Circular 230: Diligence in Tax Practice

Thank you. *[Applause]*

Good morning. My name is Elizabeth Kastenberg. I am a supervisory attorney advisor with the Office of Professional Responsibility here in Washington, DC. Today we're going to be discussing Circular 230 and due diligence in tax practice.

Today we're going to talk about Circular 230 and due diligence. We're going to – review the various provisions in the circular, what it means to exercise due diligence and what you can do to protect yourself and your clients.

So, we're going to start first with the statute.

This is OPR Statutory Authority. And it addresses the conduct of taxpayers' representatives before the Service. It is not found in Title 26 as you'll note here. It is in Title 31 USC Section 330.

Title 31 is the money in finance section of the code. And Chapter 3 established the Department of the Treasury and its administrative areas. As you'll note the statute was enacted in 1884. It was enacted to address abuses related to claims made to the Treasury Post-Civil War. This statute essentially authorizes the Treasury to regulate the practice of representatives of persons before the Treasury Department including the IRS and to make determinations about –fitness to practice. Fitness means good character, good reputation, the necessary qualifications to provide a valuable service to clients, and competence to advise and assist them in presenting their cases.

So, what does practice before the IRS mean? Section 10.2A4 of the circular defines practice fairly broadly. Practice contemplates all matters that are connected with a presentation to the Internal Revenue Service with respect to a taxpayer's right, liabilities, and privileges under laws and regulations administered by the IRS. If you take a look at the bolded terms here "administered by" is important because the IRS administers some laws that are not found in Title 26. Foreign bank account reporting is probably one of the ones most people are familiar with, and that's found in Title 31.

The second bullet is a list of some of the activities that might constitute practice:

preparing and filing documents, corresponding or communicating with the IRS, rendering written advice, and the thing that most people think about as practice – representing a client at a conference or hearing or a meeting. Now one very particular activity that practice does not include is paid tax return preparation. Everyone should be familiar with a case calling *Loving vs. IRS* which was a challenge to the agency's efforts to set competence and ethical standards for the previously unregulated tax return preparation industry.

The Circuit Court of Appeals in this case concluded that 31 USC Section 330 our Statutory Authority did not provide authority for the IRS or the OPR to reach what they defined as mere tax return preparation and the agency lost that case. So, what does that mean? It means if you are an unenrolled return preparer who merely prepares tax returns –

you are not covered by the provisions of Circular 230. However, as an unenrolled return preparer you are covered by Circular 230 if you engage in representation authorized through the Service's Annual Filing Season Program which was established in Revenue Procedure 2014-42.

The Annual Filing Season Program allows for limited representation rights for returns prepared and signed by an enrolled return preparer in an examination of a tax return prepared and signed after 2015. If return preparer engages in representation he or she acknowledges by signing the Form 2848 that he or she is covered by Circular 230. Now please keep in mind that even if you are not subject to OPR Circular 230, but if you are a person who for compensation prepared all or substantial portions of any return or claim for refund you are considered a preparer for purposes of the preparer penalties.

Now Section 10.36 of Circular 230 provides that a principled person is subject to discipline under this provision or he or she has failed to take reasonable steps to ensure that the Circular and its obligations are known to employees and are being properly followed. This speaks to a firm setting. If someone else in the firm: an employee, an associate, independent contractor, violates the Circular that individual who actually violated the circular is going to be responsible for their own conduct and liable for whatever discipline that may result in.

However, under 10.36 if there's an individual who has assumed the oversight role of that employee and didn't follow through they will also be looked at to determine whether there should've been some level of culpability on their part attributed to that person because of the lack of effort to educate or ensure compliance. The responsible person who neglects –

that responsibility is accountable with no requirement that he or she had actual knowledge of the misconduct.

Even if the person with principal authority for compliance has taken reasonable steps he or she can be held accountable for a violation of a Circular and the person responsible for oversight fails to take steps to stop any violations that he or she knows or should've known about. Now if there is no person identified by name or title the IRS may identify somebody as being responsible by their actions or their role within the firm.

