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Course Objectives

- Learn why the IRS Criminal Investigations (CI) starts an investigation
- Learn what CI investigates
- Learn the criminal prosecution process
- Learn the role of the enrolled agent in the criminal investigation
I. Introduction – Tax Evasion

A. Section 7201 – Attempt to Evade or Defeat Tax – Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

B. Two kinds of tax evasion under Section 7201: (a) evasion of assessment and (b) evasion of payment.

C. Evasion of Assessment. Filing a tax return that underreports income or claims false deductions constitutes an attempt to evade the correct assessment of tax.

1. Elements of the Offense: (a) An attempt to evade or defeat a tax or the payment of tax; (b) An additional tax due and owing; and (c) Willfulness. Each element must be proved beyond a reasonable doubt. United States v. Marashi, 913 F. 2d 724, 735-36 (9th Cir. 1990).

a. Attempt to evade or defeat a tax: The taxpayer must engage in some action, that is engage in an affirmative act for the purpose of attempting to evade or defeat the assessment of tax. This element requires more than passive neglect of a statutory duty. Examples include: filing of a false return; and failing of a false amended return.

   (1) Failing to file a return coupled with an affirmative act of evasion is commonly referred to as a “Spies evasion”. For example if the taxpayer failed to file a return and engaged in an affirmative act to conceal or mislead. Spies v. United States, 317 U.S. 492, 198-99 (1943). Spies set forth the following examples of conduct which can constitute affirmative acts of evasion: Keeping a double set of books; making false or altered entries; making false invoice; destruction of records; concealing sources of income; handling transactions to avoid usual records; any other conduct likely to conceal or mislead.

b. Additional tax due and owing. The government must show the existence of a tax due and owing.


   (i) Subjective Test. A defendant’s good faith belief that he is not violating the tax laws, no matter how objectively unreasonable the belief may be, is a defense in a tax prosecution. Cheek v. United States, 498 U.S. 192, 199-201(1991).
1. Absent an admission or confession, willfulness is rarely subject to direct proof and generally must be inferred from the circumstances of the case. United States v. Wilson, 118 F. 3d 228, 236 (4th Cir. 1997). Willfulness may be inferred from any conduct, the likely effect of which would be to mislead or to conceal. Spies v. United States, 317 U.S. 491, 499 (1943).

2. The following examples of conduct were found to denote willfulness: Signing return knowing that the contents of that return understated income. United States v. Olbres, 61 F. 3d 967, 970-71 (1st Cir.), cert. denied, 516 U.S. 991 (1995); Substantial understatement of income in successive years. United States v. Lavoie, 433 F. 3d 95, 98-99 (1st Cir. 2005); Making false exculpatory statements to agents or causing them to be made. United States v. Chesson, 933 F. 2d 298, 304-05 (5th Cir. 1991).

2. Statute of Limitations. There is a six year limitation period for willfully attempting to evade or defeat any tax. Section 6531(2).

a. The limitation period begins to run six years from the date of the last affirmative act that took place or the statutory due of the return, whichever is later.

b. Where no return is filed or where the return is filed early, the statutory due of the return is used.

c. Where a return is filed late, the actual filing date is used. United States v. Habig, 390 U.S. 222, 225-27 (1968).

D. Evasion of Payment

1. Elements of the Offense: (a) An attempt to evade or defeat the payment of tax; (b) An additional tax due and owing; and (c) Willfulness.

a. The Attempt. Affirmative acts of evasion of payment generally involve schemes to deal in currency, place assets in the names of others, transfer assets abroad or omit assets on Form 433-A, collection information statement. Examples include: Concealing assets by using bank accounts of family members and coworkers, United States v. Shoppert, 362 F.3d 451, 460 (8th Cir.), cert. denied, 543 U.S. 911 (2004); Making mainly cash expenditures and using third party credit cards and placing assets in the names of third parties. United States v. Shoppert, 362 F.3d 451, 460 (8th Cir.), cert. denied, 543 U.S. 911 (2004); Bankruptcy fraud. See e.g., United States v. Huebner, 48 F.3d 376, 379-80 (9th Cir. 1994) (the
defendant, having created false loan documents and then filed for bankruptcy, was successfully prosecuted for evasion of payment.

