Nontraditional Tax Advocacy

By Frank Agostino, Brian D. Burton, Tara Krieger and Matthew Turtoro

Frank Agostino, Brian D. Burton, Tara Krieger and Matthew Turtoro examine nontraditional, cost-effective, tax advocacy tools for tax professionals whose clients have limited means, and those self-represented taxpayers who are unable to secure *pro bono* legal assistance

Introduction

Traditional tax advocacy occurs at the agency level and in the tax courts, where taxpayers benefit from professional representation. However, due to the costs involved, poor and self-represented taxpayers may find traditional tax advocacy cost prohibitive. With the IRS and Legal Services resources currently stretched to the max, all taxpayers—including the poor and self-represented—may capitalize on the IRS's desire to avoid litigation and, instead, resolve tax account issues through nontraditional means. This article covers several nontraditional, cost-effective, tax advocacy tools for tax professionals whose clients have limited means, and those self-represented taxpayers who are unable to secure *pro bono* legal assistance. The following nontraditional approaches to tax advocacy are explored:

- Congressional Inquiries
- Advocacy Using Traditional and Social Media
- The Taxpayer Advocate Service
- The Treasury Inspector General for Tax Administration

FRANK AGOSTINO is a Principal of, and **BRIAN D. BURTON, TARA KRIEGER** and **MATTHEW TURTORO** are Associates at, Agostino & Associates, a Professional Corporation in Hackensack, New Jersey.

Congressional Inquiries

The "Hawthorne effect,"[1, 2] also commonly known as the "observer effect," refers to the positive motivational impact that observation has on an actor who

is knowingly observed. As it applies to Federal Tax controversy, taxpayer rights, and tax account-related issues, taxpayers should note that the Congressional Inquiry process is an opportunity, with no financial cost attached, to capture the observer effect benefits generated by the IRS and Taxpayer Advocate Service's (TAS) knowledge that the taxpayer's elected official is monitoring the effort to resolve a constituent's tax problem to satisfaction.[3]

A. Congressional Inquiry Oversight Protects Taxpayer Rights

In 2014, the IRS was driven to revise Publication 1, "Your Rights as a Taxpayer,"[4] in response to a finding by the National Taxpayer Advocate (NTA) that most taxpayers do not believe they have rights before the IRS, and even fewer taxpayers can actually name those rights.[5] The revised Publication 1, referred to as the "2014 Taxpayer Bill of Rights," sets forth 10 rights guaranteed to taxpayers throughout the examination, appeal, collection, and refund processes. The Publication restates the IRS's Mission as working to "[p]rovide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all."[6]

Tax professionals should recognize, and convey to their clients, that taking a dispute to the media may, ultimately, expose the client's vulnerabilities (and dirty laundry) on a national stage.

Included within the 2014 Taxpayer Bill of Rights is the "Right to a Fair and Just Tax System," which entitles a taxpayer to "receive assistance from the TAS if the taxpayer is experiencing financial difficulty," or, "if the IRS has not resolved [a taxpayer's] tax issues properly and timely through its normal channels." In most cases, the TAS accepts matters without considering the referral source as a factor, be it an elected official or an individual taxpayer in need of assistance. However, as a matter of pure strategy, the observer effect suggests taxpayers seriously consider designating a Member of Congress to refer their matters for resolution through the Congressional Inquiry process.

In tax parlance, a Congressional Inquiry is a query presented by a Member of Congress to the IRS concerning a constituent's tax account-related issue. A form of constituent service, the Congressional Inquiry process permits Members of Congress to access otherwise confidential tax information in their capacity as a designee of the constituent taxpayer. Taxpayers who receive assistance from a Member of Congress receive no improper benefit, priority, or advantage, and the tax laws that govern their obligations remain unchanged. However, Congressional Inquiries serve an important function in fostering positive attitudes among taxpayers towards our country's voluntary tax compliance system by allowing taxpayers to insert their Members of Congress into the federal tax issue resolution process.[7]

Ordinarily, a taxpayer's account-related information is protected from public disclosure, which includes disclosure to Members of Congress. However, the Congressional Affairs Program (CAP) provides an exception in the Code which allows Members of Congress to access otherwise confidential tax account information as designees of constituent taxpayers.[8] CAP was established in 1989 as part of an effort to help the IRS foster positive working relationships with Members of Congress. To further this goal, CAP designates Governmental Liaisons at the IRS who coordinate outreach and messaging efforts with each congressional office. In the context of taxpayer advocacy, the most significant aspect of CAP is the "key role" of TAS, which includes the Local Taxpayer Advocate's (LTA) responsibility for all taxpayer account-related issues.[9] According to the IRM, the LTA's CAP assignments consist "primarily [of] constituent casework and advocacy" regarding taxpayer account-related issues that are referred by Members of Congress via the Congressional Inquiry Process.[10]

To initiate a Congressional Inquiry, a taxpayer must contact a Member of Congress and provide the Member's office with a written disclosure authorization sufficient to satisfy the requirements of the Privacy Act.[11] In this regard, a valid authorization must: (1) name the Member of Congress to be designated; (2) include the taxpayer's social security or employer identification number; (3) identify the tax years at issue, and; (4) contain a description of the problem. Beyond these four basic requirements, the IRS exhibits flexibility in evaluating formal compliance and routinely accepts constituent disclosure authorizations in the following forms: (1) traditional Power of Attorney (POA); (2) Form 8821: *Tax Information Authorization*[12]; (3) Congressional Authorization Form, or; (4) informal letter of designation.[13] Regarding the requirements that the authorization identify the tax years and problem at issue, even a general statement that the issue involves "all tax years" or "all returns" is sufficiently precise to allow for disclosure.[14]

A Member of Congress that submits a constituent's inquiry to the IRS without a valid written authorization

will receive a communication explaining that, because of disclosure issues, the IRS may only communicate with the taxpayer directly.[15] On its own initiative, the IRS may contact the taxpayer regarding the inquiry in order to obtain a written, or nonwritten, consent for disclosure to the Member.[16]

All Congressional Inquiries received by the TAS are controlled and monitored on the Taxpayer Advocate Management Information System (TAMIS).[17] Congressional Inquiries controlled on TAMIS must be processed within one workday of receipt, except: (1) inquiries (other than written) that can be answered immediately during the initial call; (2) courtesy copies (copies of letters addressed to someone other than the Member of Congress), which are not treated as Congressional Inquiries unless actually referred by a Congressional office, and; (3) non-case-related inquiries that will be worked by the Government Liaison or sent to Legislative Affairs for control and assignment.

Most Congressional Inquiries are assigned to the LTA, who has primary responsibility for all tax account-related issues, develops advocacy issues, and represents taxpayers.[18] The LTA must respond to a Congressional Inquiry within 20 days of receipt.[19] If the LTA is unable to deliver a response within 20 days, an interim contact with the congressional office issue is required.[20]

To maximize the effectiveness of a Congressional Inquiry, a taxpayer is well advised to commence the process as early as possible. In this regard, congressional offices report that taxpayers who reach out at the first indication of a tax account-related issue have the best chance of obtaining meaningful intervention by the Member's office. Specifically, taxpayers are alerted that they *must* contact a Member of Congress' office *before* a Collection Due Process (CDP) request or an Offer in Compromise (OIC) is filed, and before a Tax Court case, appeal, or other proceeding has been initiated. Also, in order to utilize the Congressional Inquiry process, a taxpayer *must* contact the Member's office before the TAS is otherwise involved. Once a matter is referred to the TAS via channels outside of the Congressional Inquiry process, a Member's office may merely monitor developments and help ensure responsiveness, but may not attempt to influence the TAS's handling of the matter in any way.

B. Issues Commonly Resolved *via* Congressional Inquiry

Congressional Inquiries are most commonly requested to resolve the following tax account-related issues: (1) expediting refunds in cases of exigent need; (2) Code Sec. 501(c) tax-exempt status determinations; (3) payment schedules and penalty abatement (liens, levies, and wage garnishment); (4) resolving identity theft cases, and; (5) addressing tax return processing problems. Each of these issues is addressed, in turn, below.

1. Expediting Refunds in Cases of Exigent Need

A Congressional Inquiry may help expedite a taxpayer's refund request, especially in those cases where there are circumstances which require the taxpayer have immediate access to the funds in order to cover medical expenses, make a mortgage payment, or pay a similarly significant and necessary expense.

2. Code Sec. 501(c) Tax-Exempt Status Determinations

A Congressional office can assist a taxpayer alleviate unreasonable delay in receiving a determination of a request for approval or reinstatement of tax-exempt status.[21] The IRS generally processes tax-exempt status applications in the order received but will work a case outside of the regular order if the applicant can provide a compelling reason for expedited processing. In the following cases, a Congressional office may be able to obtain an expedited determination of tax-exempt status for a constituent within 90 days: (1) an organization is in imminent danger of losing a grant or financial support if the approval process is delayed[22]; (2) a newly created organization seeks to provide disaster relief to victims of emergencies, or; (3) the IRS errors have caused undue delay in issuing a determination letter.[23]

3. Payment Schedules and Penalty Abatement (Liens, Levies, and Wage Garnishment)

Before a CDP proceeding is initiated, an OIC submitted, a Tax Court action commenced, or an appeal filed, a taxpayer may designate a Member's office to serve as a liaison between the constituent taxpayer and the LTA's Office. However, once a proceeding or administrative process is commenced, a Member's office must restrict its involvement to monitoring the LTA for responsiveness.

