The Obligation to Report Tax-Related Misconduct

The ABA Section of Taxation’s May Meeting
Presented at the Grand Hyatt Washington, Washington, D.C.
Friday, May 10, 2019

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1 This outline was authored by Lawrence A. Sannicandro, Esq. The views herein are the author’s own and do not necessarily reflect the position of any of the panelists or the organizations with which they are affiliated.
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I. Introduction

The success of the U.S. tax system depends in large part upon each taxpayer voluntarily and accurately self-reporting his, her, or its federal tax liability. An equally important, yet often overlooked, aspect of voluntary tax compliance is that government employees, private professionals, and judicial officers must help regulate the individuals operating within the system. Ethics rules require government employees, private professionals, and judicial officers to report professional misconduct by attorneys, judges, certified public accountants, enrolled agents, tax return preparers, and other persons representing taxpayers in the U.S. This outline reminds government employees, private professionals, and judicial officers of their ethical obligations to report tax-related misconduct by their peers, adversaries, and superiors.

Section II of this outline discusses the general ethics rules that apply to lawyers, judicial officers and tax professionals regardless of whether they work in the private sector, for the Executive Branch, or for the judiciary. Section III of this outline explains how and when private sector practitioners should report tax-related misconduct by employees of each of the Internal Revenue Service (sometimes, “IRS”), the IRS Office of Chief Counsel, and the U.S. Department of Justice (“DOJ”). Section III of this outline also examines the internal procedures government employees follow to report suspected tax-related misconduct by their peers and private sector counterparts. Finally, Section IV of this outline discusses the ethical obligations of judicial officers to report misconduct and how individuals who are not judicial officers can report misconduct by judicial officers.

II. Standards Applicable to Lawyers, Judicial Officers, and Other Tax Professionals

A. Laws and Rules Establishing Ethical Standards

1. Source of Ethical Rules and Standards: The ethical rules and standards applicable to private practitioners, nonjudicial government employees, and judicial officers have several sources, including but not necessarily limited to:

a. The ABA Model Rules of Professional Conduct (‘’ABA Model Rules’’);


c. The ABA Model Code of Judicial Conduct (sometimes, “Code of Judicial Conduct”) or other relevant canons of judicial conduct;

d. Certain criminal statutes, see, e.g., 5 C.F.R. § 2635.902 (providing compilation of criminal statutes relevant to certain employees of the Executive Branch);

e. The Standards of Ethical Conduct for Employees of the Executive Branch, see 5 C.F.R. § 2635.101, et seq.;

f. The Office of Personnel Management Standards of Conduct, see 5 C.F.R. § 735.101, et seq., which relate to restrictions on: (i) gambling; (ii) “criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the
Government;” or (iii) teaching, lecturing, or writing for specific purposes;

g. Supplemental regulations applicable to employees of the DOJ, see 5 C.F.R. § 3801.101, et. seq., and 28 C.F.R. § 45.1, et seq.;


j. Financial disclosure requirements, see 5 C.F.R. § 2634.101, et seq.

2. **Administration of Government Ethics Rules:** As applied to government employees, the government ethics rules are administered within every federal agency by a so-called Designated Agency Ethics Official (“DAEO”), who is generally responsible for the agency’s ethics program. See DOJ, Justice Manual, § 1-4.020.

a. **Good Faith Reliance on DAEO Advice:** Some agencies, like the DOJ, provide that disciplinary action for violating an ethics rule will not be taken by the DOJ against an employee who has engaged in conduct in good faith reliance upon the advice of the DAEO for the DOJ or the DOJ’s Professional Responsibility Advisory Office, provided that the employee has made full disclosure of all relevant facts and circumstances and followed completely the advice given.

3. **Focus of this Outline:** This outline focuses on the ABA Model Rules, Circular 230, tax-specific laws and regulations, and internal policies applicable to employees of the DOJ and the IRS. This outline generally does not discuss criminal statutes, the Office of Personnel Management Standards of Conduct, or State-specific deviations from the ABA Model Rules.

a. **The ABA Model Rules:** The ABA Model Rules serve as model rules for the ethics rules governing lawyers of most jurisdictions.

b. **Circular 230:** Circular 230 provides the standard regulating attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, tax return preparers, and other persons representing taxpayers before the IRS. Thus, any discussion of the ethical obligation to report misconduct by private bar attorneys, government attorneys, tax professionals, and judicial officers must begin with a review of these standards.
B. **ABA Model Rule 8.3:**

1. **The Rule:** Rule 8.3 of the Model Rules, entitled “Reporting Professional Misconduct,” provides:

   (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

   (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

   (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

2. **Emphasis on Self-Regulation:** ABA Model Rule 8.3 reflects the principle that the legal profession is self-regulated. See Comment 1 to ABA Model Rule 8.3. This self-regulation applies from lawyer-to-lawyer, from lawyer-to-judge, and from judge-to-lawyer. Id.

3. **Rule of Confidentiality Paramount:** A member of the legal profession is not required to report judicial misconduct if doing so would violate ABA Model Rule 1.6 (relating to the duty of confidentiality). See Comment 2 to ABA Model Rule 8.3.

4. **Report Generally Required to be Made to Bar Disciplinary Agency:** Instances of professional misconduct “should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances.” See Comment 3 to ABA Model Rule 8.3.

C. **ABA Model Rule 8.4:**

1. **The Rule:** ABA Model Rule 8.4, entitled “Misconduct,” provides:

   It is professional misconduct for a lawyer to:

   (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

   (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

   (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

2. **When Lawyers Are Subject to Discipline:** Lawyers are subject to discipline when they violate or attempt to violate the ABA Model Rules, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. See Comment 1 to ABA Model Rule 8.4.

3. **Lawyers Held Professionally Accountable for Crimes of Moral Turpitude:** A lawyer is professionally answerable for crimes of “moral turpitude,” including but not limited to:
   a. Offenses involving fraud;
   b. Willful failure to file a tax return;
   c. Crimes involving violence;
   d. Crimes involving dishonesty;
   e. Crimes involving breach of trust; and
   f. Crimes involving a serious interference with the administration of justice. See Comment 2 to ABA Model Rule 8.4.

D. **Circular 230**

1. **Circular 230, § 10.50:** Section 10.50 of Circular 230, entitled “Sanctions,” provides:

   (a) **Authority to censure, suspend, or disbar.** The Secretary of the Treasury, or delegate, after notice and an opportunity for a proceeding, may censure, suspend, or
disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable (within the meaning of §10.51), fails to comply with any regulation in this part (under the prohibited conduct standards of §10.52), or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. Censure is a public reprimand.

2. Circular 230, § 10.53: Section 10.53 of Circular 230, entitled “Receipt of information concerning practitioner,” provides:

   (a) Officer or employee of the Internal Revenue Service. If an officer or employee of the Internal Revenue Service has reason to believe a practitioner has violated any provision of this part, the officer or employee will promptly make a written report of the suspected violation. The report will explain the facts and reasons upon which the officer’s or employee’s belief rests and must be submitted to the office(s) of the Internal Revenue Service responsible for administering or enforcing this part.

   (b) Other persons. Any person other than an officer or employee of the Internal Revenue Service having information of a violation of any provision of this part may make an oral or written report of the alleged violation to the office(s) of the Internal Revenue Service responsible for administering or enforcing this part or any officer or employee of the Internal Revenue Service. If the report is made to an officer or employee of the Internal Revenue Service, the officer or employee will make a written report of the suspected violation and submit the report to the office(s) of the Internal Revenue Service responsible for administering or enforcing this part.

   (c) Destruction of report. No report made under paragraph (a) or (b) of this section shall be maintained unless retention of the report is permissible under the applicable records control schedule as approved by the National Archives and Records Administration and designated in the Internal Revenue Manual. Reports must be destroyed as soon as permissible under the applicable records control schedule.

   (d) Effect on proceedings under subpart D. The destruction of any report will not bar any proceeding under subpart D of this part, but will preclude the use of a copy of the report in a proceeding under subpart D of this part.
(e) Effective/applicability date. This section is applicable beginning August 2, 2011.

E. **Governing Bodies**

1. **State Licensing Boards:** Each State and the District of Columbia has a disciplinary board, agency, or committee that enforces ethics rules for lawyers. The board, agency, or committee is usually an arm of the State’s supreme court and typically has authority to interpret ethics rules, investigate alleged violations of those rules, conduct evidentiary hearings, and administer attorney discipline.
   
   a. **List of Disciplinary Agencies:** The ABA maintains a directory of State disciplinary agencies. See ABA, Directory of State Disciplinary Agencies, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/directory_disciplinary_agencies_online.pdf (last visited Apr. 23, 2019).
   
   b. **Complementary Regulation by Government Agencies:** Certain government agencies also maintain separate offices or divisions that handle all matters related to employee or practitioner misconduct, discipline, and practice. Relevant here are the IRS’s Office of Professional Responsibility (“IRS-OPR”), the Treasury Inspector General for Tax Administration (again, “TIGTA”), the IRS’s Criminal Investigation Division (“CID”), the DOJ’s Office of Professional Responsibility (“DOJ-OPR”), and the DOJ’s Professional Misconduct Review Unit (sometimes, “PMRU”).

2. **The IRS-OPR:**
   
   
   b. **Scope of Authority:** The IRS-OPR administers the law and regulations governing the practice of tax professionals and other individuals who interact with the tax administration system on behalf of taxpayers, including, but not limited to, attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, tax return preparers who represent clients before the IRS, and appraisers who provide valuations contained in documents submitted to the IRS. Id. The IRS-OPR:
      
      i. Receives, reviews and investigates evidence of alleged misconduct by individuals covered by Circular 230;
      
      ii. Evaluates allegations to determine whether they evidence actions which constitute disreputable or incompetent conduct, or otherwise reflect violations of Circular 230;
iii. When warranted, proposes and negotiates a level of discipline appropriate with the misconduct;

iv. In the absence of a reprimand or a voluntary settlement, initiates disciplinary proceedings before an Administrative Law Judge (“ALJ”);

v. Initiates or responds to appeals of ALJ disciplinary decisions;

vi. Pursuant to Delegation Order 25-16 (Rev. 1), receives, processes, and investigates referrals of alleged misconduct under Rev. Proc. 81-38 and Rev. Proc. 2014-42 (or successor guidance), and makes final determinations of ineligibility of unenrolled tax return preparers to practice (in accordance with the applicable guidance);

vii. Serves as the Appellate Authority for enrollment appeals from the Return Preparer Office, pursuant to Delegation Orders 25-16 and 25-17;

viii. Interprets the Conference and Practice Requirements contained in 26 C.F.R. 601, Subpart E;

ix. Provides education and outreach regarding a tax professional’s obligations and duties as enumerated in Circular 230; and

x. Acts in an advisory capacity with respect to IRS oversight and compliance initiatives and programs for tax professionals.