b. Additional Tax Due and Owing. The government must prove that there is a tax due and owing.

c. Willfulness. Willfulness is defined as the “voluntary, intentional violation of a known legal duty.” Cheek v. United States, 298 U.S. 192, 201 (1991). Willfulness is subjectively measured. Indirect proof of willfulness is the typical means of establishing the element. Examples include: Conduct designed to place assets beyond the government’s reach after a tax liability has been assessed. United States v. Mal, 942 F.2d 682, 687 (9th cir. 1991). Statute of Limitations. To determine whether the statute of limitations is open for evasion of payment cases, begin with the present date, and inquire whether affirmative acts in furtherance of the crime were committed in the preceding 6 years. United States v. Shorter, 809 F.2d 54 (D.C. Cir.), aff’g 608 F. Supp. 871, 873-74, and cert. denied. , 484 U.S. 817 (1987).

II. Additional Tax Crimes

1. Willful Failure to Collect or Pay Over Tax – Section 7202
2. Willful Failure to File Return, Supply Information or Pay Tax – Section 7203
3. Fraud and False Statements – Section 7206
4. Fraudulent Returns, Statements, or Other Documents – Section 7207
5. Attempts to Interfere with Administration of Internal Revenue Laws – Section 7212(a)

III. How Do Criminal Investigations Begin At the IRS?

A. Criminal Investigations (“CI”) generally categorizes its compliance strategies and activities into three components: Legal source investigations; Illegal source investigations, and narcotics related. The illegal source investigations involve illegally earned income and include money laundering and currency reporting crimes. The narcotics related investigations involve drug trafficking organizations and financial activities involving the transportation, distribution and laundering of illegal drug proceeds.

B. The legal source investigations involve legal source income in which the primary motive is the violation of tax statutes.

C. Agency Referrals – Law enforcement agencies, federal or state agencies, or other divisions of the Internal Revenue Service (“IRS”) provide information to the Criminal Investigation Division (“CI”) that lead to criminal tax investigations.
D. The IRS’ Civil Division is the single largest source of CI investigations.  

E. Financial Reporting Forms – The filing or the failure to file financial forms such as currency transaction reports (“CTR”); suspicious activity reports (“SARs”); Forms 8300, which report receipt of more than $10,000.00 received in a trade or business, or Forms 90.22.1 “Report of Foreign Bank and Financial Accounts” and other foreign financial transaction forms have triggered many criminal investigations. 

F. Independent Criminal Investigations – Special Agents will review local newspapers, court records, and even rummage through a taxpayer’s trash to gather information to begin a criminal probe. 

G. Informant – Referrals by third party informants such as ex-wives or disgruntled employees are a common source for criminal investigation leads. 

H. Under the IRS Whistleblower Program, these tipsters can be rewarded as much as 30% by the IRS for information. 

IV. What Are the Types of IRS Criminal Investigations? 

A. Administrative vs. Grand Jury Investigations 

1. Administrative – The IRS conducts the investigation on its own, using the administrative summons to compel the production of documents and testimony. 

2. Grand Jury Investigations – The Special Agents work in conjunction with the local U.S. Attorney’s Office and/or the Department of Justice Tax Division, and use grand jury subpoenas to obtain the documents and testimony they seek. 

B. Administrative Investigations - The IRS’ stated policy is to use the administrative investigations when possible, and to request that an investigation be conducted by a grand jury only where the IRS is experiencing particular difficulty obtaining the evidence it needs through the use of administrative summonses. 

C. U.S. Attorney’s Office - The U.S. Attorney’s Offices throughout the country also initiate tax-related grand jury probes when investigations being conducted by the offices reveal evidence of possible tax crimes. 

V. How Does the IRS Civil Division Make a Referral to CI 

A. Examination Division 

1. The most frequent source of criminal referrals is the Examination Division, which conducts civil tax audits.
2. Revenue Agents have the most contact with taxpayers and it is not uncommon for a Revenue Agent during a routine corporate or individual audit to uncover facts that hint at the presence of fraud.  