4. Identity Theft Cases

The IRS recently expanded its "Law Enforcement Assistance Pilot Program on Identity Theft Activity Involving the IRS" which was first introduced in 2012. The program eases the restrictions that federal law ordinarily imposes on the IRS's ability to share taxpayer information with state and local law enforcement by providing taxpayers with the option to allow the IRS to share otherwise confidential tax account information with state and local law enforcement officials for the purpose of solving identity

theft cases. In order to initiate a Congressional Inquiry regarding identity theft, a taxpayer must provide the usual written disclosure authorization, along with two forms of proof of identification and a completed IRS Form 14039: *Identity Theft Affidavit.*[24]

5. Tax Return Processing Problems

Taxpayers may find the benefits a Congressional Inquiry into return processing issues easier to gauge than the motivational benefits which are the usual upshot of a Congressional Inquiry. The distinction is that, regarding the following "pure" processing issues, the TAS only accepts cases that are referred by a Member of Congress *via* the Congressional Inquiry process: (1) processing of original tax returns; (2) amended returns; (3) rejected and unpostable returns; and (4) injured (but not innocent) spouse claims.[25]

C. Conclusion

The IRS has already announced its expectation that the 2014 Taxpayer Bill of Rights "will become a cornerstone document to provide the nation's taxpayers with a better understanding of their rights."[26] However, even if, as NTA Nina Olson proclaimed, "taxpayer rights are human rights,"[27] those rights are not self-enforcing. As a result of staggering budget cuts, the IRS and TAS have been forced to allocate their strained resources in ways designed to achieve "more with less." In this current environment of austerity, best practices dictate that taxpayers strongly consider approaching a Member of Congress when faced with a tax account-related issue. Even where the TAS will accept a case from the taxpayer directly, at the very least, referral through the Congressional Inquiry process will generate the observer effect benefits that result from the IRS and TAS's awareness that a Member of Congress is watching them to ensure fair taxpayer treatment, integrity of process, and diligent resolution of the constituent taxpayer's issue.

Publicity in Tax Controversies Is a Powerful Weapon: Handle with Care

In all its varied forms, media coverage may influence the outcome of a tax controversy even more than the most zealous and capable representation. For better or worse, strong courtroom advocacy is often unable to generate the same wave of exposure that results from a strategically placed tabloid headline or a tweet gone viral.

Social media's growing presence in the United States is well established. A 2011 report from the Pew Internet and American Life Project showed that 65 percent of American adults used at least one social networking site—such as Facebook, Twitter, or LinkedIn.[28] In a 2013 survey of American Bar Association (ABA) members, 27 percent of participants said that their law firm had a blog, which is up from 22 percent in 2012 and 15 percent in 2011.[29] In that same survey, 59 percent of attorneys said that their firms maintained a presence on a social network; of those firms, 92 percent used LinkedIn, and 58 percent used Facebook.[30] In response to this trend, the ABA modified its Model Rules of Professional Conduct (MRPC) and corresponding comments in 2012, to account for electronic and social media.[31]

The result is that tax professionals who master the advantageous use of the media can add a panoply of nonlegal stratagems to their arsenal in dealing with the IRS. Explored below are various ways that tax professionals can, and have successfully, used both mainstream and social media to advocate, as well as the ethical considerations behind involving the "Fourth Estate."

A. The IRS Use of the Media

1. General Guidelines

In 2001, Mark E. Matthews,[32] then Chief of the IRS Criminal Investigation division, implemented "a major overhaul of the [IRS] media strategy."[33] The "new approach" that Matthews introduced was based on his belief that publicity which raises awareness of the tax evasion-related investigations conducted by Criminal Investigations (CI) department is "one of the most effective methods to encourage [taxpayer] compliance."[34] Now, the IRS regularly issues news releases regarding significant cases, and changes to the Code and Regulations. General tax advice is also frequently issued through the IRS website,[35] and the IRS promotes its presence on Facebook, Twitter and Tumblr as ways to "connect" with the IRS.[36]

As a means to deter tax evasion, the IRS and the Department of Justice (DOJ) often publish press releases outing tax cheats to the public. These releases are routinely issued in the months leading up to the April 15 deadline for general income tax returns, with the hope that taxpayers may prefer to settle their tax liabilities rather than serve as a literal "poster boy" for tax evasion.[37] State tax departments use similar tactics. For example, the New Jersey Division of Taxation, on its website, publishes a list of its "Top Debtors," which is periodically updated.[38]

Although the DOJ and local U.S. Attorney frequently spotlight their offices' participation in tax controversies, the IRS also employs national and local media relations

specialists to proactively seek coverage of select matters.[39] In this regard, the National and Field Media Relations Branches of the IRS coordinate media requests (internal and external), and develop the IRS media relations strategies.[40] Within the DOJ, similar responsibilities are vested in the Office of Public Affairs (OPA).[41]

When responding to media inquiries, the IRS emphasizes "promptness and … a spirit of genuine helpfulness," so that the media may correctly disseminate "the requirements of tax law compliance and the policies and programs of the IRS."[42] In addition, the IRS recognizes that "[t]imeliness is essential in news dissemination. ... If it is appropriate to comment, the IRS's side of the story should be made available as quickly as possible, preferably in time for the edition in which the first reporting of the story appears."[43] The IRS also cautions against "responding to inquiries of a general nature when it can reasonably be deduced that the answers are going to be applied to a specific situation," but also directs that "a statement of 'no comment' should be avoided."[44]

2. Ethical Considerations

The DOJ issues guidelines for the release of information in both civil and criminal proceedings, which the IRS generally follows.[45] The guidelines aim to "strik[e] a fair balance between the protection of individuals accused of a crime or involved in civil proceedings with the government and public's understandings that controlling crime and administering government" require action, which the DOJ hopes to accomplish through the "exercise of sound judgment by those responsible for administering the law and by the representatives of the press and other media." For example, the IRS must obtain approval from "the appropriate attorney for the government" before any news release which relates to criminal matters is distributed to the news media.[46] Also, the IRS is not allowed to provide to news media any photographs of a defendant held in custody, or assist the media in obtaining a photograph of the defendant.[47]

The guidelines provided by 28 CFR § 50.2 are similar to MRPC Rule 3.6 (see below) and are intended to control the influence of the media on trials.[48] They prohibit the release of information which would reasonably interfere with a fair trial, including information that relates to "the character, credibility, or criminal records" of a party or possible witness; test results (or refusal of a party to submit to an examination); or "an opinion as to the merits of the claims or defense of a party," except as required by law.[49] The Internal Revenue Manual specifies the information that the IRS *may* release, including "general information concerning [the Criminal Investigations division] and the type of work done by the organization," and "information that is a matter of public record" or available by public request (such as pleadings filed with the U.S. Tax Court, a sworn affidavit, or an indictment which has been made public)."[50] A trial is an example of a proceeding in a public forum, although any information introduced at a trial should be released without "editorial comment."[51]

The DOJ, according to a memorandum in the United States Attorney's Manual, Title 1, emphasizes that only "public record information" should be utilized when preparing a press release. Therefore, a press release announcing an indictment should contain only information set forth in the publicly-filed indictment and indicate that the source of the information is the indictment. Similarly, a press release discussing a conviction should be based solely on information made public at the trial or in pleadings publicly filed in the case, and should indicate that the source of the information is the public court record.[52]

It is important that tax professionals remember that a TAS filing can help preserve the rights of their client as well as remedy IRS malfeasance.

By using only publicly available sources, the IRS reduces the risk of inadvertently violating privacy statutes, particularly Code Sec. 6103, which prohibits the public disclosure of tax returns or tax return information.[53] Code Sec. 6103 may restrict public disclosure of certain items which are permitted under the DOJ § 50.2 guidelines.[54] Any federal government official who "knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103" faces civil penalties.[55] In cases where the disclosure is willful, the penalties are criminal. [56]

The U.S. Attorney's Manual memorandum also warns the IRS "to avoid statements that are ambiguous as to source," in that if a statement "could be based on information in IRS or [DOJ] files," it should only be made if "the information in the statements are obtained from and attributed to specific public sources."[57] Some courts have ruled that even if the information was disclosed at trial, the IRS may not use it in a press release if its immediate source was the taxpayer's return, or some other document not available to the public.[58]

B. The Use of the Media by Attorneys (and Other Tax Professionals)

Tax controversy attorneys, especially those who represent low-income taxpayers, use the media both for educational purposes—in order to raise public awareness for a particular issue or case—and as a tool of advocacy in order to garner sympathy for a client or cause, or bolster a client's reputation. Additionally, a media-savvy tax controversy professional who is familiar with the "observer effect,"[59] can use the media as a means of compelling voluntary compliance with the tax laws or the 2014 Taxpayer Bill of Rights in those cases where the IRS' actions appear overzealous, excessively aggressive, discriminatory, or designed to intimidate. In fact, media coverage of an IRS scandal or abuse of power has preceded each incarnation of the taxpayer bill of rights. Negative publicity has also served as the impetus for several policy changes, including the recent revisions to the IRS' innocent spouse procedures. On a microcosmic level, the authors have been involved in many cases where media attention regarding hard-hearted enforcement efforts has led to consensual settlement.

Practitioner utilization of the media as a form of client advocacy has been recognized in both legal literature and jurisprudence. The landmark case in this area is *Gentile v. State Bar of Nevada*, which held that an attorney should take "reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives" (comparing it to an attorney's recommendation to settle in a case that may be lost at trial).[60] To this end, the preamble to the MRPC states that "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Such "zealous" representation may include using the media to advance a client's interests.

Media strategies are often dictated by the financial situation of the taxpayer. Higher-profile defendants, such as public figures, corporations, or charities, often hire public relations specialists to develop media strategy. Poorer taxpayers, however, also have an opportunity to use the media, offensively, in an effort to portray themselves as David to the IRS's Goliath (a giant unnecessarily plundering those who already possess so little). Wealthy taxpayers generally use the media more defensively—to appear more sympathetic in the eyes of a potential jury, or to give voice to their side of an issue with the IRS that, if unaddressed, would place them in an unfavorable light.