3. **The TIGTA:**

a. **Generally:** The IRS Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685 (sometimes, “RRA”), established the TIGTA to provide independent oversight of IRS activities. I.R.M., pt. 11.51.1.1.1 (June 12, 2008). From a historical perspective, the TIGTA assumed most of the responsibilities of the IRS’s former Inspection Service. Id.

b. **Scope of Authority:** The TIGTA broadly focuses on all aspects of tax administration, including but not limited to conducting comprehensive performance and financial audits of IRS programs, operations, and activities. I.R.M., pt. 11.51.1.3.2.3 (June 12, 2008). In addition, the TIGTA (i) conducts investigations of IRS employees, and (ii) has sole jurisdiction and responsibility to enforce criminal laws as it pertains to IRS operations, including IRS employee misconduct and external attempts to corrupt tax administration. Id.

i. **Examples of TIGTA Investigations:** TIGTA investigations may concern alleged violations of federal criminal statutes.
or standards of ethical conduct. Examples of investigations include:

1) Attempts to interfere with the administration of Internal Revenue laws (threats, harassment and assaults against IRS personnel);
2) Bribery of public officials and witnesses;
3) Theft and embezzlement of government money or property;
4) Conspiracy to commit offense or defraud the United States;
5) False personation; and
6) Unauthorized inspection and/or disclosure of tax information. I.R.M., pt. 11.51.1.3.2.3 (June 12, 2008).

4. The CID: The CID investigates potential criminal violations of the Internal Revenue Code (“Code”), including those violations allegedly conducted by IRS employees. Where there are indications of substantive tax violations by an IRS employee, such as the preparation, filing, or assisting in the preparation or filing of false documents or returns, the TIGTA is to be notified immediately. I.R.M., pt. 9.5.3.2.2.2.1 (Feb. 9, 2005). The investigation into the alleged misconduct will be conducted jointly by the CID and the TIGTA.

5. The DOJ-OPR: The DOJ-OPR investigates allegations of misconduct involving DOJ attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice, as well as allegations of misconduct by DOJ law enforcement personnel when related to allegations of attorney misconduct within the jurisdiction of the DOJ-OPR. DOJ, Office of Professional Responsibility, available at https://www.justice.gov/opr (last visited Apr. 23, 2019). Additionally, the DOJ-OPR and the DOJ Office of the Inspector General (sometimes, “OIG”) share jurisdiction to investigate whistleblower retaliation allegations made by current and former employees of the Federal Bureau of Investigation (“FBI”) and applicants for employment with the FBI. Id.

6. The PMRU: Where the DOJ-OPR makes a finding of attorney professional misconduct, those findings are referred to the PMRU. DOJ, Justice Manual, § 1-4.320. The PMRU evaluates any findings of professional misconduct by the DOJ-OPR and, where appropriate, issues disciplinary decisions. The PMRU also authorizes referrals to the appropriate bar authority in those instances in which it and the DOJ-OPR agrees that a current or former DOJ attorney violated a rule of professional conduct.
III. Reporting Misconduct By and Against Government Employees

A. Guiding Principles for Government Employees

1. Basic Obligation of Public Service:

   a. Public Service is a Public Trust: Section 2635.101(a) of title 5 of the Code of Federal Regulations provides:

      Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.

   b. General Principles: Section 2635.101(b) of title 5 of the Code of Federal Regulations provides that the following general principles apply to every government employee:

      i. Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain;

      ii. Employees shall not hold financial interests that conflict with the conscientious performance of duty;

      iii. Employees shall not engage in financial transactions using nonpublic government information or allow the improper use of such information to further any private interest;

      iv. In general, an employee shall not solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee’s agency, or whose interests may be substantially affected by the performance or nonperformance of the employee’s duties;²

      v. Employees shall put forth honest effort in the performance of their duties;

      vi. Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the government;

² There are numerous exceptions to the general prohibition on solicitation or acceptance of gifts. See generally 5 C.F.R. § 2635.202; see also 5 C.F.R. § 2635.201 through 2635.304. This outline does not discuss the circumstances under which gifts are permitted.
vii. Employees shall not use public office for private gain;

viii. Employees shall act impartially and not give preferential treatment to any private organization or individual;

ix. Employees shall protect and conserve federal property and shall not use it for other than authorized activities;

x. Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official government duties and responsibilities;

xi. Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities;

xii. Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those – such as federal, State, or local taxes – that are imposed by law;

xiii. Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap; and

xiv. Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part.

Note: Whether particular circumstances create an appearance that the law or foregoing standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

c. Conflict of Interest Statutes: In addition to the standards of ethical conduct set forth in 5 C.F.R. § 2635.10, there are conflict of interest rules that prohibit certain conduct. These rules can be criminal statutes, see, e.g., 18 U.S.C. §§ 201, 203, 205, 208, and 209, or civil, see, e.g., 5 C.F.R. §§ 2635.402 (addressing disqualifying financial interests) and 2635.403 (addressing disqualifying financial interests).

2. The Importance of Maintaining Impartiality and Avoiding the Appearance of Loss of Impartiality: Section 2635.501 of title 5 of the Code of Federal Regulations provides that government employees should take appropriate steps to avoid an appearance of loss of impartiality in the performance of the employee’s official duties. Sections 2635.501 through 2635.503 of title 5 of the Code of Federal Regulations details the specific steps a government employee should take in furtherance of maintaining impartiality (and the appearance of impartiality).
3. **Related Statutes:** The following statutes may be implicated when dealing with allegations of misconduct against Government employees:

   a. The prohibition against solicitation or receipt of bribes, see 18 U.S.C. § 201(b);

   b. The prohibition against solicitation or receipt of illegal gratuities, see 18 U.S.C. § 201(c);

   c. The prohibition against seeking or receiving compensation for certain representational services before the Government, see 18 U.S.C. § 203;

   d. The prohibition against assisting in the prosecution of claims against the Government or acting as agent or attorney before the Government, see 18 U.S.C. § 205;

   e. The post-employment restrictions applicable to former employees, see 18 U.S.C. § 207;

   f. The prohibition on certain former agency officials' acceptance of compensation from a contractor, see 41 U.S.C. § 423(d);

   g. The prohibition against participating in matters affecting an employee's own financial interests or the financial interests of other specified persons or organizations, see 18 U.S.C. § 208;

   h. The actions required of certain agency officials when they contact, or are contacted by, offerors or bidders regarding non-Federal employment, see 41 U.S.C. § 423(c);

   i. The prohibition against receiving salary or any contribution to or supplementation of salary as compensation for Government service from a source other than the United States, see 18 U.S.C. § 209;

   j. The prohibition against gifts to superiors, see 5 U.S.C. § 7351;

   k. The prohibition against solicitation or receipt of gifts from specified prohibited sources, see 5 U.S.C. § 7353;

   l. The prohibition against fraudulent access and related activity in connection with computers, see (18 U.S.C. § 1030);

   m. The provisions governing receipt and disposition of foreign gifts and decorations, see 5 U.S.C. § 7342;

   n. The prohibitions against certain political activities, see 5 U.S.C. §§ 7321 through 7326 and 18 U.S.C. §§ 602, 603, 606 and 607;

   o. The prohibitions against disloyalty and striking, see 5 U.S.C. § 7311 and 18 U.S.C. § 1918;

   p. The general prohibition (18 U.S.C. § 219) against acting as the agent of a foreign principal required to register under the Foreign Agents Registration Act (22 U.S.C. §§ 611 through 621);
q. The prohibition against employment of a person convicted of participating in or promoting a riot or civil disorder, see 5 U.S.C. § 7313;

r. The prohibition against employment of an individual who habitually uses intoxicating beverages to excess, see 5 U.S.C. § 7352;

s. The prohibition against misuse of a Government vehicle, see 31 U.S.C. § 1344;

t. The prohibition against misuse of the franking privilege, see 18 U.S.C. § 1719;

u. The prohibition against fraud or false statements in a Government matter, see 18 U.S.C. § 1001;

v. The prohibition against concealing, mutilating or destroying a public record, see 18 U.S.C. § 2071;

w. The prohibition against counterfeiting or forging transportation requests, see 18 U.S.C. § 508;

x. The restrictions on disclosure of certain sensitive Government information under the Freedom of Information Act and the Privacy Act, see 5 U.S.C. §§ 552 and 552a;

y. The prohibitions against disclosure of classified information, see 18 U.S.C. § 798 and 50 U.S.C. § 783(a);

z. The prohibition against disclosure of proprietary information and certain other information of a confidential nature, see 18 U.S.C. § 1905;

aa. The prohibitions on disclosing and obtaining certain procurement information, see 41 U.S.C. § 423(a) and (b);

bb. The prohibition against unauthorized use of documents relating to claims from or by the Government, see 18 U.S.C. § 285;

c. The prohibition against certain personnel practices, see 5 U.S.C. § 2302;

d. The prohibition against interference with civil service examinations, see 18 U.S.C. § 1917;

ee. The restrictions on use of public funds for lobbying, see 18 U.S.C. § 1913;

ff. The prohibition against participation in the appointment or promotion of relatives, see 5 U.S.C. § 3110;

gg. The prohibition against solicitation or acceptance of anything of value to obtain public office for another, see 18 U.S.C. § 211;
hh. The prohibition against conspiracy to commit an offense against or to defraud the United States, see 18 U.S.C. § 371;

ii. The prohibition against embezzlement or conversion of Government money or property, see 18 U.S.C. § 641;

jj. The prohibition against failing to account for public money, see 18 U.S.C. § 643; and

kk. The prohibition against embezzlement of the money or property of another person that is in the possession of an employee by reason of his employment, see 18 U.S.C. § 654.

B. Reporting of Misconduct By IRS Employees

1. Impact on the Adverse Action Rules by RRA § 1203:

a. Adverse Actions Under Title 5: The basic rules governing disciplinary actions against federal civilian employees are set forth in 5 U.S.C. § 7501, et seq. (collectively “Adverse Action Rules”). In general, the Adverse Action Rules “permit discipline, up to and including termination of employment, to be imposed for such cause as will promote the efficiency of the federal service.” Notice 99-27, 1999-21 I.R.B. 4.

   i. Considerable Discretion Left to Agencies: “Agencies generally have discretion as to whether to impose disciplinary action and as to the form and severity of the action to be imposed, based upon the facts and circumstances of the situation. Most agency decisions concerning the imposition of discipline are subject to review by parties outside the agency, e.g., in arbitration or by an appeal to the Merit Systems Protection Board.” Id.

b. The Import of the RRA: Section 1203 of the IRS Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685 (again, “RRA”) significantly altered the application of the Adverse Action Rules as applied to employees of the IRS. Specifically, RRA § 1203 created a statutory provision requiring termination of IRS employees for certain types of specified misconduct.


2. RRA § 1203(a) – Termination for Certain Types of Misconduct:

a. The Statute: RRA § 1203(a) generally provides that the Commissioner of the IRS “shall terminate the employment of any employee of the Internal Revenue Service if there is a final
administrative or judicial determination that such employee committed any act or omission described in [RRA § 1203(b)] in the performance of the employee’s official duties. Such termination shall be a removal for cause on charges of misconduct.” RRA, § 1203(a), 112 Stat. at 720-721.

