Ethics – A Review of IRS Circular 230

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Prior to joining Ferenczy Benefits Law Center, Alison worked at a large bundled service provider for nearly 16 years as an Associate Vice President, Compliance Manager and Regulatory Liaison. As part of her responsibilities there, Alison served as a national speaker on audit and correction issues. Alison currently sits on the Employee Plans Subcommittee of the IRS Advisory Committee on Tax-Exempt and Governmental Entities (ACT). Actively involved with ASPPA, Alison is a current member of the organization’s Retirement Plan Academy Board and served in past years as the Chair of the CPC Exam Committee.

Agenda

- What are ethics?
- Why do we have to study this every d*%n conference?
- Who governs ethics for the IRS?
- Review of Circular 230
Ethics ... What Is It?

- According to the dictionary: the discipline dealing with what is good and bad and with moral duty and obligation; a set of moral principles; a theory or system of moral values

Types of Ethics

- Ethics defined by a professional organization (like NIPA, ASPPA, CEBS, AICPA, FINRA or the ABA) may represent what you need to do to keep your designation
- Ethics defined by a governmental department may represent what you need to do to keep your license to practice before such department (e.g., Circular 230, SEC) and may also involve criminal sanctions
- For Financial Advisors, the DOL’s fiduciary regulations, if finalized, will provide a new set of ethical obligations that control how you practice and how you are compensated
Types of Ethics (cont.)

- Ethics defined by law may represent what you need to do to keep from getting sued
  - Breach of Contract (did you do what you agreed to do?)
  - Malpractice (did you do what is commonly done in your industry?)
  - Fraud or Misrepresentation (did you lie?)

Key Practice Issue

- The difference between the client’s expectations and your performance may be the basis of the client’s belief that you have committed malpractice
- How will the client define that expectation?
  - Impressions of what a TPA does?
  - Impressions of what his/her TPA does?
  - (Where did those impressions come from?)
  - General ideas about what is involved in retirement plan administration?
  - What his/her friends with plans have said?
  - Legal documentation, such as the TPA’s service agreement?
ERPA Ethics

- Circular 230 contains ethical rules to which ERPAs, as well as other tax professionals, are subject
  - If I’m not an ERPA, why am I sitting here?
- The IRS modified Circular 230 in June 2014:
  - Eliminated “Covered Opinion” rules
  - Strengthened “Written Advice” rules
  - Created new definition of “Competence” (used to be included in the “covered opinion” rules)

Circular 230, § 10.20: Information to the IRS and § 10.23: Promptness

- If you are asked to provide information to the IRS, you must provide it promptly and not interfere with the IRS’s efforts to get that information
- You must not unreasonably delay the prompt disposition of any matter with the IRS
- Exception: you believe in good faith and on reasonable grounds that the information is subject to privilege
Circular 230, § 10.21: Knowledge of Client’s Omission

• If you know that the client has omitted material information or made an error in any filing with the IRS, must advise client:
  • that you know of the omission or error; and
  • the potential consequences of the omission or error

Circular 230, § 10.22: Due Diligence

• You must exercise due diligence in your practice
• You can rely on the work product of another person if you exercised reasonable due diligence in engaging, supervising, training, or evaluating the other person, taking into account your relationship with the other person
Circular 230, § 10.27: Fees

• No unconscionable fees
  • Didn’t the ERISA § 408(b)(2) disclosures take care of this issue in the marketplace?
• Can use contingent fees in limited circumstances only
  • Not likely to come up in TPA situations

Circular 230, § 10.28: Return of Client Records

• Generally, must return all records of client necessary for compliance with tax obligations
• Effect of fee dispute
  • Generally does not relieve obligation to return records, but
  • If state law permits retention of records in case of fee dispute, need only return records that must be attached to the taxpayer’s return
Circular 230, § 10.28: Return of Client Records (cont’d)

• Client records include:
  • Provided to practitioner in the course of representation that preexisted practitioner’s work (i.e., prior records)
  • Materials prepared by client or third party
  • Returns, claims for refund, schedule, affidavit, appraisal, etc. prepared by practitioner that were already presented to client (but not those that are pending the client’s payment of fees with respect to those documents)

Circular 230, § 10.29: Conflicts of Interest

• Cannot accept representation of a client if there is a conflict of interest:
  • Representation will be directly adverse to another client; or
  • Significant risk that representation to one or more clients will be materially limited by responsibilities to other clients or third parties or practitioner’s own interests
Circular 230, § 10.29: Conflicts of Interest (cont.)

