



2024



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TaxForum

Circular 230: Professional Responsibility in Today's Tax Practice



Agenda

- Learning Objectives
- Introduction
- Overview of Circular 230 & Office of Professional Responsibility
- Circular 230 and Today's Tax Practice
 - Remote Work
 - Competency & Technology
 - Artificial Intelligence (AI) Tools
 - Social Media
- Contact Information
- Resources & Guidance

Learning Objectives

Today, our seminar will help you:

- Understand the impact of flexible work arrangements on professional responsibility in tax practices, including how Circular 230 standards and other authorities apply;
- Recognize the significance of maintaining technological competency given evolving digital tools and remote work practices;
- Evaluate the ethical considerations and potential risks associated with using social media platforms as a means of professional engagement and communication in the tax profession; and
- Assess the role of artificial intelligence in tax practice, including its benefits, limitations, and the ethical responsibilities surrounding its use, particularly in client interactions and decision-making processes.





Introduction

- In recent years, there have been significant changes to the traditional landscape of working as a tax professional.
 - Expansion in remote work options (e.g., full-time or hybrid schedules, project-based vs. traditional full-time, non-traditional work schedules, telework locations, etc.);
 - Expectation of competency in technology and cybersecurity by non-traditional professional fields such as tax professionals;
 - Emergence of artificial intelligence tools in work production; and
 - Increase use of social media for solicitation.
- Tax professionals must assess and adjust their professional responsibility obligations under Circular 230 to encompass these new changes.



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Circular 230 & OPR



Overview of Circular 230

- Circular 230 is a set of interrelated provisions intended to ensure that “practitioners” are “fit to practice” before the Treasury Department by having the requisite character, reputation, qualifications, and competency.
 - Enabling statute: 31 USC §330
 - Circular 230 is a compendium of practice regulations in 31 CFR, Subtitle A, Part 10.
- The IRS Office of Professional Responsibility (OPR) is charged with enforcing Circular 230.
- The OPR also has authority under Delegation Orders 25-16 and 25-19 and Revenue Procedure 2014-42.

Circular 230 – Statutory Authority

- Section 330 of Title 31 of the U.S. Code authorizes –
 - Regulation of the practice of representatives of persons before the Treasury Department (including the IRS) and determinations of practitioner “fitness” to practices. 31 USC §330(a)
 - Types of disciplinary action, including monetary penalties. 31 USC §330(c)
 - Regulation of specific appraisers. 31 USC §330(d)
 - Standards for certain written advice. 31 USC §330(e)



Office of Professional Responsibility

- Administers the laws and regulations governing the practice of certain tax professionals before the IRS.
- Interprets and applies the standards of practice for tax professionals in Circular 230 fairly and equitably.
- Investigates allegations of misconduct by tax practitioners in their practice before the IRS and imposes disciplinary sanctions if warranted.
- Supports the IRS's strategy to enhance enforcement of the Internal Revenue Code (IRC) by ensuring tax practitioners adhere to professional standards and follow the law.





Fitness to Practice

- The principal focus of OPR’s oversight of practitioners is their “fitness to practice.”
 - Good character.
 - Good reputation.
 - Necessary qualifications to provide valuable service to the client.
 - Competency to advise and assist persons in presenting their cases before the IRS.



“Practice” before the IRS

- All matters under laws or regulations administered by the IRS relating to a taxpayer’s rights, privileges, or liabilities. §10.2(a)(4)
 - Examples of “practice”:
 - Representing a client in an audit, before IRS Collections, or appearing before the IRS Independent Office of Appeals.
 - Preparing documents for submission to the IRS.
 - Advising clients regarding tax positions.
 - Providing written opinions (i.e., advice to clients regarding planned or completed transactions).
 - Not *mere* tax return preparation.





Fitness to Practice

- **Attorneys**
- **CPAs**
- **Enrolled Agents**
- Enrolled Retirement Plan Agents
- Enrolled Actuaries
- Annual Filing Season Program Record of Completion Holders
- Appraisers who submit appraisals supporting tax positions



Other Rules and Standards Applicable to Practitioners

- Although not enforced by OPR, the IRC imposes reporting and other requirements on practitioners who prepare returns or render advice, as well as other participants in the tax system (e.g., appraisers).
 - Includes penalties for not safeguarding taxpayer information.
 - Violating these provisions could subject tax practitioners to disciplinary action under Circular 230 as disreputable conduct.
- Most practitioners are also subject to rules governing attorneys, CPAs, Enrolled Agents, and appraisers issued by licensing authorities or other professional bodies.
 - Discipline by those licensing authorities may prompt reciprocal action by OPR.



