December 8, 2005

The Honorable Mark W. Everson
Commissioner
Internal Revenue Service
Room 5226
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Disciplinary Procedures of the Office of Professional Responsibility

Dear Commissioner Everson:

I am writing on behalf of the Section of Taxation, the Section of Administrative Law and the Judicial Division concerning the disciplinary procedures of the Internal Revenue Service Office of Professional Responsibility. This letter also reflects comments from the Standing Committee on Professional Discipline of the American Bar Association. The views expressed in this letter represent the position of the Sections and Division that prepared them and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Executive Summary

During the May 2004 Section of Taxation Meeting in Washington, D.C., the Director, IRS Office of Professional Responsibility (“OPR”), discussed significant changes being made in OPR and asked whether Special Trial Judges (“STJs”) of the United States Tax Court (“Tax Court”) would be a more appropriate trier of fact in OPR disciplinary hearings than the administrative law judges (“ALJs”) who currently hear these cases. In response to this inquiry, the Section of Taxation’s Standards of Tax Practice Committee formed a task force to study the disciplinary process. Based on the report of the task force and additional input, the Sections, the Division, and the Committee recommend the following:

Recommendation One: The current structure of the disciplinary process -- involving agency investigation, a hearing, and both administrative and judicial review -- should be retained.

We recommend retention of the process currently in place because it appropriately balances protections for the practitioner and the interests of the government and is fully consistent with the Administrative Procedure Act (“APA”).

Recommendation Two: ALJs from other agencies should continue to preside over OPR disciplinary hearings. STJs of the Tax Court should not be used for such proceedings.
We recommend that, in order to preserve the independence and the resources of the Tax Court, ALJs from other agencies, rather than STJs of the Tax Court, should continue to preside over OPR disciplinary hearings.

**Recommendation Three:** Treasury should continue to use ALJs from other agencies for OPR disciplinary hearings, rather than employing its own ALJs, so long as the case load remains at or near current levels.

We recommend that the United States Department of the Treasury (“Treasury”) should continue to employ ALJs from other federal agencies rather than its own ALJs. OPR hearings do not currently involve issues that require a technical tax background, and it is not clear that such a background will be required in the future. Furthermore, even if the technical tax scope of OPR hearings were to expand, it is by no means clear that a judge that is a tax specialist is preferable to an ALJ from another agency.

**Recommendation Four:** OPR should increase its effort to educate practitioners about the types of conduct that are unacceptable.

To increase compliance, we recommend that OPR take steps to educate practitioners about specific types of conduct that are unacceptable under Circular 230. These efforts should include such outreach techniques as publishing hypothetical case studies to illustrate the applicable standards.

**Comments**

I. **OPR Disciplinary Hearing Task Force**

During the May 2004 Section of Taxation Meeting in Washington, D.C., while discussing changes to the disciplinary process within OPR, the Director of OPR asked whether STJs should be the triers of fact in OPR disciplinary hearings rather than ALJs from other agencies who currently hear such cases. The Section of Taxation’s Standards of Tax Practice Committee formed a task force to consider this issue and the disciplinary process as a whole. Members gathered information on OPR’s disciplinary procedures and the use of ALJs in federal administrative practice. In particular, members spoke with Stephen Whitlock, Deputy Director of OPR, representatives of the Tax Court and of Treasury. These comments result from that study, as well as input from the Section of Administrative Law, the Judicial Division, and the Standing Committee on Professional Discipline of the American Bar Association.

II. **Background**

Since 1922, Treasury has regulated those who practice before the IRS, and Congress has repeatedly affirmed Treasury’s authority to do so. The applicable regulations are set out in Treasury Circular 230. The regulations are administered and enforced by OPR.

OPR is headed by a Director and has three principal areas of oversight: enforcing
Circular 230; educating and licensing enrolled agents; and regulating actuaries who practice before the IRS. The Enforcement Unit is responsible for discipline of tax practitioners under Circular 230. That unit is divided into two groups, each under a chief. The table below sets forth statistics furnished by OPR on action taken by the Enforcement Unit to discipline attorneys from October 2004 through January 2005:

<table>
<thead>
<tr>
<th>Action</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Closed without sanction</td>
<td>38</td>
</tr>
<tr>
<td>Reprimand</td>
<td>1</td>
</tr>
<tr>
<td>Censure</td>
<td>1</td>
</tr>
<tr>
<td>Suspension by consent</td>
<td>2</td>
</tr>
<tr>
<td>Suspension after hearing</td>
<td>0</td>
</tr>
<tr>
<td>Expedited suspension</td>
<td>70</td>
</tr>
</tbody>
</table>