Often, attorneys issue press releases through their law firm website or to media outlets. Many tax professionals and firms maintain tax law blogs, both to inform and advocate for tax policy. And larger firms have started hiring social media directors, and working with professionals who specialize in social media, to optimize use of those platforms.[61]

1. Courts as Regulators of Access to Media

Although media blitzes can spread a tax professional's message effectively, their impact is not without limitation. If one side feels that his adversary is generating publicity about a particular issue that creates a danger of prejudicing the outcome of the litigation, that party may petition the court to issue a "gag order," which will prohibit the attorneys and the parties to a pending lawsuit or criminal prosecution from talking to the media or the public about the case. The supposed intent is to prevent prejudice due to pre-trial publicity which would influence potential jurors. A gag order has the secondary purpose of preventing the lawyers from trying the case in the press and on television, and thus creating a public mood (which could get ugly) in favor of one party or the other.[62] Courts have not yet definitively ruled on the constitutionality of gag orders directed to attorneys, although the U.S. Supreme Court has upheld sanctions on attorneys whose speech creates a "substantial likelihood of material prejudice."[63]

Also, tax professionals should note that, even though a court may order parties to a case not to comment, First Amendment freedoms generally allow the media to continue to report—giving rise to the peculiar situation in which the media may print negative information about a particular case to which its subject cannot respond.[64] No court has yet ruled on whether gag orders may be placed on non-attorneys who are not parties to the case—such as witnesses or police officers.

Another way in which a court can limit the use of media by litigants is by ordering a "closure of judicial proceedings"; *i.e.,* keeping the press out of the courtroom. While there are few bright-line rules covering the circumstances which justify such an order,[65] it is within a court's authority to limit the presence of the press in the courtroom when "it is apparent that the accused might otherwise be prejudiced or disadvantaged."[66] A court may also limit the "number of reporters in the courtroom ... at the first sign that their presence will disrupt the trial."[67]

State court rules allow varying levels of access to media in the courtrooms.[68] Although federal trial courts typically do not allow cameras, 14 jurisdictions—including the Northern District of Illinois, the Northern District of California, the District of Massachusetts, and the Southern District of Florida—are participating in a pilot program to evaluate the effectiveness of permitting cameras in the district courts.[69]

Courts are also experimenting with social media.

Whereas, at one time, cellular phones and other electronic devices were considered taboo, some judges now allow credentialed journalists to blog or live-tweet high-profile cases. The District of Massachusetts has been particularly progressive in this regard, permitting extensive media coverage of the Boston Marathon bomber hearings, and the trial of mobster Whitey Bulger.[70]

C. Best Practices for Using the Media as a Client Advocacy Tool

1. Preserving Client Confidentiality and Privacy

Tax professionals, particularly attorneys, should keep in mind that certain ethical considerations may be implicated when speaking to the media. Similar to the concerns of the IRS in dealing with the media, tax professionals must also be aware of the potential violations of client privacy and confidentiality that may result from media disclosure.

MRPC Rule 1.6 prohibits a lawyer from "reveal[ing] information relating to the representation of a client" without the client's informed consent.[71] Although there are specific exceptions to this rule—such as disclosure to prevent reasonably certain death or bodily harm or to prevent a client from committing a crime or fraud—Rule 1.6 mandates that the attorney "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[72] Comment 3 to MRPC Rule 1.6 states that confidentiality between client and attorney applies "not only to matters communicated to the client in confidence but also to all information relating to the representation, whatever its source."[73]

An attorney who divulges any client information to a third party risks inadvertently waiving attorney-client privilege or work product protection (documents prepared in anticipation of litigation or trial).[74] Regarding waiver, a third party may include everyone and everything, from a journalist to a social media account to, potentially, a publicist (*see* below).

Tax professionals should seriously consider the information they make public before tweeting or otherwise divulging information that might not be in the public record.[75] When in doubt, obtain client consent before mentioning anything about a case to the media. Also, be certain to discuss with clients the boundaries of what may be divulged publicly, in order to get a clear understanding of what information the client authorizes to be disclosed.

One gray area in privilege law is the treatment of public relations strategists. Although no "publicist-client privilege" officially exists, in making privilege determinations, courts often consider whether the exchange in question occurred in confidence, for purposes of obtaining legal advice, or for public relations purposes. This standard is similar to the doctrine for asserting privilege over communications with accountants, first recognized in *L. Kovel*.[76] Courts will also consider whether the advice was necessary for the attorney to manage the litigation (rather than the publicist to manage the effects of the litigation). A third way that courts have protected communications between attorney/clients and publicists is by treating publicists as an employee of the litigating party, as long as they fill a role beyond any of the party's specialized skills.[77]

Even though the courts have carved out situations in which communications with publicists may be considered privileged, there are no guarantees. Best practices are for an attorney to act as gatekeeper over any information divulged to the publicist and keep direct communications focused on litigation issues (to the point of having the publicist open a separate file). Additionally, attorneys should be aware of any applicable international laws regarding privilege where the case involves taxpayers or accounts overseas.[78]

2. Protecting Clients from Self-Incrimination

Discretion is often the better part of valor. While social media encourages interaction, tax professionals must be diligent about self-policing their blogs and tweets concerning client matters. Tax professionals must also remind their clients of the dangers of, even inadvertently, posting information about themselves on social media. Not only may clients incriminate themselves with one brash, emotional comment on Facebook, they may find themselves on the wrong side of a defamation suit.[79]

Attorneys should advise clients to refrain from posting on any social media sites regarding their legal or tax matters, and to make no statement to any member of the press without the attorney's prior consultation and approval.

3. Avoiding Trial Prejudice

Criminal defendants have a Sixth Amendment right to a "speedy and public trial, by an impartial jury."[80] Likewise, MRPC Rule 3.6 states that "a lawyer ... shall not make an extrajudicial statement that a lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[81] Moreover, an attorney may not engage in any conduct that is "prejudicial to the administration of justice."[82]

An oft-contested issue is the ability of the media, particularly in high-profile cases, to pollute the jury pool,

which interferes with a defendant's right to a fair trial. Widespread case publicity has caused verdicts to be overturned, and trial courts are bound by "duty" to protect the defendant from "inherently prejudicial publicity" as well as "to control disruptive influences in the courtroom."[83]

The benchmark decision regarding media impact on a defendant's Sixth Amendment right to an impartial jury is *Gentile v. State Bar of Nevada*.[84] In that case, a defense attorney made incriminating public statements about the investigating police officers, following his client's indictment. The defendant was ultimately acquitted. The attorney's extrajudicial comments in *Gentile* were found to have not materially prejudiced the trial outcome because the information about which he spoke had already been published by the media at the time the statements were made. However, *Gentile* led to an amendment in MRPC Rule 3.6 that specifies the categories of information which a lawyer may publicly disclose. Such disclosable information includes "a warning of danger concerning the behavior of a person involved when there is reason to believe so," "a request for assistance in obtaining evidence and information necessary thereto"; as well as, in a criminal case, information to apprehend a person accused of a crime.[85]

Another result of *Gentile* was the addition of a new section to MRPC Rule 3.6, which allows an attorney to "make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." However, the statement "shall be limited to such information as is necessary to mitigate recent adverse activity."[86] Many jurisdictions have yet to adopt this section of the MRPC.[87]

In general, pretrial publicity does not "render a trial constitutionally unfair."[88] Ordinarily, a court finds that the publicity at issue directly impacted the integrity of the proceedings, such as causing a "pattern of deep and bitter prejudice" within the community.[89]

Attorneys who are concerned about the media polluting a jury pool to the prejudice of a client should perform a thorough *voir dire*—and demonstrate to the judge why additional peremptory challenges may be necessary in a high profile case when selecting jurors, in order to minimize the effects of any media prejudice. In some cases, gag orders or closures of judicial proceedings (see above) may be required to fend off a media circus.[90]

4. Misstatements of Fact

The MRPC mandates truthfulness: "In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person."[91] Also, an attorney "shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."[92]

Similarly, Circular 230 provides that tax professionals may be sanctioned for "giving false or misleading information," "contemptuous conduct in connection with practice before the Internal Revenue Service," or "giving a false opinion, knowingly, recklessly, or through gross incompetence."[93]

In the first instance, a tax professional who seeks publicity regarding a client or matter must be certain to portray the client and the matter honestly. A simple statement to the media—particularly an unedited tirade on social media—may exaggerate or omit material facts, which can lead to sanction. Never post on social media unless it is part of a well-crafted media strategy. For easy reference when engaging a member of the media, tax professionals may find it helpful to prepare a statement, approved by the client, which states the client's position.

5. Soapboxing

Tax professionals, particularly those with regular blogs or social media accounts, will sometimes comment on a case or issue in which they are not involved. Although stating an opinion on a matter does not technically violate any ethical rule alone, it could create conflict of interest issues.[94] Therefore, tax professionals should clarify that no one in their firm is handling the matter, or representing that particular client, before expressing views on a matter in which they are not involved.

The nightmare scenario for an attorney is that the use of the media to advance an opinion leads to sanctions. Attorney sanctions were imposed for filing a pleading for "any improper purpose, such as to harass" the opposition in *Whitehead v. Food Max of Mississippi, Inc.*[95] In that case, the attorney used the media, and federal marshals, to "embarrass Kmart and advance his personal position," for the purpose of collecting a judgment.[96]

6. Inadvertent Disclosure of Returns and Return Information

As discussed above, Code Sec. 6103 prohibits the disclosure of a taxpayer's return or return information.[97] In addition to the IRS agents and employees, the statute applies to any tax professional with access to a client's returns.[98] Return preparers are also subject to penalties for violating Code Sec. 6103.[99]

In order to avoid the harsh civil, or criminal, penalties[100] and sanctions[101] that may result from unauthorized

disclosure of a taxpayer's return or return information, all tax professionals should refrain from any discussion of a client's tax liabilities when interacting with the media. Any tax professional would be ill-advised to post information pertaining to a client's tax return or return information on social media.

7. Above All, Know Your Client

The most important rule of using the media for tax professionals may be to understand each client's goals, outlook, and personality traits such as temperament, in order to ensure that the client is able to withstand the enhanced scrutiny and notoriety that results from media coverage and publicity.