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Standards of Conduct: Remote Work

Non-Traditional Work Arrangements

- Before the pandemic, remote or hybrid tax professional positions existed within some firms, but they were not as common compared with today.
- Many of today's job seekers are pursuing remote or hybrid tax positions.
- Many firms continue to embrace a more flexible work environment, especially as they look to retain and attract talent.
 - Firms identified offering flexible working arrangements (e.g., hybrid hours) as a top tip for a successful recruitment strategy. See *Thomson Reuters Institute 2023 State of the Tax Professionals Report*.



Circular 230 Provisions Applicable to Remote Work

- Several Circular 230 standards and IRC statutes can be triggered when a firm uses non-traditional work arrangements:
 - **10.36 Procedures to Ensure Compliance**
 - **10.34 Standards on Returns and Other Documents**
 - **10.82 Expedited Suspension**
 - 10.22 Due diligence
 - 10.33 Best Practices
 - 10.35 Competence
 - 10.37 Written Advice
 - IRC §6713 and §7216(a) civil and criminal penalties for unauthorized use or disclosure of taxpayer information



§10.36 – Procedures to Ensure Compliance (1 of 3)

- Under section 10.36, a firm with a Circular 230 practice must have “adequate procedures” in place to ensure compliance by its members, associates, employees, *and contractors* with Circular 230.
 - You cannot outsource your Circular 230 obligations.



§10.36 – Procedures to Ensure Compliance (2 of 3)

- Section 10.36 requires “reasonable steps” be taken to ensure a firm has in place procedures adequate to show that employees understand and follow their obligations under Circular 230. Such steps include:
 - Putting controls in place (including data security safeguards) to ensure oversight and review of employees and their work product;
 - Setting policies and procedures for the assignment of work and workload to ensure matters are overseen by employees with the competence and time to do a thorough, complete job; and
 - Taking prompt remedial action for failures to adhere to Circular 230.



§10.36 – Procedures to Ensure Compliance (3 of 3)

- A “responsible practitioner” at a firm is subject to discipline if, through willfulness, recklessness, or gross incompetence, they:
 - Fail to take reasonable steps to ensure adequate procedures for compliance with Circular 230 are in place and properly followed or
 - Individuals who are firm members, associates, or employees are or were engaged in a pattern or practice of failing to comply with Circular 230.
- Even if the responsible practitioner takes reasonable steps, they may be liable for violations if they:
 - Know or should know that one or more members, associates, or employees are or were engaged in a pattern or practice of not complying with Circular 230 and
 - Fail to take prompt action to correct the noncompliance.



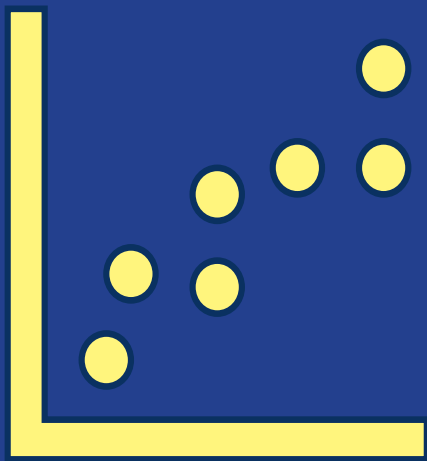
§10.34 – Standards for Tax Returns/Documents

- Under section 10.34(a), a practitioner may not sign a tax return or advise a position on a tax return that willfully, recklessly, or through gross incompetence:
 - Lacks reasonable basis,
 - Has or is an unreasonable position (IRC §6694(a)(2)),
 - Is a willful attempt to understate liability (IRC §6694(b)(2)(A)), or
 - Sets forth a reckless, intentional disregard of rules and regulations (IRC §6694(b)(2)(B)).