The IRS is increasing its enforcement activities, emphasizing particularly high-income taxpayers, tax shelters, offshore financial activities, and crimes. As part of these efforts, the IRS has enabled OPR to expand its enforcement activities with respect to tax advisers. The size of OPR’s staff has approximately doubled, the size of its enforcement staff has approximately tripled, and OPR has requested additional funding to support further staff increases. These staffing increases should enhance OPR’s substantive tax expertise and its ability to scrutinize complex tax schemes. Also, OPR intends to shift its focus from targeting practitioners’ personal compliance with the tax code to pursuing a limited number of significant cases. Accordingly, OPR is expanding its inventory of cases involving higher impact on the tax system, especially those deemed to involve tax shelters.

Our recommendations address whether OPR’s current disciplinary process, including the use of ALJs from other agencies such as the National Labor Relations Board, the Bureau of Mines, and the Environmental Protection Agency, is adequate in light of OPR’s new focus and direction.

III. Recommendations

**Recommendation One: The current structure of OPR’s disciplinary process -- involving agency investigation, a hearing, and both administrative and judicial review -- should be retained.**

A. Current disciplinary process

1. Before Hearing

OPR receives referrals regarding potential violations of Circular 230 from the operating divisions of the IRS, from the public, and from tax practitioners. If the referral appears to have merit, OPR sends an allegation letter to the practitioner and requests a response. The practitioner may request a conference prior to OPR’s evaluation of the case.
There are three possible outcomes. First, if OPR determines there is no violation, the case is closed without further action. Second, if OPR determines there is a violation, the case may be resolved by the practitioner’s agreement to some form of sanction. Third, if OPR determines there is a violation, which the practitioner contests, OPR issues a complaint, leading to an administrative hearing.

2. Hearing

The practitioner must answer an OPR complaint or a decision will be entered by default. In contested matters, an ALJ, assigned from another agency, will preside. Each side has the opportunity to present evidence. The practitioner need not attend the hearing personally, but instead may be represented by counsel.

Once the record is complete, the ALJ renders a decision. The burden of proof is on OPR, and the standard of proof depends on the proposed sanction. If the proposed sanction is censure or suspension for less than six months, the applicable standard is preponderance of the evidence. If the proposed sanction sought is more serious, the standard is clear and convincing evidence.

The powers of ALJs in the OPR disciplinary proceedings are similar to their powers under the APA. They include the powers to (1) administer oaths and affirmations, (2) rule on motions and requests, (3) determine the place and time of the hearing, (4) regulate the conduct and course of the hearing, (5) adopt and modify rules of procedure, (6) receive evidence, examine witnesses, and rule on evidentiary objections, (7) take and authorize depositions, (8) hold settlement or issue-narrowing conferences, (9) take other steps necessary and appropriate to efficient conduct of the hearing, (10) receive and consider factual and legal arguments, and (11) render a decision.

3. Treasury Review

The ALJ’s decision is Treasury’s initial determination. If neither party appeals within thirty days, the ALJ’s decision becomes Treasury’s final decision. If a party timely appeals, the Secretary of the Treasury’s delegate (the “Delegate”) functions as the administrative appellate authority to review the ALJ’s decision and render Treasury’s final decision.

OPR provides a copy of the entire record of the proceedings to serve as the basis of the Delegate’s review. The Delegate will not reverse the ALJ’s decision “unless the appellant establishes that the decision is clearly erroneous in light of the facts in the record and the applicable law. However, issues that are exclusively questions of law (as opposed to questions of fact or mixed questions of fact and law) are reviewed de novo.” The Delegate may affirm, reverse, or modify the ALJ’s decision, or the Delegate may remand the case to the ALJ to develop additional evidence.

4. Judicial Review
If the Delegate’s decision is unfavorable, the practitioner may petition a United States District Court to review the Treasury’s final decision. The District Court’s decision may be further appealed to a federal circuit court, followed by the (remote) possibility of Supreme Court *certiorari* review.

Treasury’s decision is reviewed deferentially. The agency’s factual determinations will not be disturbed if supported by “substantial evidence.” That is, the court “cannot displace the agency’s choice between two fairly conflicting views of the evidence, even if [the court] might have made a different choice had the matter been before the [c]ourt *de novo*.” Factual conclusions resting on the ALJ’s credibility determinations are entitled to “great deference.” By contrast, Treasury’s determinations as to matters of law are reviewed by the court on a *de novo* basis. However, the court will accord “deference to [Treasury’s] interpretation of any governing statutes or regulations where that interpretation is reasonable.”

