



## ETHICS DOESN'T HAVE TO BE BORING!

S. Derrin Watson, Esq.  
Ilene H. Ferenczy, Esq., CPC,  
APA



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- Maureen Pesek
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- Slides and a recording of the webinar also available on our webpage:
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- Look for webpage in the zoom registration tab of your browser – not essential but certainly appreciated!



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## Your Presenters Today

Ilene H. Ferenczy, J.D., CPC, APA



S. Derrin Watson, J.D., APM



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## Agenda

- Introduction
- What Are Ethics?
- Source of Ethics
- Other Considerations
- Case Studies



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## 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



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## Types of Ethics

- Ethics defined by a professional organization (like ASPPA, NIPA, AICPA, 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
- “Proper standard of care” in your industry to define what is not malpractice or negligence



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## Key Practice Issue

- The difference between the client's expectations and your performance may be the basis of the client's belief that you have committed malpractice
- How will the client define that expectation?
  - Impressions of what a TPA does?
  - Impressions of what his/her TPA does?
  - General ideas about what is involved in retirement plan administration?
  - What his/her friends with plans have said?
  - Legal documentation, such as the TPA's service agreement?



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## ERPA Ethical Obligations

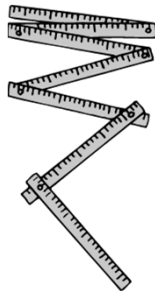


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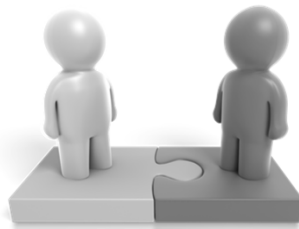
## ERPA Ethics

- Circular 230 contains ethical rules to which ERPA's, as well as other tax professionals, are subject



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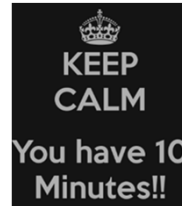
## Circular 230 Rules for Working With the IRS



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## Circular 230, §10.20: Information to the IRS and §10.23: Promptness

- If you are asked to provide information to the IRS, you must provide it promptly and not interfere with the IRS's efforts to get that information
- You must not unreasonably delay the prompt disposition of any matter with the IRS
- Exception: you believe in good faith and on reasonable grounds that the information is subject to privilege



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## Practice Tip



The IRS generally is rejecting filings if the reviewer requests information and the practitioner does not respond in a timely manner ... unless the practitioner gets an extension of time before the original deadline runs out



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## Circular 230, §10.34: Standards for Returns and Documents, Affidavits, Papers

- You may not advise a client to take a position on a document submitted to the IRS that:
  - Is frivolous
  - Is meant to impede or delay the administration of the tax laws
  - Demonstrates an intentional disregard of a rule or regulation unless there is a good faith challenge to the rule or reg
- Or advise a client to submit a return that:
  - Lacks a reasonable basis
  - Takes an unreasonable position
  - Willfully understates tax or disregards tax rules and regulations



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## Circular 230, §10.34: Standards for Returns, Docs, Affidavits, Etc. (cont'd)

- You must:
  - Advise the client of any penalties that are likely to apply with respect to a position taken on a tax return or document submission; and
  - Inform the client of any opportunity to avoid such penalty by disclosure and the requirements of disclosure



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## Question

- What is the difference between:
  - An aggressive but permitted position; and
  - A position that lacks reasonable basis?



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## Question (cont'd)

- Must the practitioner know that the position is “unreasonable” to be in violation of ethics?
  - Example: TPA has a “great idea” about how to design a retirement plan. He looks through the Code and regulations and can find nothing that says his idea is impermissible
  - However, there have been five cases litigated in the last ten years that are roughly similar to the administrator’s idea, and all have been decided against the taxpayer. The administrator has no idea of these cases ... after all, he’s not a lawyer



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## Polling Question 1

- Do you think that:
  - A. The TPA was ethical, because he did not know that the idea had flaws.
  - B. The TPA was not ethical; he should have hired someone to vet the idea more thoroughly.
  - C. I don't know; it's too close to call.



