax practice for her clients.

On May 15, 2008, the Director of OPR filed a motion for summary judgment. The Director took issue with Respondent’s assertions that she filed returns for tax years 2001 and 2002. On the other hand, IRS’ records indicate that Respondent filed her returns for 2003, 2004 and 2005 earlier in 2006 than she stated in her Answer. Nevertheless, there is no question that she failed to timely file her returns for tax years 2001-2005.

Ms. Gonzalez has responded to the Director’s motion by counsel. She attached to her response a letter from Doctor 1. Doctor 1 indicates that Ms. Gonzalez was a patient of his from March 2005-May 2006 with a follow-up visit in June 2007. He suggests that Ms. Gonzalez was [incapable due to] Diagnosis 1 of filing her returns on time, even though she was otherwise engaged in her tax practice.
I conducted two conference calls with counsel after the filing of the motion for summary judgment.

On July 25, 2008, I told that parties that with the exception of one “loose end,” Doctor 1’s letter, I was prepared to grant the Complainant’s motion and suspend Respondent from practice before the IRS for three years. I explained that I am “a creature of the Secretary of Treasury” in that I am bound by the precedent reflected in his rulings, or those of his designee, in similar cases.

I informed counsel that I was prepared to hold a video conference hearing if Ms. Gonzalez’ counsel wished to present Doctor 1 as a witness, with treatment records, and subject him to cross-examination. If Respondent wanted such a hearing, I told counsel I would allow Ms. Gonzalez to testify as well. I would note however that Ms. Gonzalez’s Federal Tax Returns for tax years 2001, 2002 and 2003 were due to be filed before she became a patient of Doctor 1.

Following the July 25, conference call, Respondent filed a motion for this judge to recuse himself, which I denied in an order dated July 30, 2008.

I conducted a follow-up conference call on August 8, 2008. Respondent’s counsel informed me that his client had told him that she wished to forgo a hearing but as of that morning, she may have changed her mind. I told counsel that I would require him to notify me in writing within two weeks (by August 22, 2008) as to whether he wanted a hearing or not, otherwise I would grant the motion for summary judgment. I reiterated that Doctor 1 must testify from treatment records, that I would not credit an unsupported opinion. Respondent has not notified me as to whether or not it wants an evidentiary hearing regarding Ms. Gonzalez’s Diagnosis 1 and its bearing of her failure to timely file her income tax returns.

The designee of the Secretary of Treasury has held that repeated failure of a practitioner to file his or her Federal Income Tax returns on time constitutes willfulness within the meaning of section 10.51(f) and 10.52(a) of Treasury Circular 230 and therefore constitutes disreputable conduct appropriately sanctioned by a suspension from practice before the Internal Revenue Service. “Willful” merely means a voluntary, intentional violation of a known legal duty, See, e.g., Director, OPR v. Martin M. Chandler, C.P.A., Complaint No. 2006-23 (Decision on Appeal, May 14, 2008).

Respondent’s voluminous submissions, including a supplemental answer filed on August 8, 2008, boil down to several essential contentions. First, she contends that her conduct was not willful because she was unaware that the IRS considered her failure to timely file her returns to be disreputable conduct. That is not the correct legal standard. An act or omission is willful if it violates a known legal duty, i.e., filing one’s taxes on time, not whether or not one is aware of the consequences of failing to comply with a known legal duty. An enrolled agent knows that Federal Income Tax Returns must be filed in a timely fashion. A repeated failure to do so is willful.
Respondent’s reliance on *Cheek v. United States*, 498 U.S. 192 (1991) is misplaced. Ms. Gonzalez has never contended that she believed that she was not required to file her taxes in a timely fashion. Whether or not she had a reasonable good faith belief that her failure to timely file was not “disreputable conduct” for which she could be suspended is irrelevant to this matter. Moreover, the Secretary’s designee has made it clear that certain requirements in the tax code are so unambiguous as to preclude a finding that a taxpayer had an honest belief that he or she need not comply with it. The requirement to file one’s returns on time is one of those requirements. *Director, OPR v. Michael A. Dobkin*, Complaint No. 2006-30 (Decision on Appeal, April 15, 2008).

Secondly, Respondent challenges the wisdom of the IRS policy and the authority of the Secretary of Treasury to suspend an enrolled agent for repeated untimely filings of his or her tax returns. Neither the wisdom of the policy nor whether the Secretary has the authority to suspend Respondent is before me.

In the *Chandler* case, in increasing the penalty that I had recommended, the Director cited the Supreme Court’s decision in *United States v. Boyle*, 469 U.S. 241 (1985). That decision discussed the necessity of having strict fixed dates for the filing of tax returns. The Director stated that the time and energy devoted to securing returns of those practitioners who do not timely file diverts IRS resources from other tasks and imposes an excessive burden on the system of tax administration.

The Secretary’s designee has also held that whether or not a practitioner has timely paid his or her taxes is irrelevant to a proceeding predicated on a failure to timely file one’s returns. The designee noted in *Dobkin, supra*, that “until the Internal Revenue Service receives returns . . ., it cannot determine whether Respondent-Appellant has fully paid his Federal income tax liabilities for the years in issue.”

