

Ethical Dilemmas Facing
Tax Practitioners Today

MITCHELL | WILLIAMS

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

"There are clear indications that professional standards have eroded in some corners of the practitioner community. Attorneys and accountants should be the pillars of our systems of taxation, not the architects of its circumvention."

-Former IRS Commissioner Mark Everson

Authority Applicable to Tax Practitioners

- Attorneys & Accountants
 - Internal Revenue Code
 - Circular 230
- Attorneys
 - Arkansas Rules of Professional Conduct
 - American Bar Association Model Rules of Professional Conduct
- Accountants
 - Arkansas State Board of Public Accountancy Code of Professional Conduct (Aug. 17, 2013)
 - American Institute of CPAs (AICPA) Code of Professional Conduct (Dec. 15, 2014)
 - AICPA Statements on Standards for Tax Services (Jan. 1, 2010)

Enforcement

- Office of Professional Responsibility (OPR)
- Attorneys
 - Arkansas Supreme Court
- Accountants
 - Arkansas State Board of Public Accountancy
 - American Institute of CPAs

Discussion of Selected Rules Governing Ethical Behavior

- Due Diligence
- Candor to the IRS
- Conflicts of Interest
- Competence
- Confidentiality

Due Diligence

Due Diligence

- Circular 230, § 10.22 Diligence As to Accuracy
 - Practitioners must exercise due diligence in preparing or assisting in the preparation of returns and documents relating to IRS matters and in determining the correctness of representations made by the practitioner to the IRS and to the client.
 - Except as provided in § § 10.34, 10.35 and 10.37, practitioners are presumed to have exercised due diligence when relying upon the work product of others if the practitioner used reasonable care in engaging, supervising, training and evaluating the person.

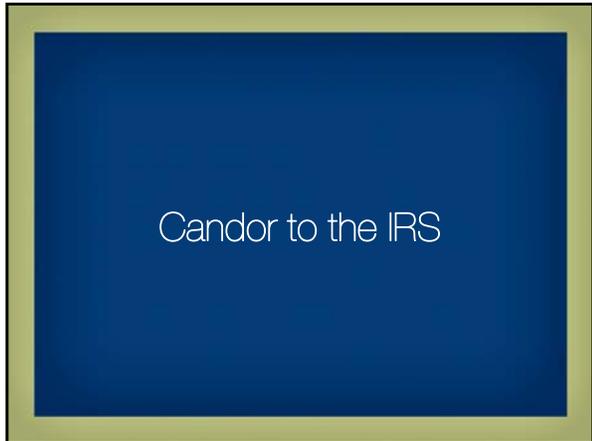
Due Diligence

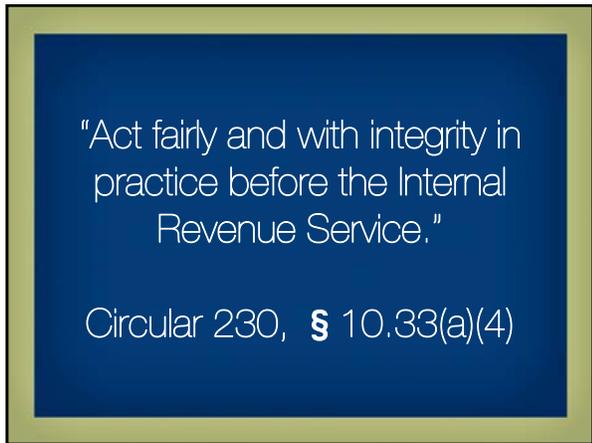
“The purpose in conducting due diligence is to investigate facts, circumstances, and actors sufficiently to enable one’s self, or those being advised, to make informed decisions about actions to be taken.”

—Karen Hawkins, Former Director of the IRS Office of Professional Responsibility

Due Diligence

- Ask probing, detailed questions about the client’s facts, situation, goals and intentions.
 - Blindly accepting the client’s representations without asking such questions is unlikely to satisfy the requirements of § 10.22.
- Consider information actually known from other sources if necessary to properly prepare the return.
 - You may rely on information provided by the client without independent verification UNLESS the information furnished appears to be incorrect, incomplete or inconsistent





Candor to the IRS

- Circular 230, § 10.20 Information Requested by the IRS
- Upon request by the IRS, the practitioner must promptly:
 - Submit non-privileged records and information to the IRS;
 - If the requested records and information are not in the practitioner's possession or control, notify the IRS of the location of the requested records and information in the possession or control of others;
 - Make reasonable inquiries of the client regarding the location of requested records and information in the possession of others.
- The practitioner is not required to inquire of others or independently verify information provided by the client regarding the identity of persons in possession or control of requested documents.