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## Circular 230, §10.34: Standards for Returns, Docs, Affidavits, Etc. (cont'd)

- You may:
  - Rely in good faith on information provided by the client
- You may not:
  - Ignore implications of information furnished, and must make reasonable inquiries if the information appears to be incorrect, inconsistent with facts, or incomplete



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## Polling Question 2

- Do TPAs have an ethical obligation to dig deeper than just asking “yes or no” questions and relying on what the client says in relation to substantive matters?
  - A. Yes
  - B. No
  - C. It depends on the service agreement



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## Circular 230 Rules for Working With Your Clients



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## Circular 230, §10.36: 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



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## Circular 230, §10.29: Conflicts of Interest

- Cannot accept representation of a client if there is a conflict of interest:
  - Representation will be directly adverse to another client; or
  - Significant risk that representation to one or more clients will be materially limited by responsibilities to other clients or third parties or practitioner's own interests
- Exception to prohibition:
  - You reasonably believe you can provide competent and diligent representation, notwithstanding the conflict
  - Representation not prohibited by law
  - Each affected client is advised of and waives the conflict in writing



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## 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



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## Polling Question 3

- Is sending a letter saying that a review of the person’s Form 5500 reveals potential for an IRS audit a violation of Circular 230, §10.30?
  - A. Yes
  - B. No



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## Circular 230, §10.21: Knowledge of Client's Omission

- If you know that the client has omitted material information or made an error in any filing with the IRS, must advise client:
  - That the omission or error was made;  
and
  - The potential consequences of the omission or error



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## Polling Question 4

- If you know that a client's Form 5500 from a prior year contains misinformation but was filed in good faith, do you need to insist that the client amend the return?
  - A. Yes
  - B. No
  - C. It depends on the seriousness



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## 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

**THINK  
BE  
CAREFUL**



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## Circular 230, §10.33: Best Practices

- You should provide clients with the 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



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## Polling Question 5

- Can you meet the ethical requirement to “communicate clearly with clients about the terms of your engagement” if you do not have a written service agreement?
  - A. Yes
  - B. No



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## Circular 230, §10.33: Best Practices (cont'd)

- 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



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## Circular 230, §10.28: Return of Client Records

- Must return all records of client necessary for compliance with tax obligations
- Effect of fee dispute:
  - Generally does not relieve obligation to return records, but
  - If state law permits retention of records in case of fee dispute, need only return records that must be attached to the taxpayer's return



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## Circular 230, §10.28: Return of Client Records (cont'd)

- Client's records include:
  - Provided to practitioner in the course of representation that preexisted practitioner's work (i.e., prior records)
  - Materials prepared by client or third party
  - Returns, claims for refund, schedule, affidavit, appraisal, etc., prepared by practitioner that were already presented to client (but not those that are pending the client's payment of fees with respect to those documents)



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## Circular 230 Rules for Running a Practice



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## Circular 230, §10.33: Remember the “Best Practices” from the Last Section?

- Owners/managers should “take reasonable steps” to ensure that the firm’s procedures for all in the firm are consistent with best practices



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## 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



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## Polling Question 6

- Which of the following do you think constitutes the appropriate ethical standard for oversight of TPA work:
  - A. Every client's administration should be double-checked by a supervisor.
  - B. An experienced administrator's work does not need to be double-checked, except for approving a participant distribution of more than \$10,000.
  - C. Reviewing a selection of an administrator's work is sufficient double-checking; a review of every case is not needed.
  - D. We expect clients to review our work and bring errors to our attention; we don't cross-check here in the office.



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## Circular 230, §10.37: Written Advice

- In giving written advice, a practitioner must:
  - Base the advice on reasonable factual and legal assumptions (must make reasonable efforts to ascertain facts)
  - Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know
  - Not rely upon any representations, statements, findings, or agreements by the taxpayer or other representative if reliance is unreasonable
  - Relate applicable law and authorities to facts, and



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

- May 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
- 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



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

- What is a “Federal tax matter”?
  - Any matter concerning the application or interpretation of any revenue provision in the Internal Revenue Code, regulation, or IRS guidance
  - Any provision of law impacting a person’s tax/return filing obligations
  - Any other law or regulation administered by the IRS



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

- When is reliance unreasonable?
  - 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



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

- When is reliance unreasonable?
  - 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
  - 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



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## Polling Question 7

- A lawyer gives your client advice that you believe to be wrong. Do you:
  - A. Follow what the lawyer says; after all, he's the legal expert.
  - B. Advise the client that you think the lawyer is wrong and have the client decide who to believe.
  - C. Call the lawyer and outline why you think he's wrong.