Section 10.22 is our General Due Diligence Provision which says pretty much everything you need to know about good practice before the IRS. You must exercise due diligence in preparing or approving for submission to the IRS or filing anything that relates to IRS matters. And this will include returns, tax forms, documents,

affidavits, or protests. You must exercise due diligence to ensure the accuracy of representations oral or written that you make to your client as well as to the Treasury Department.

You have obligations to your client to make sure that you're giving them correct and accurate information and you have obligations to make sure that the representations that you're making on behalf of your client are accurate and complete. Now there is a safe harbor in 10.22 that says, "If you rely on the work of another you will be deemed to have exercise due diligence if you have used reasonable care in selecting, engaging, supervising, training, overseeing, or evaluating that individual's work." Now reasonable care is a facts and circumstances test. So we're going to break it down a little bit.

For reliance how, you deal with someone's work product when they work for you – an employee – is going to be different than how you would deal with a –work product coning from a third party or another tax professional. For employees you will be able to rely on your employees' work product. You need to have used care in selecting and hiring them, making sure they're properly trained, and also making sure they understand their obligations under Circular 230. On at least a periodic basis you've evaluated their performance. You've ensured that they continue to correctly understand what they're doing and that they're not making mistakes that could get your entire firm in trouble.

In dealing with employee work product Section 10.36 on procedures which we just covered regarding firm liability is going to be important. With other tax professionals or third-parties the basic rule is to rely on them. You may unless you have reason to question it. So what does that mean? If you have information that the third-party document that you've received –

may not be reliable then you need to ask some questions before you can satisfy your due diligence obligation. For example, your approach should be different for a Form 1099 prepared by a major financial institution versus one that's prepared by the taxpayer's brother.

So, in the exercise of due diligence you need to do the following. You've got to now the relevant facts. You've got to ask questions. Know which facts are relevant to your situation and which are material to your situation. Do not let your client determine what facts are pertinent or significant because you're the subject matter expert. That's why they've come to you. Frame your questions to solicit the relevant information and facts from your client. Now once you have all the facts and information you have to make sure you know the law. If you don't know it, look it up. Even if you think you generally know it, take the time to double check.

Educate yourself. Find an expert you can reasonably rely on.

And then take those client's facts, match them up to the law, and take a look at what you have. If your application of the law to the facts doesn't get you to the conclusion that your client wants your due diligence obligation to your client is to tell them that. Give them the plain truth of the matter. That is what the Circular means in its requirement to determine the accuracy of your representations to your client. If your client has come to you in advance and asked you for advice you may be able to offer up options that they can get an idea of where they're going to go.

However, if they come to you after the fact, post-transaction post-taxable event, you may have to tell your client that it isn't going to work. And you're going to have to explain why. Due diligence under Section 10.22 says you have to determine the correctness of the matter and make sure you're expressing it correctly to your clients and the Treasury.

The next provision is the due diligence standard for tax Return preparation, as well as return advice and the submission of other documents to the Service.

As mentioned earlier in the *Loving* case mere tax return preparation those preparers are not deemed to be practitioners. However, if you are covered by Circular 230 by virtue of your representational activities and are subject to the regulation's governing practice Section 10.34 applies to you when you assist or advice clients in reporting items on tax returns. The due diligence provisions here for returns applies a broad principle of 10.22 to the more specific activities of return prep. Section 10.34 says you may not sign a return that lacks a reasonable basis nor may you advise taking a position on a return that lacks a reasonable basis.

What this means is what is the probability of success if challenged by the IRS? Reasonable basis is approximately 25 percent.

