The Accountant as Advocate:
A Model Standard for Client Representation in Administrative Proceedings

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ABSTRACT: The accounting profession recognizes the need for separate ethical principles applicable to tax practice – that is, for guidance beyond the general provisions of the AICPA Code of Professional Conduct. The substitution of the advocacy requirement for independence is acknowledged, yet lacks full articulation in the Statements on Standards for Tax Services. This paper proposes that the Statements be supplemented in order to address the advocacy role by explicitly borrowing from the legal profession's corresponding standards. A model statement focused on representing clients in administrative proceedings, intended as a proposal for discussion, is provided.

Keywords: Statements on Standards for Tax Services; Code of Professional Conduct; Advocacy; Circular 230; Administrative Proceedings.

INTRODUCTION

Return preparation and associated advisory services represent much, but not all, of what tax practice entails. CPAs and other practitioners also serve in an advocacy capacity in the course of audits, related controversy matters, and more.

Both of the generally applicable sources of ethics in tax practice, the AICPA Statements on Standards for Tax Services (Statements), incorporated by reference into the Code of Professional Conduct, and Circular 230, heavily emphasize return preparation and associated advisory services. Advocacy work in audit defense and in other forms of client representation before administrative bodies is less prominently, often only implicitly, addressed. Accordingly, this paper suggests that guidance focused specifically on the CPA's role as advocate in these settings would fill an evident void.

Thanks to faculty colleagues Nathan Goldman and Steven Solcher for their review of an early draft. Thanks especially to Tony Curatola and to the anonymous reviewer for this Midyear Meeting, both of whom went above and beyond in providing constructive input.

Circular 230 by its terms is limited to practice before the Internal Revenue Service. By contrast, the Statements stand as the accounting profession's benchmark guidance for tax practice generally.[1] The question explored here is whether expansion is warranted. The Appendix to this paper offers, as a baseline for further discussion, a proposed Statement No. 8, *Representing Taxpayers in Administrative Proceedings*, consistent with the principle that the Statements are "part of an ongoing process of articulating standards of tax practice for members."[2]

The treatment of advocacy in the Code of Professional Conduct (§ 1.140.010) narrowly frames it as a potential threat to the general requirement of integrity and objectivity (§ 1.100.001). The follow-on admonition is limited to stating that such services be performed in compliance with the general standards rule (§ 1.300.001), with the compliance with standards rule (§ 1.310.001), and with the accounting principles rule (§ 1.320.001). Each of those, however, simply refers the member to the Statements, thus at least facially amounting to an exercise in circularity.[3]

Correspondingly, the treatment of advocacy in the accounting literature is largely centered on behavioral research relating to the development of return positions and associated advisory services, the subject matter of Statement No. 1 and counterpart provisions of Circular

[1] *See* Statements on Standards for Tax Services (2010) ("SSTS" for citation purposes) Preface, para. 6 ("[T]he applicability of these standards is not limited to federal income tax practice. . . .").
[2] SSTS Preface, para. 8. Tax professionals continue a robust tradition of discussing possible additions to ethical guidance. *See*, *e.g.*, Michael B. Lang & Jay A. Soled, *Disclosing Audit Risk to Taxpayers*, 36 Va. Tax Rev. 423 (2017); Linda M. Beale, *Tax Advice Before the Return: The Case for Raising Standards and Denying Evidentiary Privileges*, 25 Va. Tax Rev. 583 (2006).
[3] *See* AICPA Code § 1.300.001.01, § 1.310.001.02, and § 1.320.001.02, each directing the reader to Appendix A, *Council Resolution Designating Bodies to Promulgate Technical Standards*, which authorizes the Tax Executive Committee to promulgate standards with respect to tax services (the Statements). Compare the discussion of tax services within the independence rule, limited to representing *attest clients* in tax matters (AICPA Code §§ 1.295.160.01, -.05 and -.06).

230. This valuable work[4] is quite distinct from the focus of this paper, which is audit defense and other aspects of what the profession generally refers to as controversy work as well as client representation in contexts such as administrative rulemaking.[5]

Finally, it is helpful to remember that advocacy work is shared space. Attorneys and others, licensed and not, also represent taxpayers in audit and controversy matters and before administrative agencies.[6] Here, however, because the focus is a proposed expansion of the AICPA Statements, the scope of discussion is limited to those who are subject to the AICPA Statements – that is, to CPAs. The Statements, despite being explicitly directed in terms of their applicability only to "members" (of the AICPA), arguably reflect standards of conduct that