B. Why the current process should be retained.

At first glance, the current structure seems idiosyncratic. There are multiple stages, arguably impeding efficient resolution. Also, the stages swing pendulum-like between control by the agency and independence from the agency. Agency investigation is followed by hearing before a neutral and impartial ALJ, but Treasury reviews the ALJ’s decision after which a neutral and dispassionate court reviews Treasury’s decision.

On closer consideration, however, there are justifications for this structure. The potentially serious consequences to the practitioner require meaningful opportunities for review before authorities that are independent of Treasury and the IRS. By contrast, Treasury’s own internal review procedure helps alleviate concern that the OPR sanctioning process could be used to intimidate practitioners.

The procedures used in OPR disciplinary cases are consistent with those contemplated by the Administrative Procedure Act (“APA”) for administrative adjudications. The ALJ hearing followed by Treasury review corresponds to APA §§ 554 through 557, under which the ALJ applies agency policy but is neutral and independent in finding facts. Furthermore, the review by the Article III courts of Treasury’s decision corresponds to APA §§ 701 through 706, in terms of both the forum for review and the standards to be applied.

**Recommendation Two: ALJs should continue to preside over OPR disciplinary hearings. STJs of the Tax Court should not be used for such proceedings.**

To understand why ALJs are the more appropriate trier of fact in OPR disciplinary hearings, it is important to understand the role and responsibilities of ALJs under the APA and the types of cases that OPR anticipates pursuing.

A. ALJs in Federal Practice

The use of ALJs in federal administrative agencies is governed largely by the APA,
enacted in 1946, 5 U.S.C. §§ 1305, 3105, 3344, 5372, and 7521. Congress may alter these general APA rules in specific cases, of course, by so providing in an agency’s enabling legislation.

1. Selection

ALJs are appointed by agencies, on a merit basis, to ensure fair and impartial on-the-record hearings. They are selected from a register of candidates maintained by OPM after submission of lengthy and detailed applications, written and oral examinations, and a review of their references. OPM is mandated to administer the ALJ program, to maintain a register of qualified applicants, and to test and to evaluate prospective applicants.

Extensive legal experience is necessary for the position. Such experience provides maturity, expertise in compiling a reliable record, first-hand knowledge of problems likely to be encountered as an ALJ, and intimacy with rules of evidence and procedure similar to those used in administrative hearings. The Supreme Court has declared that federal ALJs are functionally equivalent to other federal trial judges and are entitled to equal treatment in terms of tenure and compensation.

2. Oversight

Although ALJs are employed by specific agencies, Congress granted to the Civil Service Commission the powers of oversight and supervision. Oversight was transferred in 1978 to the OPM and the Merit Systems Protection Board.

3. Use

ALJs are to be “assigned to cases in rotation so far as possible.” ALJs are rotated only among the categories of cases for which they are deemed to be qualified. Assignment may not be made in a way that interferes with ALJ independence.

Cases decided by ALJs may involve enormous stakes and have a considerable impact on the national economy. An ALJ may handle a single case that affects millions of people and involves billions of dollars. ALJs adjudicate cases involving a wide range of regulatory matters.

4. ALJ Powers

In contested matters, the ALJ has three principal duties: (i) to conduct the hearing, (ii) to render decision, and (iii) to prepare a full record of the proceedings to facilitate review. In some situations, ALJs may also facilitate settlements. ALJs have broad powers to control the hearing and related proceedings. Such hearings may be inquisitorial in nature to the extent the ALJ is inclined to participate in the development of the facts. Strict application of rules of evidence is not required.
The ALJ may issue either an initial decision or a recommended decision. The former becomes final agency action (thus subject to judicial review under 5 U.S.C. § 704) unless it is reviewed by the agency. In contrast, a recommended decision may take effect only if affirmatively acted on by the agency. ALJs tend to issue recommended decisions when addressing novel issues requiring the development of new policy. The ALJ’s decision should include findings and conclusions “on all the material issues of fact, law, or discretion presented on the record.”

5. Agency Review

Agency review of ALJ decisions takes a variety of forms: sometimes the review is performed by the agency’s head, sometimes by a lower-level agency official via delegation, sometimes by a formally constituted appeal or review board within the agency. Agencies reviewing ALJ decisions typically have more flexibility than do appellate courts reviewing trial court opinions. The APA permits an agency to engage in de novo review of the facts (as well as of the law). However, agency rules or practice may accord the ALJ’s conclusions some degree of deference, and ALJ findings of fact tend to carry some weight, particularly when the ALJ had the opportunity to assess the demeanor and credibility of witnesses. As discussed under Recommendation One, the hearing process under Circular 230 is consistent with this pattern.