B. Eggshell Audits

1. When tax returns under audit contain the potential for tax fraud to be charged, this is called an “Eggshell Audit.”

2. The taxpayer is walking on eggshells hoping that the Revenue Agent will not determine tax fraud.

3. Revenue Agents are trained to look for evidence of fraud whenever they audit income, estate, or gift tax returns.

4. The Internal Revenue Manual contains a Fraud handbook that states that “when the examiner discovers a firm indication of fraud, the examination should be immediately suspended without disclosing to the taxpayer or representative for the action.”

C. Reverse Eggshell Audit

1. Once the Revenue Agent suspects fraud during the civil exam and he or she refers the case to CI, CI may conduct a joint criminal and civil investigation.

   a. Alternatively, a joint criminal and civil investigation can be initiated by CI because there is already be an ongoing criminal investigation and CI requests that an examiner be assigned to the investigation.

2. Parallel investigation – Certain entities or tax years are subject to a criminal investigation while related entities or other tax years are the subject of a simultaneous civil audit.

   a. Any information collected by the civil examiner in this circumstance may be used in a criminal referral, again without the taxpayer’s knowledge.

   b. A taxpayer may be under criminal investigation while his closely held corporation is the subject of a civil audit, or he may be under criminal investigation for certain tax years and be the subject of concurrent investigation for other years.

3. Taxpayer will be subject to investigation by both the civil and criminal divisions of the IRS without necessarily being notified of the criminal investigation.

4. The benefit to the government of this type of joint investigation is that it allows the government to use the investigative tools of a civil audit, like administrative summonses and examinations of tax returns, without the
invocation of due process, the right against unreasonable searches and seizures, the right against self-incrimination, and the right to counsel. 27

5. The danger to the taxpayer is that the taxpayer believing that he or she is complying with the audit may waive his or her constitutional rights and attorney-client privilege. 28

a. In a criminal investigation, the IRS is not required to notify a taxpayer of the issuance of third party summonses.29

b. A Special Agent will delay giving the taxpayer the requisite notice of his or her constitutional rights against incrimination and the availability of an attorney prior to an interview in order for the Revenue Agent to continue to collect information and conduct interviews with the taxpayer. 30

6. Unlike the eggshell audit, where the goal of the practitioner is to seek to avert a criminal investigation by keeping the examiner in the dark about the fraud, in a reverse eggshell audit, the practitioner is the one in the dark, seeking to discover whether there is a simultaneous criminal investigation. 31

D. Taxpayer’s Protection Against Reverse Eggshell Audit

1. The IRS has an affirmative duty to disclose the criminal nature of a civil examination when the taxpayer’s representative directly asks whether a criminal investigation is underway. 32

2. U.S. v. Tweel - In this case, the taxpayer’s accountant asked the examining revenue agent whether a “special agent” was involved in the investigation. The revenue agent answered that no special agent was involved. While the agent answered truthfully that no special agent was involved, the audit was conducted to acquire evidence for a criminal prosecution. The revenue agent’s response to the accountant’s inquiry “materially deceived” the taxpayer into providing incriminating information to the IRS.33

3. Before answering a summons or turning over documents, consider asking the Revenue Agent the following questions:34

   a. Is there a parallel or sub rosa criminal investigation?

   b. Has this matter been referred to the fraud coordinator?

   c. If so, what guidance has been given by the fraud coordinator?

   d. What information has been provided to the fraud coordinator, and by the fraud coordinator?

4. Taxpayer can also take the Fifth.35
a. The taxpayer can refuse to answer a summons by exercising his or her constitutional privilege not to incriminate himself or herself. 36

E. Signs of Criminal Referral – Revenue Agent may refer case to CI if 37:

1. Undue interest – Revenue Agent (“RA”) shows an undue amount of interest in the sensitive transaction.

2. Excessive copying – RA requests large numbers of copies of documents rather than merely asking to review the documents.

3. Questions on intent – RA poses questions that focus on the intent of the taxpayer.

4. Bank records analysis – RA begins examining in great detail records that can be used to corroborate or impeach items reported on the return.

5. Net worth analysis – RA focuses attention on the balance sheet of the taxpayer for the beginning and ending of each year.

6. The disappearing agent – RA stops discussing the status of the audit or disappears.

F. Standards for Referral

1. Firm Indication of Fraud – The fraud handbook instructs agents to refer a case to CI upon discovery of firm indications of fraud. 38
VI. What is the Enrolled Agent’s Role During the Examination?