[4] As a sampling of the relatively extensive academic literature, *see* John Hasseldine & Darius Fatemi, *Tax practitioner judgements and client advocacy: the blurred boundary between capital gain vs. ordinary income*, 16 eJ. of Tax Res. 303 (2019); Donna D. Bobek et al., *The Role of Client Advocacy in the Development of Tax Professionals' Advice*, 32 J. Am. Tax'n Assoc. 25 (2010); Ed. O'Donnell et al., *The influence of domain knowledge and task complexity on tax professionals' compliance recommendations*, 30 Acct., Orgs. and Society 145 (2005); J. David Mason & Linda Garrett Levy, *The Use of the Latent Constructs Method in Behavioral Accounting Research: The Measurement of Client Advocacy*, 13 Advances in Tax'n 123 (2001); C. Bryan Cloyd & Brian C. Spilker, *The Influence of Client Preferences on Tax Professionals' Search for Judicial Precedents, Subsequent Judgments and Recommendations*, 74 The Acct. Rev. 299 (1999).

[5] Not to belabor the point, but there is much more to a full-service tax practice than return preparation and associated advising. *See*, *e.g*., Darius Fatemi et al., *The Influence of Ethical Codes of Conduct on Professionalism in Tax Practice*, 164 J. of Bus. Ethics 133, 135 (2020) ("The tax services market is fragmented, but common elements include the provision of tax planning and compliance work, together with other functions such as representing taxpayers in disputes."); Victor Thuronyi & Frans Vanistendael, TAX LAW DESIGN AND DRAFTING (vol. 1, International Monetary Fund 1996, V. Thuronyi ed.), ch. 5, *Regulation of Tax Professionals* at 14: "A tax advisor representing a taxpayer before the tax authorities acts as an advocate. * * * Representation can take place to obtain a ruling; in connection with audits or investigations, before or after assessment; and before administrative tribunals or tax boards."

[6] As to representation before the IRS, for example, Circular 230 by its terms applies to attorneys, CPAs, enrolled agents, enrolled actuaries, enrolled retirement plan agents, registered tax return preparers, and in certain circumstances "others." *See* Circular 230, §§ 10.3, 10.5(e) and 10.7. Although CPAs and other nonattorneys are able to represent taxpayers before the United States Tax Court if admitted per Tax Court Rule 200(a)(3), representation in litigation is beyond the scope of this paper. The focus here is limited to controversy work and other appearances during the course of administrative proceedings.

should be followed by all CPAs in tax practice whether AICPA members or not. Indeed, in this author's opinion, any contrary argument would be untenable.[7]

Circular 230 borrows freely from the American Bar Association's Model Rules of Professional Conduct.[8] The Statements do so to a lesser degree but mainly by overlapping Circular 230. There is no question, however, but that the ABA rules are more closely and extensively attuned to matters of professional advocacy in adversarial settings. Whether the Statements, which now stop short, should be expanded is the question for consideration.

INDEPENDENCE AND OBJECTIVITY

Independence and objectivity, hallmarks of the accounting profession, are, of course, strongly associated with the role of financial statement auditor. There a CPA's loyalty unquestionably is divided between that owed to the client and the larger public interest principle.[9] In tax practice, however, the independence mandate is subsumed by different responsibilities, those inherent in the role of client advocate. This much the profession explicitly recognizes:

> When considering relevant ethical requirements, there is an important distinction for tax practitioners regarding "independence." Although independence of judgment is always an essential part of being a CPA, a tax practitioner is frequently called upon to be an advocate for clients. So, the independence requirement for an accounting and auditing practice is replaced with an advocacy requirement for a tax practice.[10]

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[7] *See* SSTS Preface, para. 4., describing how the predecessor Statements on Responsibilities in Tax Practice "became de facto enforceable standards of professional practice."

[8] *See*, *e.g.*, T.D. 9668, 2014-27 I.R.B. 1, 7 ("As commenters noted, the competency standard in § 10.35 is nearly identical to the standard in the Model Rules of Professional Conduct for attorneys, but, unlike the Model Rules, § 10.35 applies to all individuals subject to Circular 230, not just attorneys.").

[9] *See* AICPA Code § 0.300.030.01. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984) ("[T]he independent auditor assumes a *public* responsibility transcending any employment relationship with the client. * * * This 'public watchdog' function demands that the accountant maintain total independence from the client at all times, and requires complete fidelity to the public trust." [original emphasis]).