B. Using STJs to adjudicate OPR disciplinary hearings would strain constitutional checks and balances, impair the perceived independence of the Tax Court, and potentially exhaust limited Tax Court resources.

Based on recent pronouncements, future OPR disciplinary actions may involve more complex tax cases. Some have questioned whether the ALJs who now preside over disciplinary hearings will possess sufficient knowledge and expertise to correctly decide discipline cases arising out of more complicated transactions. The Director of OPR has asked whether it would be better to use Tax Court STJs for this purpose because they would have tax expertise. However, despite the greater tax expertise of the STJs, we believe that, on balance, continuing the use of ALJs from other agencies is preferable. For at least three reasons, the use of STJs for this purpose is potentially harmful to the Tax Court as an institution or represents a serious potential drain on its resources.

First, employing STJs for OPR hearings would be constitutionally suspect. OPR hearings fulfill an internal purpose of Treasury, an Article II department. As discussed in Recommendation One, absent timely appeal, the ALJ’s decision becomes Treasury’s final decision. If there is timely appeal, the ALJ’s decision is tentative only and is subject to the Delegate’s review prior to the issuance by the Delegate of Treasury’s final decision. In other words, the role of the ALJ is to discharge an internal administrative function. In that light, it may be necessary that the official rendering the decision after the hearing be an Article II actor, as an ALJ is.

In contrast, STJs are Article I actors. Congress (the Article I body) is empowered to
create “legislative courts” outside of Article III. The jurisdiction of such courts is fixed by statute. The Tax Court is an Article I court, and its STJs are Article I personnel.

It would strain the separation of powers principle for an Article I magistrate to render what might be the final decision of an Article II department. It would be even more peculiar for a decision of an Article I magistrate to be subject to reversal by an Article II official (the Delegate).

Second, replacing ALJs with STJs would diminish the Tax Court’s role in our system of tax controversy resolution. As the chief adjudicative body in our tax controversy resolution system, the Tax Court must be perceived by taxpayers and their representatives as separate from the IRS and neutral as between the IRS and taxpayers. Using Tax Court magistrates to adjudicate OPR disciplinary hearings would blur the perception that the Tax Court is separate and neutral. The benefits of gaining access to the tax expertise of STJs are outweighed, in our view, by the value of maintaining clear lines of division between the Tax Court and the IRS.

Third, the question of resources always must be considered. The present volume of OPR disciplinary hearings probably would not inordinately burden STJs were they to preside over such hearings. However, the burden might become significant should the number of disciplinary hearings or the complexity and duration of disciplinary proceedings increase appreciably.

**Recommendation Three**: Treasury should continue to use ALJs from other agencies for OPR disciplinary hearings, rather than employing its own ALJs, as long as case loads remain at or near current levels.

A. Basis of OPR disciplinary action

Although practitioner conduct cases may arise in connection with sophisticated tax transactions, OPR has indicated that any charges that may result will not turn on the technical tax aspects of any particular opinion or advice. For example, OPR has indicated that it is unlikely to press charges based on an incorrect legal analysis in an opinion. It would be more likely to press charges if the opinion relied on unreasonable factual assumptions. Therefore, even if a tax opinion relates to a complex set of transactions entailing sophisticated tax issues, technical tax expertise may not be required in order to determine whether the practitioner who authored the opinion violated Circular 230. However, if OPR’s current plan is altered and OPR begins to challenge the sufficiency and correctness of an opinion’s underlying legal analysis, a decision maker with a strong technical tax background may be helpful, although complex tax trials are often conducted by non-specialist district court judges and appeals are always decided by non-specialist judges.

B. ALJs from other agencies are appropriate triers of fact in OPR cases.

Treasury does not currently maintain its own corps of ALJs. The ALJ presiding over an OPR disciplinary hearing may lack extensive substantive tax expertise, and, because he or she is employed by an agency other than the Treasury, the ALJ may not hear enough tax cases to
acquire such expertise. However, it does not appear that that fact has created problems thus far, and it is unlikely to be problematic in the readily foreseeable future. In addition, the same ALJs are assigned to hear all OPR disciplinary hearings so that the ALJ should gain experience hearing OPR disciplinary cases. Importantly, the administrative adjudication scheme established by the APA contemplates that ALJs may not be experts in the law being applied.