§ 10.34(a) and (b) – Standards for Tax Returns



- Under subparagraphs (a) and (b) of section 10.34, a practitioner –
 - May not advise taking frivolous positions.
 - May not advise submissions:
 - To delay or impede tax administration,
 - That are frivolous, or
 - Containing or omitting information that demonstrates an intentional disregard of rules or regulations.
- Patterns matter!

§10.34 – Penalties and Client Reliance

- Under section 10.34, a practitioner must advise a client of potential penalty exposure regarding:
 - A position taken on the return if the practitioner advised the client regarding the position, or the practitioner prepared or signed the return.
 - Any document, affidavit, or other paper submitted to the IRS.
- A practitioner must also advise the client of the opportunity for penalty avoidance through disclosure.
 - A disclosure can be made by attaching a Form 8275, *Disclosure Statement*, or Form 8275-R, *Regulation Disclosure Statement*, to the return.





§ 10.82 – Expedited Suspension (1 of 2)

- Under section 10.82, the OPR can impose a suspension before *filing a complaint* if the practitioner has received an opportunity to be heard in another forum
 - Suspension or revocation of law license or CPA certificate for cause by the licensing authority (i.e., state bar or board of accountancy)
 - Criminal conviction
 - Violation of conditions imposed based on a prior OPR sanction
 - Certain court sanctions

§ 10.82 – Expedited Suspension (2 of 2)

- Attorneys and CPAs should check their state licensing authorities regarding whether they can practice outside their state.
 - For example, ABA Model Rule 5.5 states:
 - a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.
 - b) A lawyer who is not admitted to practice in [a] jurisdiction shall not:
 - 1) except as authorized by these Rules or other law, *establish an office or other systematic and continuous presence* in this jurisdiction for the practice of law; or
 - 2) *hold out to the public or otherwise represent* that the lawyer is admitted to practice law in this jurisdiction.



Best Practices for Remote Work Environments

- Establish robust supervision protocols for remote workers, emphasizing competency, due diligence, and adherence to standards, especially for new hires.
- Enhance procedural updates to ensure compliance with remote work requirements, including secure handling of client files, clear policies on shared workspaces, expectations of technological proficiency, effective client communication, document management protocols for safeguarding taxpayer data, regular training on data security, and fostering a learning culture for remote workers.
- Awareness of jurisdictional licensing requirements for attorneys and CPAs.





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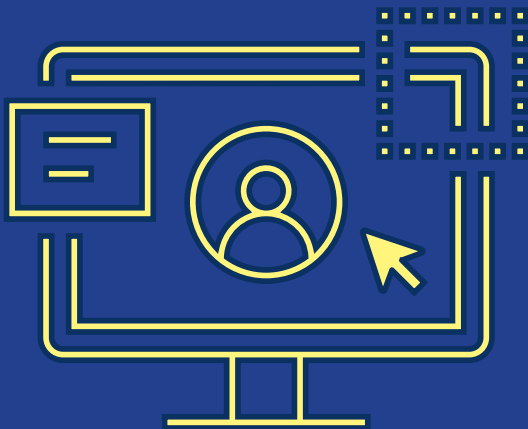
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Standards of Conduct: Competency & Technology

Standards of Conduct: Competency & Technology

- Tax professionals and firms with remote work arrangements can meet their Circular 230 obligations when the right tools and technologies are in place.
 - The right tools and technologies will not suffice if the firm's employees are not competent in using those tools.



Circular 230 Provisions Applicable to Competency & Technology

- The Circular 230 standards and IRC statutes that may apply to a practitioner's technological competency include:
 - **10.35 Competence**
 - 10.22 Due diligence
 - 10.33 Best Practices
 - 10.36 Procedures to Ensure Compliance
 - IRC §6713 and §7216(a) civil and criminal penalties for unauthorized use or disclosure of taxpayer information



§10.35 – Competence (1 of 3)

- Practitioners must have the knowledge, skill, thoroughness, and preparation necessary for the matter for which they have been engaged.
 - Know when you are not competent.
- Practitioners can provide competent representation by researching and educating themselves on the issue or consulting with other tax professionals who have established competence.