[10] AICPA, Tax Ethics & Professional Standards Guidance ("Advocacy vs. Independence in Tax Practice"), https://www.aicpa.org/interestareas/tax/resources/standardsethics/taxethicsguidance.html#:~:text=Tax%2

The substitution is unequivocal, yet the AICPA Statements do not elaborate in any broad or systematic way. "[A] member has both the right and responsibility to be an advocate for the taxpayer" (Stmt. No. 1, ¶ 8), but this limited to "when recommending a tax return position," not in representing that (or any) taxpayer in administrative proceedings. While the latter may be implied, it is at most only that, and qualified by a reminder of the duty to "the tax system" as well as to the client (Stmt. No. 1, ¶ 11). State rules, by contrast, often are broader in scope. As to "tax practice" generally – i.e., *not* limited to return preparation and advisory services – a number of states simply adopt the familiar standard that a CPA may resolve doubt in a client's favor as long as there is "reasonable support" for the position.[11]

A fair argument can be made that ethical considerations unique to advocacy work – that is, to the representation of clients before administrative tax authorities either post-return or with respect to matters not related to a particular return – should be treated as more than an afterthought or orphan.[12] Representation before taxing authorities begs the same ethical-

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0Ethics%20%26%20Professional%20Standards%20Guidance%20Guidance%20All,Conduct%20%2C%20including%20all%20general%20and%20technical%20standards (last accessed Jan. 20, 2021). Recognition of the uniqueness of tax practice is not new. Introducing the very first iteration of Statement No. 1 more than 50 years ago, the AICPA's Committee on Federal Taxation observed that "the principles the CPA observes in tax practice require separate articulation * * * [T]here is no intention to apply to tax practice those rules of professional conduct which relate only to examinations of financial statements." Statements on Responsibilities in Tax Practice: Introduction (1964). *See also* Michael L. Roberts, *Independence, impartiality, and advocacy in client conflicts*, 22 Res. In Acct. Reg. 29, 37 (2010) ("In audit situations, independence-in-fact requires an impartial weighing of client versus public interests. In tax situations, however, there is an explicit mandate for advocacy. From this difference, it is clear that the duty owed by the CPA . . . in the auditing scenario is a higher standard than the duty owed to the government in the tax scenario." [citation omitted]).

[11] *See*, *e.g.*, Florida Admin. Code § 61H1-21.002; Georgia GSBA Rule 20-12-.03; Hawaii Admin. Rules § 16-71-61(b); Maryland Admin. Code § 09.24.01.06(B); Nebraska Admin. Code § 5.003; Mississippi Admin. Code, Rule 6.3.2; New Jersey Admin. Code § 13:29-3.2; Oregon Admin. Code § 801-030-0005(2)(b); Pennsylvania Admin. Code § 11.22; Texas Admin. Code § 501.73(a) ("In tax practice . . . a [CPA] may resolve doubt in favor of his client as long as any tax position taken complies with applicable standards such as those set forth in Circular 230 issued by the IRS and the AICPA's SSTSs.").

[12] CPAs and other nonattorneys who represent clients in Tax Court litigation are subject instead and explicitly to the ABA Model Rules and thus are beyond the present scope. *See* Tax Court Rule 201(a),

boundaries questions and at the threshold are conflict of interest concerns. Circular 230 generally prohibits client representation either (i) where such representation is directly adverse to another client or (ii) where responsibilities to other clients create a "significant risk" that the representation would be materially limited.[13] An exception is provided for circumstances in which the practitioner reasonably believes that "competent and diligent representation" to the affected client(s) nevertheless can be afforded and informed consent is provided by all concerned.[14]

The Statements, however, are all but mute as to such conflicts. The single exception in Statement No. 6, however, certainly hints at why broader coverage may be justified:

> A conflict between the member's interests and those of the taxpayer may be created by, for example, the potential for violating Code of Professional Conduct Rule 301, *Confidential Client Information* . . . ; the tax law and regulations; or laws on privileged communications. . . . (¶ 10)

Valid considerations each, yet missing is any reference to the kinds of conflicts commonly associated with advocacy work. As reflected in both Circular 230 and the ABA Model Rules, these include representation of multiple clients with conflicting or potentially conflicting interests as well those between current and former clients. These circumstances, not uncommon

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stating that practitioners, including nonattorneys, "shall carry out their practice in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association."

[13] Circular 230, § 10.29(a). *Compare* ABA Rule 1.7(a), defining a "concurrent" conflict of interest as where "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person. . . ."

[14] Circular 230, § 10.29(b). *Compare* ABA Rule 1.7(b), which nevertheless allows representation despite a concurrent conflict where, among other things, "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation * * * (3) the representation does not involve the assertion of a claim by one client against another . . . ; and (4) each affected client gives informed consent, confirmed in writing." Tax Court Rule 24(g) provides an additional parallel: "If any counsel of record . . . represents more than one person with differing interests with respect to any issue in a case, then such counsel must either secure the informed consent of the client. . . ; withdraw from the case; or take whatever other steps are necessary to obviate a conflict of interest. . . ."

in litigation[15] but inherent in controversy work generally, arguably deserve more explicit delineation in the AICPA Statements.