3. **RRA § 1203(b) – Misconduct for Which Termination is Appropriate:**
   a. **The Statute:** Per the statute, the acts or omissions which can give rise to termination under RRA § 1203(a) are:

      (1) willful failure to obtain the required approval signatures on documents authorizing the seizure of a taxpayer’s home, personal belongings, or business assets;

      (2) providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer representative;

      (3) with respect to a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, the violation of--

         (A) any right under the Constitution of the United States; or

         (B) any civil right established under--

            (i) title VI or VII of the Civil Rights Act of 1964;

            (ii) title IX of the Education Amendments of 1972;

            (iii) the Age Discrimination in Employment Act of 1967;

            (iv) the Age Discrimination Act of 1975;

            (v) section 501 or 504 of the Rehabilitation Act of 1973; or

            (vi) title I of the Americans with Disabilities Act of 1990;

      (4) falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative;

      (5) assault or battery on a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, but only if there is a criminal
conviction, or a final judgment by a court in a civil case, with respect to the assault or battery;

(6) violations of the Internal Revenue Code of 1986, Department of Treasury regulations, or policies of the Internal Revenue Service (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service;

(7) willful misuse of the provisions of section 6103 of the Internal Revenue Code of 1986 for the purpose of concealing information from a congressional inquiry;

(8) willful failure to file any return of tax required under the Internal Revenue Code of 1986 on or before the date prescribed therefor (including any extensions), unless such failure is due to reasonable cause and not to willful neglect;

(9) willful understatement of Federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect; and

(10) threatening to audit a taxpayer for the purpose of extracting personal gain or benefit.  [RRA § 1203(b), 112 Stat. at 721.]

b. Existing Personnel Law and Procedures Apply to RRA § 1203: In Notice 99-27, 199-21 I.R.B. 4, the IRS advised taxpayers that it generally will apply existing personnel law and procedures in interpreting RRA § 1203.

i. Procedural Due Process Safeguards: Under RRA § 1203, ostensibly to comport with principles of procedural due process, IRS employees who are subject to discipline under RRA § 1203 are provided with:

1) Advance written notice;

2) An opportunity for an oral and written reply; and

3) A right to appeal the substance of the charges. See Notice 99-27.

c. Defined Terms: Pursuant to the IRS’s adherence to existing personnel law and procedures in interpreting and applying RRA § 1203, the IRS applies the following definitions:

i. “Taxpayer” Defined: A “taxpayer” means “any person subject to any internal revenue law, and with respect to
whom an act or omission is undertaken because of that person's status as a taxpayer.” Notice 99-27; see also I.R.C. § 7701(a)(14).

ii. “Taxpayer Representative” Defined: A “taxpayer representative” means “any person who acts in a representative capacity to a taxpayer, and with respect to whom an act or omission is undertaken because of that person's status as a representative of a taxpayer.” Notice 99-27.

iii. “Person” Defined: A “person” includes “an individual, trust, estate, partnership, association, company or corporation.” Notice 99-27; see also I.R.C. § 7701(a)(1).

iv. “Employee” Defined: An “employee” means “an individual who is appointed in the civil service, engaged in the performance of a Federal function under authority of law, and subject to the supervision of an individual already appointed in the civil service while engaged in the performance of the duties of the position.” Notice 99-27.

1) Prior Conduct Excepted: As a consequence of the foregoing definition, and because RRA § 1203 is triggered only with respect to “any employee” of the IRS, the IRS takes the position that acts or omissions that occurred prior to the individual becoming an IRS employee are not within the scope of RRA § 1203. Notice 99-27.

v. “In the Performance of the Employee’s Official Duties” Defined: The phrase “in the performance of the employee’s official duties” include only those acts or omissions listed under RRA § 1203(b) that have a nexus to an employee’s position in the IRS. Id.

1) Establishing Nexus: “To establish nexus, a clear and direct relationship must be demonstrated between the act or omission of the employee that constitutes the grounds for the employee’s removal and either the employee’s ability to accomplish his or her duties satisfactorily or some other legitimate governmental interest promoting the ‘efficiency of the service,’ as required by 5 U.S.C. [§] 7513(a).” Notice 99-27 (citing Doe v. Hampton, 566 F.2d 265, 272 (D.C. Cir. 1977)).

d. Intent Required: Certain provisions of RRA § 1203 require a specific intent (e.g., willfulness). In Notice 99-27, the IRS takes the position that acts or omissions of IRS employees will be
subject to discipline under RRA § 1203 only if the acts are taken, or the omissions are made, with some degree of intent.

e. Deadly Sin #1 – Failure to Obtain Approvals in Connection with Seizure of Principal Residence, Personal Belongings, or Business Assets: RRA § 1203(a) and (b)(1) require removal of an IRS employee who willfully fails to obtain signatures on documents authorizing the seizure of a taxpayer’s home, personal belongings, or business assets. I.R.M., Ex. 5.10.2-1 (Aug. 10, 2018), specifies the approvals required before various property can be seized:

<table>
<thead>
<tr>
<th>Asset Type</th>
<th>Judicial Authorization</th>
<th>Area Director Authorization</th>
<th>Territory Manager Authorization</th>
<th>Group Manager Authorization</th>
<th>Director of Field Collection Authorization</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>REAL PROPERTY</strong></td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Principal Residence – Primary dwelling of the taxpayer, the taxpayer’s spouse, former spouse and/or the taxpayer’s minor children.</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Personal Residence – A primary residence of someone other than the taxpayer, the taxpayer’s spouse, former spouse and/or minor children.</td>
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<td></td>
<td>X</td>
</tr>
<tr>
<td>Real property used in the trade or business of an individual taxpayer.</td>
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<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Mobile Home determined to be real property.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>If used as principal residence, see principal residence approval level. If used as personal residence, see personal residence approval level. If used as a business asset, see real property used in the trade or business for approval level. If not in any of the categories mentioned, follow real property not listed in the exceptions above.</td>
</tr>
<tr>
<td>Real Property not listed in the exceptions above</td>
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<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td><strong>PERSONAL PROPERTY</strong></td>
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<tr>
<td>Contents of a principal residence. A principal residence is the primary dwelling of the taxpayer, the taxpayer’s spouse, former spouse and/or the taxpayer’s minor children.</td>
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<td>X</td>
</tr>
<tr>
<td>Contents of a personal residence. A personal residence is the primary residence of someone other than the taxpayer, the taxpayer’s spouse, former spouse and/or minor children.</td>
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<td>X</td>
</tr>
<tr>
<td>Tangible personal property used in the trade of business of an individual taxpayer.</td>
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<td></td>
<td>X</td>
</tr>
<tr>
<td>Asset Type</td>
<td>Judicial Authorization</td>
<td>Area Director Authorization</td>
<td>Territory Manager Authorization</td>
<td>Group Manager Approval</td>
<td>Director of Field Collection Approval</td>
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<tr>
<td>Perishable goods – Seizure and expedited sale of property under IRC 6336.</td>
<td></td>
<td></td>
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<td>X</td>
</tr>
<tr>
<td>Firearms of substantial value may be seized if they are included as a business asset (sports equipment outlet, hardware store, gun shop, etc.). Prior to the seizure the revenue officer must contact PALS who will contact Area Counsel and ATF.</td>
<td></td>
<td></td>
<td>X</td>
<td></td>
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<tr>
<td>Controlled substances or drug paraphernalia.</td>
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<td>X</td>
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<tr>
<td>Material considered obscene or pornographic – Area Counsel must be contacted before such material is seized.</td>
<td></td>
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<td>X</td>
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<tr>
<td>Criminal Enterprises (assets of narcotics related taxpayers in connection with jeopardy/termination assessments).</td>
<td></td>
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<td>X</td>
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<tr>
<td>Property with environmental considerations.</td>
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<td>X</td>
</tr>
<tr>
<td>Cleared Contractor Facility.</td>
<td></td>
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<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Mobile Home determined to be personal property.</td>
<td>If used as principal residence, see principal residence approval level. If used as personal residence, see personal residence approval level. If used as a business asset, see real property used in the trade or business for approval level. If not in any of the categories mentioned, follow personal property not listed in the exceptions above.</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Vehicles</td>
<td>Group manager unless the vehicle is used in the trade or business of an individual taxpayer, see tangible personal property used in the trade or business of an individual taxpayer.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personal Property not listed in the exceptions above</td>
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<td></td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

**f. Deadly Sin #2 – False Statement Under Oath:** RRA § 1203(a) and (b)(2) require removal of an IRS employee who makes a false statement under oath with respect to a material matter involving a taxpayer or taxpayer representative.

**i. The Broad Applicability of Being Under Oath:** IRS employees may be called to provide testimony or submit documents under oath in various contexts. Accordingly, RRA § 1203(a) and (b)(2) may be implicated in the civil, criminal, or administrative setting.
ii. **Materiality:** For a statement to be materially false, “the false statement must be one that would have a natural tendency to influence, or be capable of influencing, a decision on the matter involving a taxpayer or taxpayer representative.” Notice 99-27, 1999-21 I.R.B. 4.

iii. **Examples:**

1) **Example 1:** A Revenue Agent intentionally falsely states under oath that a taxpayer had shown him receipts to document a particular deduction when he had not seen any such receipts. Is this false statement within the coverage of RRA § 1203(b)(2)?

   a) **Answer:** Yes. The Revenue Agent’s false sworn statement that the taxpayer had shown him receipts to document a particular deduction would have a natural tendency to influence, or the capacity to influence, a decision on the matter involving the taxpayer or taxpayer representative. Thus, it is within the coverage of RRA § 1203(b)(2). See Notice 99-27, 1999-21 I.R.B. 4.

2) **Example 2:** A Revenue Officer is being questioned about his use of annual leave. The Revenue Officer provides a statement to the TIGTA, under oath, in which he intentionally falsely states that he was at the office all day each of the prior six Fridays. Is this false statement within the coverage of RRA § 1203(b)(2)?

   a) **Answer:** No. The Revenue Officer’s false statement to the TIGTA does not have a natural tendency to influence, or the capacity to influence, a decision on a matter involving a taxpayer or taxpayer representative. Therefore, it would not be within the coverage of RRA § 1203(b)(2). However, even though the IRS would not be required to terminate the employment of the Revenue Officer pursuant to RRA § 1203(b)(2), the IRS may discipline the Revenue Officer up to and including termination from Federal service. See Notice 99-27, 1999-21 I.R.B. 4.