§10.35 – Competence (2 of 3)

- A practitioner's failure to meet standards of professional care may prejudice a client's rights by failing to:
 - Meet important filing deadlines imposed by applicable tax statutes;
 - Conduct necessary research on applicable authorities; or
 - Comply with a duty imposed by other ethical responsibilities.
- A practitioner unable to attain the necessary competence may have to decline (or withdraw) from representing the client.



§10.35 – Competence (3 of 3)

- One facet of competence that has gained importance since the COVID-19 pandemic is the duty of tax practitioners, support staff, and contractors to maintain sufficient technological competence.
 - See, e.g., Comment 8 to ABA Model Rule 1.1 (Competence).
- Technological competency is needed to ensure the practitioner can competently represent their clients, communicate relevant information, and safeguard client personally identifiable information (PII) and property.



Best Practices to Ensure Competency as to Confidentiality

- Ensure responsible handling of Personally Identifiable Information (PII) by collecting only what's necessary, restricting access to authorized personnel, and disposing of it securely and promptly when no longer needed.
- Routinely check IRS e-Services account for the number of returns filed with the practitioner's EFIN.
- Routinely check the CAF — through either the Tax Pro Account after linking your CAF or a CAF77 request—for the authorizations filed with the practitioner's CAF number.



Best Practices for Technological Competency

- Implement comprehensive cybersecurity measures across all electronic systems, including risk assessment, network surveys, and installation of security software with automated updates and scans.
- Ensure data protection through secure backup procedures, compliance with legal email policies, maintenance of strong password practices, and proper disposal of old hardware.
- Create a written information security plan (WISP)
 - Publication 5708, *Creating a Written Information Security Plan for your Tax & Accounting Practice*, provides sample information to help develop a WISP, as required by the Federal Trade Commission under the Gramm-Leach-Bliley Act.
 - OPR Alert Issue No. 2023-10, *Careful WISP(er) – Professional Responsibility and Data Security: Practitioners’ Obligation to Have a Written Information Security Plan (11/14/23)*





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Standards of Conduct: Artificial Intelligence

Standards of Conduct: Artificial Intelligence

(1 of 2)

- Generative artificial intelligence (AI) has become a hot topic and much more accessible to the average individual with text and email generation, ChatGPT, etc.
- AI's future role as a tax practitioner's tool is still being developed.
 - In August 2023, the American Bar Association launched a year-long task force to study the impacts of AI on law practice.
- AI cannot be a substitute for a practitioner's competent representation.
 - Under section 330 of 31 USC and Circular 230, a practitioner competency (e.g., knowledge, skill, thoroughness, and preparation necessary for the matter for which they have been engaged) to advise and assist persons in presenting their cases before the IRS.





Standards of Conduct: Artificial Intelligence

(2 of 2)

- Due diligence is required in assessing the reliability of AI-created result
- While a practitioner can provide competent representation by researching and educating themselves on an issue, using AI for this education has risks. AI chatbots are prone to fabricating facts (called “hallucinations”).
 - A Colorado judge reported an attorney to the state bar for using ChatGPT to complete and file a document containing fake case citations with the court.
 - A Manhattan judge imposed a \$5,000 fine on two lawyers who submitted a legal brief “full of made-up cases and citations,” all generated by ChatGPT.
 - A California judge penalized a law firm for submitting a legal brief citing “fake” cases. Per the firm, a young, newly hired lawyer used “online research” to write the motion.



Circular 230 Provisions Applicable to Artificial Intelligence

- Circular 230 standards and IRC statutes that touch on the ethical use of AI include:
 - **10.22 Due diligence**
 - **10.51(a)(13) Giving a False Opinion, knowingly, recklessly, or through gross incompetence**
 - 10.33 Best Practices
 - 10.34 Standards on Returns and Other Documents
 - 10.35 Competence
 - 10.36 Procedures to Ensure Compliance
 - 10.37 Written Advice
 - IRC §6713 and §7216(a) civil and criminal penalties for unauthorized use or disclosure of taxpayer information



§10.22 – Due Diligence

- A practitioner must exercise due diligence in:
 - Preparing, approving, or filing tax returns, documents, affidavits, etc., relating to IRS matters.
 - Determining the correctness of oral/written representations made to the client or Treasury personnel.
- Willful blindness violates a practitioner's due diligence responsibilities under Circular 230.