A. In sensitive audits where there are overtones of fraud, the taxpayer and the return preparer will feel more comfortable retaining an attorney to handle the audit.  

B. The attorney may use a forensic accountant to “front” the examination with the attorney in the background providing strategy and advice.

C. The forensic accountant provides critical support in an eggshell or reverse eggshell audit by reviewing books and records, organizing the documents, and developing alternative approaches to issues, and computing different tax consequences based on those alternative approaches.

D. Understand the Freedom of Information Act.

1. The U.S. Freedom of Information Act (FOIA) is a law ensuring public access to U.S. government records.

2. FOIA carries a presumption of disclosure; the burden is on the government - not the public - to substantiate why information may not be released.

3. Upon written request, agencies of the United States government are required to disclose those records, unless they can be lawfully withheld from disclosure under one of nine specific exemptions in the FOIA.

4. This right of access is ultimately enforceable in federal court.

5. The return and return information of a taxpayer may be disclosed to a designee of the taxpayer pursuant to IRC § 6103(c).

E. Understand the IRS’ Broad Subpoena Power

1. The IRS can subpoena documents and compel testimony from a taxpayer, the taxpayer’s representative, or a third party for the purposes of ascertaining the correctness of any return, making a return where none has been made, or determining the liability of any person for any internal revenue tax.

2. To enforce the summons the IRS must show that the summons:
   a. Was issued for a legitimate purpose;
   b. Seeks information relevant to that purpose;
   c. Seeks information that is not already within the IRS’ possession; and
   d. Satisfies all administrative steps required by the United States Code.

3. The IRS summons is subject to traditional privileges and limitations (i.e., attorney-client privilege).
F. Produce Documents in File If Its In the Client’s Best Interest To Do So.

1. Unfavorable Inferences - The assertion of privileges such as attorney-client privilege at the audit or tax court level leads to an inference that the taxpayer is hiding something. 51

2. Best Evidence - In cases where the IRS questions motives or business purpose for forming a closely held entity, the best evidence of those motives can come from the correspondence prepared in connection with the transaction at issue. That is, well-drafted contemporaneous correspondence outlining the business and financial reasons. 52

G. Understand and Preserve All Privileges

1. Attorney- Client Privilege
   
a. The attorney-client privilege protects communications between the client and the lawyer made for the purpose of enabling the lawyer to provide legal advice or other legal services to the client, as long as both of them intend for the communications to remain confidential and the purpose of the communication is not to further a crime or fraud. 53
   
b. Bills and Invoice –
   
   (1) Lawyers’ bills are generally not privileged. 54
   
   (2) Descriptions in the lawyer’s invoices are privileged provided the privilege is not waived. 55

   (i) Billing descriptions reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided. 56

   c. Corporations/ Partnerships/ Entities, Etc.

   (1) Counsel’s communications with any corporation employee (though not shareholders) may be privileged under federal law, while some states limit the privilege between counsel and the “control group” of employees. 57

   (2) Communications to Shareholders may constitute a waiver. 58

   (3) Communications with and disclosures to general partners of a partnership client are generally privileged. 59
2. **Kovel Doctrine** - The attorney-client privilege is extended to the accountant under Kovel.  

   a. An attorney may employ individuals including accountants to assist him or her in the effective representation of the client, within the attorney-client and work product privilege.

   b. **U.S. v. Kovel** – A law firm that employed an accountant on its own staff represented a taxpayer who was the target of a grand jury investigation focusing on whether he had committed various income tax offenses. To assist the law firm in advising the taxpayer, the taxpayer communicated information to the in house accountant who, in turn, helped explain the client’s business and tax reporting to a lawyer in the firm. The government subpoenaed the law firm’s files on the ground that the communications involving the accountant were not subject to the attorney-client privilege.