**Deadly Sin #3 – Violation of the U.S. Constitution or certain specified laws:** RRA § 1203(a) and (b)(3) require removal of an
IRS employee who violates any right under the U.S. Constitution or certain specified legislation that affords additional protections to persons of certain classes. The constitutional rights most susceptible to being violated in a matter before the IRS are the Fourth, Fifth, and Sixth Amendments.

i. **The Fourth Amendment:** The Fourth Amendment reflects the principle that “each man’s home is his castle”, secure from unreasonable searches and seizures of property by the government. Additionally, the Fourth Amendment protects against arbitrary arrests, and is the basis of the law regarding search warrants, wiretaps, and other forms of surveillance, among other principles concerning criminal law and privacy law. The Fourth Amendment provides:

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ii. **The Fifth Amendment:** The Fifth Amendment creates a number of rights relevant to criminal and civil legal tax proceedings. In criminal cases, the Fifth Amendment guarantees the right to a grand jury, forbids “double jeopardy,” and protects against self-incrimination. In all proceedings in which a citizen is denied “life, liberty, or property,” the Fifth Amendment also requires that “due process of law” be part of any such proceeding. The Fifth Amendment provides:

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
iii. The Sixth Amendment: The Sixth Amendment guarantees the rights of criminal defendants, including the right to a public trial without unnecessary delay, the right to a lawyer, the right to an impartial jury, and the right to know his or her accusers and the nature of the charges and evidence against the defendant. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

h. Deadly Sin #4 – Falsifying or Destroying Documents to Conceal Mistakes by IRS Employees: RRA § 1203(a) and (b)(4) require removal of an IRS employee who falsifies or destroys documents to conceal mistakes by any IRS employee with respect to a matter involving a taxpayer or taxpayer representative.

i. Deadly Sin #5 – Assault or Battery on a Taxpayer: RRA § 1203(a) and (b)(5) require removal of an IRS employee who (a) commits an assault or battery on a taxpayer, taxpayer representative, or other employee of the IRS, and (b) there is a criminal conviction or a final judgment by a court in a civil case with respect to the assault or battery.

i. Requires a Criminal Conviction or Final Judgment by a Court in a Civil Case: Importantly, RRA § 1203(a) and (b)(5) require a criminal conviction or a final judgment by a court in a civil case with respect to the assault or battery.

ii. Must Relate to the IRS’s Involvement with the Taxpayer or Taxpayer Representative in an Official Capacity: RRA § 1203(b)(5) can broadly be read to impose liability on an IRS employee who commits any assault or battery on “a taxpayer” or “a taxpayer representative,” even if the assault or battery did not occur in connection with the IRS employee’s official duties. Thus, as noted, the IRS interprets RRA § 1203 as only applying where there is sufficient nexus between (a) the act or omission of the IRS employee that constitutes the grounds for the employee’s
removal, and (b) either the employee’s ability to accomplish his or her duties satisfactorily or some other legitimate governmental interest promoting the efficiency of the service as required by 5 U.S.C. § 7513(a). Notice 99-27.

iii. **Examples:** The following examples demonstrates the application of the nexus principle to RRA § 1203(b)(5) specifically and other provisions of RRA § 1203(b) more generally:

1) **Example 1:** While at home after duty hours, an IRS employee becomes involved in a physical argument with his neighbor, who pays taxes. The neighbor sues the employee for assault and battery and a court finds the employee liable for civil assault and battery. Is the agency mandated to terminate the employment of the employee pursuant to RRA § 1203?

   a) **Answer:** No. RRA § 1203 is triggered only with respect to acts or omissions committed in the performance of the employee's official duties. Under the facts presented here, the IRS employee's conduct was off-duty conduct having no connection to the IRS. Therefore, the civil judgment finding the employee liable for assault and battery on his neighbor would not fall under RRA § 1203(b)(5). Additionally, the assault and battery was not “on a taxpayer, taxpayer representative, or other employee of the IRS,” as is required by RRA § 1203(b)(5). See Notice 99-27.

2) **Example 2:** A taxpayer tells the Internal Revenue Agent who is auditing the taxpayer that the Agent is incompetent. While off duty, the Agent sees the taxpayer at a restaurant and tells him that he did not appreciate the comment. The Agent pushes the taxpayer. A court finds the Agent liable for civil assault and battery. Is the agency required to terminate the employment of the employee pursuant to RRA § 1203?

   a) **Answer:** Yes. Under the facts presented, the physical altercation, while occurring off-duty, resulted from the Agent's interaction as an IRS employee with the taxpayer. Thus,
the Agent's off duty conduct has a nexus, or a clear and direct relationship, to the efficiency of the service. Therefore, the civil judgment finding the employee liable for civil assault and battery would fall within the scope of RRA § 1203(b)(5). See Notice 99-27.

j. **Deadly Sin #6 – Violations of the Code, Treasury Regulations, or IRS Policies for the Purpose of Retaliation or Harassment:** RRA § 1203(a) and (b)(6) require removal of an IRS employee who violates the Code, Treasury Regulations, or IRS policies (including those reflected in the I.R.M.) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the IRS.

i. **Harassment Defined:** The term “harassment” is defined as using words, gestures, or actions that tend to alarm, disturb, or abuse another person. I.R.M., pt. 10.57.1.6 (Oct. 5, 2018).

ii. **Zero Tolerance Policy for Retaliation:** The IRS has a zero tolerance policy for retaliation.

iii. **Auditing a Taxpayer for Complaining is Retaliation:** An example of retaliation may involve auditing a taxpayer for complaining against an IRS employee.

k. **Deadly Sin #7 – Willful Misuse of the Provisions of I.R.C. § 6103:** RRA § 1203(a) and (b)(7) require removal of an IRS employee who willfully misuses I.R.C. § 6103 “for the purpose of concealing information from a congressional inquiry.”

l. **Deadly Sin #8 – Willful Failure to File Tax Returns Without Reasonable Cause:** RRA § 1203(a) and (b)(8) require removal of an IRS employee who willfully fails to file a tax return without reasonable cause.

i. **Mirrored Language and Principles of I.R.C. § 7203:** RRA § 1203(b)(8), which makes the willful failure to file a tax return grounds for termination, mirrors the language in I.R.C. § 7203. In applying RRA § 1203(b)(8), the IRS employs standards similar to those application to I.R.C. § 7203. Thus, to support an action under RRA § 1203(b)(8), the IRS must prove by a preponderance of the evidence that the IRS employee’s act or omission was a voluntary, intentional violation of a known legal duty. See Notice 99-27; see also [Cheek v. United States](https://www.unitedstatescourts.gov/public/law/cases/498-U.S.-192), 192 (1991).
ii. The TIGTA’s April 15, 2019 Report: The IRS may soon place renewed emphasis on ensuring that IRS employees discharge their obligation to timely file tax returns and pay taxes required by law. On April 15, 2019, the TIGTA released a report advising that IRS management does not always follow its own procedures for reviewing compliance with the tax laws, which results in inaccurate and inconsistent determinations. See TIGTA, Improvements Are Needed to Ensure That Employee Tax Compliance Cases Are Adjudicated Consistently, Ref. No. 2019-10-021 (Apr. 15, 2019). IRS management agreed with all of TIGTA’s recommendations and plans to take appropriate corrective action.

1) TIGTA’s Findings: TIGTA’s review of 1,250 closes cases found that in 21 cases, IRS management did not make a proper determination of willfulness, as required. TIGTA estimates that IRS management did not properly determine willfulness in 530 (42%) of the 1,250 cases closed in FY 2017.

iii. Tension in Degree of Intent: Reasonable Cause v. Willful: RRA § 1203(b)(8) requires that the employee act willfully and without reasonable cause. There is an inherent tension in the degrees of intent selected by Congress. Thus, the reasonable cause prong should help show that the IRS employee did not act willfully, but even if the IRS employee did not have reasonable cause unless the failure to file was willful.

iv. Addition to Tax for Non-Fraudulent Acts Should Be Insufficient to Support a Claim Under RRA § 1203(a) and (b)(8): Given the requirement of willfulness, an IRS employee who is assessed a plain vanilla addition to tax for failure to file under I.R.C. § 6651(a)(1) should not, without more, face removal for violating RRA § 1203(a) and (b)(8).

v. Addition to Tax for Fraudulent Acts May Support a Claim Under RRA § 1203(a) and (b)(8): Given the requirement of willfulness, an IRS employee who is assessed a fraudulent failure to file addition to tax under I.R.C. § 6651(f) may be subject to removal proceedings under RRA § 1203(a) and (b)(8).

m. Deadly Sin #9 – Willful Understatement of Federal Tax Liability: RRA § 1203(a) and (b)(9) require removal of an IRS employee who willfully understates his or her federal tax liability, unless
such understatement was due to reasonable cause and not to willful neglect.

i. Mirrored Language and Principles of I.R.C. § 7201: RRA § 1203(b)(9), which makes the willful understatement of tax liability grounds for termination, mirrors the language in I.R.C. § 7201. In applying RRA § 1203(b)(9), the IRS employs standards similar to those application to I.R.C. § 7201. Thus, to support an action under RRA § 1203(b)(9), the IRS must prove by a preponderance of the evidence that the IRS employee’s act or omission was a voluntary, intentional violation of a known legal duty. See Notice 99-27; see also Cheek, 498 U.S. at 192.

ii. The TIGTA’s April 15, 2019 Report: As noted, on April 15, 2019, the TIGTA released a report advising that management within the IRS does not always accurately classify and determine willful noncompliance or consistently adjudicate those cases. See TIGTA, Improvements Are Needed to Ensure That Employee Tax Compliance Cases Are Adjudicated Consistently, Ref. No. 2019-10-021 (Apr. 15, 2019). Also as noted, IRS management plans to take appropriate corrective action.

iii. Tension in Degree of Intent: Like RRA § 1203(b)(8), RRA § 1203(b)(9) also requires that the employee act willfully and without reasonable cause. Again, there is an inherent tension in the degrees of intent selected by Congress. Thus, the reasonable cause prong should help show that the IRS employee did not act willfully, but even if the IRS employee did not have reasonable cause unless the failure to file was willful.

n. Deadly Sin #10 – Threatening to Audit a Taxpayer to Extract Personal Gain: RRA § 1203(a) and (b)(10) require removal of an IRS employee who threatens to audit a taxpayer to extract personal gain.

i. Threat Defined: As used in RRA § 1203(b)(10), the term “threat” “refers to a statement by one person to another in which the speaker is expressing an intent to inflict an unwelcome condition or burden, in this case, an audit of tax returns.” James v. Tablerion, 363 F.3d 1352, 1361 (Fed. Cir. 2004).

ii. Objective Standard: The standard for determining whether a threat was actually made is whether a hypothetical reasonable person would perceive the statement to be a threat.
iii. **Case Law:** In *James v. Tablerion*, 363 F.3d 1352 (Fed. Cir. 2004), the Federal Circuit found that RRA § 1203(b)(10) was violated where an IRS employee threatened to report her ex-husband to the IRS after he refused to give-up his right to claim their child as a dependent. The Court found the presence of personal gain in the form of the exemption and a perceived threat in that the husband knew that his wife was an IRS employee.

4. **RRA § 1203(c) – Discretion Vested in Commissioner Alone:** RRA § 1203(c)(1) provides that the Commissioner of the IRS may decide to take a personnel action other than removal if certain mitigating factors are present. However, this decision may only be made by the Commissioner personally and is not subject to review in any administrative or judicial proceeding. RRA § 1203(c)(2), (3).

5. **RRA § 1204 – IRS Personnel May Not Be Evaluated on Tax Enforcement Results:** In the RRA, Congress went further than designating ten actions by IRS employees that result in termination from employment. In RRA § 1204(a), Congress specifies certain standards by which IRS employees should be evaluated, emphasizing the importance of “taxpayer service” and eliminating the relevance of tax enforcement results, when evaluating employees.

   a. **The Statute:** RRA § 1204, entitled “Basis for Evaluation of Internal Revenue Service Employees,” provides:

   (a) In General.--The Internal Revenue Service shall not use records of tax enforcement results--

   (1) to evaluate employees; or

   (2) to impose or suggest production quotas or goals with respect to such employees.

   (b) Taxpayer Service. The Internal Revenue Service shall use the fair and equitable treatment of taxpayers by employees as one of the standards for evaluating employee performance.

   (c) Certification. Each appropriate supervisor shall certify quarterly by letter to the Commissioner of Internal Revenue whether or not tax enforcement results are being used in a manner prohibited by subsection (a).