Although tax professionals may seek out the media as a way to highlight "bad acts" committed by their adversaries, media attention inevitably turns the mirror on the clients themselves. And while the government response to media use is not exactly retaliatory *per se,* going to the media can be expected to result in deployment of the IRS's equivalent of SEAL Team Six to investigate the client's background. In cases where a client has not been a model of tax compliance—or, in general, has skeletons in the closet—the media will track down witnesses for comment, even if they have not previously been involved with the government's investigation.

Tax professionals should recognize, and convey to their clients, that taking a dispute to the media may, ultimately, expose the client's vulnerabilities (and dirty laundry) on a national stage. A tax professional should only consider involving the media when the tax professional is confident that the client sufficiently understands the perils of becoming a public figure, and both agree that the benefits of such action to the client outweigh the risks.

D. Conclusion

All forms of media, when properly utilized, may serve as influential tools for a tax professional. However, tax professionals who rush to publicize their "good story" without awareness and consideration of the potential pitfalls may quickly find themselves in a troublesome ethical and professional bind.

Assistance Provided by the Taxpayer Advocate Service

The compliance-based tax collection system works, in part, because of the public's perception that all tax professionals, including those working for the IRS, are honest, reasonable, efficient, and fair.[102] The TAS helps promote this perception by assisting taxpayers to resolve account-related problems with the IRS, identifying areas in which taxpayers commonly have difficulty, and proposing changes in the administrative practices of the IRS as well as legislative fixes to mitigate taxpayer harm.[103] The mission statement of TAS provides that: "This section outlines the way the TAS handles taxpayer complaints and also highlights similar state services available to taxpayers.

A. The Basics

TAS was created in 1986 by Code Sec. 7803(c).[104] The head of TAS, the National Taxpayer Advocate, is appointed by the Secretary of the Treasury and reports directly to the Commissioner of Internal Revenue. The National Taxpayer Advocate must have a background in customer service and tax law and "experience representing individual taxpayers," and cannot have worked for the IRS in the two years preceding, or plan on working for the IRS for the five years following, his or her appointment to TAS.[105]

Though most of the TAS case advocates originate from other divisions of the IRS and bring with them familiarity with the collection and exam process, due to the breadth of the issues involved in case advocacy, TAS also maintains a staff of technical experts. Case advocates routinely refer complex cases, or cases with unusual fact patterns or interpretations of law, to these technical experts. Therefore, although a taxpayer can expect that a case will remain with one case advocate throughout the entire process, case advocates often consult with technical experts on strategy regarding how to best advocate for the taxpayer.

TAS can aid taxpayers and their representatives in a number of ways. They are the first people a practitioner should contact, for example, when a taxpayer's case is with an IRS Appeals Office and the IRS Settlement Officer working on the case violates the IRS procedures or case law. Instead of waiting to appeal the case to US Tax Court, a taxpayer and/or the taxpayer's representative may want to file a Form 911 and bring the IRS's Settlement Officer's work under an additional level of review. Filing a Form 911 works in conjunction with contacting the IRS Settlement Officer's manager and has proved a remarkably effective approach to taxpayer advocacy (potentially due to the observer effect theory).[106]

The initial IRS Form that tax professionals must be familiar with is Form 911: *Request for Taxpayer Advocate Service Assistance and Application for Taxpayer Assistance Order*.[107] Form 911 is used with clients who have an IRS issue causing financial difficulties to themselves, their business or their family; with taxpayers (and/or

CHART 1

National Taxpayer Advocate Intake Line
877-777-4778

New Jersey
955 S. Springfield Ave., 3rd Floor
Springfield, NJ 07081
Phone: 973-921-4043
Fax: 973-921-4355

New York: Manhattan
290 Broadway, 5th Floor
New York, NY 10007
Phone: 212-436-1011
Fax: 212-436-1900

New York: Brooklyn
2 Metro Tech Center, 100 Myrtle Ave., 7th Floor
Brooklyn, NY 11201
Phone: 718-834-2200
Fax: 718-834-6545

Overseas
Taxpayer Advocate Service, IRS
PO Box 193479
San Juan, Puerto Rico 00919-3479
Fax: 1-787-622-8933

businesses) facing an immediate threat or adverse IRS action; or when a taxpayer has attempted to repeatedly contact the IRS, but the IRS has proved nonresponsive or failed to respond by the date promised. This form can be faxed or mailed to the local TAS office, or the practitioner can call the National TAS Intake Line. *See* Chart 1 for contact information.

Once Form 911 is submitted, the practitioner should notify the IRS officer on the case by sending a copy of the completed, signed form to the officer. Case criteria are available online and fall into four general categories: economic burden to taxpayer, systemic burden to taxpayer, best interest of the taxpayer, and public policy interests.[108] General response time guidelines and estimates are available at the IRS website.[109]

B. Case Management

Upon acceptance into the program, a case is ready for assignment to "Case Advocates." Normally, cases are assigned within three workdays of the "TAS Received Date" for Criteria 1-4 cases and within five workdays of the "TAS Received Date" for Criteria 5-9 cases.[110] Note that when a taxpayer or return preparer, after being informed that his or her case does not meet the criteria for TAS, persists with phone calls, *etc.,* the representative is instructed to keep the appearance of a qualified case, but to note to the contrary in the electronic system. Moreover, cases involving litigation are generally not accepted.[111]

Practitioners should note that contacting TAS is never a substitute for contacting the IRS. For example, writing to TAS does not serve as a substitute for writing to the proper IRS office to exhaust administrative remedies and request costs under Code Sec. 7433 (Civil damages for certain unauthorized collection actions),[112] nor does writing to TAS put the IRS on notice of a refund claim.[113] Cases are generally left open until all related issues are completely resolved. In cases where no relief is granted, a return preparer can discuss the situation with a Local Taxpayer Advocate. Advise taxpayers unsatisfied with the outcome of their case that they have the opportunity to speak to a manager.

Closed cases may be re-opened for a number of reasons. If additional information has been provided by the taxpayer, if there is evidence of the IRS error, or if the response from the taxpayer on a case was closed due to "no response," TAS will allow the case to be reopened. Moreover, if the taxpayer is dissatisfied with the outcome, corrective action can be taken if the internal review shows that the case was resolved incompletely or incorrectly. The decision whether to reopen must be made within one workday for category 1-4 cases and within three workdays for category 5-9 cases.[114]

The IRS has many general rules for transferring cases between different offices. "Sensitive Issue Cases," including those involving suicidal communications (either orally or in writing), potential media contact cases, or those involving politicians, celebrities, and employees, *etc.,* must be brought to a manager's attention before transfer.[115] Congressional Cases are transferred to the local office in the Congressperson's home state.[116]

Authorities, both administrative and procedural, are granted to the NTA by the Commissioner and re-delegated to employees and management.[117] These delegations allow TAS to resolve routine cases in the same manner as other sections within the IRS exercising the same authority. Authorities delegated to TAS include: (1) Delegation Order No. 40—Credits and Refunds; (2) Delegation Order No. 231—Abate Interest on Erroneous Refunds; (3) Delegation Order No. 232—Authority to Issue, Modify, or Rescind Taxpayer Assistance Orders; (4) Delegation Order No. 233—Authority of the National Taxpayer Advocate to Approve Replacement Checks, to Substantiate Credits, and to Abate Penalties; (5) Delegation Order No. 250—Authority to Issue Taxpayer Advocate Directives, and; (6) Delegation Order No. 267—Authority of the National Taxpayer Advocate to Perform Certain Tax Administration Functions.

TAS does not currently have the ability to abate penalties or issue manual refunds. Instead, an Operational Assistance

Request must be prepared. TAS uses Form 12412, *Operations Assistance Request* (OAR), to request assistance from an Operating Division or Functional Unit (collectively, OD/Functions) "to complete an action on a TAS case when TAS does not have the authority to take the required action."[118] The OAR additionally provides an "audit trail of TAS requests to the OD/Functions and also their responses to TAS. Using the TAMIS to generate the OAR and track the responses, the OD/Functions, as well as TAS, can also create reports that identify units, issues and time spent on correcting the taxpayer accounts."[119] For example, if TAS is convinced that a taxpayer needs a manual refund in order to prevent the offset of a refund to a tax liability, TAS prepares an OAR to the function requesting that the function do so. The OAR must include supporting documentation and arguments. The function has the right to disagree, and in that scenario, the cases would be elevated for the potential issuance of a Taxpayer Assistance Order (TAO), or the taxpayer would receive appeal rights.

IRM 13.1.20 provides guidance on when to issue a TAO in lieu of an OAR. TAS may issue appropriate orders if the taxpayer suffers or is about to suffer hardship.[120] Hardship is defined as an immediate threat of adverse action; a delay of more than 30 days in resolving taxpayer account problems; the incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.[121] Relief normally includes the release of the levy; a cease action order in actions relating to collections, bankruptcies/receiverships, and the discovery of liability and enforcement of title; and any other Code provisions described therein.

Like most government agencies these days, TAS is being asked to do more with less. One role of a private practice advocate is to ensure that our clients do not get "less" than the full measure of due process that Taxpayer Bill of Rights guarantees and that the TAS can deliver. If there are any breakdowns in the oral or written communications with the frontline TAS advocate handling your taxpayer's case, tax controversy professionals should not hesitate to escalate the case. Even TAS agents have managers and a national office who may direct your advocate to prioritize resolution of your clients' problems or a Taxpayer Bill of Rights violation by the IRS. Simply put, the job of the Taxpayer Advocate is to advocate. Our job is to remind them to do so zealously and diligently by encouraging them to use all of the tools in their toolbox.