This concept of reasonable basis in 10.34 is tied to the same concept that we find in the accuracy-related penalties under 6662. 10.34(a) goes on to say that you may not sign or advice a position on the return that is an unreasonable position. It refers you to the preparer penalties under 6694 and it defines an unreasonable position as one that lacks substantial authority but had a reasonable basis and is undisclosed. Section 10.34 also says you may not sign or advice with respect to a tax return position that is willful attempt to understate liability either by you or your client, or that is a reckless or intentional disregard of the rules and regulations.

10.34 is expanded on the general due diligence provisions in the context of return preparation by pointing to the preparer penalty standards. As with the general due diligence standard under 10.22 this provision requires that you understand the applicable law –

with respect to your clients' relevant facts. Now our last bullet here which says patterns matter: in this context what this refers to is that a single mistake is not what the OPR looks for. A single mistake a foot fault, a one-off. That is not what's going to get you on the radar.

What we look for is multiple mistakes, multiple demonstrations of recklessness, and multiple demonstrations of disregard or incompetence. So, it should really come as no surprise that IRS field agents are asked to make referrals to the OPR when they see a pattern of diligence-related preparer penalties. They are also required to make referrals if there are willful preparer penalties involving a Circular 230 practitioner.

Now the second part of 10.34 – Subpart B – is just as important. It's the basic set of due diligence standards for documents –and other papers. This is going to be most applicable when you're representing someone in an examination or a collection matter or before appeals. Subpart B says when taking positions on documents that are actually submitted to the agency you may not advise a position that is frivolous. On our probability of success of challenge by the IRS that is zero. It is a position that is patently improper. 10.34 also says you may not advice making a submission that would be frivolous or where the submission is intended to delay or impede tax administration.

So, depending on the facts and circumstances making a submission for the sole purpose of stopping a collection matter can potentially be a violation of this particular section. Finally, you may not advise making a submission that either contains or omits information that demonstrates an intentional disregard of the rules and regulations. An example of this is going to be in a collection matter –where financial statements have assets that are purposely left off.

10.34 Subparts C and D address penalties and client reliance. If you prepared the tax returns sign the return, advised the position taken on the return, or advised a position on another submission or filed it aware of a problematic position on the return and there's a potential that your client might incur a penalty then it is your obligation under 10.34 to advise the client of that penalty exposure and to give them an opportunity to avoid the penalty by making a disclosure on the tax return. Now of course once you've told them your client can decide that they're not going to take the position.

And that's probably the easiest way out of it. Now there is no Circular 230 requirement addressing how you document your advice regarding penalty exposure. However, the OPR does like to tell folks that it is wise to have something in your file that –

indicates when a conversation occurred, what you said, and maybe documenting the fact that your client has heard it, has understood it, and has accepted, and are going to take their chances. Now we do this because if a particular situation arises in an examination it's very likely that your client may forget that you gave them advice and that you warned them about the exposure.

And they're going to shift that blame to you. That's what happens right? Now the last part of 10.34 begins by saying, "As the practitioner you may rely in good faith without verification on client information." Now with the 10.22 reliance rules you don't have to audit your client. That's not really what you're there for. But you also can't ignore implications of other information that you may have been given, whether by the client or someone else. You can't ignore actual knowledge. You have to make –reasonable inquiries if the information you're given appears to be incorrect, inconsistent, or incomplete.

So that's kind of where you get that gut feeling. There's something a little off about what they've given you. So, you've got to be thinking about the credibility of the information that you've received. You also need to distinguish between information or data and characterizations or decisions. For example, a client comes to you with their tax data and the data provides a $100,000.00 expense. Say it's listed as conference room table. It's awfully nice conference room table. You can accept that statement and say okay it's $100,000.00. I know your office. I know your style. I've seen the other things in your office space.

But you also can't simply accept the client's characterization of it as a $100,000.00 expense because that's an actual legal conclusion. So you need to ask a couple of –

questions. It's your responsibility as part of your due diligence to ask the questions that lead to the characterization issues. Another example is tax data that lists a $50,000.00 capital gain. How do you know it was a capital gain if it just says $50,000.00? Maybe it was ordinary income. Maybe some of it is depreciation recapture. So the point here is that you need to distinguish between information from your client that you can trust unless you have a reason not to trust versus determinations that you as a practitioner and the professional need to make about what you call it when you put it on the tax return, when you put a deal together.

