

FROM THE CHAIR

by Kenneth W. Gideon, Washington, DC



KENNETH W. GIDEON

CIRCULAR 230

The long awaited Circular 230 regulations were issued December 17, 2004, and will become effective in June 2005. Given the importance of these regulations to our members, they were the focus of a number of programs at our January meeting, including an address by Cono Namorato, Director of the IRS Office of Professional Responsibility, Saturday, January 22, 2005, as well as the subject of a live teleconference on February 9, 2005, featuring Eric Solomon, Deputy Assistant Secretary for Regulatory Affairs and Acting Deputy Assistant Secretary for Tax Policy at Treasury, Donald Korb, Chief Counsel at IRS, and Ron Wiener, Wolf, Block, Schorr & Solis-Cohen, LLP, Philadelphia, PA. The Tax Section has filed extensive comments on the rules in proposed form, which are available on the Section's website at www.abanet.org/tax/pub-policy.

Covered opinions and prominent disclosure. The new rules in section 10.35(b)(2) provide that "covered opinions" must comply with four basic requirements: (1) the facts must be identified and ascertained and unreasonable factual assumptions or representations must be avoided, (2)

the opinion must relate the law to the facts, (3) the opinion must consider all significant tax issues and reach a "more likely than not" conclusion as to each such issue, and (4) must reach an overall conclusion as to whether the Federal tax treatment of the transaction is the proper treatment. There are, however, significant exceptions from "covered opinions" where the practitioner "prominently discloses" that the advice was not intended or written by the practitioner to be used and cannot be used by the taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer. See section 10.35(b)(4) concerning "reliance opinions," section 10.35(b)(5)(ii) concerning "marketed opinions," and section 10.35(c)(3)(v) concerning "limited scope opinions."

New section 10.37. There are, however, significant limitations on the scope of the "prominent disclosure" exceptions: advice on transactions described in section 10.35(b)(2)(i)(A) and (B) (listed transactions and transactions with "the principal purpose" of tax avoidance or evasion), no matter how informal, cannot utilize the "prominent disclosure" exception. In addition, new section 10.37 provides that a practitioner must not give written advice (including electronic communications) concerning any Federal tax issue that "unreasonably" relies on factual or legal assumptions or on unreasonable assumptions, representations or statements or fails to consider "all relevant facts that the practitioner knows or should know." The January meeting provided a timely forum for discussion of how sections 10.35 and 10.37 are expected to interact and to be applied in practice.

Other changes. A new rule, section 10.39, has been proposed for tax exempt bond opinions. Section 10.38 (concerning the advisory committee) has been modified to clarify that the committee may not make recommendations about actual practitioner cases

or have access to information pertaining to actual cases.

JOINT FALL CLE MEETING

Our Joint Fall CLE Meeting with the Real Property, Probate and Trust Law Section in Boston was a resounding success, as more than 1200 registrants attended. More than 600 heard IRS Chief Counsel Donald Korb address our Friday breakfast session on IRS initiatives with respect to exempt organizations and tax shelters. We now plan to hold breakfast sessions with government speakers at the May meeting in Washington and the September meeting in San Francisco.

SECTION WEBSITE/ TECHNOLOGY COMMITTEE

During the Fall Meeting, the Council considered a report on improving our Section website by Vice Chair (Communications) Celia Roady. Work on website improvements is underway, but all suggestions and ideas are welcome and should be forwarded to Celia. To further our website improvement efforts and to facilitate effective use of technology generally by our Section, the Council approved the establishment of a new Technology Committee for the Section, to be headed by Tom Jorgensen. Each Section committee has been requested to appoint a representative to Tom's committee to assist the committees in maintaining and improving committee webpages. The first meeting of the new Technology Committee will be held on Saturday, January 22, 2005, in San Diego and we hope that all committees will be represented at that meeting.

MEETINGS WITH THE GOVERNMENT

In October, Section representatives met with Commissioner Mark Everson

advice associated with return preparation is necessarily not privileged—a result that seems to defy the distinction enacted by Congress between tax advice and tax return preparation. On that basis, the court generally rejected the claimed section 7525 privilege, required production of the KPMG tax opinions, but recognized the section 7525 privilege with respect to the outside attorneys' opinions.

The court also held that a lawyer is barred from practicing law as a member or employee of an accounting firm and on that basis, generally rejected the assertion of the attorney-client privilege and attorney work product doctrine by KPMG.

The court buttressed its denial of the attorney work product doctrine on the grounds that Section 7525 does not include a work product component and the documents were, in the court's view, not prepared in anticipation of litigation.

The court upheld elements of KPMG's "Own Privilege" relating to communications involving its General Counsel's Office relating to contracts, liability, etc.

Finally, the court rejected the request for a categorical privilege log, although it acknowledged the burden would be great.

BDO Seidman. In *U.S. v. BDO Seidman, et al.*, 2004 U.S. Dist. LEXIS 12145 (N.D. Ill., Feb. 4, 2002), the District Court held that "the motivation

is itself a confidential communication." The Court stated a four factor test for determining if a document was privileged:

- a. Was the purpose of the tax practitioner's representation to provide tax advice?
- b. Would revealing the taxpayers' names reveal their motives for seeking tax advice?
- c. Have the taxpayers waived the privilege?
- d. Was the document at issue communicated or generated for the purpose of preparing the taxpayer's tax returns?

In order for section 7525 privilege to apply, the answer to question 1 must be yes, to question 2 yes, to question 3 no, and to question 4 no. In *United States v. BDO Seidman*, 337 F.3d 802, (7th Cir. 2003), the Seventh Circuit affirmed the District Court's denial of the plaintiff's Motion to Intervene in an IRS enforcement action against BDO.

Arthur Andersen. In *United States of America v. Arthur Andersen, LLP*, 2003 U.S. dist. LEXIS 14228 (N.D. Ill., August 15, 2003), a District Court first held that intervenors may continue to use fictitious names in an action for enforcement of summonses against Arthur Andersen, LLP, that the section 7525 privilege applies, and that any information about the intervenors' identities is to be redacted before complying with the summonses.

Later the District Court withdrew this favorable opinion and issued an adverse Memorandum Opinion following the Seventh Circuit's BDO opinion. Ironically, the intervenors in BDO filed for *en banc* review by the Seventh Circuit *only ten days earlier* based on the uncontroverted fact that the disputed transactions were not "listed" at the time they were consummated and therefore, the investors did in fact expect their identities and activities to remain confidential.

Wachovia (Jenkins & Gilchrist). In *John Doe #1 et al. v. Wachovia Corporation*, 286 F. Supp. 2d 627 (2003), a North Carolina District Court denied investors injunctive relief in regard to preventing a bank from turning over investor lists, after determining that the law firm that issued "more likely than not" opinion letters to the investors did not enjoy a traditional attorney-client relationship with them. The court also held that the section 7525 privilege was inapplicable.

As the foregoing discussion demonstrates, every tax practitioner should be acquainted with the attorney-client, work product and tax practitioner privileges. Failure to do so could result either in wrongly advising a client that material will be privileged or in an inadvertent waiver of a client's privilege. ■

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and other IRS officials to discuss the then-proposed Circular 230 regulations and the Service's new initiatives aimed at promoting audit currency. In early December, we briefed Acting Assistant Treasury Secretary Greg Jenner, IRS Chief Counsel Korb, and other Treasury and IRS officials on guidance issues arising under the American Jobs Creation Act of 2004 that our commit-

tees had identified as areas where prompt guidance was needed. The list reflects another fine performance by our committees acting under a short time deadline.

CLE ON THE ROAD/ SECTION TELE- CONFERENCES

In November, we launched a CLE effort, "Tax CLE on the Road," designed to bring Tax Section CLE to members in cities where the Tax

Section has not sponsored programs before. ABA member surveys have identified that practitioners prefer local CLE programming. Our pilot program on "Allocation-Based Versus Distribution-Based Partnership Agreements," was held in Saint Louis and Dallas. I would like to thank Bob McKenzie and Elinore Richardson for their leadership in this new effort. Mark Martin and Philip Wright assisted with local planning and sponsor-

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ships. Our speakers, Barbara Spudis de Marigny, Rebecka Eggers, Paul Gordon, Dick Lipton, Tom Helfand, and Lewis Steinberg, provided a fine inaugural for the new program. We will keep you posted on where "Tax CLE on the Road" will travel in 2005.

The Section's "Last Wednesday" teleconferences continue to generate significant interest from our members around the country. Our planned February 9 teleconference on the recently-published Circular 230 regulations is part of this program. Consult the Tax Section website for information on these and other Section CLE opportunities. Our "Tax Link Live"

teleconference will be held in early March (as advertized in this issue).

SAN DIEGO MEETING

As this issue goes to press, we will be in San Diego at the Section's Midyear Meeting where the panoply of interesting issues arising from the JOBS Act and the new Circular 230 regulations will provide much to discuss. ■