§10.22 – Due Diligence: Reliance on Client

- Relying on information furnished by clients
 - *Generally*, a practitioner may rely in good faith without verification upon information provided by the client.
 - A practitioner cannot ignore the implications of information furnished to or known by the practitioner, and
 - The practitioner must make reasonable inquiries if the information provided appears incorrect, incomplete, or inconsistent with other facts or assumptions
 - Cannot be willfully blind!



§10.22 – Due Diligence: Reliance on Third Party

- Relying on another's work product
 - A practitioner may rely on other professionals' work product with reasonable care.
 - May not ignore other information furnished to you or known by you.
 - Duty to make reasonable inquiries if the information provided appears incorrect, incomplete, or inconsistent with other facts or assumptions.
 - Application of this standard to AI-generated work products.



§10.51(a)(13) – Giving a False Opinion

- A practitioner may not give a false opinion knowingly, recklessly, or through gross incompetence, including an opinion that is intentionally or recklessly misleading or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws.



Best Practices if Utilizing AI

- While AI is a helpful, even powerful, tool, it cannot substitute the practitioner's knowledge, analysis, or conclusions. Practitioners need to recognize that AI is not without shortcomings and risks:
 - Using open model AI like ChatGPT exposes a client's PII or other confidential information.
 - Lack of transparency on where the information is coming from in an AI response. (Note: ChatGPT's Internet "scan" is only current through 2021).
 - Practitioners can't accept the responses from AI tools—practitioners must validate the results with actual court cases, citations, tax law, etc.
 - Concern that AI models can generate biased results based on the data fed to them.





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Standards of Conduct: Social Media

Standards of Conduct: Social Media (1 of 2)

- Tax professionals must know the potential legal and compliance risks associated with their online presence and exercise caution when using social media.
 - Sharing tax advice or opinions on social media without the proper qualifications or compliance can lead to legal issues. Endorsing certain products or services without disclosing conflicts of interest can result in ethical violations.
 - Tax professionals deal with sensitive financial and personal information. Sharing this data on social media can pose a significant risk. Even seemingly harmless posts or comments can inadvertently reveal information that could breach confidentiality, be exploited by cybercriminals, be used in identity theft, or embarrass clients.



Standards of Conduct: Social Media (2 of 2)

- Social media blurs the lines between personal and professional life. Tax professionals must be cautious about what they post, as inappropriate or unprofessional content can damage their reputation and potentially lead to disciplinary actions from professional organizations or regulatory bodies.
- Cybercriminals often use social media to gather information about individuals, making them vulnerable to phishing and social engineering attacks. Tax professionals may be targeted with fake messages or profiles designed to deceive them into revealing sensitive information or clicking on malicious links.



Circular 230 Provisions Applicable to Social Media

- The ethical use of social media is covered in several Circular 230 standards and the Code:
 - **10.30 Solicitation**
 - **10.29 Conflicting Interests**
 - **10.51(a)(15) Disreputable Conduct (willfully disclosing or using tax return information)**
 - **IRC §6713 and §7216(a) civil and criminal penalties for unauthorized use or disclosure of taxpayer information**
 - 10.33 Best Practices
 - 10.22 Due diligence
 - 10.34 Standards on Returns and Other Documents
 - 10.35 Competence
 - 10.36 Procedures to Ensure Compliance
 - 10.37 Written Advice





§10.30 – Solicitation

- Practitioners are prohibited from making a false, fraudulent, or deceptive statement or claim.
- Inclusion of client testimonials or information in advertising (or social media posts) could breach the duty of confidentiality.
- Practitioners may publish a fee schedule and distribute this fee information to the public.
 - Fee information must disclose whether the client will be responsible for phone charges, copy charges, filing fees, etc.
 - Can't charge more than the published rates for at least 30 days after the last publication of the fee schedule.



§10.29 – Conflicting Interests (1 of 2)

- Conflicts can often occur when representing related taxpayers, for example, married taxpayers, a partnership and the partners, or a corporation and its shareholders or officers.
- Conflicts can also arise when there is a significant risk that the practitioner's representation of one client will be materially limited by their:
 - Representation of another client or former client,
 - Responsibilities to a third party—such as a fiduciary, beneficiary, or someone whom they owe a contractual or other obligation, or
 - Own personal interests.