That's what we're calling characterization. How do you characterize that item? The last point to make on 10.34 is that you may not engage in what we call willful blindness. You have to ask the questions. And your client has to give you answers. And this goes back to the general due diligence provision that says you have to know all the relevant facts. And you have to know the relevant law and have to apply them to reach a conclusion.

You have not met your due diligence obligation under 10.34 or 10.22 if you failed to ask questions that you should've asked or if you say to your client directly or indirectly, "Don't tell me that because if you tell me that I'm going to have to give you bad news." So, you don't want to go there either.

So why is this important? Because you the practitioner need to be able to prove and substantiate your advice or characterization. Now if you've ever dealt with the OPR – and hopefully none of you have – the OPR looks at your past. We look at what you did or did not do very, very much post-transaction, post-return filing. In some cases, we may look at it quickly but in others it may take a while to get there. So, it's very important that you have documentation and substantiation so that you can prove and tell us what your actions and what your advice was. So that's really key – to make sure you have documentation.

Circular 230 Subpart C describes sanctions for violations of the regulations. This is going to be what we call here on the slide disreputable conduct. Under 10.51 we have 18 different types of incompetence and disreputable conduct. One of these – this particular one – (a)(4) takes the 10.34 due diligence rules on return preparation and other documents to another level. It's titled: Giving False and Misleading Information. (a)(4) prohibits you from giving false and misleading information or participating in any way in giving false or misleading information to the Department of the Treasury or to any officer, employee, or any tribunal authorized to pass on federal tax law matters.

Now the scope of this prohibition covers anything you submit to the IRS. This is going to be testimony, tax returns, financial statements, any application you might be filing whether it be for a PTIN. Maybe it's your enrollment as an enrolled agent or other practitioner your renewals. It includes affidavits, declarations, and protests to appeals. The OPR often sees this violation most when representatives try to spin a story to try to hide some of the bad facts in favor of others just so they can get the client what they need.

Review Question 3

Under 10.51 we have another subsection here: (a)(7). It identifies as disreputable and incompetent conduct willfully assisting or in some way counseling, encouraging, or suggesting to a client or a prospective client an illegal plan to evade federal taxes or the payment of taxes or the violation of any federal tax law. So, let's consider how this plays out in a collection matter. Say a client comes to me and says, "Liz,

I need a little more time to make this right and I won't be able to do it if you let them levy my bank account. Now you know me. We've been friends for years. You just can't let them take my assets."

Now what am I going to do in a situation like that? Well the reality is there are legitimate steps that I can take to help my client, but transferring assets and hiding them from the Revenue Officer isn't going to be one of them. So, what we ask you to do in this is to think about and walk through your legitimate options with your client before agreeing to do whatever it is your client had asked you to do. Take a look at it. There are many ways to get your client where they need to be.

Now Section 10.29 addresses a different kind of diligence and that is what you need to understand when you may not represent a client due to a conflict of interest. The basic rule in –

10.29 aligns with the model rules of professional conduct that is put out by the American Bar Association – the ABA. So, the ABA has a general rule on conflicts. And the language in Circular 230 is very similar to what we find in the ABA general rule. The ABA also has some more specific applications of their rule to situations encountered when representing clients.

So, when we look at the various conflicts of interest the OPR looks at the ABA model rules and their body of interpretation and application of the concepts. So, for practical purposes Circular 230 conflicts rules and interest is basically the same as the ABA rules. To comply with Section 10.29 a practitioner has to make two determinations: to determine whether a conflict exists, and once you've decided if there is a conflict the second is to determine what to do about it. Circular 230 describes two classes –of conflicts. The first is when you have one client whose interests are directly adverse to another client.