Finally, the Secretary and his designee have held that they have the authority to suspend Respondent for failing to timely file her Federal income tax returns. I am bound by the prior decisions of the Secretary in similar cases. Respondent’s recourse is to challenge the Secretary’s authority in Federal court.

Thus, I grant the Director’s motion for summary judgment and suspend Juanita Gonzalez from practice before the IRS for a period of three years (36 months). I have reduced the requested suspension from 48 to 36 months by taking at face value Ms. Gonzalez’s assertions regarding the Diagnosis 1 and personal problems she experienced during the relevant time period. However, there is nothing in this record that would lead me to conclude that she was unable to file her returns on time. I would also note that every single practitioner whose case I have handled has an excuse for failing to comply with the unambiguous legal requirement to file one’s Federal income tax returns on time.
Respondent shall not be reinstated at the end of the 36 months unless she has filed all of her outstanding Federal tax returns and paid any outstanding Federal tax liabilities, or has entered into an installment agreement or offer of compromise which has been accepted by the IRS and with which Respondent has remained in compliance.

________________________________________

Arthur J. Amchan
Federal Administrative Law Judge

National Labor Relations Board
1099 14th St. N.W., Suite 5400
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202-501-8588

Department of the Treasury

Internal Revenue Service

Treasury Department

Circular No. 230 (Rev. 4-2008)
Cat. Num. 16586R
www.irs.gov

Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, Enrolled Retirement Plan Agents, and Appraisers before the Internal Revenue Service
conditions as he or she deems appropriate, authorize an individual who is not otherwise eligible to practice before the Internal Revenue Service to represent another person in a particular matter.

(e) Preparing tax returns and furnishing information. Any individual may prepare a tax return, appear as a witness for the taxpayer before the Internal Revenue Service, or furnish information at the request of the Internal Revenue Service or any of its officers or employees.

(f) Fiduciaries. For purposes of this part, a fiduciary (i.e., a trustee, receiver, guardian, personal representative, administrator, or executor) is considered to be the taxpayer and not a representative of the taxpayer.

(g) Effective/applicability date. This section is applicable on September 26, 2007.

§ 10.8 Customhouse brokers.

Nothing contained in the regulations in this part will affect or limit the right of a customhouse broker, licensed as such by the Commissioner of Customs in accordance with the regulations prescribed therefore, in any customs district in which he or she is so licensed, at a relevant local office of the Internal Revenue Service or before the National Office of the Internal Revenue Service, to act as a representative in respect to any matters relating specifically to the importation or exportation of merchandise under the customs or internal revenue laws, for any person for whom he or she has acted as a customhouse broker.

(g) Effective/applicability date. This section is applicable on September 26, 2007.

Subpart B — Duties and Restrictions Relating to Practice Before the Internal Revenue Service

§ 10.20 Information to be furnished.

(a) To the Internal Revenue Service.

(1) 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 Rev-

enue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.

(2) Where the requested records or information are not in the possession of, or subject to the control of, the practitioner or the practitioner’s client, 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.

(b) To the Director of the Office of Professional Responsibility. When a proper and lawful request is made by the Director of the Office of Professional Responsibility, a practitioner must provide the Director of the Office of Professional Responsibility with any information the practitioner has concerning an inquiry by the Director of the Office of Professional Responsibility into an alleged violation of the regulations in this part by any person, and to testify regarding this information in any proceeding instituted under this part, unless the practitioner believes in good faith and on reasonable grounds that the information is privileged.

(c) Interference with a proper and lawful request for records or information. A practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the Internal Revenue Service, its officers or employees, or the Director of the Office of Professional Responsibility, or his or her employees, to obtain any record or information unless the practitioner believes in good faith and on reasonable grounds that the record or information is privileged.
Karen Hawkins, director of the IRS Office of Professional Responsibility (OPR), said January 22 that changes are being made to how disciplinary cases proceed in, and are handled by, her office, with a goal of making the process more transparent.

OPR generally handles compliance and conduct cases differently, Hawkins said. The office has come up with many discipline approaches for compliance cases, she noted, including several versions of soft letters that are used before OPR looks at a case. OPR sometimes receives field referrals on practitioner conduct involving unreasonable delay, contemptuous conduct, or harassment, she said. Hawkins spoke at the Standards of Tax Practice session at the American Bar Association Section of Taxation meeting in San Antonio.

Process and Punishment

Currently, the first step in handling a disciplinary case is sending a pre-allegation letter to a practitioner, Hawkins said. The letter provides notice that OPR has received a complaint and asks the practitioner to respond with any mitigating evidence. If the letter is ignored, OPR will begin an investigation using internal sources, she said. Compliance record checks are now a routine part of the investigation. "It is amazing to me how many people who are delaying or harassing are noncompliant," she said.

If the process goes beyond step one, OPR sends another letter setting out particular allegations as a result of the investigation and inviting the practitioner to an in-person or telephone conference.
There are no set timelines governing the conference, Hawkins said, but her goal is to resolve cases as quickly and efficiently as possible. She urged practitioners to come prepared and "get us absolutely everything we need to reach a conclusion in your favor."