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## 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

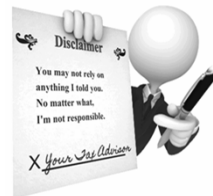


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## Circular 230, §10.37: Written Advice (cont'd)

- What about disclaimers?
  - A disclaimer doesn't mean that you are not liable for a violation of §10.37
  - May want to have a disclaimer to indicate scope of opinion
  - Don't use "old" disclaimers



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

- Sample disclaimer:
  - PLEASE NOTE: Any tax and legal advice provided in this correspondence is for the exclusive use of the person to whom it is directed and is dependent on the facts and circumstances provided to us by such person (regardless of whether such facts and circumstances are discussed in this correspondence). The use of this information for any other situation and by any other individual, regardless of how this correspondence was provided to the other individual, may be inappropriate. Furthermore, if the facts and circumstances communicated to us are not accurate and complete, please contact us immediately, as our advice may change. Please also contact our office with any questions you may have.



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## Other Considerations



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## Things to Consider

- Your reputation
  - With your clients
  - With other practitioners
  - With your employees
- Your risk tolerance
- Your personal ethics



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## Polling Question 8

- A TPA believes that participant loans and hardship distributions are dangerous, because they deplete a participant's retirement account. Therefore, she never offers these features to her clients. Is that ethical?
  - A. Yes. It's for her clients' and their employees' good.
  - B. No. Clients should decide plan terms for themselves.



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## A Good Ethical Rule of Thumb

Do what's right ... and don't let anyone  
take away your good name!



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## When in Doubt ...

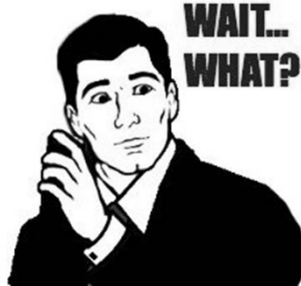
Consult a Trusted Friend!



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## What Does This Mean in Real Life?



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## Scenario #1:

### The Case of the Non-employees, Non- partners, Non-nothings



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## Scenario #2: The Case of the Missing Documents



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## Polling Question 9

- If a client presents you with a properly signed document that you believe (but do not know) was really backdated, do you have any ethical obligation to question the client?
  - A. Yes
  - B. No



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## Scenario #3: The Case of the ACH Failures



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## Scenario #4: 3(16) Administration by the Dollars



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## Polling Question 10

- What do you think about the way Philip talked to Jeanie?
  - A. It's the facts of business life; get real
  - B. He sounds disrespectful
  - C. He sounds a patriarchal pig
  - D. This could lead to a lawsuit for a hostile work environment or gender discrimination



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## Scenario #5:

### The Case of the Plan That Thought It Was a Checking Account

A check form with the amount '1400' in the top right corner. The date field is blank. The MICR line at the bottom contains the numbers '20074549', '1400489345', and '1400'. The text 'PAY TO THE ORDER OF' and 'FOR' are visible on the left side.

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## Polling Question 11

- What should Madeline do about Ralph?
  - A. Fire him as a client.
  - B. Send him the correctly prepared forms 1099R and Form 5500 to file; if he modifies them or fails to file them, that's his business.
  - C. Prepare the forms as he instructs you in writing; he's the one signing them.



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## Scenario #6:

### The Case of the Missing Plan Termination



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# Questions?



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## Contact Information

### Ilene H. Ferenczy

Ferenczy Benefits Law Center

*Author of the  
Qualified Plan eSource*

(678) 399-6602  
ilene@ferenczylaw.com

### S. Derrin Watson

Of Counsel, Ferenczy Benefits Law Center

*Author of  
Who's the Employer?, 403(b) eSource,  
457 eSource*

(805) 451-8713  
sderrin@gmail.com

### Timothy M. McCutcheon

*Publisher of ERISApedia.com*

(612) 605-2266  
tmm@erisapedia.com  
sales@erisapedia.com



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## For Further Study

Joanne Pecina will demonstrate how to get the answers you need from the ERISApedia.com resources.



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