For example, you have two partners now fighting one another. You've been representing both of them as well as the partnership and now they're disputing something that is going to implode the partnership. Those partners – their interests – are directly adverse to one another. They're probably even suing one another. So, these opposing interests in that kind of situation are going to be pretty obvious. The second class of conflicts is a little more challenging. These are defined by what we call a significant risk that your representation of one client will be materially limited by your representation of another client, your responsibilities to a former client, a third-party, or your own personal interests.

Now the responsibilities to another client are not much different from the direct adversity except they're probably not suing one another. Maybe you have a partner who wants to characterize an item on his individual return –

slightly differently from the characterization in the partnership return and you're representing the partnership and the partners. In the former client situation, you may have a partner who wants you to represent him or her in a matter that affects a former partner. You previously represented both of them. So now you have to determine whether there is significant risk of material limitation because of your prior representation of both the former partner as well as the partnership.

Third-party context is similar. The third-party may be a fiduciary or a beneficiary of a trust that you acted as a fiduciary for, or someone to whom you owe a contractual or other obligation. Probably the hardest to recognize is when your own personal interests may materially limit your representation. For example, the IRS examines a return you prepared. They start asking questions about various entries you put on the return, some of which –

you may have advised on. Some you may have calculated, and some you may have just chosen from a variety of alternative tax treatments.

Initially you're not going to see a conflict because you have a neutrality of interest here. You want these return positions to be sustained at the end of the audit. But suppose the IRS now starts focusing on issues that you have some responsibility for. You may have made a slight mistake. Then you may be concerned at this point about a preparer penalty. Or maybe you're worried about Circular 230. You may see your interests and those of your client becoming a little different – maybe a lot different. That divergence and that difference is going to affect how you're going to be answering questions raised in the exam.

You might suddenly be putting a little more blame on your client. Maybe you're saying, "Oh the client didn't give me that information. I never received that. I didn't know about that." And even if those statements are true the conflict of interest –

between yourself and your client arises because your interests are now materially affected and they affect your ability to represent your client.

Now once you've identified that you have a conflict, either direct adversity or significant risk of material limitation, you come to the second part of the conflict analysis and that is what are you going to do about it?

Now you can withdraw from the representation – probably one of the easier ones to do. Or you can eliminate the cause of the conflict. For example, if you have a practitioner who has a financial interest of your personal involvement related to a client matter that could impair your judgement or objectivity in advising the client. You can resolve the client by divesting yourself of the financial interest. Now it may be possible to continue to represent the client notwithstanding a conflict provided you do three things to meet the exception –in 10.29.

The first thing you need to do is be what we call introspective. Before you talk to your client about the conflict issue you have to think it through on your own. You have to have a reasonable belief in your ability to continue to provide competent and diligent representation to any and all clients who are affected by the conflict of interest. Now whether the situation involves multiple partners, multiple shareholders, or a husband/ wife, or the conflict is between you and the client you have to have formed a reasonable belief in your ability to continue to provide competent, diligent representation to that client.

So you can't just say, "I think I can do this. I'm all right. I can do this. I won't let it affect my judgement." What you really need to do is review the information you have before you, review the conflict rules, and make a determination about the representation as well as about yourself. You have to –

apply a reasonable person's standard. Ask yourself what would a reasonable practitioner in this situation do about this conflict? Would they continue it or would they not? Now it's not required by Circular 230 but a common approach to these types of questions is to talk to someone you know.

Ask a trusted advisor who understands conflict of interest. Don't identify your client though when you do that. Determine whether you can remain true to the representation. Can you represent the client to the best of your ability? If you've determined that you can provide competent and diligent representation to your client you have to determine if the representation is not legally prohibited. For example, for former government employees, specifically former IRS employees, we are covered by post-employment laws that prohibit us from representing matters that we had previously been involved in as government employees.

So that's a little easier to find out.