If practical reasons exist for settling the case, let OPR know, Hawkins said, as the office doesn't want to move such cases forward. "I'm a settler; I think there is value in just getting these sorts of things out of the system, particularly when they're compliance cases."

If the allegations are strictly on compliance issues, the proposal for a particular sanction could range from censure to four years of suspension, Hawkins said. If a case involves alleged misconduct, it is more likely that the OPR lawyer has talked to the practitioner about a range of potential disciplinary actions, with the letter containing the high end of OPR's proposal. Regarding what type of discipline is needed for a practitioner to reform his conduct, she said there is usually no value in taking someone out of the system so long that they lose their livelihood.

Hawkins noted that OPR also has the authority under Circular 230 section 10.60 to arbitrarily reprimand practitioners, which is essentially what it is doing in sending out soft letters. Hawkins said in recent cases in which there is minimal cooperation from a practitioner, OPR has been suggesting that General Legal Services (GLS) include an additional count under Circular 230 section 10.20(b) for noncooperation.

**Use of ALJs**

It usually takes a few weeks for a case to get posted on the Web site after a decision has been rendered by an administrative law judge and OPR has made appropriate redactions, Hawkins said.

Hawkins said as part of the IRS preparer review report, OPR has advised Treasury that it should consider reinstituting ALJs to handle potentially much larger caseloads. Treasury's contract with the National Labor Relations Board for ALJ services was canceled last year because the board found the cases too complicated, she said. OPR now uses ALJs from the Environmental Protection Agency, U.S. Coast Guard, and U.S. Postal Service, she said, adding that most GLS lawyers who litigate on OPR's behalf are generally labor lawyers themselves.

Ellen Marcus of Zuckerman Spaeder LLP said she had seen major improvements to OPR under Hawkins's tenure, particularly with the new publicity provisions that allow lawyers to see precedent from ALJs and the appellate authority.

Marcus urged counsel representing practitioners in OPR disciplinary cases to consider suggesting sanctions not listed in Circular 230. There is a lot of risk
involved in taking a case all the way to an ALJ, because no current ALJs are specialists in Circular 230, she said, adding, "That's a little scary."

Tax Analysts Information

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**Subject Areas:** Professional responsibility  
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Matthew C. Hicks is an associate in Caplin & Drysdale’s Washington, D.C. office. He joined the firm in 2007.

Services
Mr. Hicks advises and defends clients in a wide variety of federal tax disputes throughout the nation, including:

- Complex civil tax shelter proceedings involving summons enforcement actions, injunctions, refund actions, and potential criminal prosecutions
- Voluntary disclosures, including disclosures of undeclared foreign bank and financial accounts
- Civil and criminal failures to pay over employment taxes to the IRS
- Disciplinary actions with the IRS Office of Professional Responsibility
- IRS challenges to conservation easements

Highlights
Before joining Caplin & Drysdale, Mr. Hicks was a Trial Attorney for the U.S. Department of Justice, Tax Division. While there, he litigated refund suits, summons enforcement actions, and TEFRA partnership issues in federal district courts and the Court of Federal Claims. In addition, Mr. Hicks was the lead attorney in a federal multidistrict refund action, and he served as one of the Tax Division’s resident authorities on the discovery of electronically stored information.

Mr. Hicks is also known for his work on Jade Trading v. United States, 80 Fed. Cl. 11 (2007), a Son of BOSS tax shelter case that resulted in a three-week bench trial, a win for his client, and the perjury conviction of a witness questioned by Mr. Hicks.

Professional Activities
Mr. Hicks speaks before many professional associations and conferences. His recent engagements include:

- Moderator, Representing Practitioners in Ethics and Disciplinary Actions, American Bar Association, Section of Taxation, Standards of Tax Practice Committee, Midyear Meeting, San Antonio, January 2010
- Panelist, Atypical Statutes of Limitations Issues, American Bar Association, Section of Taxation, Court Procedure & Practice Committee, Joint Fall CLE Meeting, Chicago, September 2009
- Panelist, E-Discovery & Other Discovery Issues, United States Tax Court Judicial Conference, Galloway, NJ, April 2009
- Chair, E-Discovery in the U.S. Tax Court, Federal Bar Association, 33rd Annual Tax Law Conference, Washington, D.C., March 2009
- Panelist, Tax Shelter Prosecution Update, American Bar Association, Section of Taxation, Civil and Criminal Tax
- Penalties Committee, 2009 Midyear Meeting, New Orleans, January 2009
- Moderator, E-Discovery: Meeting e-Xpectations and Managing e-Xpenses, American Bar Association, Section of Taxation, Court Procedure & Practice Committee, Joint Fall CLE Meeting, San Francisco, September 2008

Awards and Honors
- Recognized by the Tax Division of the U.S. Department of Justice with Special Act or Service Awards in 2005 and 2007
- Honored by the Internal Revenue Service with the Mitchell Rogovin National Outstanding Support to the Office of Chief Counsel Award in 2007