   *   *   *   *   *   *   *   *

   (e) Effective Date. This section shall apply to evaluations conducted on or after the date of the enactment of this Act.
b. **IRS Regulations:** In order to implement RRA § 1204, the IRS promulgated 26 C.F.R. § 801.1, et seq., through which the IRS provided rules to ensure that (i) the IRS has a balanced performance measurement system, and (ii) records of tax enforcement results (so-called “ROTERs”) are not used to improperly influence the handling of taxpayer cases.

c. **Tax Enforcement Measures Excluded From Evaluations:** Pursuant to 26 C.F.R. § 801.6(c), in evaluating employees, the IRS should consider only “outcome-neutral production and resource data that does not contain information regarding the tax enforcement result reached in any case that involves particular taxpayers.”

   i. **Examples of Quantity Measures:** Examples of quantity measures include, but are not limited to:

   1) Cases started;
   2) Cases closed;
   3) Work items completed;
   4) Customer education, assistance, and outreach efforts completed;
   5) Time per case;
   6) Direct examination time and out-of-office time;
   7) Cycle time;
   8) Number or percentage of overage cases;
   9) Inventory information;
   10) Toll-free level of access; and
   11) Talk time. See 26 C.F.R. § 801.6(c).

   ii. **Tax Enforcement Results Excluded:** As noted, 26 C.F.R. § 801.6(c) specifically excluded tax enforcement results from consideration in evaluating IRS employees. On the subject to tax enforcement results, the IRS recognizes:

   A tax enforcement result is the outcome produced by an IRS employee’s exercise of judgment in recommending or determining whether or how the IRS should pursue enforcement of the tax laws. Examples of tax enforcement results include a lien filed, a levy served, a seizure executed, the amount assessed, the amount collected, and a fraud referral. Examples of data that are not tax enforcement results include a quantity measure and data derived from a quality
review or from a review of an employee’s or a work unit’s work on a case, such as the number or percentage of cases in which correct examination adjustments were proposed or appropriate lien determinations were made. [26 C.F.R. § 801.6(d)(1).]

iii. Records of Tax Enforcement Results Not Considered: The IRS defines tax enforcement results as follows:

Records of tax enforcement results are data, statistics, compilations of information or other numerical or quantitative recordations of the tax enforcement results reached in one or more cases. Such records may be used for purposes such as forecasting, financial planning, resource management, and the formulation of case selection criteria. Records of tax enforcement results may be used to develop methodologies and algorithms for use in selecting tax returns to audit. Records of tax enforcement results do not include tax enforcement results of individual cases when used to determine whether an employee exercised appropriate judgment in pursuing enforcement of the tax laws based upon a review of the employee’s work on that individual case. [26 C.F.R. § 801.6(d)(2).]

6. How to Complain About Government Employees Through TIGTA

a. In General: Complaints about IRS employees can be submitted to TIGTA in-person, online, by telephone, by facsimile, by email, or by postal mail.

i. Confidentiality Preserved for all But Online Submissions: TIGTA keeps all complaints submitted by telephone, mail, or in-person confidential. See TIGTA, Report Fraud, Waste, & Abuse, available at https://www.treasury.gov/tigta/contact_report.shtml#theform (last updated Feb. 21, 2018). TIGTA does not guarantee the confidentiality of submissions made online, by email, or by facsimile. Id. (as to online submissions and submissions by email).

b. Telephone Complaints: Complaints about IRS employees can be submitted to TIGTA by telephone by calling (800) 366-4484.
c. **Postal Mail Complaints:** Complaints about IRS employees can be submitted to TIGTA by sending a written complaint to:

   Treasury Inspector General for Tax Administration Hotline
   P.O. Box 589
   Ben Franklin Station
   Washington, DC 20044-0589

d. **Online Complaints:** Complaints about IRS employees can be submitted to TIGTA using an online complaint form, available at https://www.treasury.gov/tigta/contact_report.shtml#theform.

e. **Facsimile Complaints:** Complaints about IRS employees can be submitted to TIGTA by sending a facsimile to (202) 927-7018.

f. **Email Complaints:** Complaints about IRS employees can be submitted to TIGTA by sending an email to Complaints@tigta.treas.gov.

7. **TIGTA Investigations of Alleged Misconduct:** In addition to typical investigative techniques, such as speaking to the complaining party and third-parties, the TIGTA will also interview the employee. The TIGTA provides details information to Treasury employees about what to expect in connection with an investigation under RRA § 1203 or otherwise. Per the TIGTA website, the following are the items of note:³

   a. **Right to Representation by NTEU:** Any bargaining unit employee who is the subject of an investigation, or who is being interviewed as a third party witness, and who reasonably believes that an interview with a TIGTA investigator may result in disciplinary action by IRS has the right, upon request, to representation by a person designated by the National Treasury Employees Union (“Union”).

      i. **Employee-Initiated Interviews:** If the interview is employee-initiated, there is no obligation to inform the employee of the right to Union representation before beginning the interview. If, however, at any time during the interview, the TIGTA investigator should reasonably believe that the information offered by the employee could result in discipline of the employee, the employee must then be advised of his or her right to Union representation.

      ii. **The Role of Union Representatives:** When the person being interviewed is accompanied by a Union representative, the representative’s role in both criminal

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³ Although reformatted, portions of the following discussion were taken directly from the TIGTA website. See TIGTA, Investigatory Interview Procedures, available at https://www.treasury.gov/tigta/oi_interview.shtml (last updated Nov. 19, 2018).
and non-criminal cases includes, but is not limited to, the following rights:

1) To clarify the questions;
2) To clarify the answers;
3) To assist the employee in providing favorable or extenuating facts;
4) To suggest other employees who have knowledge of relevant facts; and,
5) To advise the employee.

Note: A representative may not transform the interview into an adversarial contest.

b. **Manager Contacted:** Absent concerns about an individual’s personal safety or other specific investigative concerns, TIGTA investigators will contact an employee’s manager to schedule an interview with an employee. At the time of the contact, the investigator will advise the employee’s manager of the general subject of the interview, including whether the interview involves criminal or non-criminal matters, if known. The investigator will also generally advise the manager if the employee is the subject of an investigation or a third party witness.

c. **Employee’s Right to Confer:** If TIGTA investigators contact the employee directly to schedule the interview, the investigator will inform the employee that his or her manager will be contacted and that:

i. If the employee reasonably believes the interview may result in disciplinary action, the employee is entitled to representation during the interview by a person designated by the Union; and,

ii. The interview will be scheduled to allow the employee an opportunity to seek the counsel of a Union representative, provided that this does not unduly delay the interview.

d. **Request to Complete Form 8111:** The TIGTA will ask the employee to complete Form 8111. If the employee is being interviewed as the subject of the investigation and fails to bring an executed IRS Form 8111 to the interview, the TIGTA investigator will give the employee a copy of the form to execute or instruct the employee to retrieve the original Form 8111. The employee will execute Form 8111 and provide the original form to the TIGTA investigator prior to the interview. The employee is given a copy of the executed Form 8111.
e. **Employees as Third-Party Witnesses:** If the employee is being interviewed as a third-party witness, the TIGTA investigator will provide the employee with IRS Form 9142 before beginning the interview. When an employee is provided Form 9142, the employee is asked to acknowledge receipt and will be given a copy of the executed form.

f. **Requests to Delay Interview to Secure Union Representation:** If an employee appears for a scheduled interview without Union representation and reasonably believes, because the subject matter of the interview has changed, that disciplinary action may result, the employee may request a brief delay to secure Union representation.

   i. **Delays Permitted in Non-Criminal Settings:** Once it is determined that an investigation is not criminal in nature or once prosecution is declined, the Union and the employee may request a reasonable delay of the interview. The request should not be unreasonably denied.

   g. **Recesses Permitted:** If an employee is represented in an interview and the subject matter of the interview changes to matters over which the employee and the representative have not conferred, the employee or the representative may request a brief recess to confer on such issues.

   h. **Scope of Investigation to be Identified:** When scheduling an interview with an employee who is the subject of an investigation, the TIGTA investigator will inform the employee of the general nature of the matter and whether it concerns criminal or administrative misconduct. In cases solely involving administrative misconduct, if the employee refuses to respond to questions, the employee should be advised of the following:

   i. **Testimony Under Oath:** Pursuant to the I.R.M., when directed to do so by TIGTA or other competent Treasury or IRS officials, employees must testify or respond to questions in matters of official interest. Employees must give such testimony, or respond to questions, under oath when required or requested to do so. The failure to respond as required may result in discipline, including removal.

   j. **Potential Criminal Violations:**

      i. **Miranda Rights in Custodial Setting:** At the outset of a custodial interview regarding possible criminal conduct of an employee who is the subject of the investigation, the TIGTA investigator should give the employee a statement of Miranda rights contained on TIGTA Form 5228-G. If the employee waives his or her Miranda rights, the
employee is requested to indicate such waiver by signing the Form 5228, of which the employee will be given a copy.

ii. Other Rights in Non-Custodial Setting: When the subject of an investigation is being interviewed regarding possible criminal conduct and the interview is non-custodial, at the beginning of the interview the TIGTA investigator should give the employee a statement of rights contained in Form 5230.

iii. Kalkines Warnings: Kalkines warnings are typically given to make clear that the person being interviewed understands he or she has an obligation to answer questions truthfully. In an interview involving possible criminal conduct where prosecution has been declined by appropriate authority, at the beginning of the interview the TIGTA investigator should give the employee a statement of the Kalkines warning. When employees are given the Kalkines warning, they are also asked to sign (and given a copy of) IRS Form 8112, by which the employee acknowledges receipt of the Kalkines warning. The Kalkines warning given by the TIGTA contains the following language:

You are here to be asked questions pertaining to your employment with the Internal Revenue Service and the duties that you perform for the IRS. You have the option to remain silent, although you may be subject to removal from your employment by the Service if you fail to answer material and relevant questions relating to the performance of your duties as an employee. You are further advised that the answers you may give to the questions propounded to you at this interview, or any information or evidence which is gained by reason of your answers, may not be used against you in a criminal proceeding except that you may be subject to a criminal prosecution for any false answer that you may give.

k. Right to Record Interview: Either party may manually and/or mechanically record TIGTA interviews. The role of any person other than employees or their representatives in the recording of the interview is subject to applicable confidentiality provisions. The recording may not unreasonably delay the interview. An employee who chooses to record an interview must provide TIGTA personnel with advance notice of the decision to record
sufficient to permit the TIGTA investigator to arrange for TIGTA to record the interview.

1. **Questionnaires as Supplement to Interview:** If TIGTA investigators have determined to use a Statement Analysis Questionnaire in an investigation, employees are entitled to utilize all applicable provisions of these procedures, if appropriate, that apply to the subjects of investigations, including Miranda and Kalkines.

m. **Other Information Examined:** As prescribed by the Privacy Act, and only in non-criminal matters, TIGTA investigators should endeavor to collect information, where practicable, directly from the subject individual if the information may result in adverse determinations about an individual’s rights, benefits and privileges under federal programs.

n. **Ex Parte Communications Prohibited:** In interviews regarding possible criminal conduct when the employee interviewed is represented by counsel, and when the TIGTA investigator is on reasonable notice of such representation, the employee’s counsel has the authority to represent the employee during the interview. TIGTA investigators on reasonable notice of such representation should not initiate *ex parte* communication with the employee.