Now the last part of our analysis is a little bit harder – probably the hardest part of all – which is you have to tell your client. You have to tell your client, and every single client who's going to be affected by the conflict. You have to inform them of the nature of the conflict, what the potential harm is for them, what the pros and cons are with your representation. It would also be wise of you to tell your client they have a right to consult an independent person for legal advice or another advisor about the conflict. Once you've given them the appropriate advice and information you need to secure from each effected client or former client a waiver that says they consent to your continued representation notwithstanding the conflict, that you've explained it to them, you've acknowledged that you've thoroughly explained it to them, and they understand it.

That waiver must occur within 30 days of the conflict arising.

Now when a conflict arises you may not know it right off the bat. It may not be evident at the beginning of a transaction or a relationship. For example, you've represented spouses for a number of years. Not every spouse that comes in is going to end up in a divorce or separated. But the minute you realize that a conflict has arisen you then need to go through the analysis of whether or not you continue the representation. If you determine there's a conflict there has to be a writing within 30 days so that you can continue.

Now the spouse situation is one of the most common dual representation conflicts and probably the easiest to illustrate this concept mainly because you will know information about one that you don't want to disclose to the other and vice versa. But you owe them both an obligation. When you have a situation like that finding an objective and knowledgeable third-party is a pretty good idea.

Now the waivers that you obtain within 30 days of the conflict arising need to be retained for 36 months after the engagement that you were involved in ended. And they must be produced to the OPR whenever requested. So, make sure you keep your records all up to date on those situations.

Section 10.37 addresses due diligence in the context of written tax advice. Circular 230 used to have a provision called covered opinions. We got rid of that. We now have Section 10.37 which is a set of principles that is applied to written tax advice and it's based on more facts and circumstances of the written advice. What we say is you must make a reasonable effort to determine the relevant facts. You have to reasonably consider those facts and you have to make a reasonable, factual, and legal assumption in situations where you don't know the actual facts.

It is not reasonable for you to rely on representations or statements or agreements or anything else given to you or told to you if you know or should know that the information is incorrect, incomplete, or inconsistent.

Now this follows the same principles that we find in 10.22 as well as 1034(d).

One thing we tell everybody with written advice: do not play the audit lottery. You may not give advice that is based on assumption that the return will not be examined. Or if it is examined the issue will not be noticed. So even if your client says to you, "What are the odds that I'm going to get caught? Or what are the odds that they're going to actually see that on the return?" Those little comments,

those little statements – that is your client asking you to play the audit lottery.

So, you must take into account the opportunity that you'll be able to settle the matter. So, you can do that. You can say to your client, "Well we're going into this meeting. This is a position that is probably going to be challenged by the Service. But if we get challenged the laws is unsettled in this area. We've got pros and cons on both sides. So, I think the IRS is going to be weighing their hazards of litigation. We've weighed ours. And we think that we can come to a joint resolution on this issue." That is a better response to your client than to tell them, "It's just going to be a two percent chance."

So, in the written advice area you may rely on the advice of others. We've heard that terminology back in 10.22 as the safe harbor. It's okay as long as the advice is reasonable and your reliance is in good faith considering all the facts and circumstances.

Now your reliance is not going to be considered reasonable if you know that the person that you've gotten the advice from is incompetent or unqualified to be giving you the advice, or you know that they have potentially a conflict of interest under 10.29.

So, you may see this come up with working with another preparer who prepared the return. And that return is now under exam and they're trying to give you a pitch for why they put certain things on the return, why they did certain things. That preparer obviously has their own self-interest at heart and they're going to be telling you things that are going to protect them and how to defend themselves. So, in another situation there's an opinion on a transaction that was written by somebody that was involved with designing the whole transaction and promoting the transaction. You also have to question the independence of that person and their legal analysis of what you're about to do.

When we think about –due diligence here and the conflicts of interest analysis we talked a little bit about reasonable practitioner standard. That's the same standard we kind of across the board apply here in due diligence. It's an objective determination. How would your peers in the community react to this situation? So, like everybody here – how would you react to certain situations that are presented to you? Once again, it's good to consider consulting with a colleague, asking them what their reaction is because you're then dealing with your community and the industry about the issue.