C. Statute of Limitations Issues

The statute of limitations (SOL) for taxpayer disputes can be suspended by the initiation of the TAS complaint process.[122] To effect a suspension, the practitioner or taxpayer must provide TAS with the following information: (1) taxpayer name, identification number, and current mailing address; (2) type of tax (individual, corporate, *etc.*) and tax period(s) involved; (3) description of the IRS action or proposed action causing or about to cause a significant hardship; (4) the IRS office and personnel involved, if known; (5) description of the specific hardship; (6) form of relief requested, and; (7) signature(s) of the taxpayer(s) or duly authorized representative.

One way for tax professionals, and taxpayers alike, to further strengthen the integrity of our voluntary tax compliance system is to utilize TIGTA when incidents of misconduct occur.

Once the required information is provided, the suspension of the SOL will run from one of the following: (1) the date the *Application of Assistance Order* (Form 911) is denied; (2) the date an agreement is reached with the involved function as to what should be done with the OAR; (3) the date the *Taxpayer Assistance Order* (Form 9102) is issued; or (4) the date the review is completed by the parties capable of modifying or rescinding the Form 9102.[123]

Immediate intervention is available in certain, finite scenarios. For immediate intervention to be a viable option, the representative or taxpayer must show that there is an operational issue, identified internally or externally, which causes immediate, significant harm to multiple taxpayers. This issue must demand an urgent response and cannot be resolved soon enough through the normal corrective process.[124] The resolution must be identified within three to five calendar days of the actual start date.[125] Filing for immediate intervention may result in an Advocacy Proposal, a Taxpayer Advocate Directive, an IRM Procedural Update (IPU), or another type of procedural change.

D. Senate Finance Committee

A further avenue for appeal is offered by the Senate Finance Committee (SFC).[126] To take advantage of this line of appeal, the return preparer should instruct the taxpayer to write to the SFC regarding a tax matter or the behavior of an IRS employee. After making a determination, the Committee office will inform the taxpayer that the

correspondence will be forwarded to the TAS within 14 days (unless the taxpayer objects).[127]

The Independent Review Team (IRT) reviews SFC cases and their corresponding draft closing letters within seven calendar days of receipt. Technical Advisor teams in each area conduct the independent review process using developed guidelines.[128]

E. State TAS Offices

Just as the National TAS provides assistance to taxpayers across the nation, state offices similarly aid resident taxpayers. The New York State Office of Taxpayer Assistance (NY TAS)[129] helps taxpayers who were unable to resolve protracted tax problems through regular channels or whose tax problems are causing undue economic harm. It also identifies systemic problems, including those that compromise taxpayer rights or unduly burden taxpayers, and recommends administrative and legislative reforms.

For a claim to be accepted by NY TAS, the return preparer or taxpayer must show that: (1) a reasonable attempt has been made to resolve the problem through the Department's established methods; (2) tax laws, regulations or policies are being administered unfairly or incorrectly, or have impaired (or will impair) taxpayer rights; (3) the taxpayer faces a threat of immediate adverse action (*e.g.,* seizure of an asset) for a debt that is not owed or where the action is unwarranted, unfair, or illegal; (4) irreparable injury or long-term adverse impact is expected if relief is not granted, or the taxpayer experiences or is about to experience undue economic harm; (5) there has been an undue delay by the tax department in providing a response to a taxpayer's inquiry or resolution of a taxpayer's problem or inquiry, and; (6) the taxpayer's unique facts and circumstances warrant assistance; or public policy reasons compel assistance.[130]

Public policy complaints can be based on the presence of systemic issues in the collections process. A "systemic issue" must adversely impact other taxpayers or impact segments of the taxpayer population. It must also relate to: (1) department systems, policies, and procedures; (2) require study, analysis, administrative changes or legislative remedies, and; (3) involve protecting taxpayer rights, reducing or preventing taxpayer burden, ensuring equitable treatment of taxpayers, or providing essential services to taxpayers.[131] Requesting help from the NY TAS is a relatively simple process. The return preparer or taxpayer must complete Form DTF-911 and mail or fax to the Office of the Taxpayer Rights Advocate.[132] Practitioners may find the New York Bill of Taxpayer Rights helpful when completing the above.[133]

New Jersey also has an Office of the Taxpayer Advocate (OTA) available for taxpayers who were unable to reach a resolution of their tax issues through normal channels or who are subject to financial hardship.[134] New Jersey defines hardship as "a threat of immediate adverse action," or undue "economic harm (present or about to happen) resulting from the way in which the tax laws, regulations or policies are being administered by the Division of Taxation."[135] The state also clarifies that mere inconvenience cannot rise to the level of hardship.[136]

The OTA will also accept cases where there is a threat of immediate adverse action for a disputed liability, or where there has been a lack of adequate notice or unwarranted, unfair, or illegal actions by the Division. Moreover, delays of more than 75 days to resolve a tax account problem or in receiving a response to an inquiry to the Division can cause OTA to accept the relevant file. Finally, if the taxpayer who you represent believes the Division's procedures failed to resolve his or her problem as intended, OTA may be contacted.

OTA works to identify systemic issues and thereafter recommends administrative and legislative reforms. It can prove crucial in assisting with tax problems related to the New Jersey Department of Treasury, but not tax problems related to other state departments. Note that there are limitations on OTA's power—it cannot reverse technical or legal determinations and does not presently assist with Earned Income Tax Credit issues. To ask OTA for help, fill out Form NJ-OTA-911 and mail or fax to the Office of the Taxpayer Advocate.[137] Once again, the state Taxpayers' Bill of Rights may prove helpful during this process.[138]

F. Conclusion

TAS has recently expanded its focus to include providing help to international taxpayers. TAS recommendations from a 2012 study included: identifying international taxpayer groups that share similarities and common characteristics; identifying the needs of these groups and channels of assistance available to them; identifying service gaps and concurrent risk factors, as well as prioritizing based on these gaps and risk factors; developing solutions to the problems faced by international taxpayers, and; involving the IRS Office of Chief Counsel and regional experts on tax treaties and international legal issues.[139] It is important that tax professionals remember that a TAS filing can help preserve the rights of their client as well as remedy IRS malfeasance.

The Treasury Inspector General for Tax Administration

TIGTA was established by the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) for the primary purpose of providing independent oversight of the IRS activities. The ability to effectively remedy IRS misconduct plays an important role in how the public perceives the voluntary tax compliance system. However, taxpayers are often unaware of their ability to file Form 12217 with an employee's manager or with TIGTA in response to a bad experience.

TIGTA is staffed mainly by auditors and investigators, charged with the duty to address IRS abuse. TIGTA investigations are designed to: (1) promote economy, efficiency, and effectiveness in administering the Nation's tax system; (2) detect and deter fraud and abuse in the IRS programs and operations; (3) protect the IRS against external attempts to corrupt or threaten its employees; (4) review and make recommendations about existing and proposed legislation and regulations related to IRS and TIGTA programs and operations; (5) prevent fraud, abuse, and deficiencies in IRS programs and operations, and; (6) inform the Secretary of the Treasury and Congress of problems and progress made to resolve them.[140]

A. What Constitutes Grounds for a TIGTA Investigation?

TIGTA investigates alleged violations of the following "10 Deadly Sins" composed by the Government Accountability Office in 1998, and listed in Code Sec. 1203(b)(1)–(10)[141]: (1) willful failure to obtain the required approval signatures on documents authorizing a seizure of a taxpayer's home, personal belongings, or business assets; (2) providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer representative; (3) Violating the rights protected under the Constitution or the civil rights established under six specifically identified laws with respect to a taxpayer, taxpayer representative, or other employee of the IRS; (4) falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative; (5) assault or battery of a taxpayer, taxpayer representative, or employee of the IRS but only if there is a criminal conviction or a final judgment by a court in a civil case, with respect to the assault or battery; (6) violating the Code, Department of the Treasury regulations, or policies of the IRS (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the IRS; (7) willful misuse of the provisions of Code Sec. 6103 for the purpose of concealing information from a congressional inquiry; (8) willful failure to file any return of tax required under the Code on or before the date prescribed therefore (including any extensions), unless such failure is due to reasonable cause and not to willful neglect; (9) willful understatement of federal tax liability, unless such failure is due to reasonable cause and not to willful neglect; and (10) threatening to audit a taxpayer for the purpose of extracting personal gain or benefit.

B. Initiating the TIGTA Audit

Should a taxpayer or tax professional encounter IRS activity that violates any of the prohibited behavior identified in the 10 Deadly Sins, the taxpayer is well-advised to initiate a TIGTA Audit. A TIGTA Audit is comprised of "reviews mandated by statute or regulation, as well as reviews identified through Audit's planning and evaluation process."[142] As part of the TIGTA Audit, every allegation/complaint that is received is reviewed to evaluate whether investigative action is required, and any report that contains information regarding threats, assaults, or bribery is addressed immediately.