There is to date no evidence of a high incidence of inaccuracy in ALJ decisions on OPR disciplinary cases. If inaccuracy is found, the ability to appeal the decision to the Delegate is a check prior to the issuance of Treasury’s final decision as to matters of law, although not as to those of fact. To date, there has not been any significant complaint that ALJs have been reaching incorrect results. In addition, Treasury review of ALJ decisions exists in large part to correct ALJ errors in applying the law or agency policy, so incorrect results based on established law or agency policy may be cured before Treasury issues its final decision.

The nature of disciplinary proceedings seems unlikely to change in ways that render ALJ technical tax expertise essential in the foreseeable future. Many, perhaps most, future disciplinary cases will involve the same kinds of issues that have appeared in prior cases. While a larger percentage of future cases may arise from more transactionally complex contexts, it is not OPR’s current intention to base complaints, even in these complex cases, on technical tax grounds. The likely grounds -- such as deliberate reliance on manifestly unreasonable assumptions -- are ones that any competent ALJ should be able to understand and act on.

It would be costly to the Treasury to hire and maintain its own corps of ALJs for OPR hearings. As matters stand now, and for the foreseeable future, it is not clear that this step must be taken. In addition, the fact that ALJs are not Treasury employees helps to reinforce the idea that the ALJ is impartial, neutral, and dispassionate.

Recommendation Four: OPR should make an increased effort to alert and educate the practitioner community about the specifics of enforcement activities.

A. Visibility and publicity of OPR disciplinary proceedings and actions

At present, the outcomes of OPR’s disciplinary proceedings are not publicly visible. OPR disciplinary hearings are conducted under seal, which OPR believes impairs the general deterrent effect of the disciplinary process. OPR has proposed that Circular 230 should be amended to make disciplinary hearings public (while protecting the confidentiality of third-party return information). The issue is the subject of proposed legislation.

With respect to the results of disciplinary action taken by OPR, the IRS publishes in the INTERNAL REVENUE BULLETIN the names of practitioners and the sanctions they receive. The IRS also recently began posting this information on its website. OPR may notify the sanctioned attorney’s state bar association or the sanctioned accountant’s state accounting board of the sanction. Those bodies may then impose sanctions of their own, which may be public if permitted under state rules.
In addition, in 1995 and 1997 the IRS published in the INTERNAL REVENUE BULLETIN examples of the type of action that would result in disciplinary action. The 1997 document, entitled “Scenarios of Disciplinary Actions from the Office of Director of Practice,” stated:

The following scenarios are composites of matters that have come to the attention of the Office of Director of Practice. The scenarios are intended to inform tax practitioners of the types of activity that may result in disciplinary action under [Circular 230]. . . . Because disciplinary matters are resolved on the basis of their particular facts and circumstances, these scenarios do not constitute precedent in any matter before the Director.

The 1995 document addressed a failure to file returns by a practitioner, disreputable conduct, unreasonable delay, and dishonesty. The 1997 document discussed four factual situations: false statements, contemptuous conduct, lack of due diligence, and knowledge of a client’s mistake. For each situation, the document set out a composite fact pattern and described the action taken by the Director and the sanction imposed on the practitioner.

B. Wider publication of sanctioned conduct will assist in educating practitioners, thereby increasing compliance with Circular 230.

Publicizing OPR sanctions of Circular 230 violations might increase compliance by practitioners. We recommend that, in addition to publication in the INTERNAL REVENUE BULLETIN and posting on the IRS website, OPR should explore new ways to publicize sanctions against individual practitioners. We also recommend that OPR should identify in published guidance the types of conduct OPR considers improper in the same fashion that the IRS through Revenue Rulings announces its position on substantive tax issues. Although presented as “hypothetical” facts, Revenue Rulings are often based on the facts of actual cases. Revenue Rulings notify taxpayers and their advisers of the position of the IRS concerning permissible or impermissible tax positions. Similarly, a Revenue Ruling-like document might be used to identify the line between permissible and impermissible conduct under Circular 230.

In fact, the IRS used this technique when it published the “Scenarios of Disciplinary Actions from the Office of Director of Practice” in 1997. We urge OPR to make more regular use of this device to gain the benefits of alerting the tax community to OPR’s enforcement activities and put the public on notice with respect to behavior OPR believes in violation of Circular 230. This would be a proactive way of discouraging unwanted behavior and encouraging compliance.