When we're dealing with facts and circumstances we're looking at the relationship with your client. What's the complexity of the issue? What is your level of sophistication? So, this particular provision that we have in the Circular is very flexible because it is based on facts and circumstances.

Now we take a look at 10.35 which we call competence which says that you must be competent to practice before the Internal Revenue Service. Like 10.22 due diligence standards, competence in 10.35 is described in very general terms for flexibility. Competent practice requires the appropriate level of knowledge, skills, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. This is primarily a message for those who think you can by tax software, punch in some numbers, let it do its work, and not understand what the underlying implications are.

This is also a message for folks who think they can go by without attending conferences like this -- without continue education. In one of the prior tax forums I was involved in a little post-seminar discussion. And one of the folks there –

let me know that she herself was a not a tax practitioner. She was actually the secretary for her accountant who had decided not to attend the forum. He was off on vacation on some island beach. She was there to scan his badge. Never, never a good idea – not to tell the person who just talked right? So, the reality though is none of us are totally competent at all points in time. That's okay. We understand that. I run around with my handy dandy Circular. Even though I deal with it I have to refresh my memory.

I also refresh my memory by checking the code and regs. We go back and look – the regs and codes are big books, lots of words, lots of little nuances. But we have ways of getting competent. And more importantly you have to recognize when you are not competent, when you don't have the skill set that's needed. So, what can you do? You can get competent. You can attend –

courses like this. You can gain it through experience. You can do research in the area so that when you do consult with a subject matter expert you can speak intelligently and understand the acronyms that they throw out at you.

You can also work with a subject matter expert. So, there is a responsibility here – unspoken – that not only do you need to be competent, you need to recognize your areas of weakness and to make sure that you're getting your client the appropriate representation and advise in some manner if it can't come from you.

So this general rule in 10.35 has a parallel provision under 10.51 in Subpart (a)(13) which addresses false opinions that are knowing or reckless or grossly incompetent in some way. It makes it disreputable and incompetent conduct to give intentional or recklessly misleading opinions.

This applies to both oral

[audio cuts out]. That went out – sorry. Just like the due diligence provisions the 10.51 competence and false opinion rule applies whether you're giving an opinion to your client or the Treasury. In another parallel with the dual diligence provisions we look for patterns again. Again, the one-off is not what's going to put you on the radar. It's going to be multiple demonstrations.

There are a couple of definitions here we should be aware of.

False opinions: this is one that contains a knowing misstatement, a fact, law, asserts unwarranted positions that counsel or assist in conduct known to be illegal or fraudulent or that conceal those matters that are required by law to be revealed. An example of a false opinion could be misrepresentations that occur in presentations before the IRS of financial assets while assisting a client in a collection matter. So, this rule in 10.51 --

could also apply in 10.34(b). Reckless conduct means highly unreasonable omission or misrepresentation that involves an extreme departure from the standards of ordinary care.

10.34 measure is reasonably prudent practitioner and 10.51 address recklessness as something that would constitute a deviation to the extreme, something that falls far below the ordinary reasonable practitioner standard. Gross incompetence is described as gross indifference or grossly inadequate preparation or consistently failing to perform your obligations to your client. When we look at oral and written opinions again patterns are going to matter. How often has this happened? In this particular area with Circular 230 it is very difficult to prove violations with a single instance of behavior.

So that is why we look for multiple actions.

As tax professionals there are a number of resources available to you on the IRS website that relate to practice before the Service. This particular site contains links to some of the key documents that are important for practitioners to know about. The first one is the current version of a Circular June 2014. The second item tells you how to describe to the *OPR Bulletin*. Many of you probably subscribe already to the *IRS News* which is delivered by e-mail. And this is a similar one that just focuses on OPR. The third bullet is a document that describes most of the duties and restrictions in Subpart B of Circular 230 in plain language.

