The views expressed herein represent the position of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

On May 30, 2000, the Internal Revenue Service announced its intention to amend the regulations governing practice before the Internal Revenue Service (IRS), which appear in the Code of Federal Regulations and in pamphlet form as Treasury Department Circular No. 230. The Service invited individuals and organizations to submit comments on revising Circular 230 to address general standards of practice and standards of practice relating to tax shelters.

The comments contained herein relate to two issues on which the Service specifically requested comments:

1. **Contingent fees**: whether section 10.28 should prohibit a practitioner from charging a fee for an opinion or advice relating to a position taken or to be taken by a taxpayer in an original return where such fee is contingent upon whether the tax treatment of the transaction is sustained, and whether section 10.28 should continue to permit a practitioner to charge a contingent fee for assisting a client in filing an amended return or claim for refund when the practitioner reasonably anticipates at the time the fee arrangement is entered into that the amended return or claim will receive substantive review from the Service.

2. **Limited practice**: whether section 10.7(c)(1) should be modified to permit, under limited circumstances, an individual who is not authorized to practice before the Service to represent a taxpayer without obtaining authorization for a special appearance from the Director of Practice under section 10.7(d).

**Contingent fees.**

A tax adviser functions as an important component of our self-assessment system, and it is important that the adviser provide clients with clear and unbiased advice. Just as section 10.28 now prohibits contingent fees for preparing an original return, a practitioner should not be permitted to charge contingent fees for advice designed to assist in establishing a position to be reported in an original return. Indeed, it would seem inconsistent for different rules governing contingent fees to apply in preparing a return, and in formulating positions designed to be taken
on returns. In both cases, allowing contingent fees would seem to raise an incentive for practitioners to encourage participation in the “audit lottery.” Moreover, a rule prohibiting contingent fees with respect to advising a taxpayer on a return position would be consistent with the approach taken under Treas. Reg. § 301.7701-15, which defines an income tax return preparer as a person who either prepares a taxpayer’s return or who gives a taxpayer advice that is directly relevant to the determination of the existence, characterization, or amount of an entry on a return.

Section 10.28, which now permits contingent fees for preparing amended returns or refund claims, when the practitioner reasonably anticipates that the amended return or claim will receive substantive review, seems to reach an appropriate balance of competing considerations and does not appear to require change. Allowing contingent fees in such circumstances would appear to increase access to professional advice for persons having claims against the government, without raising incentives for practitioners to encourage participation in the “audit lottery.”

**Limited practice:**

Under Circular 230, attorneys, certified public accountants, enrolled agents and (to a limited degree) enrolled actuaries are permitted to practice before the Service. Because such authority has a statutory basis, any expansion might require legislation as well. Moreover, section 10.7(c) already permits certain individuals to engage in limited practice before the Service without obtaining prior authorization from the Director of Practice, and it is hard to see why that rule should be modified. It would be difficult for the Service to regulate the practice of individuals who are outside of the traditional practitioner base, and the value of expanding the practitioner base to include such unregulated individuals is not apparent.

An amendment to section 10.7(c) would be appropriate in the case of approved tax clinics, whose directors (i) are individually authorized to practice before the Service and (ii) provide close supervision of students who enroll in their clinic. Obviating the current special authorization requirement would relieve some of the administrative burden on clinic directors.