Sincerely,

Dennis B. Drapkin
Chair, Section of Taxation
APPENDIX

SOURCES AS TO ALJs IN
FEDERAL PRACTICE GENERALLY

A. Legislative Reports


B. Books

Michael Asimow, A GUIDE TO FEDERAL AGENCY ADJUDICATION (2003).

Alfred C. Aman, Jr., ADMINISTRATIVE LAW AND PROCESS (1993).


Kenneth C. Davis, & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE (3d ed. 1994).


ABA Section of Administrative Law & Practice, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW (2004).

C. Articles


John H. Frye, III, Survey of Non-ALJ Hearing Programs in the Federal Government, 44


1 These comments were prepared by a task force of members of the Section of Taxation’s Standards of Tax Practice Committee. Principal responsibility was exercised by its chair, Rochelle L. Hodes. Substantive comments were received from its members, George W. Connelly, Jr., Steven M. Harris, Karen L. Hawkins, Steve R. Johnson and Leslie S. Shapiro. Substantial contributions were also made by Randolph J. May, Michael Asimow, Jeffrey Lubbers, and Hon. Ann Marshall Young of the Administrative Law Section; Jodi B. Levine and Daniel F. Solomon, Chair, NCALJ, of the Judicial Division; and Mary M. Devlin, Ellyn S. Rosen, and The Hon. Barbara K. Howe of the Standing Committee on Professional Discipline. The comments were reviewed by Michael B. Lang, as Committee Chair, and John S. Harper for the Tax Section’s Committee on Government Submissions.


Even without express statutory authority, agencies have inherent authority to establish rules of procedure, including rules governing those who practice before the agency. E.g., Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117, 120-22 (1926).


4 See generally id. § 10.1.

5 These statistics, provided by OPR from their internal sources, only represent action taken against attorneys during this period. Also, not all OPR cases are opened and closed in the same fiscal year. Thus, for example, many of the cases closed in FY 2005 were received by OPR in an earlier fiscal year. Therefore, these numbers do not
reflect the full caseload of OPR during this period.

6Only approximately 20 to 25 cases each year reach the stage of formal complaint assigned to an ALJ, and most of those are resolved prior to a hearing. That number includes cases against accountants and enrolled agents as well as cases against attorneys. In 2004, there were two attorneys who were suspended after a hearing.

7These exemplify “follow on” sanctions, i.e., OPR sanctions following state licensing sanctions or criminal proceedings. See 31 C.F.R. § 10.82. OPR gives the practitioner an opportunity to respond, and OPR is empowered to suspend the practitioner without further proceedings. The practitioner may demand that OPR file a complaint so that he or she may have a hearing; however, such demands are rarely, if ever, made.


9OPR perceives its disciplinary role as influencing the conduct of taxpayers by modifying the behavior of tax practitioners. The duties of practitioners under Cir. 230 are set out in 31 C.F.R. §§ 10.20 – 10.38.


11Historically, the bulk of discipline cases have involved practitioners’ personal compliance with the tax laws as when a practitioner fails to file accurate returns or fails to file returns at all. E.g., Sicignano, supra note 2; Ovrutsky v. Brady, 1989 WL 248571 (D. Md. 1989), rev’d in unpublished opinion, 925 F.2d 1457, 1991 WL 18156 (4th Cir. 1991), or “follow on” sanctions as when OPR suspends or disbars an attorney from practicing before the IRS after the attorney has been suspended or disbarred by his or her state authorities for non-tax violations, or when the practitioner has been the subject of criminal proceedings, e.g., Harary v. Blumenthal, 555 F.2d 1113 (2d Cir. 1977); Washburn v. Shapiro, 409 F. Supp. 3 (SD. Fla. 1976).

12See 31 C.F.R. § 10.53(a), (b).

1331 C.F.R. § 10.60.

14Id. § 10.61.

15Procedures preliminary to the hearing are set out in id. §§ 10.60-10.69.

1631 C.F.R. § 10.64.

17The Office of Personnel Management (“OPM”) provides ALJs to agencies upon request. 5 C.F.R. §930.208 (2001). Note that there is an issue regarding whether judges in OPR proceedings are formally acting as ALJs (even though they are ALJs in their home agency) and whether OPR proceedings are formally covered by the Administrative Procedure Act (“APA”). Pursuant to 5 U.S.C. § 554(a), the APA adjudication provisions are triggered only in the case of ‘adjudication required by statute to be determined on the record after opportunity for agency hearing.’ However, 31 U.S.C. § 330, the statute authorizing regulation of practice before the Treasury Department, contains no such requirement. Nevertheless, it appears that the current rules regarding the OPR disciplinary process have their roots in the APA. Therefore, we will look to the APA for guidance as we evaluate current OPR procedures relating to practitioner discipline and we will be referring to the judges in OPR disciplinary proceedings as ALJs.

