Let’s Get Ethical!

Alison J. Cohen, Esq., CPC
Ferenczy Benefits Law Center

Agenda

- Why do we have to study ethics every d#%n conference?
- How are ethics impacted by technology?
- Circular 230 and its application to technology
- Considerations for your practice
Lather, Rinse, and Repeat

- Lather, Rinse, and Repeat

Lather, rinse, repeat...
Lather, rinse, repeat...

Duck, Cover, and.......
Lather, Rinse, and Repeat

• I’m just a Bill, yes I’m only a Bill.....

Ethics ... What Is It?
• According to the dictionary: the discipline dealing with what is good and bad and with moral duty and obligation; a set of moral principles; a theory or system of moral values
Types of Ethics

• Ethics defined by a professional organization (like NIPA, ASPPA, CEBS, AICPA, FINRA or the ABA) may represent what you need to do to keep your designation.

• Ethics defined by a governmental department may represent what you need to do to keep your license to practice before such department (e.g., Circular 230, SEC) and may also involve criminal sanctions.

• For Financial Advisors, the DOL’s fiduciary regulations, if finalized, will provide a new set of ethical obligations that control how you practice and how you are compensated.

Types of Ethics (cont.)

• Ethics defined by law may represent what you need to do to keep from getting sued.
  • Breach of Contract (did you do what you agreed to do?)
  • Malpractice (did you do what is commonly done in your industry?)
  • Fraud or Misrepresentation (did you lie?)
ERPA Ethics

- Circular 230 contains ethical rules to which ERPAs, as well as other tax professionals, are subject
  - If I’m not an ERPA, why am I sitting here?
- The IRS modified Circular 230 in June 2014:
  - Eliminated “Covered Opinion” rules
  - Strengthened “Written Advice” rules
  - Created new definition of “Competence” (used to be included in the “covered opinion” rules)

NIPA Code of Ethics

- Stated as Standards of Professional Conduct
- Include:
  - Practice within laws and regulations
  - Continuing education to improve competency
  - Design and administer plans consistent with client goals
  - Practice only where competent and recommend other professionals when appropriate
  - Maintain client confidence unless client gives permission or law requires
  - Deliver all documents and information essential to the administration of a plan to successor administrator
NIPA Code of Ethics

• Include (continued):
  • Avoid conflicts of interest or resolve so that obligations to clients can be met
  • Support professional integrity of NIPA
  • Exchange ideas and experiences to help improve or solve problems of the profession
  • Promote pension administration profession and NIPA
  • No discriminatory conduct or practice
  • Truthful advertising and solicitation
  • No dishonest, deceitful, fraudulent, or willfully illegal acts
  • Honor the integrity of the designation and respect limitations placed on it

Technology Challenges

• Keeping up with the need for immediate gratification
• Trusting your sources of information
• Automating to the point no one knows how to do anything any more
• Attention span deficit
• Make it look easy
Circular 230, §10.22: Due Diligence

• You must exercise due diligence in your practice
• You can rely on the work product of another person if you exercised reasonable due diligence in engaging, supervising, training, or evaluating the other person, taking into account your relationship with the other person

Example

• Francine has every intention of properly supervising and training Margaret, but she’s juggling things as much as she can. She asks Margaret if she feels confident that her work is right, and Margaret assures her that, after the training course she took, she is quite capable.
• 15 months later, one of Margaret’s plans is audited by the IRS and multiple qualification errors are found. Some of the errors were done by the client, some by Margaret.
  • Ethical issue?
  • Malpractice issue?
Key Practice Issues

- What resources do you have to provide for employees to perform research?
  - Is Google an acceptable resource?
  - Is Google your only resource?
- Do you have a formal training program?
- How is employee supervision handled?
  - Is it long enough?

Circular 230, §10.30: Solicitation

- No false, fraudulent, coercive statements or claims
- Cannot use the term “certified” or imply that you are an IRS employee
- If make uninvited solicitation, must clearly identify as such and identify source of information used in choosing the recipient
- Fee information cannot be misleading
Key Practice Considerations

- Do blogs count as solicitations?
- Do employee personal accounts count as solicitations?
  - What about LinkedIn?
- Do you have a company policy to review personal posts/pages?

Circular 230, §10.33: Best Practices

- You should provide clients with highest quality representation by adhering to best practices in providing advice and preparing IRS submissions
- You must communicate clearly with clients regarding the terms of your engagement
You should:

- Establish facts
- Determine which facts are relevant
- Evaluate the reasonableness of any assumptions or representations
- Relate the applicable law to the facts
- Arrive at a conclusion
- Advise clients regarding the import of conclusions reached
- Act fairly and with integrity vis-à-vis the IRS

Owners/managers should “take reasonable steps” to ensure that the firm’s procedures for all in the firm are consistent with best practices.
New §10.35: Competence

- A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service
  - Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged
  - A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law

Example

- ABC TPA, Inc. has no written internal procedures
- New employees are trained by the available senior associate, so everyone has their own set of notes
- Even if everyone is trained correctly......
  - Is this consistent with the Best Practice requirement?
  - Is it possible for there to be consistency with this method?
- Can someone with 6 months of experience help represent a client with an IRS audit?
Circular 230, §10.37: Written Advice

- In Giving Written Advice, A Practitioner Must:
  - Base the written advice on reasonable factual and legal assumptions;
  - Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;
  - Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;
  - Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;
  - Relate applicable law and authorities to facts; and
  - Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

Circular 230, §10.37: Written Advice (Cont’d)

- What is a “Federal tax matter”? 
  - Any matter concerning the application or interpretation of -
    - A revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code;
    - any existing or former internal revenue law, regulation, revenue ruling, revenue procedure, other published or unpublished guidance, or tax treaty, either in general or as applied to specific taxpayers or groups of specific taxpayers;
    - Any provision of law impacting a person’s obligations under the internal revenue laws and regulations, including but not limited to the person’s liability to pay tax or obligation to file returns; or
    - Any other law or regulation administered by the Internal Revenue Service.
Circular 230, §10.37: Written Advice (cont’d)

• Definition of reasonable reliance
  • Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent

Circular 230, §10.37: Written Advice (cont’d)

• When Can You Reasonably Rely on Another?
  • A practitioner may rely on the advice of another person only if the advice is reasonable, and the reliance is in good faith considering all the facts and circumstances
  • Reliance is not reasonable when--
    • The practitioner knows or reasonably should know that the opinion of the other person should not be relied on;
    • The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice; or
    • The practitioner knows or reasonably should know that the other person has a conflict of interest in violation of the rules described in this part
Circular 230, §10.37: Written Advice (cont’d)

- What is written advice?
  - Includes electronic advice
  - Doesn’t include comment letters to IRS
  - Doesn’t include continuing education materials
    - Unless marketing transactions or products
    - Putting contact information in materials isn’t marketing

Circular 230, §10.37: Written Advice (cont’d)

- What about disclaimers?
  - Disclaimer doesn’t take you out of §10.37
    - It could take you out of old §10.35
  - “Treasury and the IRS expect that these amendments will eliminate the use of a Circular 230 disclaimer in e-mail and other writings”
  - May want to have a disclaimer to indicate scope of opinion
Key Practice Issue

• E-mail is considered to be written advice
  • Do employees realize that emails count and not just formal letters?
• Text messaging is also considered to be written advice
• What about tweets?
• Bob, in his spare time, enjoys responding to questions posted online. Are his responses considered to be written advice?

Circular 230, § 10.36 Office Procedures

• If you oversee a firm’s practice, you “must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with” Circular 230
• IRS can discipline you if:
  • you don’t take reasonable steps to establish procedures and see that they are followed (and correct violations), and
  • “one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with” Circular 230
Putting It All Together

Other Things to Consider

- Your reputation
  - With your clients
  - With other practitioners
  - With your employees
- Your risk tolerance
- Your personal ethics
A Good Ethical Rule of Thumb

- Do What’s Right ... and don’t let anyone take away your good name!

A Good Ethical Plan

- Consider in advance the ethical “dilemmas” that most commonly affect your area of practice and determine: where is the line in the sand?
  - Things clearly on the “okay” side are fine
  - Things clearly on the “absolutely not” side are not
  - Only the small issues in the gray area require additional thought
Questions?

Contact Information

Alison J. Cohen
Ferenczy Benefits Law Center LLP
2200 Century Parkway, Suite 560
Atlanta, Georgia 30345
(678) 399-6604 (V)
(866) 515-5140 (toll free)
(404) 320-1105 (F)
acohen@ferenczylaw.com

Follow us on Twitter: @ferenczylaw