C. **The Role of the National Taxpayer Advocate**

1. **Reporting Systemic Misconduct by the National Taxpayer Advocate:** The National Taxpayer Advocate reports misconduct by the IRS on an annual basis through her National Report.

2. **How to Complain About Government Employees Through the Taxpayer Advocate Service**

a. **TAS Employees Familiar With RRA § 1203(b):** Employees of the Taxpayer Advocate Service (sometimes, “TAS”) are required to have a basic understanding of the conduct provisions of RRA § 1203 as outlined in IRS Document 11043, RRA98 § 1203 All Employee Guide. I.R.M., pt. 13.1.15.3(1) (Jan. 6, 2009).

b. **Reporting Alleged Violations of RRA § 1203:** TAS employees are responsible for reporting allegations involving potential RRA § 1203 violations to their manager for forwarding to the appropriate officials (discussed below).

   i. **Processing of Cases Within TAS and the Preparation of Form 12217:** The employee’s manager is required to complete Form 12217, § 1203 Allegation Referral Form, and determine if the case should be referred to TIGTA or management. I.R.M., pt. 13.1.15.3(3) (Jan. 6, 2009).
ii. **Referral of Complaints:** Except for Equal Employment Opportunity and tax-related issues, allegations relating to all Executives, Senior Level Managers (paybanded and supervisory GS-15s) and employees of the CID must be directly and immediately referred to TIGTA. \textit{Id.}

c. **Reporting Alleged Non-RRA § 1203 Violations:** TAS employees can also process complaints regarding inappropriate behavior.

i. **Complaints Against Employees:** Allegations relating to inappropriate conduct or handling by an IRS employee or IRS manager must be referred to the employee’s manager. I.R.M., pt. 13.1.15.4 (July 31, 2010).

ii. **Complaints Against Managers:** Allegations relating to the manager should be referred to that manager’s immediate manager. \textit{Id.}

iii. **Information Required:** Regardless of whom against the complaint is made, the TAS employee should have the following information:

1) The taxpayer’s name, address, telephone number and specifics of the alleged inappropriate behavior and or complaint; and

2) The name, identification number, function and location of the IRS employee.

D. **Reporting Misconduct By Chief Counsel Employees**

1. **In General:** The federal government conducts background investigations and re-investigations to ensure that prospective employees, current employees, or contract employees are suitable for the job and/or either eligible for a position of public trust or suitable to have access to national security information. I.R.M., pt. 30.4.1.5.1 (Feb. 1, 2007). The Chief Counsel Directive Manual (“CCDM”), which is part of the I.R.M., also provides detailed guidance as to the mechanisms that the IRS uses to root-out misconduct by Chief Counsel attorneys.\textsuperscript{4}

2. **Background Investigations:**

   a. **Background Investigations Generally:** A background investigation consists of:

   i. Checks of databases maintained by other agencies;

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\textsuperscript{4} The CCDM also contains various provisions for Chief Counsel employees to: (i) file complaints for alleged sexual harassment, see, e.g., I.R.M., pt. 30.4.4.4 (Oct. 13, 2005); (ii) file complaints internally for various alleged transgressions, see, e.g., I.R.M., pt. 30.4.1.11.3 (Feb. 1, 2007); and (iii) challenge reviews or determinations concerning within grade increases or reductions in grade, see, e.g., I.R.M., pts. 30.4.2.3.2 and 30.4.2.4.4.3 (June 12, 2006). This outline does not discuss those procedures.
ii. A personal subject interview of the employee/applicant; and

iii. Interviews, known as “source interviews” of individuals who know the employee/applicant. I.R.M., pt. 30.4.1.5.1 (Feb. 1, 2007).

b. **Purposes of Background Investigations:** The purpose of the background investigation is to determine information relating to the following topics:

   i. Character and reputation;
   
   ii. Honesty and integrity;
   
   iii. Use of illegal drugs and alcohol;
   
   iv. Negative involvement with law enforcement’
   
   v. Emotional or mental health as it affects the public trust and the safety of the workplace;
   
   vi. Untrustworthy or unreliable associations; and
   
   vii. Susceptibility to blackmail or coercion.

c. **Red Flags During Background Investigations:** Where there is an inquiry concerning a routine or a conduct matter in the pre- or post-background information investigation, the National Background Investigation Center will contact the Associate Chief Counsel for Finance and Management. I.R.M., pt. 30.4.1.5.1(4) (Feb. 1, 2007). The Associate Chief Counsel for Finance and Management then notifies the appropriate Associate Chief Counsel/Division Counsel, Deputy Associate Chief Counsel/Deputy Division Counsel, or other official, that their employee is under investigation and that inquiries are being made about the employee. Id.

d. **Consequences of Negative Background Investigations:** Where there is a negative background investigation report forwarded to the Associate Chief Counsel for Finance and Management, the appropriate manager and employee will be notified. I.R.M., pt. 30.4.1.5.1(5) (Feb. 1, 2007). The outcome of the investigation could result in discipline, up to and including removal, termination, or rescinding an offer. Id.

3. **Complaining Against On-boarded Chief Counsel Attorneys:**

   a. **Observing the Chain of Command:** When a professional has a complaint against a Chief Counsel attorney, it is generally advisable to first complain to the attorney’s direct supervisor. Anecdotally, managers within the Office of Chief Counsel tend to take very seriously allegations of misconduct against employees in
their charge. Those managers will typically investigate allegations and, as appropriate, escalate those complaints within the IRS.

i. **Send Accolades Too:** When a professional has an accolade for a Chief Counsel attorney, it is also suggested to send a letter to that employee’s direct manager. Anecdotally, that letter may become a part of the employee’s personnel file and may affect eligibility for promotions, eligibility for the Office of Chief Counsel Awards Program, and the like.

b. **TIGTA Investigations:** When there is an inquiry concerning a conduct matter for employees who are already on-board, the TIGTA will contact the Deputy Chief Counsel for Operations or, in his or her absence, his or her delegate. I.R.M., pt. 30.4.1.5.2 (Feb. 1, 2007). The Deputy Chief Counsel for Operations or his or her delegate will then determine which office(s) will serve as the point of contact for TIGTA. Id.

E. **Reporting of Misconduct By DOJ Employees**

1. **In General:** The Justice Manual sets forth internal procedures that apply to DOJ employees. As relevant here, the Justice Manual summarizes (a) the rules on government ethics most likely to be encountered by DOJ employees, and (b) applicable rules of professional misconduct. The Justice Manual also provides internal procedures DOJ employees must follow when presented with actual or alleged violations of the rules on government ethics and professional misconduct.

2. **Allegations of Misconduct by DOJ Employees Generally:**

   a. **Overview:** DOJ employees must report to the Office of Professional Responsibility (“DOJ-OPR”) allegations of professional misconduct by DOJ attorneys and related law enforcement misconduct. DOJ employees are also required to report allegations of criminal wrongdoing or administrative misconduct by DOJ employees to the Office of Inspector General (“OIG”). See DOJ, Justice Manual, § 1-4.200.

   b. **Allegations Are Not Conclusive:** The reporting of an allegation raises no inference that the allegation is well-founded. Rather, where a DOJ employee is uncertain as to whether or where an allegation should be reported, the employee should consult with his or her supervisor, supporting legal office, the DOJ-OPR, or the OIG. Id.

   c. **Cooperation in Misconduct Investigations:** DOJ employees must cooperate with the DOJ-OPR and the OIG in connection with misconduct investigations. See 28 C.F.R. § 45.13. This cooperation requires, among other things, that DOJ employees

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5 The Justice Manual was, until 2018, referred to as the “United States Attorneys’ Manual.”
respond truthfully to questions posed during the course of an investigation upon being informed that their statements will not be used to incriminate them in a criminal proceeding. DOJ, Justice Manual, § 1-4.200. DOJ employees who refuse to cooperate with the DOJ-OPR or the OIG misconduct investigations after having been informed that their statements will not be used to incriminate them in a criminal proceeding may be subject to formal discipline, including but not limited to removal. Id. DOJ employees must also cooperate and respond truthfully even if their statements can be used against them in connection with employment matters. Id.

d. Cooperation in Audits, Inspections, Etc.: OIG may also conduct interviews in connection with audits, inspections, evaluations, and reviews. Id. These interviews are considered to be, and are conducted as, voluntary interviews “because they do not typically involve allegations of criminal or administrative misconduct.” Id. Thus, DOJ employees generally must (i) cooperate with audits, inspections, evaluations, and reviews conducted by the OIG, and (ii) respond truthfully to questions posed during such matters. Id.

3. Reporting Attorney Professional Misconduct and Related Law Enforcement to the DOJ-OPR:

a. Allegations of Misconduct Against DOJ Attorneys: DOJ employees must report to their supervisor any evidence or non-frivolous allegation that a DOJ attorney engaged in professional misconduct. DOJ, Justice Manual, § 1-4.300.

i. When Misconduct Rises to the Level of Professional Misconduct: Misconduct constitutes professional misconduct when it relates to an attorney’s responsibility to investigate, litigate, or provide legal advice. Id.

ii. Supervisors Involved in the Alleged Misconduct: Where the supervisor was involved in the alleged misconduct, the supervisor must bring the evidence or non-frivolous allegation of misconduct to the attention of a higher-ranking official regardless of whether the supervisor believes the misconduct to be of a serious nature. Id.

b. Allegations of Misconduct Against Enforcement Personnel: DOJ employees must also report to their supervisor any evidence or non-frivolous allegations of misconduct against DOJ law enforcement personnel that relate to allegations of attorney misconduct within the jurisdiction of the DOJ-OPR. Id.

c. Discretion Granted to Supervisor: The supervisor must evaluate whether the allegation is non-frivolous and whether the misconduct is of a serious nature. Id. If the allegation is non-frivolous and the
misconduct is serious, the supervisor must report the allegation to the DOJ-OPR through appropriate channels. *Id.*

i. Reporting Misconduct to the DOJ-OPR: Allegations of misconduct may be reported to the DOJ-OPR as follows:

Office of Professional Responsibility
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 3266
Washington, DC 20530
Telephone: (202) 514-3365 (callers reporting allegations of misconduct should request to speak to the “duty attorney”)

d. Direct Channel to the DOJ-OPR Always Available: A DOJ employee may also report misconduct allegations directly to the DOJ-OPR. *Id.*

e. Allegations Concerning an AUSA: If the evidence or allegation concerns an Assistant United States Attorney (“AUSA”), the supervisor also shall notify the General Counsel’s Office for the Executive Office for United States Attorneys. *Id.*

f. Former Employees: The decision of whether to conduct an investigation of a former employee is made on a case-by-case basis. *Id.*

i. Declining to Investigate Former Employees: The DOJ-OPR must obtain approval from the Office of the Deputy Attorney General before declining to investigate or terminating an investigation on the ground that an employee has left the DOJ. *Id.*

4. Reporting Statements or Findings of Judicial Officers Concerning Attorney Professional Misconduct:

a. Judicial Statements Concerning Misconduct: DOJ attorneys must report to their supervisors any statement by a judge or magistrate indicating a belief that misconduct by a DOJ attorney has occurred, or taking under submission a claim of misconduct. DOJ, Justice Manual, § 1-4.310.

i. Complaints Immediately Escalated: Supervisors must report to the DOJ-OPR immediately any evidence or non-frivolous allegation of misconduct that is of a serious nature. *Id.*

b. Judicial Findings of Misconduct and Requests for Review: Whenever a judge or magistrate makes a finding of misconduct by a DOJ attorney or requests an inquiry by the DOJ into possible misconduct, the employee shall immediately report the finding or
request to the employee’s supervisor and to the DOJ-OPR, regardless of whether the matter is regarded as serious or is the subject of additional litigation. Id.

c. **Constant Monitoring:** After a matter has been reported to the DOJ-OPR, the employee or supervisor who reported the matter, or other appropriate supervisor, must apprise the DOJ-OPR of any significant developments, including relevant pleadings, hearings, or rulings by the court. Id.