Complaints may be submitted *via* phone, mail, in-person, or email. However, confidentiality is not guaranteed for complaints received *via* email. Phone submissions may be directed to 1-800-366-4484, complaints may be faxed to (202) 927-7018, submitted by mail to the Treasury Inspector General for Tax Administration Hotline, P.O. Box 589, Ben Franklin Station, Washington, DC 20044-0589, or emailed to *Complaints@tigta.treas.gov*. At minimum, a TIGTA complaint must include: (1) an accurate and complete statement of facts; (2) the names, addresses and office locations of applicable individuals; (3) the dates (whether past or expected in future) of wrongdoing; (4) how the complainant became aware of the wrongdoing, and; (5) information concerning other persons who may have information on the alleged wrongdoing.[143]

C. The Results of a TIGTA Audit

Most often, allegations of misconduct are reported to an IRS employee's supervisor who then forwards the complaint to TIGTA. However, in the following cases, allegations are first forwarded to other IRS managers: (1) Equal Employment Opportunity and tax related issues; (2)

allegations relating to executives and senior managers, and; (3) potential criminal violations by the IRS employees.[144]

Once TIGTA receives a complaint, it is evaluated and addressed according to the procedures described in RRA98 §1203 All Employee Guide (Document 11043).[145] Allegations considered potential Code Sec. 1203 violations are forward on to TIGTA for processing and resolution,[146] while allegations determined to contain non-Code Sec. 1203 violations are handled *via* administrative procedures.[147]

However, it is important to remember that, for Code Sec. 1203 to be implicated in a case involving alleged misconduct against a taxpayer, the IRS employee must have committed the prohibited acts or omissions "in the performance of the employee's official duties." Moreover, although Code Sec. 1203 provides that termination is the consequence for Code Sec. 1203 violations, the National Treasury Employees Union has successfully secured mitigation, and less severe penalties than termination, for its members in these cases.[148]

D. Conclusion

Tax professionals should bear in mind that a TIGTA complaint can be a valuable tool to protect the First, Fourth, Fifth, and Eighth Amendment rights of their clients. Moreover, to increase the public's positive perception of the fairness of the tax collection system, tax professionals are charged with "self-policing" and reporting each other's misconduct. By example, Code Sec. 7214(a)(8) and Reg. §301.7214-1 require any IRS employee who has knowledge or information of a violation of the Internal Revenue laws to report the violation, in writing, to the Commissioner of the IRS. Likewise, absent a privileged relationship, private tax professionals have a legal and moral obligation to report misconduct under Circular 230. One way for tax professionals, and taxpayers alike, to further strengthen the integrity of our voluntary tax compliance system is to utilize TIGTA when incidents of misconduct occur. Of course, all complaints must be sincere, as Circular 230 sanctions apply to filing false TIGTA complaints.[149]

ENDNOTES

1 The Hawthorne Studies, which examined the impact of observation on employee productivity, were conducted by Harvard Business School professor Elton Mayo and his research assistant, future Harvard Business School professor, Fritz Roethlisberger, from 1927 to 1932 at the Western Electric Hawthorne Works in Cicero, Illinois.

2 *See* L.N. Jewell, *Contemporary Industrial and Organizational Psychology* 4 (1998) (defining the Hawthorne effect as "changes in behavior that are brought about through special attention to the behavior").

3 The IRS, an agency staffed overwhelmingly with honorable and committed public servants, has been challenged to do "more with less." By example, the IRS training budget has been cut by over 85 percent since 2009. Similarly, the National Taxpayer Advocate has stated that the TAS "can't possible help all six million to twelve million taxpayers who may be having problems at any given time." A fear exists within the tax controversy community that the simultaneous rise in taxpayer demand for services and decline in capital needed to meet those demands will require, at least to some extent, the diversion of resources away from taxpayer protection efforts. *See IRS, Taxpayer Advocate Service 2013 Annual Report to Congress,* Vol. 1, at 26. (Reporting *EMPLOYEE TRAINING: The Drastic Reduction in IRS Employee Training Impacts the Ability of the IRS to Assist Taxpayers and Fulfill its Mission*); June 12, 2012 Taxpayer Advocate Press Release (Taxpayer Advocate Service Clarifies Case Acceptance Criteria), available at *www.taxpayeradvocate.irs.gov/userfiles/file/TAS_change_case_criteria_6_12_12.pdf*.

Unsurprisingly, the IRS and TAS awareness that congressional oversight is present during the Congressional Inquiry process can lead to heightened internal supervision over the matter that may play a significant role in ensuring a taxpayer's procedural and substantive due process rights are respected. For this reason, a Congressional Inquiry may be especially attractive to taxpayers in vulnerable situations, including taxpayers who are unable to afford representation by a tax professional and taxpayers who are not fluent speakers of the English language.

4 IRS Pub. 1 (Rev. 6/2014), available at *www.irs.gov/pub/irs-pdf/p1.pdf*. The 2014 Taxpayer Bill of Rights provides taxpayers with: (1) The Right to Be Informed; (2) The Right to Quality Service; (3) The Right to Pay No More than the Correct Amount of Tax; (4) The Right to Challenge the IRS's Position and Be Heard; (5) The Right to Appeal an IRS Decision in an Independent Forum; (6) The Right to Finality; (7) The Right to Privacy; (8) The Right to Confidentiality; (9) The Right to Retain Representation; and (10) The Right to a Fair and Just Tax System.

5 *Nat'l Taxpayer Advocate, 2013 Annual Report to Congress Vol. 1, at 14* (2013), available at *www.taxpayeradvocate.irs.gov/userfiles/file/2013FullReport/Volume-1.pdf* (EMPLOYEE TRAINING: The Drastic Reduction in IRS Employee Training Impacts the Ability of the IRS to Assist Taxpayers and Fulfill its Mission).

6 IRS Pub. 1 (Rev. 6/2014). *See* IRM 1.2.10.1.1 (Dec. 18, 1993) (Policy Statement 1-1) for a variation presenting the IRS Mission as follows: "Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all."

7 *See* IRM 1.2.10.1.31 (Nov. 4, 1977) (Policy Statement 1-231) (stating that the IRS administrative procedures will be designed to promote voluntary compliance and recognizing "the importance of voluntary compliance on the part of taxpayers to the efficient operation of the tax system.").

It is important to remember that, while Members of Congress may assist with resolving tax issues, they do not have the authority to override an IRS decision. Further, Members of Congress may be limited in the ability to assist with state or local tax issues. Taxpayers may want to contact their state or local officials for assistance with those matters. Also, Members of Congress may not act as an attorney on the taxpayers' behalf, and are powerless to intervene in disputes between individuals, businesses, financial institutions, and other private entities.

8 Code Sec. 6103(c).

9 IRM 13.1.8.1 (Apr. 26, 2011).

10 The TAS is headed by the National Taxpayer Advocate (NTA), who reports to the Commissioner. Each state and campus has at least one LTA who is independent of the local IRS office and reports directly to the NTA.

11 The Privacy Act of 1974, 5 USC § 552a, establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in the records systems of federal agencies.

12 Available at *www.irs.gov/pub/irs-pdf/f8821.pdf*.

13 An authorization to a Member of Congress includes that Member of Congress' staff that handles tax inquiries.

[14] IRM 11.3.4.2.1 (June 10, 2008).

[15] IRM 11.3.4.2.3 (May 20, 2005).

[16] *Id*.; 26 CFR §301.6103(c)-1. If the request to the Member is from a third party such as an attorney or Certified Public Accountant, the IRS may provide information only if there is a POA from the taxpayer on file and the request authorizes disclosure of tax information to the third party POA on the taxpayer's behalf. IRM 11.3.4.2.3 (May 20, 2005).

[17] TAMIS records and tracks TAS activity and performance in carrying out the statutory role of TAS to assist taxpayers experiencing problems and hardships with the IRS.

[18] IRM 11.5.2.6.5 (Mar. 1, 2006).

[19] *Id*.

[20] *Id*.

[21] The worsening delay in processing tax exempt applications is identified as one of the most serious problems facing the IRS by NTA Nina E. Olson in her 2013 Annual Report to Congress. *See Nat'l Taxpayer Advocate, 2013 Annual Report to Congress Vol. 1,* at 166 (2013).

[22] In the case of financial harm threatened by a delayed determination, the organization must provide documentation of the compelling reason, such as information showing a significant donor has declined to donate because the tax-exempt status has been revoked. For a pending grant, the following specific information will help support a request for expedited processing: (1) the name of the person or organization committed to giving the grant or asset; (2) the amount of the grant or the value of the asset; (3) the date the grant will be forfeited or permanently redirected to another organization; (4) the impact on the organization's operations if it does not receive the grant or asset, and; (5) the signature of a principal officer or authorized representative.

[23] TAS can also assist organizations in nonexpedite situations if the organization submitted the application prior to the date the IRS is currently assigning applications to examiners for review (Aug. 2013 as of June 5, 2014).

[24] *See* IRS Taxpayer Guide to Identity Theft, available at *www.irs.gov/uac/Taxpayer-Guide-to-Identity-Theft*.

[25] *See* June 12, 2012 Taxpayer Advocate Press Release (Taxpayer Advocate Service Clarifies Case Acceptance Criteria), available at *www.taxpayeradvocate.irs.gov/userfiles/file/TAS_change_case_criteria_6_12_12.pdf*.

[26] *See* June 10, 2014 IRS Press Release IR-2014-72 (IRS Adopts "Taxpayer Bill of Rights;" 10 Provisions to be Highlighted on IRS.gov, in Publication 1), available at *www.irs.gov/uac/Newsroom/IRS-Adopts-Taxpayer-Bill-of-Rights;-10-Provisions-to-be-Highlighted-on-IRSgov,-in-Publication-1*.

[27] Olson, N., *A Brave New World: The Taxpayer Experience in a Post-Sequester IRS* (originally delivered as a speech at the Laurence Neal Woodworth Memorial Lecture at the meeting of the American Bar Association Section of Taxation on May 9, 2013), available at *www.taxpayeradvocate.irs.gov/userfiles/file/NTA_Woodworth_TaxNotes_0603.pdf*.

[28] Helen W. Gunnarson. *Friending Your Enemies, Tweeting Your Trials: Using Social Media Ethically,* Ill. Bar J., Oct. 2011, available at *www.isba.org/ibj/2011/10/friendingyourenemiestweetingyourtri*.

[29] *See* Robert Ambrogi, *Lawyers' Use of Social Media Grows Modestly, ABA Annual Tech Survey Shows*, Law Sites, *www.lawsitesblog.com/2013/08/lawyers-social-media-use-continues-to-grow-aba-annual-tech-survey-shows.html* (Aug. 5, 2013).

[30] *Id.*

[31] *See www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf*.

[32] Mark Matthews is now a partner at Caplin & Drysdale.

[33] Mark E. Matthews, *New IRS Publicity Strategy*, U.S. Att'ys' Bull., July 2001, at 15, available at *www.justice.gov/usao/eousa/foia_reading_room/usab4904.pdf*. *See also* IRM 9.3.2, Publicity and Internal Communications (Feb. 16, 2012).