COMPETENCE, DILIGENCE

Circular 230 defines competence as "the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged," and it is explicit that such competence may be acquired on an as-needed basis.[16] This simply echoes the Code of Professional Conduct:

> Competence is derived from a synthesis of education and experience. * * * Competence represents . . . a level of understanding and knowledge that enables a member to render services with facility and acumen. It also . . . dictat[es] that consultation or referral may be required when a professional engagement exceeds the personal competence of a member or a member's firm. Each member is responsible for assessing his or her own competence. . . .[17]

By contrast, the AICPA Statements are silent with respect to competence, implicitly treating it as a given in the context of return preparation and advisory services. References to "reaching a conclusion" (Stmt. No. 1, ¶ 12), to a member's "determination" (Stmt. No. 1, ¶ 14), and to "recommend[ing] a tax return position" (throughout) seem to presuppose a foundational

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[15] A regular example is where one attorney purports to represents both spouses or former spouses in a case in which the correctness of an asserted tax deficiency and/or innocent spouse relief are or may be at issue. *See*, *e.g.*, *Gebman v. Comm'r.*, T.C. Memo. 2017-184.

[16] Circular 230, § 10.35(a). *See also*: T.D. 9668, 2014-27 I.R.B. 1, 6 (6-30-2014): "[F]inal § 10.35 contemplates that practitioners may become competent in a variety of ways, including . . . consulting with experts in the relevant area and studying the relevant law. Whether consultation and/or research are adequate to a make a practitioner competent in a particular situation depends on the facts and circumstances of the particular situation."

[17] AICPA Code § 0.300.060.03, -.04. *Compare* ABA Code, Rule 1.1 *Competence*: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *See also*: Florida Admin. Code § 61H1-22.001(1) ("A certified public accountant shall undertake only those engagements which he or his firm can reasonably expect to complete with professional competence."); Texas Admin. Code § 501.74(a) ("A [CPA] shall not undertake any engagement for the performance of professional accounting services or professional accounting work which he cannot reasonably expect to complete with due professional competence. . . .").

level of professional competence without saying so. Thus, CPAs are left to instinct and inference as to the issue of competence in advocacy work before agencies other than the IRS.

Tax controversy work is inherently adversarial.[18] It is so from the outset, and the system "relies on the advocates to inform the discussion and raise the issues."[19] But whether acting in defense of a tax return as filed or before administrative agencies in other circumstances, advocacy skills cannot blithely be assumed. The role demands multifaceted aptitude, both innate and learned.[20] Like public speaking, it is a talent that is not universal, regardless of level of education, years of experience, or technical knowledge. Its essence, persuasiveness in confrontational communication, demands not just substantive expertise but also the practiced talents of patience, organization and cogent presentation. "[A]dvocacy is an art and not a science."[21]

"Unlike a lawyer," the Supreme Court has observed, "a CPA is not a professional trained in the art of persuasion. A CPA's training emphasizes independence and objectivity, not advocacy."[22] It follows that the work of representing clients before taxing authorities tests capabilities that may or may not be possessed innately. Even if most of what happens before the

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[18] *See* Loren D. Prescott, Jr., *Challenging the Adversarial Approach to Taxpayer Representation*, 30 Loy. L.A. L. Rev. 693 (1997) ("[T]he profession takes the position that tax compliance process involves a dispute between two adversaries . . . and should be treated as an adversarial proceeding warranting partisan advocacy. . . .").

[19] *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003).

[20] The late Chief Justice Burger, a frequent critic of what he perceived as poor advocacy skills, made the point quite simply: "We must acknowledge . . . that good advocates are made, much as good airplane pilots are made – by study, by observation of experts and by training with experts." Warren E. Burger, *The Special Skills of Advocacy*, 3 J. Contemp. L. 163, 167 (1977).

[21] *Strickland v. Washington*, 466 U.S. 668, 681 (1984); *compare* Fabio Ambrosio, *Tax Advocacy at Work: Knowing and Executing Your Strategy*, 14. J. Tax Prac. & Proc. 25, 30 (2012) ("Effective tax advocacy persuades the decision maker of those facts and precedents that are favorable to your client's position, while distinguishing and minimizing adverse precedents or facts."); Abraham L. Freedman, *On Advocacy*, 1 Vill. L. Rev. 290, 300 (1956) ("[T]he most powerful form of oral argument is one which presents the facts objectively, fairly reveals the arguments that can be made on both sides and then, marshalling the factors which weight the scales to one side, emerges with the true conclusion.").