§10.29 – Conflicting Interests (2 of 2)

- May represent if:
 - You have a reasonable belief in your ability to provide competent, diligent representation to each affected client;
 - Not legally prohibited; and
 - Each affected client waives conflict by giving informed consent in writing when the conflict is known (i.e., within 30 days).
 - Must keep consents for 36 months after representation stops and make them available to the IRS upon request.



§10.51(a)(15) – Willfully Disclosing or Using Tax Return Information

- Section 10.51(a)(15) prohibits the willful disclosure or use of a tax return or tax return information in a way not authorized by the Code or contrary to an order from a court or administrative law judge in an OPR proceeding.
- Although not enforced by OPR, the Code imposes civil (IRC §6713) and criminal (IRC §7216(a)) penalties for unauthorized use or disclosure of taxpayer information.



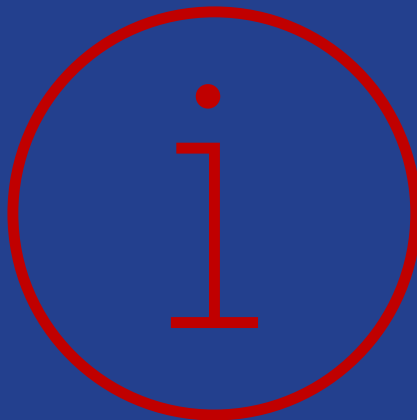
Best Practices with Social Media

- Tax professionals can implement best practices to avoid risks associated with using social media:
 - Maintain separate personal and professional social media profiles with strict privacy settings and regular updates, while adhering to clear social media policies established by the firm.
 - Exercise caution by refraining from sharing sensitive financial or client information, verifying the authenticity of connections, and avoiding offering specific tax advice without proper qualifications and disclosures.
 - Monitor online presence regularly using tools like Google Alerts, and ensure online activities comply with ethical and legal standards set by professional organizations and regulatory authorities.





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Contact Information & Resources



Contact and Referrals to OPR

- **Office of Professional Responsibility**

- 1111 Constitution Ave., NW, SE: OPR Rm. 7238, Washington, DC 20224
- eFax: (855) 814-1722
- Visit <http://www.irs.gov/> and search "Circular 230 Tax Professionals"

- **Referrals**

- For practitioners covered under Circular 230, send a fax setting forth the information to OPR's eFax.
- To make a referral regarding a return preparer, file Form 14157. It will go to the RPO, and if the preparer is under OPR's jurisdiction or has representational activities, the information will be routed to OPR.



Recursos y Guías en Español

- Formulario 2848, *Poder Legal y Declaración del Representante y Instrucciones para el Formulario 2848(SP)*
- Formulario 8821, *Autorización para recibir Información Tributaria y Instrucciones para el Formulario 8821*
- Pub. 947, *Como Ejercer ante el Servicio de Impuestos Internos (IRS) y el Poder Legal*
- Circular 230 del Departamento del Tesoro (Rev. 6-2014), *Reglamentos que rigen el ejercicio ante el Servicio de Impuestos Internos*





Resources and Guidance

- Publications
 - Treasury Department Circular No. 230 (Rev. 6-2014)
 - IRS Pub. 947, *Practice Before the IRS and Power of Attorney*
 - IRS Pub. 4557, *Safeguarding Taxpayer Data: A Guide for Your Business*
 - IRS Pub. 5708, *Creating a Written Information Security Plan for your Tax & Accounting Practice*
 - IRS Pub. 5709, *How to Create a Written Information Security Plan for Data Safety*
 - IRS Form 2848, *Power of Attorney and Declaration of Representative*
 - IRS Form 8275, *Disclosure Statement*
 - IRS Form 8867, *Paid Preparer's Due Diligence Checklist*

Resources and Guidance

- Internet
 - OPR Website
 - News & Updates from the Office of Professional Responsibility
 - Rights and Responsibilities of Practitioners in Circular 230 Disciplinary Cases
 - Guidance on Restrictions During Suspension or Disbarment from Practice Before the Internal Revenue Service