• Exception to prohibition:
  • You reasonably believe you can provide competent and diligent representation, notwithstanding the conflict;
  • Representation not prohibited by law;
  • Each affected client is advised of and waives the conflict in writing

Conflict or No Conflict??

• You do the retirement plan work for the largest car dealership in the county.
• You are asked to do the retirement plan work for the second largest car dealership in the county, your first client’s largest rival.
• Can you do the work?
Conflict or No Conflict??

- Husband and Wife own ABC Company
- You perform the TPA work for the ABC Company 401(k) Plan
- Wife finds out Husband was cheating on her, opens up the DEF Company and takes over half of ABC’s client’s with her
- Can you perform the TPA work for the new DEF 401(k) Plan?
- What if you are also the 3(16) and reviewing QDROs are part of your services?

Circular 230, § 10.30: Solicitation

- No false, fraudulent, coercive statements or claims
- Cannot use the term “certified” or imply that you are an IRS employee
- If make uninvited solicitation, must clearly identify as such and identify source of information used in choosing the recipient
- Fee information cannot be misleading
Legit or Not Legit Sales Tactics?

- Most dependable TPA in the area
- More staff with designations than competitor
- Has the most connections with the IRS and DOL
- Services are practically free
- Can get you out of paying any corporate taxes

Circular 230, § 10.33: Best Practices

- You should provide clients with highest quality representation by adhering to best practices in providing advice and preparing IRS submissions
- You must communicate clearly with clients regarding the terms of your engagement
Circular 230, § 10.33: Best Practices (cont’d)

• You should:
  • Establish facts
  • Determine which facts are relevant
  • Evaluate the reasonableness of any assumptions or representations
  • Relate the applicable law to the facts
  • Arrive at a conclusion
  • Advise clients regarding the import of conclusions reached
  • Act fairly and with integrity vis-à-vis the IRS

Circular 230, § 10.33: Best Practices (cont’d)

• Owners/managers should “take reasonable steps” to ensure that the firm’s procedures for all in the firm are consistent with best practices
  • (Procedure? What’s a procedure?)
Circular 230, § 10.34: Standards for Returns and Documents, Affidavits, Papers

• You may not advise a client to take a position on a document submitted to the IRS that is:
  - Frivolous; or
  - Meant to impede or delay the administration of the tax laws;
  - Contains/omits information that demonstrates an intentional disregard of a rule or regulation unless there is a good faith challenge to the rule or reg;

• Or advise a client to submit a return that:
  - Lacks a reasonable basis;
  - Takes an unreasonable position;
  - Willfully understates tax or disregards tax rules and regs

Circular 230, § 10.34: Standards for Returns and Documents, Affidavits, Papers (cont’d)

• You must:
  • Advise the client of any penalties that are likely to apply with respect to a position taken on a tax return or document submission; and
  • Inform the client of any opportunity to avoid such penalty by disclosure and the requirements of disclosure
Circular 230, § 10.34: Standards for Returns and Documents, Affidavits, Papers (cont’d)

- You may:
  - Rely in good faith on information provided by the client

- You may not:
  - Ignore implications of information furnished, and must make reasonable inquiries if the information appears to be incorrect, inconsistent with facts, or incomplete

New § 10.35: Competence

- A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service
  - Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged
  - A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law
Circular 230, § 10.35: Covered Opinions

• Old Rules:
  • Covered opinion: Written advice concerning federal tax issues arising from:
    • Listed transactions
    • Principal purpose to avoid or evade taxes
    • Significant purpose to avoid or evade taxes if the advice is:
      • A marketed opinion
      • A reliance opinion
      • Subject to conditions of confidentiality or
      • Subject to contractual protection

Circular 230, § 10.35: Covered Opinions (cont’d)

• Remember this?
  • IRS CIRCULAR 230 DISCLOSURE: ABC does not provide tax or legal advice. To the extent this communication (including attachments), mentions or discusses any tax matter, it is not intended or written to be used, and cannot be used by the recipient or any other person, for the purpose of (1) avoiding penalties under the Internal Revenue Code, or (2) promoting, marketing or recommending to another party the matter addressed herein. Any taxpayer should seek advice based on the taxpayer’s particular circumstances from an independent tax advisor.
Circular 230, § 10.37: Written Advice

- In Giving Written Advice, a Practitioner Must:
  - Base the written advice on reasonable factual and legal assumptions;
  - Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;
  - Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;
  - Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;
  - Relate applicable law and authorities to facts; and
  - Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

Circular 230, § 10.37: Written Advice (cont’d)

- What is a “Federal tax matter”?  
  - Any matter concerning the application or interpretation of -
    - A revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code;
    - any existing or former internal revenue law, regulation, revenue ruling, revenue procedure, other published or unpublished guidance, or tax treaty, either in general or as applied to specific taxpayers or groups of specific taxpayers.
Circular 230, § 10.37: Written Advice (cont’d)

• What is a “Federal tax matter” (cont’d)?
  • Any provision of law impacting a person’s obligations under the internal revenue laws and regulations, including but not limited to the person’s liability to pay tax or obligation to file returns; or
  • Any other law or regulation administered by the Internal Revenue Service

Circular 230, § 10.37: Written Advice (cont’d)

• Definition of reasonable reliance
  • Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent
Circular 230, § 10.37: Written Advice (cont’d)

• When Can You Reasonably Rely on Another?
  • A practitioner may rely on the advice of another person only if the advice is reasonable, and the reliance is in good faith considering all the facts and circumstances
  • Reliance is not reasonable when -
    • The practitioner knows or reasonably should know that the opinion of the other person should not be relied on;
    • The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice; or
    • The practitioner knows or reasonably should know that the other person has a conflict of interest in violation of the rules described in this part

Circular 230, § 10.37: Written Advice (cont’d)

• What is written advice?
  • Includes electronic advice
  • Doesn’t include comment letters to IRS
  • Doesn’t include continuing education materials
    • Unless marketing transactions or products
    • Putting contact information in materials isn’t marketing
Circular 230, § 10.37: Written Advice (cont’d)

• What about disclaimers?
  • Disclaimer doesn’t take you out of § 10.37
    • It could take you out of old § 10.35
  • “Treasury and the IRS expect that these amendments will eliminate the use of a Circular 230 disclaimer in e-mail and other writings”
  • May want to have a disclaimer to indicate scope of opinion

Circular 230, § 10.37: Written Advice (cont’d)

• Sample New Disclaimer:
  • PLEASE NOTE: Any tax and legal advice provided in this correspondence is for the exclusive use of the person to whom it is directed and is dependent on the facts and circumstances provided to us by such person (regardless of whether such facts and circumstances are discussed in this correspondence). The use of this information for any other situation and by any other individual, regardless of how this correspondence was provided to the other individual, may be inappropriate. Furthermore, if the facts and circumstances communicated to us are not accurate and complete, please contact us immediately, as our advice may change. Please also contact our office with any questions you may have.
Circular 230, § 10.36: Office Procedures

• If you oversee a firm’s practice, you “must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with” Circular 230
• IRS can discipline you if:
  • you don’t take reasonable steps to establish procedures and see that they are followed (and correct violations), and
  • “one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with” Circular 230

Circular 230, § 10.31: Taxpayer Checks

• Can’t negotiate or endorse client refund check, including electronically
Circular 230, § 10.82: Expedited Suspension for Nonfiling of Tax Returns

• Applies to practitioners who fail to file Federal returns:
  • 4 out of last 5 years for annually
  • 5 out of last 7 periods for returns required more often than annually

Other Things to Consider

• Your reputation
  • With your clients
  • With other practitioners
  • With your employees
• Your risk tolerance
• Your personal ethics
**A Good Ethical Rule of Thumb**

• Do What’s Right … and don’t let anyone take away your good name!

**A Good Ethical Plan**

• Consider in advance the ethical “dilemmas” that most commonly affect your area of practice and determine: where is the line in the sand?
  • Things clearly on the “okay” side are fine
  • Things clearly on the “absolutely not” side are not
  • Only the small issues in the gray area require additional thought
Questions?

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