   (1) The law firm responded that the use of the accountant was indistinguishable from the use of a foreign language interpreter because the tax and accounting concepts that the accountant communicated to the lawyer were ever bit as “foreign” to the lawyer as a language that he did not speak.

   c. **Limitations to Kovel Privilege** – Under **U.S. v. Adlman**, 68 F.3d 1495 (2d Cir. 1995), the Court held that attorney-client privilege did not apply because the evidence indicated the taxpayer, a Corporation, consulting an accounting firm for tax advice rather than in-house counsel receiving accounting advice to assist him in rendering legal advice. The Court noted that the taxpayer did not produce adequate documentation, such as a separate retainer agreement or itemized billings, for the accounting firm’s tax advice, to support a claim of privilege.

   d. **Safeguards to Protect the Kovel Privilege**

   (1) The client’s existing accountant should not be hired to perform forensic accounting services (unless absolutely necessary) because use of the existing accountant makes it more difficult to establish that the accountant was hired primarily to help the attorney render legal advice.

   (2) A forensic accountant engagement letter should state that all documents, including working papers, are the property of the lawyer, and are to be returned at the lawyer’s request.

   (3) The forensic accountant’s work should be labeled “protected by the attorney-client and work product privileges.”
3. Work Product Privilege

a. Under work product privilege, parties and their lawyers can communicate regarding an anticipated litigation and prepare for litigation and trial without concern that the adverse party can gain access to their analyses and strategies.  

b. Type of Information Protected

(1) Factual Work Product - Attorney’s notes of interview with witness. However, the opposing counsel can pierce this work product by showing a compelling need for the information.

   (i) For Example - If the witness dies, the opposing party can obtain the attorney’s notes because the opposing party can not call the witness at trial.

(2) Opinion Work Product – Lawyer’s opinion, conclusions, mental impressions and trial strategies are not discoverable.

(3) Comparison with attorney-client privilege - The work product privilege is more inclusive than the attorney-client privilege because it includes communications prepared by anybody as long as they were prepared with an eye towards the realistic possibility of impending litigation.

(4) Additionally, it includes materials collected for the attorney such as interrogatories, signed statements, other information acquired for the prosecution or defense of a case, “memoranda, briefs, and communications...other writings prepared by counsel for his own use in prosecuting his client’s case.”

(5) However, the work-product privilege is also less powerful than the attorney-client privilege because it can be pierced by a showing of necessity.

c. Information Not Protected –

(1) Tax accrual work papers prepared by attorneys are not protected under the work product privilege.

(2) U.S. v Textron Inc. et al, Docket No. 072631 – Tax accrual work papers that describe the potential liabilities for additional taxes explaining the tax reserve entries in corporate financial statements do not constitute work product because the tax accrual papers were prepared for financial statements and not for the purpose of litigation.
4. Common Interest/ Joint Defense Privilege - Persons with the same or highly similar interests can establish confidentiality for their communications with each other.  

a. Two or more taxpayers can share information, legal research, settlement or trial strategies, and expert witness opinions with one another in confidence, even if they are at differing stages of the dispute and are in different industries.  

5. Settlement Offer Privilege - Rule 408 of Federal Rules of Evidence (“FRE”) makes inadmissible at trial any offers to settle the dispute. Its is intended to encourage the settlement of disputes by excluding from evidence conduct and statements made in compromise negotiations, rather than excluding only the offers of compromise themselves. 

a. Government’s “Deliberative Process” Privilege – Protects government agent’s opinions, conclusions, recommendations, and mental impressions from disclosure under the FOIA request.  

(1) The privilege can be asserted only for pre-decisional materials before the IRS asserts its audit position.  

(2) Once the agency has formulated its opinions and conclusions, any subsequent communications or documents are “post-decisional” and are not subject to the privilege.  

(3) Even if the document is “pre-decisional” the government is obligated to produce those portions of the documents that do not contain protected opinions, conclusions, recommendations, and mental impressions.  

6. Tax Practitioner’s Privilege  

a. IRC § 7525 extends the common law protection of confidentiality to a communication between a taxpayer and any federally authorized tax practitioner. (i.e., CPA, EA)  

b. Limitations –  

(1) Criminal tax proceedings are not protected.  

(2) Communications concerning tax shelters are not protected.  

