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DETERMINING THE DISCIPLINARY SANCTION:

What Factors Are Considered in Ethics Enforcement

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I. POTENTIAL SANCTIONS

- A. Circular 230, Section 10.50, provides authority for the Office of Professional Responsibility to 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 under Circular 230, or with intent to defraud, willfully and knowingly misleads or threatens the client or prospective client.
1. The power to censure includes the power to issue public or private reprimands.
 2. Effective after June 20, 2005, Section 10.52 includes:
 - (a) Willfully violating any of the regulations (other than section 10.33); or
 - (b) Recklessly or through gross incompetence violating Sections 10.34, 10.35, 10.36 or 10.37.
 3. Proposed amendments to Circular 230 provide authority to impose a monetary penalty on a practitioner in addition to, or in lieu of, any other sanction. A monetary penalty may also be imposed on an employer or other firm or entity, if the employer, firm or entity knew or reasonably should have known that a practitioner, acting on behalf of such employer, firm or entity, was engaging in conduct contrary to the provisions of Circular 230.

II. INCOMPETENCE AND DISREPUTABLE CONDUCT

- A. Under Section 10.51, Incompetence and disreputable conduct includes, but is not limited to:
1. Conviction of any criminal offense under the revenue 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. Knowingly giving false or misleading information to the Department of Treasury or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them;
 - (a) Any document or statement, written or oral, is included in the term information;
5. Solicitation of employment as prohibited under Section 10.30, by 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;
6. 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;
7. 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;
8. 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;
9. Disbarment or suspension from practice as an attorney, certified 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;
10. 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;

11. Contemptuous conduct in connection with practice before the Internal Revenue, including the use of abusive language, making false accusations and statements, knowing them to be false, or circulating or publishing malicious or libelous matter;
 12. 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.
 - (a) False opinions 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.
 - (b) 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.
- B. Proposed amendments identify the following additional acts as incompetent and disreputable conduct:
1. Willfully failing to sign a return prepared by the practitioner when such signature is required by law;
 2. Willfully disclosing 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.

III. **FACTORS CONSIDERED BY THE OFFICE OF PROFESSIONAL RESPONSIBILITY (OPR)**¹

- A. OPR seeks to impose An appropriate sanction commensurate with the alleged misconduct. This is important, because OPR is required to identify the appropriate sanction in the administrative complaint (see Section 10.62(b)). Administrative Law Judges (ALJ) will apply a heightened burden of proof (“clear and convincing evidence”) to cases

¹ Section III of this outline is substantially derived from an outline presented by Cono R. Namorato at the October 2004 Standards of Practice Committee meeting.

under Section 10.76, which OPR seeks disbarment or a suspension of six months or greater.

1. Circular 230 provides no hard and fast formula for determination of the appropriate sanction in each case. Generally, OPR looks at the following factors:
 - (a) The nature and severity of the offense(s) in question;
 - (b) The repetitiveness of the conduct (i.e., a pattern rather than an isolated incident);
 - (c) The practitioner's prior OPR disciplinary history;
 - (d) Any aggravating or mitigating factors which may be present (see list below); and
 - (e) The impact that not adequately disciplining the practitioner would have on tax administration, the confidence of the practitioner community and the taxpaying public in our enforcement efforts, etc.
2. **General Aggravating Factors (this list is not exhaustive):**
 - (a) Sum of money at issue;
 - (b) Impact on public's perception of tax system's fairness if practitioner's actions were to go unsanctioned;
 - (c) Degree of frequency with which practitioner engages in practice before the Service.
3. **General Mitigating Factors (this list is not exhaustive):**
 - (a) Age of the allegations (not the age of the practitioner);
 - (b) Practitioner's good-faith reliance on faulty information furnished by his or her client or a third party;
 - (c) Degree of contrition expressed by practitioner;
 - (d) Health problems, extenuating circumstances or personal hardships experienced by practitioner.
4. **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.