[34] IRM 9.3.2.2 (July 2, 2004).

[35] These releases are available at *www.irs.gov/uac/Latest-News* .

[36] *See www.irs.gov/uac/IRS-New-Media-1* and *www.irs.gov/uac/Newsroom/Tax-Information-Available-Through-IRS-Social-Media-Tools*.

[37] Bob Graham, *Tax season is publicity season for IRS' cases against cheats*. Insurance & Financial Advisor, available at *ifawebnews.com/2011/03/04/tax-season-is-publicity-season-for-irs%E2%80%99-cases-against-cheats* (published Mar. 4, 2011).

[38] *Top Debtors Listings*, State of N.J., Dep't of the Treasury, Div. of taxation, *www.state.nj.us/treasury/taxation/jdgdiscl.shtml* (last updated Aug. 20, 2014).

[39] IRM 11.1.2.1(2) (Aug. 22, 2008).

[40] IRM 11.1.1.9(1) (Aug. 22, 2008). For more information about the IRS media strategies, *see generally* IRM 11.1, Communications. For a list of the IRS Media Relations Offices, *see www.irs.gov/uac/IRS-Media-Relations-Offices---Contact-Numbers* (last updated Sept. 8, 2014).

[41] United States Attorneys' Manual, Title 1, Organization and Functions, 1-7.210, available at *www.justice.gov/usao/eousa/foia_reading_room/usam/title1/7mdoj.htm* (last visited Sept. 15, 2014).

[42] IRM 9.3.2.10(2) (July 2, 2004).

[43] IRM 9.3.2.10(3) (July 2, 2004).

[44] IRM 9.3.2.10(4), (5) (July 2, 2004).

[45] *See* 28 CFR § 50.2.

[46] IRM 9.3.2.6(3) (June 5, 2006).

[47] IRM 9.3.2.7(3) (July 2, 2004).

[48] For criminal actions, the DOJ shall not "furnish any statement or information for the purpose of influencing the outcome of a defendant's trial" or "which could reasonably be expected to be disseminated by means of public communication" if it were expected to influence a defendant's trial. 28 CFR §50.2(a)(2). For civil actions, DOJ personnel shall not "participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to (1) Evidence regarding the occurrence or transaction involved. (2) The character, credibility, or criminal records of a party, witness, or prospective witness. (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such. (4) An opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule. (5) Any other matter reasonably likely to interfere with a fair trial of the action." 28 CFR §50.2(b)(2).

[49] 28 CFR §50.2(b)(2).

[50] IRM 9.3.2.6(2) (June 5, 2006).

[51] IRM 9.3.2.8.2 (June 5, 2006).

[52] Memorandum to All United States Attorneys, *Press Releases in Cases Involving the IRS*, *www.justice.gov/usao/eousa/foia_reading_room/usam/title1/doj00028.htm.*

[53] Although Code Sec. 6103(m)(1) allows the IRS to "disclose taxpayer identity information to the press and other media for purposes of notifying persons entitled to tax refunds" when the IRS cannot locate such persons "after reasonable effort and lapse of time," the IRS has declared that the definition of media here does not include the Internet. IRS Tech. Assistance Mem. CC-TAM-PMTA-00219 (Aug. 7, 1998). Even though the IRS instituted such a policy in the nascent days of the Internet, it appears to still be in force.

[54] IRM 9.3.2.6(7) (June 5, 2006). The IRM also lists a number of types of information that the IRS personnel may *not* make during a criminal investigation, including "observations about a defendant's character"; defendant's prior criminal record; "statements, admissions, confessions, or alibis attributable to the defendant or the refusal or failure of the accused to make a statement"; "references to investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations"; the identity or credibility of witness testimony; "any opinion as to the accused's guilt or a possibility of a plea"; "any statement or information expected to influence the outcome of a pending or future trial"; or any "highly prejudicial" information whose release "would serve no law enforcement function." IRM 9.3.2.7(2) (July 2, 2004). *See also* Circular 230 §10.51(15) ("Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code" or the court is a sanctionable offense.)

[55] *See* Code Sec. 7431.

[56] *See* Code Sec. 7213(a).

[57] Memorandum to All United States Attorneys, *supra* note 52.

[58] *Id.*; *Johnson v. Sawyer*, CA-5, 97-2 ustc ¶50,616, 120 F3d 1307 (Taxpayer's middle initial, home address, and occupation were not considered

public information because they were taken from the return, not the trial record.); *see also J.V. Rice*, CA-10, 99-1 USTC ¶50,224, 166 F3d 1088 ("whether information about a taxpayer may be classified as 'return information' invoking application of § 6103 turns on the *immediate source* of the information") (emphasis in original); *J.G. Mallas*, CA-4, 93-1 USTC ¶50,302, 993 F2d 1111 ("The Government points to no such exception—and we are aware of none—permitting the disclosure of "return information" simply because it is otherwise available to the public."); *P.F. Thomas*, CA-7, 89-2 USTC ¶9638, 890 F2d 18 ("[T]he definition of return information comes into play only when the immediate source of the information is a return, or some internal document based on a return ... and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns."). *But see E.P. Lampert*, CA-9, 88-2 USTC ¶9463, 854 F2d 335 (nondisclosure restrictions no longer apply to return information made public in a judicial proceeding).

[59] The "observer effect," or "Hawthorne effect," refers to the modifications in behavior that take place when an individual believes he is being observed. *See, e.g.*, Rob McCarney, *et al., The Hawthorne Effect: A Randomised Controlled Trial*, 7 BMC MED. RES. METHODOLOGY 30 (2007). For more information on the observer effect in tax controversy law, please see our July 2014 newsletter, available at *docs.google.com/file/d/0B719qAMBEjGQNTlYUy1yblNNSjA/edit*.

[60] *Gentile v. State Bar of Nevada*, SCt, 501 US 1030, 111 SCt 2720 (1991).

[61] Some debate whether social media may be replacing the traditional press release. If so, argues Kevin O'Keefe of LexBlog, Inc., one such organization that specializes in developing attorneys' online presence, that change is slow in coming. Among other things, Mr. O'Keefe notes that press releases are still more professional than posts on social media, and law firm communications "have not progressed as rapidly as in the popular and news press." *See* Kevin O'Keefe, *Are press releases in the legal industry dead?* REAL LAWYERS HAVE BLOGS*, kevin.lexblog.com/2013/09/24/are-press-releases-in-the-legal-industry-dead/* (Sept. 24, 2014).

[62] The People's Law Dictionary, LAW.COM, *dictionary.law.com/default.aspx?selected=802* (last visited Sept. 16, 2014).

[63] *Supra* note 60.

[64] Although gag orders on the press are presumptively unconstitutional, *Nebraska Press Association v. Stuart*, SCt, 427 US 539 (1976), on rare occasions they have been upheld, if their scope is narrowly tailored. *See M.A. Noriega*, CA-11, 917 F2d 1543 (1990), *cert. denied*, 498 US 976 (1990) (upholding a gag order on CNN from broadcasting tapes of private conversations between defendant and his attorney).

[65] *Compare Gannett Co. v. DePasquale*, SCt, 443 US 368, 99 SCt 2898 (1979) ("the Sixth Amendment confers the right to a public trial only upon a defendant and only in a criminal case," and not members of the press) *with Richmond Newspapers v. Virginia*, SCt, 448 US 555, 100 SCt 2814 (1980) (distinguishing *Gannett* as holding for pretrial motions only, but that the First Amendment allows the press access to trials "absent an overriding interest") *and Globe Newspaper Co. v. Superior Court*, SCt, 457 US 596 (1982) (denial of the press access to trial "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest").

[66] *Sheppard v. Maxwell*, 384 US 333, 358 (1966).

[67] *Id.*

[68] For recent state and federal court decisions on access to media in the courtroom, *see* the Courtroom Access page of Reporters Committee for Freedom of the Press, available at *www.rcfp.org/category/tags/courtroom-access* (last updated July 17, 2014).

[69] The study was slated to run for three years, but has since been extended and will end July 18, 2015. For more information, *see Courts Selected for Federal Camera in Court Pilot Study*, U.S. COURTS, *www.uscourts.gov/News/NewsView/11-06-08/Courts_Selected_for_Federal_Cameras_in_Court_Pilot_Study.aspx* (June 8, 2011).

[70] The District of Rhode Island has also tinkered with social media. Kevin O'Keefe, *Courtroom coverage by social media a welcome development*, REAL LAWYERS HAVE BLOGS, *kevin.lexblog.com/2013/12/22/courtroom-coverage-by-social-media-a-welcome-development/* (Dec. 22, 2013).Utah has allowed journalists to use cell phones, laptops, and cameras in its state court since April 1, 2013. Lilly Chapa, *Journalists now allowed to tweet, live blog from Utah courtrooms*, REP. COMMITTEE FOR FREEDOM OF THE PRESS, *www.rcfp.org/browse-media-law-resources/news/journalists-now-allowed-tweet-live-blog-utah-courtrooms* (Nov. 20, 2012).

[71] ABA Model Rules of Professional Conduct (MRPC) Rule 1.6(a).

[72] MRPC Rule 1.6(b), (c).

[73] MRPC Rule 1.6, Comment 3.

[74] *See* Fed. R. Civ. P. Rule 26(b)(3).

[75] *See, e.g.*, *In the Matter of Peshek,* Ill. Atty. Reg. and Disc. Comm, 09 CH 89 (Aug. 25, 2009), Ill S. Cut MR 23794 (May 18, 2010) (Illinois public defender suspended for posting personal and confidential client information on her blog, as well as making derogatory comments about judges).