[22] *Edenfield v. Fane*, 507 U.S. 761, 775 (1993) [internal quotation marks omitted].

IRS or any other taxing authority is negotiation rather than courtroom formality, it remains that a level of practiced proficiency is the *sine qua non*.[23]

Consider, as a single example of the array of competence issues in an advocacy setting, the matter of responding to a taxing authority's requests for information or documents in the course of an audit. As straightforward as may seem the admonition that "a member should be cognizant of applicable confidentiality privileges" (Stmt. No. 7, ¶ 11), it presupposes a working knowledge of what those privileges are and some level of sophistication as to when and how they apply.[24] The same is true of section 10.20(a)(1) of Circular 230, requiring prompt responsiveness with respect to requested records or information "unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged."

An IDR (Form 4564, Information Document Request) or similar request by any taxing authority easily and often might confront the reality that CPAs are not trained in the law of evidentiary privileges, an obvious challenge to reaching a defensible conclusion as to whether particular client communications or documents are protected.[25] Further, a determination that requested information or documents are privileged in whole or in part only – and immediately – leads to the matter of then constructing a proper defense. But this again circles back to the question of competence: how many CPAs understand how to construct an adequate privilege log,

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[23] *See Premo v. Moore*, 562 U.S. 115, 125 (2011) ("The art of negotiation is at least as nuanced as the art of trial advocacy. . . .").

[24] *See*, *e.g.*, *Schaeffler v. United States*, 22 F. Supp. 3d 319 (S.D.N.Y. 2014), involving the unsuccessful assertion of the work product doctrine with respect to a memorandum delivered to a client by Ernst & Young.

[25] For example, the statutory practitioner privilege, IRC § 7525, by its terms entirely derivative of the common law attorney-client privilege, in fact offers little protection in the return preparation context. *See, e.g., U.S. v. Arthur Andersen, LLP*, 273 F. Supp. 2d 955, 958 (N.D.Ill. 2003) ("Confidentiality in the tax context may be waived when the communications with the tax adviser ultimately are used to prepare the client's tax returns. . . ."); *U.S. v. KPMG LLP*, 237 F. Supp. 2d 35, 39 (D.D.C. 2002) ("[T]he privilege does not protect communications between a tax practitioner and a client simply for the preparation of a tax return.").

or have ever even seen one? An assertion of privilege is not self-executing; it is a matter of marshalling the proper tools and ring-fencing a perimeter. In view of the many traps for the unwary, it seems a safe assumption that most CPAs should defer to counsel, and should be encouraged to do so.[26]

The closely related requirement of diligence speaks to ethics in the more kinetic sense. The Code of Professional Conduct observes that "[d]iligence imposes the responsibility to render services promptly and carefully, to be thorough, and to observe applicable technical and ethical standards." (§ 0.300.060.05) Circular 230 includes an admonition against "unreasonably delay[ing] the prompt disposition of any matter before the Internal Revenue Service." (§ 10.23) It also, and more affirmatively, includes a "diligence as to accuracy" requirement – that is, of due care not only in preparing or approving documents to be submitted to the Service but as well to other written or oral communications both to the IRS and to clients. (§ 10.22(a))

The corresponding provision of the ABA Model Rules, Rule 1.3, requiring an attorney to "act with reasonable diligence and promptness in representing a client," is clearly directed at the advocacy role. Thus, both Circular 230 and the ABA Model Rules provide substantive mandates while the Statements remain silent. There is no direction as to promptness, nor to responsiveness, beyond the observation that delayed disclosure of a material error in a client's tax return might be construed as a lack of good faith or to having provided misleading information. (Stmt. No. 6, ¶ 9) But diligence is a broader responsibility in general, certainly so in representing taxpayers in administrative proceedings, and the Statements arguably should treat it as such.

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[26] As examples of privilege claims gone wrong, *see U.S. v. KPMG LLP*, 316 F. Supp. 2d 30, 44 (D.D.C. 2004) ("The Court has lost confidence in KPMG's privilege log since it has been shown to be inaccurate [and] incomplete. . . . The claims of privilege under 26 U.S.C. § 7525 are unsupportable. . . ."); *Bregman v. District of Columbia*, 182 F.R.D. 352, 363 (D.D.C. 1998) ([P]laintiff's failure to comply with Fed. R. Civ. P. 26(b)(5), requiring him to file a privilege log, bars in itself any claim of privilege, whatever its basis.").

CANDOR, DEMEANOR

In representing taxpayers before administrative agencies, the obligation of candor begins with the client but extends to the adversary – and to the tribunal, where applicable.[27] Maintaining adequate communication with taxpayer-clients is multidimensional. At the outset is "[c]ommunicating clearly with the client regarding the terms of the engagement" (Circular 230, § 10.33(a)(1)), a matter effectively expedited by the power of attorney process. IRS Form 2848, *Power of Attorney and Declaration of Representative*, allowing the appointment of a representative by type of tax and the period(s) involved, is generally duplicated at the state level.[28]

Although qualitatively adequate communication is a two-way street, it properly falls on the professional to assure that it happens. Representing taxpayers in administrative proceedings carries special risk in the form of potential misunderstandings as to matters such as offering or accepting settlement proposals and responding to requests by the taxing authority for extensions of applicable limitation periods. ABA Model Rule 1.4, *Communication*, speaks directly to the allocation of authority as between lawyer and client. It requires the attorney to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," to "keep the client reasonably informed about the status of the matter," and to "explain a matter

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[27] As of this writing a substantial number of states have established what the AICPA refers to as "tribunals" for hearing controversy matters relating to state and local tax matters and in which CPAs are or may be allowed to represent taxpayers. *See* AICPA, Chart of States with and without State Tax Tribunals (as of 6/2/20), https://www.aicpa.org/Advocacy/State/DownloadableDocuments/Chart-of-States-with-and-without-State-Tax-Tribunals.pdf (last accessed Jan. 20, 2021).

[28] *See, e.g.*, California FTB 3520-PIT, Individual or Fiduciary Power of Attorney Declaration (2019), https://www.ftb.ca.gov/forms/misc/3520-pit.pdf; Illinois Dept. of Revenue, IL-2848 Power of Attorney (R-08/20), https://www2.illinois.gov/rev/forms/misc/Documents/powerofattorney/IL-2848.pdf; Texas Comptroller of Public Accounts, Form 86-113 Limited Power of Attorney (11-07), https://eforms.com/download/2015/11/texas-tax-power-of-attorney-form-86-113.pdf.

to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[29]

There are, to be sure, regular examples of taxpayers attempting to disown a settlement as having been beyond the scope of the representative's authority.[30] Nevertheless, the AICPA Statements address client communications in limited circumstances only. Statements No. 1 and No. 6 provide direction regarding communication as to penalty exposure and as to errors discovered in previously filed returns. But beyond the latter occurring in the context of an administrative proceeding, there is no generally applicable guidance for representation of taxpayers in controversy settings or other administrative matters.

Candid communication with the government is another matter again, bearing in mind that a taxing authority's processes in examining returns and determining tax deficiencies are not objective. The Internal Revenue Service is not a tribunal; rather, it and its state and local counterparts are executive branch agencies. Their reason for being is the collection of revenue. "The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes . . . imposed by this title. . . ." (IRC § 6201(a)) It follows that there is no purpose or premise of neutrality.[31]

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[29] Similarly, Rule 1.2(a) provides that "a lawyer shall abide by a client's decisions concerning the objectives of the representation and . . . shall consult with the client as to the means by which they are pursued. * * * A lawyer shall abide by a client's decisions whether to settle a matter."

[30] *See, e.g.*, *Dorchester Industries Inc. v. Comm'r.,* 108 T.C. 320 (1997), *aff'd* 208 F.3d 205 (3rd Cir. 2000); *WFO Corp. v. Comm'r.*, T.C. Memo. 2004-186; *Newbern v. Comm'r.*, T.C. Memo. 1999-112.

[31] *See* ABA Committee on Professional Ethics, Opinion 314 ("The Internal Revenue Service is neither a true tribunal, nor even a quasi-judicial institution. * * * [T]he [IRS] is not designed and does not purport to be unprejudiced and unbiased in the judicial sense."). But compare the more recent IRS guidance regarding the appeals process, I.R.M. § 8.6.4.2.5 (6-16-2020), *Judicial Attitude Towards Settlement* ("The judicial attitude . . . see[s] both sides of a question; and is objective and impartial. Any approach which contemplates a maximum possible result in favor of the Government or a deficiency in every case is incompatible with a judicial attitude and the Appeals mission.").

A longstanding issue in tax controversy settings involves the degree of candor owed the government. Circular 230 proscribes "[g]iving false or misleading information, or participating in any way is the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof . . . in connection with any matter pending or likely to be pending before them. . . ." (§ 10.51(a)(4).) The ABA draws a finer line: "[T]he lawyer is under a duty not to mislead the Internal Revenue Service deliberately and affirmatively, either by misstatement or by silence," and yet "as an advocate before a service which itself represents the adversary point of view, where his client's case is fairly arguable, a lawyer is under no duty to disclose its weaknesses. . . ."[32]

The Statements are notable for their silence in this regard, at least beyond the duty to disclose material tax return errors with the client's consent. Left to fall back on the Code of Professional Conduct, the CPA finds only the caveat that "[s]ome professional services involving client advocacy may stretch the bounds of performance standards, go beyond sound and reasonable professional practice, or compromise credibility. . . ." (§ 1.140.010.03, italics omitted.) Much more could be said, and helpfully, in terms of expectations of candor when representing taxpayers in proceedings in which the counterparty is the government.

Matters of demeanor go to decorum in a broader sense. The Code of Professional Conduct includes within the Acts Discreditable Rule a prohibition against "sign[ing], or permit[ting] or direct[ing] another to sign, a document containing materially false and misleading

[32] ABA Opinion 314. The Model Rules go further, but only with respect to candor toward a court or other neutral body: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal . . . ; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known . . . to be directly adverse to the position of the client . . . ; or (3) offer evidence that the lawyer knows to be false." Model Rule 3.3, *Candor Toward the Tribunal*. But as to seeking a private letter ruling or other formal advice, see section 7.01(10) of Rev. Proc. 2018-1, 2018-1 I.R.B. 1, 27 ("The taxpayer is strongly encouraged to inform the Service about, and discuss the implications of, any authority believed to be contrary to the position advanced. . . .").

information. (§ 1.400.040.01(c)) Circular 230 includes among best practices "[a]cting fairly and with integrity in practice before the Internal Revenue Service (§ 10.33(a)(4)) and prohibits "contemptuous conduct," including making false statements. (§ 10.51(a)(12).) ABA Rule 3.1 imposes an affirmative obligation not to "assert or controvert an issue . . . unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[33]

Of course, there are statutory penalties applicable to asserting or defending the indefensible. Section 6701 imposes a penalty on "any person" who aids or assists in preparing or presenting any document that would result in an understatement of tax liability of "another person." Section 7206(2) authorizes corresponding criminal penalties for willfulness in preparing or presenting any document which "is false as to any material matter." And section 6673(a)(2) authorizes the Tax Court, when its proceedings are multiplied "unreasonably and vexatiously," to require the practitioner, whether or not an attorney, to pay personally "the excess costs, expenses, and attorneys' fees. . . ."[34] All the more reason, it fairly might be argued, why the muteness of the Statements should be remedied.

CONCLUSION

Similarities, even overlaps, between Circular 230 and the ABA Model Rules are plainly evident, even intentional. So are those between Circular 230 and the Statements on Standards for

[33] Related prohibitions, although limited to the litigation context, include "mak[ing] a frivolous discovery request or fail[ing] to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party" and "in trial, alluding to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. . . ." Model Rule 3.4(d) and (e).

[34] *See*, *e.g.*, *Best v. Comm'r.*, T.C. Memo. 2016-32 at *20-21, *aff'd*., 120 A.F.T.R.2d 2017-6595 (9th Cir. 2017) ("Because only frivolous issues were raised, the bringing of this case in and of itself was nothing more than a meritless tactic requiring the use of Government and Court resources that could otherwise have been applied to hear legitimate taxpayer concerns."); *Tinnerman v. Comm'r.*, T.C. Memo. 2010-150 at *16 ("[T]he filings . . . demonstrate reckless disregard of the facts and the settled law and contentions so lacking in merit as to be frivolous, dilatory, and subject to sanctions.").

Tax Services. It follows that the presence of any particular guidance or proscription in Circular 230 does not, in and of itself, justify omission of that same coverage from the Statements. Circular 230 is applicable only to practice before the Internal Revenue Service. The Statements apply to tax practice generally.

The limited treatment of advocacy work in the Code of Professional Conduct is problematic. It would not be, of course, if the Statements filled the void, but they do not. Thus, a CPA representing a taxpayer in an administrative proceeding is left with sparse guidance as to ethical issues unique to confrontational dynamics. The relatively generous regulation addressing tax return preparation and associated advisory services leaves the vacuum as to advocacy work all the starker.

Over the past half century the AICPA Statements have continued to evolve. There is no reason why that process should not continue. The Appendix to this paper – Statement on Standards for Tax Services No. 8, *Representing Taxpayers in Administrative Proceedings* – is offered as a starting point for further consideration.

APPENDIX

Proposed Statement on Standards for Tax Services No. 8, *Representing Taxpayers in Administrative Proceedings*

Introduction

1. This statement sets forth the applicable standards for members engaged to represent taxpayers who are involved in any administrative proceeding with a taxing authority.

2. For purposes of this statement, *administrative proceeding* includes (i) an examination by a taxing authority or an appeals conference relating to a return or claim for refund or (ii) any other matter in which a member acts as a taxpayer's authorized representative before a taxing authority but does not include practicing in an advocacy capacity in litigation.[35]

3. This statement applies without regard to whether the member was a preparer with respect to any return or returns involved in the administrative proceeding.

Statement

4. A member, before agreeing to represent a taxpayer in an administrative proceeding, should assess whether the member is competent to act in an advocacy capacity within the foreseeable scope of the representation. If the member concludes that such competence is lacking, the member should consider whether (i) it is feasible to acquire such competence within a reasonable time or (ii) to decline the representation.

5. A member, before agreeing to represent a taxpayer in an administrative proceeding, should assess the likelihood of any current or potential conflict of interest. If the member concludes that such a conflict exists or may exist, the member should consider whether (i) to solicit the informed consent of the taxpayer and other affected parties or (ii) to decline the representation.

6. A member should communicate with a taxing authority or otherwise act in a representative capacity in an administrative proceeding only after securing the taxpayer's written consent and submitting evidence of such consent in the manner prescribed by the taxing authority.

7. A member representing a taxpayer in an administrative proceeding should endeavor to respond to requests by the taxing authority for information or documents pertaining to the subject matter of the representation with reasonable expediency. If a member believes in good faith that

[35] Practice before the United States Tax Court, including by nonattorneys, is governed by the American Bar Association's Model Rules of Professional Conduct. *See* Tax Court Rules 200(a)(3) and 201(a).

information or documents requested from the taxpayer or from any third party (but relating to the taxpayer) are or may be privileged, the member should either determine whether an assertion of privilege is warranted or consult with legal counsel toward making such a determination.

8. A member representing a taxpayer in an administrative proceeding should not, without the taxpayer's informed consent, (i) concede any tax return position, (ii) agree to an extension of any applicable limitation period for assessment or collection of taxes, or (iii) enter into any closing agreement or similar contractual commitment with a taxing authority.

9. A member representing a taxpayer in an administrative proceeding should act with integrity and avoid acts discreditable to the member, to the profession, or to the client.

Explanation

10. Members may be engaged to represent taxpayers before taxing authorities in various circumstances. These include, but are not limited to, matters relating to the correctness of a previously filed tax return, a refund claim relating to a previous period, or collection efforts by a taxing authority. Additional instances of taxpayer representation may involve advance ruling requests, Freedom of Information Act requests, whistleblower actions, or other matters not specifically involving a previously filed return.

11. Members are charged with assessing their level of competence prior to agreeing to act on behalf of a taxpayer. It is recognized that members' experience and ability vary both generally and with respect to various kinds of taxpayer representation. A member should take steps to ensure competence relative to the nature of the representation requested, taking into account not only the issues involved or likely to be involved but also the member's experience and ability in the role of advocate.

12. A member representing a taxpayer in an administrative proceeding should act with appropriate diligence in furthering the goals of the representation. The member should monitor applicable deadlines and limitations periods, apprise the taxpayer of their significance, and implement appropriate measures to assure timely action. A member should communicate with the taxpayer in a manner reasonably certain to assure that the taxpayer is able to make appropriate decisions with respect to the goals of the representation.

13. A member representing a taxpayer in an administrative proceeding should be alert to possible conflicts of interest. These include but are not limited to direct conflicts between or among current clients as well as potential conflicts between current and past clients. A conflict of interest would include circumstances in which knowledge obtained in representing one client reasonably could be anticipated to have a negative impact on another client or on the member's ability to provide competent representation to any client.

14. A member representing a taxpayer in an administrative proceeding should be cognizant of and adhere to known expectations of the taxing authority with respect to positions advocated. In particular, a member will not affirmatively mislead the taxing authority and should take appropriate steps to assure that the taxing authority adequately understands the analysis being

advocated with respect to issues relevant to the proceeding. Where authority directly contrary to the member's analysis is known to exist, the member should incorporate appropriate reasons why such authority is distinguishable or otherwise should not control the outcome of the proceeding.

15. Questions of privilege with respect to information or documents properly requested by a taxing authority may implicate various authoritative sources. These include, under federal law, the attorney-client privilege, the section 7525 privilege, and the work product doctrine. In addition, state law, where relevant, may provide applicable privileges by statute or otherwise. A member should remain alert to circumstances of potential privilege with respect to requested information or documents and defer to counsel to resolve uncertainties.