Candor to the IRS

- Circular 230, § 10.21 Knowledge of Client's Omission
- If a practitioner knows the client has made an error in or omission from any return or other tax-related document submitted to the IRS, the practitioner must:
 - Advise the client of the fact of such error or omission, and
 - Advise the client of the potential consequences of the error or omission under the Code or Treasury Regulations.

Candor to the IRS

- Circular 230, § 10.34 Standards with Respect to Tax Returns and Documents, Affidavits and Other Papers
- A practitioner may not willfully, recklessly or through gross incompetence:
 - Sign or advise a client to take a position that the practitioner knows or reasonably should know contains a position that lacks a reasonable basis
 - Take, or advise a client to take, a frivolous position
 - Submit, or advise a client to submit, any document for the purpose of delaying or impeding the administration of the tax laws
 - Submit, or advise a client to submit, any document that contains or omits information suggesting an intentional disregard of the law unless supported by a good-faith challenge

Conflicts of Interest

Conflicts of Interest

- Circular 230 § 10.29 Conflicting Interests
- A practitioner may not represent a client before the IRS if the representation involves a "conflict of interest."
- A "conflict of interest" exists if:
 - The representation of one client is directly adverse to another client; or
 - There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or by a personal interest of the practitioner.

Conflicts of Interest

- Notwithstanding a conflict of interest, the practitioner may represent a client if:
 - The practitioner reasonably believes that he or she is able to provide competent and diligent representation to each affected client;
 - The representation is not prohibited by law; and
 - Each affected client waives the conflict of interest and signs a written, informed consent within a reasonable period of time after the practitioner learns of the conflict but in no event later than thirty (30) days after the conflict is known by the practitioner.

Conflicts of Interest

- Hypothetical Situations

Competence

A tax practitioner is not required to be all knowing, but he or she should be "self-aware enough to know when to research or study a subject before giving advice or interacting with IRS personnel."

—Karen Hawkins, Former Director of the IRS Office of Professional Responsibility

- ## Competence
- Circular 230, 10.35(a) Competence
 - Practitioner must be competent to engage in practice before the IRS.
 - Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.
 - The appropriate standard of conduct is the objectively reasonable tax professional.

Competence

- Circular 230, § 10.51 Incompetence or Disreputable Conduct Subject to Sanctions
 - Giving any false or misleading information, or participating in any way in the giving of false or misleading information the IRS.
 - Use of misleading representations with the intent to deceive a client or prospective client in order to procure employment.
 - Contemptuous conduct in connection with IRS practice, including the use of abusive language, making false accusations or statements, knowing them to be false, or circulating or publishing malicious or libelous matter.
 - Giving false opinions, 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.
 - Unauthorized disclosure or use of tax return information.

Competence

- AICPA Statement on Standards for Tax Services, No. 1, Tax Return Positions
 - "A member should not recommend a tax return position or prepare or sign a tax return taking a position unless the member has a good-faith belief that the position has at least a realistic possibility of being sustained administratively or judicially on its merits if challenged."
 - "A member should not recommend a tax return position or prepare or sign a tax return reflecting a position that the member knows (a) exploits the audit selection process of a taxing authority, or (b) serves as a mere arguing position advanced solely to obtain leverage in a negotiation with a taxing authority."
 - EXCEPTION if the member concludes that there is a reasonable basis for the position and the position is adequately disclosed.

Confidentiality

Confidentiality

- I.R.C. § 7216: Disclosure or Use of Information by Preparers of Returns

Return preparers who “knowingly or recklessly” make unauthorized disclosures or use of “information furnished . . . in connection with, the preparation of any . . . return” are subject to criminal sanctions (i.e., imprisonment) under § 7216.

Confidentiality

- I.R.C. § 6713: Disclosure or Use of Information by Preparers of Returns

Any unauthorized disclosure or use of information provided to a return preparer will subject the return preparer to monetary penalties under § 6713.

Confidentiality

- I.R.C. § 7525

Section 7525 of the Code extends the common law protections of confidentiality applicable to communication between a taxpayer and his or her attorney (i.e., privilege) to communications between a taxpayer and an authorized tax practitioner, except in criminal tax matters.

Confidentiality

- AICPA Code of Professional Conduct, Section 0.400 Definitions

.09 Any information obtained from the client that is not available to the public should be considered confidential client information.