5. **Adjudicating Findings of Attorney Professional Misconduct and the PMRU:**

a. **Findings of Attorney Professional Misconduct:** Where the DOJ-OPR has made findings of attorney professional misconduct, those findings are referred to the DOJ’s Professional Misconduct Review Unit (“PMRU”). DOJ, Justice Manual, § 1-4.320.

b. **The Role of the PMRU:** The PMRU evaluates any findings of professional misconduct by the DOJ-OPR and, where appropriate, issues fair, timely, and consistent disciplinary decisions. Id.

   i. **Authority of the PMRU:** The PMRU has authority to handle most disciplinary matters involving career DOJ attorneys. Id.

   ii. **Limits on the Authority of the PMRU:** The PMRU does not have authority to adjudicate disciplinary actions in misconduct cases pertaining to non-career attorneys (whether appointed by the President with Senate confirmation, or otherwise politically appointed). Id.

c. **Referrals to State Licensing Jurisdictions:**

   i. **Upon Intake:** The PMRU also authorizes referrals to the appropriate bar authority in those instances in which the DOJ-OPR concludes that a current or former DOJ attorney violated a rule of professional conduct during his or her tenure with the DOJ. Id.

   ii. **At the Conclusion of the Disciplinary Action:** At the conclusion of any final disciplinary action by the PMRU if there is a final determination that a subject attorney committed professional misconduct implicating a rule of professional conduct or when the PMRU Chief otherwise determines that a rule of professional conduct so requires, the PMRU Chief should direct the DOJ-OPR to refer the subject attorney to the appropriate bar authority or authorities. Id.

6. **Litigation Concerning Attorney Professional Misconduct Allegations:** A DOJ attorney who is found to have engaged in professional misconduct in
a particular case may not continue to represent the United States in that case unless approval is obtained from the responsible United States Attorney or Assistant Attorney General. DOJ, Justice Manual, § 1-4.330.

7. Reporting Fraud, Waste, Abuse, and Employee Misconduct to the OIG: Except with respect to attorney professional misconduct allegations, DOJ employees shall report to the OIG, to their appropriate supervisor, or to the appropriate internal affairs office any evidence or non-frivolous allegation of: (a) a violation of any law, rule, regulation, order; (b) waste, fraud, or abuse; or (c) criminal or serious administrative misconduct, or an investigation of allegations of criminal misconduct against any DOJ employee. DOJ, Justice Manual, § 1-4.400. Details on reporting such misconduct are available in the Justice Manual. See id.

F. DOJ Reporting of Misconduct By Non-DOJ Employees and Judicial Officers

1. Reporting Allegations of Professional Misconduct Concerning Non-DOJ Attorneys or Judges

a. Allegations of Misconduct by Non-DOJ Attorneys and Judicial Officers Coordinated Through the DOJ-OPR: Allegations that non-DOJ attorneys or judges have committed misconduct should be reported to the DOJ-OPR to determine whether to refer the allegation to appropriate disciplinary authorities. DOJ, Justice Manual, § 1-4.340. If the DOJ-OPR determines that a referral is appropriate, the allegation should be reported to the disciplinary authority. Id.

b. Allegations of Misconduct by Non-DOJ Attorneys and Judicial Officers: Individual DOJ employees are not authorized to refer non-DOJ attorneys or judicial officers to appropriate disciplinary authorities. Id.

IV. Reporting Misconduct By and Against Judicial Officers

A. Overview


2. Reporting of Misconduct is a Two-way Street: Judges should report misconduct by other judges and attorneys. Likewise, as discussed elsewhere in this outline, attorneys should report misconduct by a judge.

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6 There are multiple sources of ethical rules and standards that can apply to judicial officers. For example, United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges are generally subject to the “Code of Conduct for United States Judges.” Readers of this outline should consult the specific rules that apply to the jurisdiction in which they practice.
3. **Relevant Canons of Judicial Conduct:** In addition to Rules 2014 and 2.15 of the Code of Judicial Conduct, discussed below, the following ethical rules may also be implicated in connection with the obligation of a judge to report misconduct by another judge or an attorney (and vice versa):

   a. **Compliance with the Law:** Rule 1.1 of the Code of Judicial Conduct, entitled “Compliance with the Law,” provides: “A judge shall comply with the law, including the Code of Judicial Conduct.”

   b. **Avoiding the Appearance of Impropriety:** Rule 1.2 of the Code of Judicial Conduct, entitled “Promoting Confidence in the Judiciary,” provides: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

   c. **Avoiding the Abuse of the Prestige of Judicial Office:** Rule 1.3 of the Code of Judicial Conduct, entitled “Avoiding Abuse of the Prestige of Judicial Office,” provides: “A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”

   d. **Duty of Candor to Disciplinary Authorities:** Rule 2.16 of the Code of Judicial Conduct, entitled “Cooperation with Disciplinary Authorities,” provides:

      (A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

      (B) A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

   e. **Use of Nonpublic Information:** Rule 3.5 of the Code of Judicial Conduct, entitled “Use of Nonpublic Information,” provides: “A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge’s judicial duties.”

B. **Reporting of Professional Misconduct by Judicial Officers**

1. **In General:** The Code of Judicial Conduct makes clear that “[t]aking action to address known misconduct is a judge’s obligation.” Comment 1 to Rule 2.15 of the Code of Judicial Conduct.

2. **The Obligation to Report Misconduct Under Rule 2.15 of the Code of Judicial Conduct:** Rule 2.15 of the Code of Judicial Conduct, entitled “Responding to Judicial and Lawyer Misconduct,” provides:
(A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge’s honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

3. Knowledge of Actual Misconduct to be Reported to Appropriate Disciplinary Authorities: Rule 2.15(A) and (B) of the Code of Judicial Conduct imposes an obligation upon a judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Comment 1 to Rule 2.15 of the Code of Judicial Conduct.

a. Ignoring Misconduct Undermines the Integrity of the Legal System: The Comments to the Code of Judicial Conduct instruct that: “[i]growing or denying known misconduct among one’s judicial colleagues or members of the legal profession undermines a judge’s responsibility to participate in efforts to ensure public respect for the justice system.” Id.

4. Knowledge of Substantial Likelihood of Misconduct to be Acted Upon: Rule 2.15(C) and (D) also impose an obligation upon a judge to report to the appropriate disciplinary authority information about a substantial likelihood that another judge or lawyer may have committed misconduct. Comment 2 to Rule 2.15 of the Code of Judicial Conduct.

a. Appropriate Action Upon Knowledge of Substantial Likelihood of Misconduct by Judges: Appropriate action to be taken if a judge has knowledge of a substantial likelihood of misconduct may include, but is not limited to:

i. Communicating directly with the judge who may have violated the Code of Judicial Conduct;

ii. Communicating with a supervising judge about the judge who may have violated the Code of Judicial Conduct; or
iii. Reporting the suspected violation to the appropriate authority or other agency or body. \textit{Id}.

b. Appropriate Action Upon Knowledge of Substantial Likelihood of Misconduct by Attorneys: Similarly, appropriate actions to be taken in response to information indicating that a lawyer has committed a violation of the ABA Model Rules may include but are not limited to:

i. Communicating directly with the lawyer who may have committed the violation; or

ii. Reporting the suspected violation to the appropriate authority or other agency or body. \textit{Id}.

5. Reporting Judicial and Lawyer Disability and Impairment: Rule 2.14 of the Code of Judicial Conduct, entitled “Disability and Impairment,” provides: “A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.” Thus, judges have an ethical obligation to also report other judges or attorneys who are impaired by conditions such as drug use, alcohol abuse, or other emotional or physical conditions.

6. Suspicions of Criminal Activity: It is not uncommon for judges in civil tax proceedings to learn of potential criminal violations of the law (either related to tax or otherwise). The Code of Judicial Conduct does not discuss whether judges must report, may report, or shall not report such suspicions of criminal activity.

a. Tensions Between Rule 3.5 of the Code of Judicial Conduct and Acting with Integrity: There is an arguable tension between Rule 3.5 of the Code of Judicial Conduct, which generally prevents judges from making use of nonpublic information for any purpose unrelated to the judge’s judicial duties, and a judge’s duty to act with integrity. Arguably, a judge has considerable discretion as to whether to report suspicions of criminal activity because such reporting tends to support that the judge is acting with integrity and impartiality. However, it is advisable for a federal judge to consult the Committee on the Code of Conduct for an advisory opinion by calling or writing the General Counsel for the Committee as follows:

Chair, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544
State judges are advised to consult the State-equivalent of the Committee on the Code of Conduct.

C. **Tax Court-Specific Rules Designed to Further the ABA Model Rules**

1. **In General:** The United States Tax Court (“Tax Court”) has adopted certain rules (“Tax Court Rules”) designed to prevent and/or address instances of professional misconduct by employees or to otherwise preserve the integrity of the judiciary. Relevant here are rules that:

   a. Limit conflicts of interest in proceedings before the Tax Court, see Tax Court Rule 24(g);

   b. Establish a code of conduct governing professionals who practice before the Tax Court, see Tax Court Rule 201; and

   c. Authorize the Court to discipline practitioners who are convicted of crimes of moral turpitude or other conduct unbecoming a member of the Tax Court bar, see Tax Court Rule 202.

2. **Tax Court Rule 24(g):**

   a. **The Rule:** Tax Court Rule 24(g), entitled “Conflicts of Interest,” provides strict rules concerning conflicts of interests. The rule provides:

   If any counsel of record (1) was involved in planning or promoting a transaction or operating an entity that is connected to any issue in a case, (2) represents more than one person with differing interests with respect to any issue in a case, or (3) is a potential witness in a case, then such counsel must either secure the informed consent of the client (but only as to items (1) and (2)); withdraw from the case; or take whatever other steps are necessary to obviate a conflict of interest or other violation of the ABA Model Rules of Professional Conduct, and particularly rules 1.7, 1.8, and 3.7 thereof. The Court may inquire into the circumstances of counsel’s employment in order to deter such violations. See [Tax Court] Rule 201.

   Thus, Tax Court Rule 24(g) aims to prevent the following two types of conflicts from infecting Tax Court proceedings.

   b. **Promoters and Operators of Transaction or Entity or Conflicts of Interest:** Pursuant to Tax Court Rule 24(g), where any counsel of record (1) was involved in planning or promoting a transaction or operating an entity that is connected to any issue in a case, or (2) represents more than one person with differing interests with respect to any issue in a case, then that attorney must secure the
informed consent of the client and take whatever steps are necessary to avoid violating the ABA Model Rules.

c. **Lawyer-as-Witness Rule:** Pursuant to Tax Court Rule 24(g), where any counsel of record is a potential witness in a case, then that counsel must take any steps to obviate the conflict as are required to avoid a violation of the ABA Model Rules (e.g., stipulate to testimony, secure co-counsel, or withdraw as counsel).