(3) Tax Return preparation is not covered.  

c. U.S. v. Frederick, 182 f. 3d 496, 500 (7th Cir. 1999) - Eviscerated Section 7525 holding that: The preparation of tax return is traditional “accounting work” and not the providing of legal advice; and (2) the lawyer’s
performing non-privileged accounting work destroyed any claim of privilege relating to documents and communications that referred to both the criminal investigation and the tax return preparation. 85

H. Waivers

1. Third Party – A communication between a client and attorney is not privileged if it is made in the presence of a third party. 86

   a. No privilege attaches to a letter that shows a “cc” to someone outside the attorney-client relationship. 87

2. Inadvertent waiver – Even an inadvertent waiver by the lawyer (or the Kovel CPA) generally constitutes an enforceable waiver. 88

3. The waiver extends to the entire subject matter. 89

4. Witness Waiver – Adverse parties are entitled to inspect anything shown to a witness at any time to refresh his recollection for the purpose of testifying. 90 FRE 612.

5. The advice of counsel can not be used as sword then cloaked with privilege. 91

   a. Privilege is waived in its entirety by raising “reliance upon tax counsel” as “reasonable cause” penalty defense under Section 6664. 92

6. When to waive privilege- The client may wish to waive privilege in order to assert the defense that any underpayment of tax was made in good faith and due to reasonable cause. 93

   a. Reliance on advice of tax advisors constitutes reasonable cause and good faith if, under all circumstances, such reliance was reasonable and the taxpayer acted in good faith. 94

VII. What is the Enrolled Agent’s Role in the Preparation for Trial

A. Once a case reaches the stage of trial, the attorney may need the assistance of an enrolled agent to help analyze the evidence presented by the government and attack the positions taken by the testifying government agents. 95

   1. Reviewing and analyzing books, records, and transactions;

   2. Researching accounting and tax issues;

   3. Interviewing;

   4. Examining the outside accountant’s or auditor’s work papers;

   5. Educating counsel;
6. Reviewing the government’s theory of the case, computations and meeting with the government’s experts;

7. Assisting the attorney to depose or cross-examine witnesses.

VIII. What is the Enrolled Agent’s Role as an Expert Witness

A. When accountants are called by the prosecution, they generally testify about their investigative findings. 96

B. When they are called by the defense, they may testify about the prosecution’s accounting expert, in order to create doubt in the minds of jury members about the credibility or weight to give to the prosecution’s expert. 97

C. Counsel retains an expert accounting witness to review information and documents, to assist counsel in rendering legal advice to the client and to offer opinion testimony at trial. 98

D. The expert’s opinions are usually in the form of a written report. 99

E. Federal Rules of Civil Procedure ("FRCP") Section 26, relating to General Provisions Governing Discovery, Duty of Disclosure, provides in FRCP 26(a)(2), Disclosure of Expert Testimony, the following 100:

1. Written report prepared and signed by the witness.

2. Written report shall contain a complete statement of all opinions to be expressed; the basis and reasons therefore; the data or other information considered by the witness in forming the opinion.

3. Exhibits

4. Qualifications of the witness, including publications authored within preceding ten years.

5. Compensation.

6. Listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

F. Federal Rules of Evidence That Apply To Testimony Given By Experts

1. Rule 702, related to Testimony by Experts, opens the door for individuals having specialized knowledge to assist the trier of fact to understand the evidence presented at trial or to determine a fact in issue during the trial. Usually, counsel will offer to the court an individual as an expert once he or she is ‘qualified’ as expert after voir dire. 101

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2. Rule 703, related to Bases of Opinion Testimony by Experts, allows an expert to base his or her opinion on facts or data perceived by the expert or made known to the expert at or before the hearing. Opposing counsel may challenge whether the expert in the particular field or discipline reasonably relied on the facts and data. In ruling on this objection, trial court weighs the probative value of the information against its prejudicial effect. 102

3. Rule 704, related to Opinion on Ultimate Issue, provides for an expert to offer an opinion on an ultimate issue to be decided by judge or jury. It does not, however, allow an expert to testify with respect to the mental state or condition of a defendant in a criminal case. 103

4. Rule 705, related to Disclosure of Facts or Data Underlying Expert Opinion, allows an expert to offer an opinion supported by his or her reasons without first testifying to the underlying facts or data for the opinion. Usually, opposing counsel on cross examination will require the expert to disclose the underlying facts or data for the opinion. Usually, opposing counsel on cross-examination will require the expert to disclose the underlying facts or data. 104

5. Rule 706, related to Court Appointed Experts, provides for a court to appoint an expert on its own or on the motion of any party. 105

G. Standard for Admissibility of Expert Witness Testimony –

1. Challenges to Admission of Expert
   a. Daubert challenges. 106
   b. Frye Challenges. 107
   c. Does not qualify as an expert by knowledge, skill, experience, training or education. 108
   d. Requires a valid connection to the pertinent inquiry as a precondition to admission. 109
   e. Courts remain vigilant against the admission of legal conclusions. 110
   f. In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717 (3rd Cir. 1994) lists others. 111

      (1) Relationships of technique to methods already established to be reliable.

      (2) Existence and maintenance of standards controlling technique’s operation.

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(3) Expert witness’ qualifications and non-judicial uses to which method has been put.
g. Side-taking or result-oriented work.  

h. Conflict of interest.  

i. Spoliation.  

j. Name not disclosed within time limit.  

k. Improper expert witness designation.  

2. **Frye Standard** – The Frye Standard although no longer used in federal courts, is still used in many state courts.

   a. The test for admitting expert testimony is: (1) whether the expert’s testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue and (2) whether the theories and/or techniques relied upon by the expert are generally accepted by the relevant professional community; and (3) whether the particular expert is qualified to present expert testimony on the subject at issue.


4. **Daubert** requires four key factors to be considered:

   a. Whether the theory or technique can be (and has been) tested.

   b. Whether the theory or technique has been subjected to peer review and publication.

   c. The theory’s or technique’s known or potential error rate.

   d. Whether the theory or technique has attracted widespread acceptance within the relevant community.

5. **Evidence Upon Which Experts May Rely**

   a. Experts may base their opinions on facts or data that they themselves perceived or which were made known to them at or before a judicial hearing.

   b. The facts of data need not be admissible in evidence in order for the expert’s opinion to be admitted if the facts or data are of a type reasonably relied upon by experts in the same field in forming opinions.

   c. Otherwise, inadmissible facts or data may not be disclosed to the jury unless the court determines that their probative value in assisting the jury
in evaluating the expert’s opinion substantially outweighs their prejudicial
effect. 124

H. Related Offenses Under the Criminal Code


10. Failure to File Currency Transaction Reports and Related “Structuring
Violations - 31 U.S.C. §§ 5313 and 5324
1 IRC § 7202. Any person required under this title to collect, account for, and pay over any tax imposed by
this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to
other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more
than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

2 IRC § 7203. Any person required under this title to pay any estimated tax or tax, or required by this title
or by regulations made under authority thereof to make a return, keep any records, or supply any
information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or
supply such information, at the time or times required by law or regulations, shall, in addition to other
penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not
more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both,
together with the costs of prosecution. In the case of any person with respect to whom there is a failure to
pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no
addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of
any provision of section 6050I, the first sentence of this section shall be applied by substituting “5 years”
for “1 year”.

3 IRC § 7206. Any person who –

7206(1) Declaration Under Penalties of Perjury
Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a
written declaration that it is made under the penalties of perjury, and which he does not believe to be true
and correct as to every material matter; or

7206(2) Aid or Assistance
Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in
connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other
document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is
with the knowledge or consent of the person authorized or required to present such return, affidavit, claim,
other document; or

7206(3) Fraudulent Bonds, Permits, And Entries
Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required
by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures
the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

7206(4) Removal or Concealment With Intent To Defraud
Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or
commodities for or in respect wherever any tax is or shall be imposed, or any property upon which levy is
authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed
by this title; or

7206(5)(A) Concealment of Property
Conceals from any officer or employee of the United States any property belonging to the estate of a
taxpayer or other person liable in respect of the tax, or

7206(5)(b) Withholding, Falsifying, And Destroying Records
Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false
statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the
tax;
shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in
the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of
prosecution.

4 IRC § 7207. Fraudulent Returns, Statements, Or Other Documents
Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other
document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more
than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both. Any
person required pursuant to section 6047(b), section 6104(d), or subsection (i) or (j) of section 527 to
furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or
such other person any information known by him to be fraudulent or to be false as to any material matter
shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1
year, or both.
5 IRC § 7212(a) Corrupt or Forcible Interference
Whoever corruptly or by force or threats of force (including any threatening letter or communication)
endeavors to intimidate or impede any officer or employee of the United States acting in an official
capacity under this title, or in any other way corruptly or by force or threats of force (including any
threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due
administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not
more than 3 years, or both, except that if the offense is committed only by threats of force, the person
convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The
term “threats of force”, as used in this subsection, means threats of bodily harm to the officer or employee
of the United States or to a member of his family.
7 Id. At 5-19.
8 Id. At 5-17.
9 Id. At 5-18.
10 Id. At 5-22; IRM Section 25.2.1; IRC § 7623(a).
11 IRC § 7623 (b)(1).
13 Id. At page 3.
14 Ibid.
15 Ibid.
16 Id. At page 1.
17 Ibid.
<http://www.tjtaxlaw.com/20021100%20Campagna%20Outline%20on%20Eggshell%20Audits%20%28TJ
138%29.pdf>
19 See Haynes, page 1.
20 Ibid; See IRS Fraud Handbook, Exhibit 1.
21 Ibid.
22 IRM Section 25.1.4.1
23 Schainbaum, Martin A. “The Reverse Eggshell Audit: The Dangers of Parallel Proceedings.” October
24 Ibid.
25 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.
30 Ibid.
31 Schainbaum, Martin A and Smith, Bryant. “Parallel Investigations: The Unclear Present Danger of
33 See Schainbaum, Martin.
34 Ibid.
35 Ibid.
36 Ibid.
37 See Campagna, page 8.
38 I.R.M. Section 4231, P981(1).
39 See Campagna at page3.
40 Ibid.
41 See Campagna at page 4.
44 Treasury Regulation § 601.701(b).
45 See Borek.
46 Ibid.
47 IRC § 7602.
50 Ibid.
51 Ibid.
52 Ibid.
54 See Porter; U.S. v. Ellis, 90 F. 3d 447, 450-51(11th Cir. 1996)
56 Ibid.
58 Ibid.
60 U.S. v. Kovel, 296 F.2d 918 (2nd Cir. 1961); See Sample Kovel Letter for Accountant, Exhibit 3.
61 Ibid.
62 Ibid.
63 Ibid.
64 Kaplan, Steven Z. “Privilege Meets Transparency: Can We Practice Safe Tax?” <http://www.thefreelibrary.com/Privilege+meets+transparency%3F- a0149851809>
66 Ibid.
67 Ibid.
68 See Kaplan, page 7; Hickman v. Taylor, 329 U.S. 495 (1947)
69 See Kaplan, page 7.
70 Ibid.
71 Ibid.
72 Ibid.
73 Ibid.
74 Ibid.
75 U.S. v Textron Inc. et al, Docket No. 072631
76 See Kaplan, page 8.
77 See Kaplan; United States v. United Technologies Corp, 979 F. Supp. 108, 110 (D. Conn 1997)
78 See Kaplan, page 9.
79 Ibid.
80 Ibid.
81 Ibid.
82 Ibid.
83 See Porter, page 10.
84 Ibid.
85 See Kaplan, page 6.
86 See Kaplan, page 5; U.S. v. Evans, 113 F.3d 1457, 1462(7th Cir. 1997).
88 See Porter, page 5; In re Sealed Case, 676 F.2d 793, 807 n.44 (D.C. Cir. 1982).
90 See Porter, page 6.
91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid.
95 See Campagna, page 4
96 Singleton, Tommie; Singleton, Aaron; Bologna, Jack; and Lindquist, Robert, Fraud and Forensic Accounting, Third Edition, page 262.
97 Ibid.
99 See Pagano, page 23.
100 Ibid.
101 See Pagano, page 25.
102 Ibid.
104 Ibid.
105 Ibid.
107 Ibid.
108 Ibid.
109 Ibid.
110 Ibid.
111 Ibid.
112 Ibid.
113 Ibid.
114 See Crumbley, page 49.
115 Ibid.
116 Ibid.
117 See Crumbley, page 51.
118 Ibid.
119 Ibid.
120 Ibid.
121 Ibid.
122 See Crumbley, page 58.
123 Ibid.
124 Ibid.