That's another place you might be able to get a better understanding of what each of these provisions might require. The next to the last bullet is a –

document that explains to practitioners what their rights and responsibilities are during a disciplinary case. This is again a plain language discussion. This is about Subpart D of Circular 230. Finally, we have a four-page document that we give to every practitioner we either suspend or disbar which essentially tells the practitioner what they may or may not do with respect to practice before the Service during their period of suspension or disbarment.

It also provides them some guidelines of what they need to do to seek reinstatement. And while I expect none of you have ever gotten it it's worth a read by everybody to appreciate just how extensive the limitations are if you are suspended or disbarred, and the practical implications of a loss of a practice rights before the Service. Again, all of these documents and links to them can be found at www.irs.gov under the tax professionals.

So, in summary we've talked about due diligence. You need to know the facts and circumstances. You need to ask questions. Know the applicable law. Apply the law. Document your conversations with your clients. And recognize and be honest about your own abilities. Maybe at the beginning of a career you're out seeking clients because you need to put food on the table. But at the end of the day it's all about you, your career, your job, your livelihood, and your reputation. The rules we just talked about are there to safeguard you as much as your clients and the IRS.

This is OPR's contact information. If you have any questions I will be at the Speaker's Corner today from 11:00 AM until 12:00 PM and tomorrow from 12:00 PM to 1:00 PM. This afternoon we have a presentation on determining authority and I hope you all will join me for that. Thank you for attending today and I –

hope you've found it helpful and informative. *[Applause]*

Circular 230: Diligence in Tax Practice-Glossary

Covered Opinion. IRS's rules on written advice provided to clients by tax practitioners have been tightened. Anyone who obtains the services of a professional tax advisor should be aware of how these new rules affect the advice they receive. The rules are contained in "Circular 230" and apply to "covered opinions" (formerly known as "tax shelter opinions"). A covered opinion is defined as written advice, including electronic communications (i.e., e-mail, faxes), on a federal tax issue arising from
1.a transaction IRS has determined is a tax-avoidance transaction,
2.a partnership or other entity or investment plan, or any other plan or arrangement, that has tax avoidance or evasion as a principal purpose, or
3.a partnership or other entity or investment plan, or any other plan or arrangement, that has tax avoidance or evasion as a "significant purpose," if the written advice is a "reliance opinion" (explained below), or "marketed opinion" (i.e., the opinion will be used by a promoter to market an investment).

Disbarment. is the removal of a lawyer from a bar association or the practice of law, thus revoking his or her law license or admission to practice law. Disbarment is usually a punishment for unethical or criminal conduct. Procedures vary depending on the law society.

Due diligence standards. The Four Standards established under Section 6695 of the Internal Revenue Code and related regulations set out the refundable credit due diligence requirements and the penalties for failure to comply with them. The refundable credits subject to due diligence are the earned income tax credit (EITC), the Child Tax Credit (CTC) and the refundable part of the CTC, the Additional Child Tax Credit (ACTC) and the American opportunity tax credit (AOTC).

False opinions. are oral or written Incompetent and disreputable conduct includes giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions.

Hazards of litigation. are defined by the IRS as the risk (hazard) that the IRS will lose, and the Tax Court will agree with you. IRS auditors are usually narrow in their approach to a case – they are investigators, and do not consider the hazards of litigation.

Reckless conduct. An unreasonable position, intentionally disregarding the rules.

The Annual Filing Season Program. The Annual Filing Season Program aims to recognize the efforts of non-credentialed return preparers who aspire to a higher level of professionalism. Those who choose to participate can meet the requirements by obtaining 18 hours of continuing education, including a six hour federal tax law refresher course with test. The return preparer must also renew their preparer tax identification number (PTIN) for the upcoming year and consent to adhere to the obligations in Circular 230, Subpart B and section 10.51.

Circular 230: Diligence in Tax Practice-Index