18Under 31 C.F.R. § 10.70(a), the ALJ is appointed under the provisions of 5 U.S.C. § 3105. Rules governing the hearing and the ALJ’s decision are set out in 31 C.F.R. §§ 10.71-10.76. The Federal Rules of
Evidence “are not controlling” in disciplinary proceedings. However, the ALJ may “exclude evidence that is irrelevant, immaterial, or unduly repetitious.” *Id.* § 10.72(a).

19 31 C.F.R. §10.69(a)(2); see, e.g., Washburn, supra note 11, at 6.


21 This includes the power to grant or to deny continuances. *See, e.g.*, Alker v. Humphrey, 247 F.2d 22, 23 (D.C. Cir.) (per curiam), cert. denied, 355 U.S. 841 (1957).

22 31 C.F.R. § 10.70(b).

23 *Id.* § 10.76(b).

24 31 U.S.C. § 330 vests the power in the Secretary of the Treasury. In Treasury Order 107-04, the Secretary delegated the power to the General Counsel of the Treasury. In General Counsel Order No. 9, that power was further delegated to the IRS Chief Counsel. In Chief Counsel Notice CC-2004-015 (as renewed), the power was further delegated to the Special Counsel to the Senior Counsel, Office of Chief Counsel.

25 31 C.F.R. §§ 10.77, 10.78.

26 *Id.* § 10.77.

27 *Banister*, supra note 20, at 18; see 31 C.F.R. § 10.78.

28 *Banister*, supra note 20, at 18.

29 Occasionally -- and unsuccessfully -- practitioners have sought instead to recover via tort actions damages allegedly caused by Treasury’s disciplinary decision. *E.g.*, Washburn, supra note 11; Sicignano, supra note 2 .


31 Lopez, supra note 20, at 1288. The substantial evidence standard sometimes has been explained in formulations that are verbally different from the *Lopez* formulation but typically lead to the same outcome. *E.g.*, Owrutsky, supra note 11. (“In this context, ‘substantial evidence’ means such evidence as would be sufficient to justify, in the case of a jury trial, the refusal to direct a verdict on a particular fact sought to be proven.”).

32 *Lopez*, supra note 20, at 1288; see also Owrutsky, supra, note 11, 1991 WL 18156, at *2 (“our scope of review of the ALJ’s factual findings is limited and deference must be given to the factfinder’s inferences and credibility determinations”).

33 *E.g.*, Lopez, supra note 20, at 1288.

34 *Id.*; see also Poole, supra note 2, 1984 WL 742, at *2 (“The Court must uphold the agency’s reasonable interpretation of the statute it administers.”).

35 Treasury is part of the Executive Branch of the federal government under Article II of the United States Constitution. The federal district and circuit courts are part of the Article III Judicial Branch. By contrast, as discussed under Recommendation Two, the Tax Court is a legislative court under Article I.
See 5 U.S.C. § 706(2)(A), (E). In general, § 702 provides: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” Section 706 provides in relevant part: “The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or which is] unsupported by substantial evidence.”

The sources on which this description is generally based are identified in the Appendix.

See 5 U.S.C. § 3105. See also, 5 U.S.C. § 5372(a) (“For the purposes of this section, the term ‘administrative law judge’ means an administrative law judge appointed under section 3105.”)

The classification of "administrative law judge" is reserved by OPM for the specific class of appointments made under 5 U.S.C. § 3105 and applies to all agencies: “The title 'administrative law judge' is the official class title for an administrative law judge position. Each agency will use only this official class title for personnel, budget, and fiscal purposes.” 5 C.F.R. § 930.203b.

5 C.F.R. § 930.201 requires OPM to conduct competitive examinations for ALJ positions and defines an ALJ position as one in which any portion of the duties includes those which require the appointment of an ALJ under 5 U.S.C. § 3105. ALJs can only be appointed after certification by OPM: “An agency may make an appointment to an administrative law judge position only with the prior approval of OPM, except when it makes its appointment from a certificate of eligibles furnished by OPM.” 5 C.F.R. § 930.203a; Id. § 930.203a; see also 5 U.S.C. § 5372 (2000) (providing for pay for administrative law judges, also subject to OPM approval).


Federal Maritime Comm’n v. South Carolina State Ports Authority, 535 U.S. 743 (2002); see also, Rhode Island Dept. of Environmental Management v. United States, 304 F.3d 31 (1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

These regulatory matters include: agency civil penalty matters; air transportation safety; alien labor certification and attestations; antitrust; banking practices; child labor violations; civil fraud in federal programs; civil rights matters; commodity futures; certain types of contract cases; education grants; employee polygraph tests; environmental degradation; food and drug safety; grants administration; hazardous materials; housing violations; interstate and retail pricing of electricity, oil, and natural gas utilities; immigration law; international aviation; international trade; labor; Medicare; migrant farm labor; mine safety; minimum wage disputes; occupational workplace conditions; postal rates; Social Security Act benefits; standards of conduct in union elections; telecommunications licensing; unfair labor practices; whistleblower complaints involving aviation, nuclear, energy, environmental, securities and commercial trucking statutes; and worker compensation type claims.

See id.


Of course, the final agency decision is subject to review by Article III judges, but reviewing Article I and Article II actions is central to the constitutional purpose of Article III courts. Judicial review comes only after final agency decision. See 5 U.S.C. § 704.

Remarks of Stephen Whitlock, Deputy Director of OPR, at the Joint Fall 2004 CLE Meeting of the ABA Sections of Taxation and Real Property, Probate and Trust Law (Boston).

*Id.* See also 31 C.F.R. §§10.33, 10.35, 10.37 regarding Circular 230 opinion standards. Whether assumptions are “unreasonable” in the context of even unsophisticated tax transactions may require a refined judgment. For example, how can one decide if it is “unreasonable” to assume an asset is a capital asset rather than dealer property without some familiarity with the applicable legal standards? Nonetheless, most factual assumptions, including this category of assumptions, are likely to require less tax background than the legal analysis of the underlying tax shelter might require.

There had been some controversy as to whether OPR had jurisdiction over tax opinion writers. In October 2004, Congress confirmed that OPR has this jurisdiction. See *American Jobs Creation Act of 2004*, § 822(b), Pub. L. No. 108-357, 118 Stat. 1586 (“Jobs Act”). Revised regulations governing standards for tax opinions were promulgated in December 2004. See T.D. 9165, 2005-4 I.R.B. 357.

Supra, note 51.

31 C.F.R. § 10.71. However, the practitioner may request that the hearing be public and that the record of the proceeding “be made available for inspection by interested persons.” The ALJ may grant the request “where the parties stipulate in advance to protect from disclosure confidential tax information in accordance with all applicable statutes and regulations.” *Id.* § 10.71(b). Such requests are rarely made, although a request was made in the *Banister* case, supra note 20.

Remarks of Cono Namorato, supra note 10.

Section 4(c) of the Taxpayer Protection and Assistance Act of 2005, S. 832, would amend 31 U.S.C. § 330 to make public the pleadings, record, and hearing in OPR disciplinary cases, subject to protection of some information. S. 832 was referred to the Senate Finance Committee on April 18, 2005. Parallel legislation has not yet been introduced in the House of Representatives. Although this subject was not a focus of this report, the ABA Standing Committee on Professional Discipline notes that longstanding ABA policy calls for hearings on formal disciplinary charges to be open to the public after the filing and service of formal charges. Rule 16, *ABA Model Rules for Lawyer Disciplinary Enforcement*. See letter of The Hon. Barbara K. Howe to Dennis B. Drapkin, October 3, 2005.

See 31 C.F.R. §§ 10.80 & 10.90. The practitioner may petition for reinstatement under the conditions described in *id.* § 10.81. Until 2004, the sanctions that could be imposed, either by agreement or after default or contested formal proceedings, were a private letter of reprimand, censure, suspension from practice before the IRS, or disbarment from such practice. *See id.* § 10.50(a). All of these except a letter of reprimand are matters of public record. As a result of legislation enacted in October 2004, OPR now also has the ability to impose monetary penalties on the practitioner and, in some instances, on his or her firm, and the ability to seek injunctions to prevent further conduct violative of Circular 230. 31 U.S.C. 330(b) added by section 822 of the *Jobs Act*, supra note 53.

The ABA Standing Committee on Professional Discipline suggested adding a recommendation urging that OPR make referrals to state disciplinary agencies and continue reporting to the ABA’s National Lawyer...
Regulatory Data Bank in all cases of lawyer practitioners disciplined by the agency. See letter of The Hon. Barbara K. Howe to Dennis B. Drapkin, October 3, 2005.

60 A study of which states have public hearings in bar disciplinary matters was outside the scope of the task force and, therefore, we have no basis to evaluate whether the state experience is relevant to OPR hearings.