3. **Tax Court Rule 201:**
   a. **The Rule:** Tax Court Rule 201, entitled “Conduct of Practice Before the Court,” provides:
   
   (a) General: Practitioners before the Court shall carry on their practice in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association.

   (b) Statement of Employment: The Court may require any practitioner before it to furnish a statement, under oath, of the terms and circumstances of his or her employment in any case.

4. **Tax Court Rule 202:**
   a. **Generally:** Tax Court Rule 202, entitled “Disciplinary Matters,” authorizes the Court to discipline a practitioner as a result of:

   i. Conviction in any federal or state court of any felony or of any lesser crime involving false swearing, misrepresentation, fraud, criminal violation of any provision of the Internal Revenue Code, bribery, extortion, misappropriation, theft, or moral turpitude;

   ii. Imposition of discipline by any other court of whose bar an attorney is a member, or an attorney’s disbarment or suspension by consent or resignation from the bar of such court while an investigation into allegations of misconduct is pending;

   iii. Conduct with respect to the Court which violates the letter and spirit of the ABA Model Rules, the Tax Court Rules, or orders or other instructions of the Court; or

   iv. Any other conduct unbecoming a member of the Bar of the Court.

b. **Affirmative Obligation to Report:** A member of the Tax Court Bar who has been convicted of any felony or of any lesser crime as defined in Tax Court Rule 201(a)(1), who has been disciplined as described in Tax Court Rule 201(a)(2), or who has been disbarred or suspended from practice before an agency of the United States
Government exercising professional disciplinary jurisdiction, is required to inform the Chair of the Tax Court’s Committee on Admissions, Ethics, and Discipline of such action in writing no later than 30 days after entry of the judgment of conviction or order of discipline.

5. **The Tax Court Disciplinary Committee:** The Tax Court has a disciplinary committee that resolves disciplinary matters under Tax Court Rule 202 and otherwise.

6. **Referral of Cases From the Tax Court to the IRS-OPR:** Where a Tax Court judge suspects professional misconduct by a Chief Counsel attorney, the Judge may refer that matter directly to the IRS-OPR.

### D. Rules of Judicial Conduct and Disability

1. **The Judicial Conduct and Disability Act:** The Judicial Conduct and Disability Act, 28 U.S.C. § 351, et seq., establishes a process by which any person can file a complaint alleging that a federal judge has engaged in “conduct prejudicial to the effective and expeditious administration of the business of the court” or has become, by reason of a mental or physical disability, “unable to discharge all the duties” of the judicial office.


3. **Effective Date:** The Tax Court’s Rules for Judicial Conduct and Disability are effective June 15, 2016. Id.

4. **Application of Rules:** A rule under the Tax Court’s Rules for Judicial Conduct and Disability will not apply if the Chief Judge of the Tax Court, a special committee, or the Judicial Disability and Conduct Council expressly finds that exceptional circumstances render the application of that rule manifestly unjust or contrary to the purpose of the Judicial Conduct and Disability Act. See Judicial Conduct Rule 2(b).

5. **Oversight in the Judicial Conduct and Disability Council:** The Judicial Conduct and Disability Council performs within the Tax Court the functions performed by circuit judicial councils under 28 U.S.C. §§ 354(b) through 360.

   a. **Members of the Judicial Conduct and Disability Council:** The Judicial Conduct and Disability Council has seven members determined as follows:

      i. The two longest-serving active judges;

      ii. The two judges who have most recently attained two years of judicial service; and
iii. The three judges who have most recently become senior judges. Judicial Conduct Rule 17.1(a)

b. Term: Members of the Judicial Conduct and Disability Council shall serve for terms of three years. Judicial Conduct Rule 17.1(b).


7. Misconduct Defined: The Judicial Conduct Rules draw a distinction between cognizable misconduct and all other types of misconduct.

a. Cognizable Misconduct Includes: Under the Judicial Conduct Rules, cognizable misconduct includes:

i. Using the judge’s office to obtain special treatment for friends or relatives;

ii. Accepting bribes, gifts, or other personal favors related to the judicial office;

iii. Having improper discussions with parties or counsel for one side in a case;

iv. Treating litigants, attorneys, or others in a demonstrably egregious and hostile manner;

v. Engaging in partisan political activity or making inappropriately partisan statements;

vi. Soliciting funds for organizations;

vii. Retaliating against complainants, witnesses, or others for their participation in this complaint process;

viii. Refusing, without good cause shown, to cooperate in the investigation of a complaint under these Rules;

ix. Violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure; or

x. Conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the Tax Court, including a substantial and widespread lowering of public confidence in the Tax Court among reasonable people. Judicial Conduct Rule 3(i)(1), (2).

b. Cognizable Misconduct Does Not Include: Under the Judicial Conduct Rules, cognizable misconduct does not include:

i. An allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge’s ruling, including a
failure to recuse, without more, is merits-related. If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it attacks the merits.

ii. An allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases. Judicial Conduct Rule 3(i)(3).

8. **Filing a Complaint:** A complainant may initiate a complaint of judicial misconduct or disability by filing with the Court a complaint. See Judicial Conduct Rule 6(a). A complaint form is attached as an appendix to the Judicial Conduct Rules. See Appendix A to the Judicial Conduct Rules. Alternatively, the Chief Judge may conduct an inquiry when the Chief Judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability. See Judicial Conduct Rule 5(a).

a. **Contents of Complaint:** A complaint must be legible and must include:

i. A brief statement of the facts, including: what happened; when and where the relevant events happened; any information that would help an investigator check the facts; and for an allegation of disability, any additional facts that form the basis of that allegation; and

ii. The complainants address and signature. In addition, the truth of the statements made in the complaint must be verified in writing under penalty of perjury. See Judicial Conduct Rule 6.

b. **Number of Copies:** The complainant must provide one original and two conformed copies of the complaint. Each copy should be in an envelope marked “Complaint of Misconduct” or “Complaint of Disability.” The envelope must not show the name of any subject judge. See Judicial Conduct Rule 6(e).

c. **Where to File:** A complaint must be filed with the Clerk of the Court, United States Tax Court, 400 Second Street, N.W., Washington, D.C. 20217. Judicial Conduct Rule 7.

d. **Docket Number Assigned:** Upon receiving a complaint against a subject judge, the Clerk of the Court must open a file, assign a docket number according to a uniform numbering system adopted
by the Court, and acknowledge the complaint’s receipt. See Judicial Conduct Rule 8(a).

e. Copies Distributed: The Clerk of the Court retains the original complaint. See Judicial Conduct Rule 8(b). One copy is sent to the Chief Judge and one copy is sent to the subject judge. Id.

f. Time for Filing Complaint: A complaint may be filed or identified at any time. See Judicial Conduct Rule 9. A complaint may be dismissed if the untimeliness of the complaint makes an investigation impracticable. Id.

9. Complaint Reviewed by Chief Judge for Preliminary Determination: When a complaint is filed by the Chief Judge or is filed, the Chief Judge must review it unless the Chief Judge is disqualified pursuant to Judicial Conduct Rule 25. After reviewing a complaint, the Chief Judge must determine whether it should be:

   a. Dismissed;
   
   b. Concluded on the ground that voluntary correcting action has been taken;
   
   c. Concluded because intervening events have made an action on the complaint no longer necessary; or
   
   d. Referred to a special committee.

   Note: For this purpose, the Chief Judge may make a limited inquiry by, among other things, communicating with the complainant, the subject judge, and any others who may have knowledge of the matter. See Judicial Conduct Rule 11(b).

10. Petition for Review: After the Chief Judge issues an order under Judicial Conduct Rule 11(c), (d), or (e), the complainant or the subject judge may petition the Judicial Conduct and Disability Council to review the order. Judicial Conduct Rule 18. The petition for review must be filed within 42 days after the date of the Chief Judges order. Id.

11. Appointment of Special Committee: If some or all of a complaint is not dismissed or concluded, the Chief Judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the Judicial Conduct and Disability Council. See Judicial Conduct Rule 11(f). The special committee must consist of the Chief Judge and one or more additional judges of the Tax Court in active or senior status.

   a. Notice Requirements Imposed on Chief Judge: Various notice requirements are imposed on the Chief Judge. See generally Judicial Conduct Rule 11(g). This outline does not discuss the notice required to be given.
12. **Investigatory Powers in Special Committee:** The Special Committee has investigatory powers, and the extent and method of its investigation depends upon the allegations of the complaint and the Chief Judge’s preliminary determination. See Judicial Conduct Rule 13(a). Experts may be consulted. Id.

   a. **Subpoena Powers:** The Chief Judge may delegate to the special committee authority to exercise subpoena powers. See Judicial Conduct Rule 13(d). The Judicial Conduct and Disability Council or the special committee may also institute contempt proceedings under 28 U.S.C. § 332(d). Id.

   b. **Criminal Conduct:** If the special committee’s investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to avoid compromising any criminal investigation. See Judicial Conduct Rule 13(b).

13. **Hearings:** The special committee may hold hearings to take testimony, receive evidence, and/or hear argument. See Judicial Conduct Rule 14(a). The subject judge has the right to counsel. See Judicial Conduct Rule 14(c). The rules of evidence do not apply to hearings. See Judicial Conduct Rule 13(f).

14. **Special Committee Report:** The special committee must file with the Judicial Conduct and Disability Council a comprehensive report of its investigation, including findings and recommendations for council action. See Judicial Conduct Rule 17. The report must be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of special committee members, and the record of any hearings held. Id. The special committee’s report is then sent to the Committee on Judicial Conduct and Disability. Id.

15. **Action by the Judicial Conduct and Disability Council:**

   a. **Discretionary Actions:** The Judicial Conduct and Disability Council may:
      
      i. Dismiss the complaint;
      
      ii. Conclude the proceeding because the appropriate correction action has been taken or intervening events have made the proceeding unnecessary;
      
      iii. Refer the complaint to the Judicial Conference with the recommendation of the Judicial Conduct and Disability Council;
      
      iv. Take remedial action to ensure the effective and expeditious administration of the business of the Tax Court; or

b. Mandatory Actions: The Judicial Conduct and Disability Council must refer a complaint to the Judicial Conference if:

i. By majority vote, the Judicial Conduct and Disability Council finds that a judge has engaged in conduct that should result in removal under I.R.C. § 7443(f) (relating to inefficiency, neglect of duty, or malfeasance in office, but for no other cause); or

ii. In the interest of justice, the complaint is not amenable to resolution by the Judicial Conduct and Disability Council. Judicial Conduct Rule 20(b)(2).

16. Action by the Committee on Judicial Conduct and Disability: The Committee on Judicial Conduct and Disability reviews for errors of law, clear error of fact, or abuse of discretion the recommendation by the Judge Conduct and Disability Council. Judicial Conduct Rule 21(a). The Judicial Conference may, in its sole discretion, review any such decision by the Committee on Judicial Conduct and Disability, but neither a complainant or a subject judge has a right to this review. Id. The review of petitions by the Committee on Judicial Conduct and Disability is ordinarily final. Id.