[76] *L. Kovel, CA-2, 62-1* USTC ¶9111, *296 F2d 918 (attorney-client privilege may encompass third parties of the communications "be made in confidence for the purposes of obtaining legal advice"). Cf. Burton v. R.J. Reynolds Tobacco Co.*, DC-KS, 200 FRD 661 (2001) (some documents not covered by privilege because they were related to "public relations and public image issues" and "make no reference to legal issues or the rendering of legal advice."). *See also In re Grand Jury Subpoenas Dated March 24, 2003*, DC-NY, 265 FSupp2d 321 (2003) ("[T]he ability of lawyers to perform some of their most fundamental client functions—such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid narrow charges brought against the client, and (c) zealously seeking acquittal or vindication—would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants.").

[77] *See, e.g.*, *In re Copper Market Antitrust Litigation*, DC-NY, 200 FRD 213 (2001) (PR firm was "incorporated into" Japanese company's staff to "perform a corporate function that was necessary in the context of the government investigation, actual and anticipated private litigation, and heavy press scrutiny obtaining at the time," providing English-language skills and experience with the U.S. media that the company could not do itself; communications were therefore privileged.).

[78] For more information on attorney-publicist communications, *see* David Jacoby and Judith S Roth, *Attorneys and public relations consultants: privileged or perilous communications?* IBA LEGAL PRACTICE DIVISION, LITIGATION COMMITTEE NEWSLETTER, Sept. 2008, available at *www.schiffhardin.com/binary/jacoby_roth_ibanet_0908.pdf*.

[79] *See* Michael Downey, *12 Tips for Reducing Online Dangers and Liabilities*, LAW PRACTICE, July–August 2010, available at *www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v36_is4_pg26.html*.

[80] U.S. CONST. amend. VI.

[81] MRPC Rule 3.6(a).

[82] MRPC Rule 8.4(d).

[83] *Sheppard v. Maxwell*, SCt, 384 US 333 (1966).

[84] *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

[85] For the full list of permitted statements, see MRPC Rule 3.6(b).

[86] MRPC Rule 3.6(c).

[87] *See, e.g.,* Florida Bar Rule 4-3.6 (the equivalent of MRPC Rule 3.6 without the wording of 3.6(c)). Some states, such as New York, include a provision explicitly defining a statement "ordinarily" likely to "prejudice materially an adjudicative proceeding." *See* New York Rules of Professional Conduct Rule 3.6(b); *see also* Illinois Rules of Professional Conduct Rule 3.6(b) ("certain subjects which would pose a serious and imminent threat to the fairness of a proceeding"); MRPC Rule 3.6, Comment 5 (examples of statements that would prejudice a criminal trial). Note the similarities with the DOJ provisions, at 28 CFR §50.2 *supra* notes 45, 48–49.

[88] *Dobbert v. Florida*, SCt, 432 US 282 (1977).

[89] *Irvin v. Dowd*, SCt, 366 US 717 (1961).

[90] For further reading, *see* Robert S. Stephen, *How to Manage a Trial in the Face of a Media Circus*, 26 SUFFOLK U. L. REV. 1063 (1992) available at *medicalmalpracticelawyersite.com/media-circus/*.

[91] MRPC Rule 4.1(a).

[92] MRPC Rule 8.2(a). *See Mississippi Bar v. Lumumba*, 912 So2d 871 (Miss 2005) (An attorney was

sanctioned because a "statement to newspaper reporter, to effect that trial judge who had cited attorney for contempt in course of criminal proceedings 'had the judicial temperament of a barbarian[,]' was made with willful, reckless disregard as to its truth concerning judge's qualifications and integrity, in violation of" the equivalent of MRPC Rule 8.2(a). The attorney was also sanctioned under Rule 8.4 for "conduct that is prejudicial to the administration of justice.").

[93] IRS Circular 230 §10.51(4), (12), (13).

[94] *See* MRPC Rule 1.7; Circular 230 § 10.29.

[95] Fed. R. Civ. P. Rule 11.

[96] *Whitehead v. Food Max of Mississippi, Inc.*, CA-5, 332 F3d 796 (2003) (*en banc*).

[97] Although this particular rule applies to federal tax returns, individual states generally have similar confidentiality statutes regarding state tax returns. *See, e.g.*, N.Y. Tax Law § 697(e).

[98] *See also* Circular 230 § 10.51(15) *supra* note 94.

[99] A preparer of tax returns who "knowingly or recklessly discloses any information furnished to him for, or in connection with, the preparation of any such return, or uses any such information for any purpose other than to prepare, or assist in preparing, any such return shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution." Code Sec. 7216.

[100] Code Secs. 7431, 7213.

[101] Circular 230 §10.51(15).

[102] Special thanks to Marcie Harrison, New Jersey Local Taxpayer Advocate, Deputy National Taxpayer Advocate for her help on this article.

[103] *www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/volume-1.pdf*.

[104] Code Sec. 7803(c).

[105] *Id.* A wealth of information on TAS is available on their website at *www.taxpayeradvocate.irs.gov/*.

[106] Further examples of scenarios in which TAS has proved helpful are available at *www.taxpayeradvocate.irs.gov/About-TAS/Success-Stories*.

[107] *www.irs.gov/pub/irs-pdf/f911.pdf*.

[108] IRM 13.1.7.2 (July 23, 2007).

[109] IRM Exhibit 13.1.7.

[110] Criteria breakdown available at: *www.irs.gov/irm/part13/irm_13-001-007.html*.

[111] IRM 13.3.1.1(7)-(8) (Jan. 15, 2005), IRM 13.1.16.12 (Mar. 23, 2011), 13.1.21.1.1 (Feb. 1, 2011), 13.1.21.1.2 (June 12, 2012), 13.1.21.3.1 (Feb. 1, 2011), 13.1.17.5 (Nov. 1, 2011).

[112] *See G.D. Bowers* , CA-7, 2013-1 USTC ¶50,109, 498 Fed Appx 623.

[113] *See J.D. Green,* CA-10, 2011-2 USTC ¶60,620, 428 FedAppx 863, 868.

[114] IRM 13.1.16.9.3 (Feb. 1, 2011).

[115] IRM 13.1.17.5 (Nov. 1, 2011).

[116] *Id*.

[117] IRM 13.1.4.2.2; 13.1.4.2.2.1 through 13.1.4.2.2.6.

[118] IRM 13.1.19.1 (Feb. 1, 2011) TAS OAR Process. Available at: *www.irs.gov/irm/part13/irm_13-001-019.html*; Also refer to IRM 13.1.7.7, Operations Assistance Request (OAR) Process and *tasnew.web.irs.gov/index.asp?pid=865*.

[119] *Id.*

[120] Code Sec. 7811; Reg. §301.7811-1.

[121] *Id.*

[122] IRM 13.1.14.2 (Oct. 31, 2004), IRM 13.1.14.2 (Oct. 31, 2004).

[123] *Id.*

[124] IRM 13.2.1.4.2.1 (July 16, 2009).

[125] *Id.*

[126] IRM 13.1.9.2.1 (Oct. 31, 2004).

[127] If the taxpayer does not object, the correspondence is forwarded to the National Taxpayer Advocate for review. Otherwise, the case is worked by an area office or local office.

[128] IRM 13.1.9.2.3 (Apr. 1, 2003).

[129] Communications should be addressed to: New York State Department of Taxation and Finance, Office of the Taxpayer Rights Advocate, W.A. Harriman Campus, Building 9, Albany, NY 12227. Complaints can also be made *via* telephone to: 518-530-4357, or *via* fax to: 518-435-8532. *See also*, an informational video available at: *www.youtube.com/watch?v=_nGQPDc44Rk)*.

[130] *www.tax.ny.gov/tra/*.

[131] *Id.*

[132] Available at: *www.tax.ny.gov/pdf/current_forms/misc/dtf911.pdf*.

[133] Available at: *www.tax.ny.gov/pdf/memos/multitax/m93_2c_2i_2m_2r_2s.pdf*.

[134] Communications should be addressed to: State of New Jersey Division of Taxation, Office of the Taxpayer Advocate (OTA), P.O. Box 240, Trenton, NJ 08695-0240 or sent *via* fax to: 609-984-5491 or email to: *nj.taxpayeradvocate@treas.state.nj.us*.

[135] *Id.*

[136] *Id.*

[137] Available at: *www.state.nj.us/treasury/taxation/pdf/ota/ota-911.pdf*.

[138] Available at: *http://www.state.nj.us/treasury/taxation/pdf/pubs/sales/anj1.pdf*.

[139] *www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/Most-Serious-Problems-International-Taxpayer-Issues.pdf*.

[140] *www.treasury.gov/tigta/about_what.shtml*.

[141] However, *see www.washingtonpost.com/blogs/federal-eye/wp/2013/05/10/irs-targeting-of-political-groups-might-be-a-sin/* ("TIGTA said the IRS (between October 2010 and December 2012) doled out more than $2.8 million [in bonuses] to about 2,800 workers with recent conduct issues. That included more than $1 million in cash awards for roughly 1,100 employees with federal tax-compliance problems.").

[142] *www.treasury.gov/tigta/about_what.shtml*.

[143] *Id. See also,* Figure 1: Process for All Section 1203 Cases With the Exception of Employee Tax Compliance and Discrimination Cases, GAO, I *RS's Efforts To Evaluate the Section 1203 Process for Employee Misconduct and Measure Its Impacts on Tax Administration*, GAO-04-1039R (Washington, DC, Sept. 27, 2004) (*www.gao.gov/assets/100/92897.pdf*), at 16 detailing the process through which the complaint is routed.

[144] *www.treasury.gov/tigta/about_what.shtml*.

[145] Information available at *www.irs.gov/irm/part13/irm_13-001-015.html*.

[146] *See* IRM pt. 13.1.15.3, RRA98 §1203—Employee Responsibilities.

[147] IRM pt. 13.1.15.4, Customer Complaints (Non–Code Sec. 1203 Violations).

[148] *See* IRS Guide to Penalty Determination (2011).

[149] Circular 230, §§10.50 and 10.51(a)(4) ("Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to. …Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading").