Anatomy of an OPR Case (Definitely Not R.I.P.)

By Dennis N. Brager

Dennis N. Brager examines the details of an investigation by the Office of Professional Responsibility.

Most practitioners assume that they will never be the target of an investigation by the Office of Professional Responsibility (OPR). However, even the most ethical and responsible tax professional can through inadvertence, bad luck, or personal problems that spill over in to his or her professional life, wind up in the sights of OPR. The purpose of this article is to explore the nuts and bolts of an OPR case against a practitioner.

Background

OPR administers and enforces the regulations governing practice before the IRS. The regulations governing practice are set out in title 31, Code of Federal Regulations, part 10, and are published in pamphlet form as Treasury Department Circular No. 230.[1] Although practitioners uniformly refer to these regulations as Circular 230, it is worth remembering that because these rules are set forth in Title 31 of the US Code, they are not governed by the usual tax procedure rules that govern tax cases under Title 26 of the US Code.[2] OPR is headed by a Director.[3] The current Director is Karen Hawkins who previously spent her legal career in private practice.

OPR consists of four "units."[4] They are:

- Case Development and Licensure Branch, Washington, DC—This unit reviews disciplinary cases for jurisdiction, recommends the disposition of questionable applications for enrollment and oversees OPR's Office of Practitioner Enrollment.
- Enforcement and Oversight Branch I, Washington, DC—This unit investigates practitioner misconduct with respect to possible violations of the Circular 230 regulations, recommends disciplinary sanctions, negotiates settlements and assists the IRS Associate Chief Counsel (General Legal Services) in presenting contested cases before Administrative Law Judges (ALJs) and with appeals to the Appellate Authority.
- Enforcement and Oversight Branch II, Washington, DC—This unit provides administrative support to the Joint Board for the Enrollment of Actuaries, an independent Federal board established pursuant to the Employee Retirement Income Security Act of 1974 by the Secretary of Labor and the Secretary of the Treasury. The Joint Board, pursuant to its authority under ERISA, acts on applications for enrolled actuary status and, as appropriate, suspends or terminates the enrollment of actuaries who violate the Joint Board's regulations.
- Office of Practitioner Enrollment, Detroit, Michigan—This unit processes applications for initial enrollment as an enrolled agent or as an enrolled retirement plan agent and, on three-year cycles, processes applications for renewal of enrollment.

The Director of OPR is authorized to institute disciplinary proceedings against practitioners, *i.e.*, those individuals who are eligible to "practice" before the IRS. This means attorneys, CPAs, enrolled agents, enrolled actuaries and enrolled retirement plan agents.[5] Circular 230 also authorizes the Director to disqualify appraisers who provide supporting valuations for internal revenue matters.[6] The IRS published regulations effective September 30, 2010 which require all tax return preparers including those who were not

Dennis N. Brager is a nationally recognized California State Bar Certified Tax Specialist at Brager Tax Law Group in Los Angeles, California and a former Senior Tax Attorney for the IRS Office of Chief Counsel.

previously regulated by OPR to obtain Preparer Tax Identification Numbers (PTINS).

The IRS has also issued proposed revisions to Circular 230 which would expand the definition of a practitioner to include "registered tax return preparers," as a new class of practitioner. Sections 10.3 through 10.6 of the proposed regulations describe the process for becoming a registered tax return preparer and the limitations on a registered tax return preparer's practice before the IRS. In general, practice by registered tax return preparers is limited to preparing tax returns, claims for refund and other documents for submission to the IRS. A registered tax return preparer may prepare all or substantially all of a tax return or claim for refund, and sign a tax return or claim for refund, commensurate with the registered tax return preparer's level of competence as demonstrated by written examination.

How to Get in Trouble with OPR– Let Me Count the Ways

The Secretary of the Treasury or his delegate may publicly reprimand, suspend or disbar any practitioner from practice before the IRS if the practitioner is incompetent or disreputable, or engages in prohibited conduct.[7] Monetary penalties are also a possibility.[8] A laundry list of potential incompetent or disreputable conduct is set forth Section 10.51, and includes but is not limited to:

- Conviction of any criminal offense under the Federal tax laws.
- Conviction of any criminal offense involving dishonesty or breach of trust.
- Conviction of any felony under Federal or State law for which the conduct involved renders the
- practitioner unfit to practice before the IRS.
- 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. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations and any other document or statement, written or oral, are included in the term "information."
- Solicitation of employment as prohibited under Section 10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the IRS or any officer or employee thereof.
- Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.
- Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.
- Misappropriation of, or failure properly or promptly to remit, funds received from a client for the purpose of payment of taxes or other obligations due the United States.
- Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the IRS by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of an advantage or by the bestowing of any gift, favor or thing of value.
- Disbarment or suspension from practice as an attorney, CPA, public accountant or actuary by any duly constituted authority of any State, territory, or possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.
- Knowingly aiding and abetting another person to practice before the IRS during a period of suspension, disbarment or ineligibility of such other person.
- Contemptuous conduct in connection with practice before the IRS, including the use of abusive language, making false accusations or statements, knowing them to be false, or circulating or publishing malicious or libelous matter.
- Giving a false opinion, knowingly, recklessly or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions de-

scribed in this paragraph include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading. For purposes of this paragraph, reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances and a consistent failure to perform obligations to the client.

> Even the most ethical and responsible tax professional can through inadvertence, bad luck, or personal problems that spill over in to his or her professional life, wind up in the sights of OPR.

- Willfully failing to sign a tax return prepared by the practitioner when the practitioner's signature is required by Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.
- Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code, contrary to the order of a court of competent jurisdiction, or contrary to the order of an ALJ in a proceeding instituted under §10.60.

In the past OPR has focused mainly on practitioners who have been convicted of a felony, disbarred by a state regulatory authority or failed to take care of their own tax obligations. The new Director has publicly promised to focus on other types of violations. For example, she has pledged to crack down on practitioners who fail in their duty of due diligence stating:

> Practitioners who think OPR isn't serious about due diligence should take heed. Practitioners may not ignore the implications of information already known, and must make reasonable inquiries if the information furnished by a client appears to be incorrect, inconsistent, or incomplete.[9]

OPR has also released a statement titled Professional Responsibility and the Report of Foreign Bank and Financial Accounts (*www.irs.gov/taxpros/agents/article/0,,id=100709,00.html*). It provides:

> Practitioners who prepare an individual's Form 1040 have a duty under Circular 230 to inquire of their clients with sufficient detail to prepare proper and correct responses to the foreign bank account questions on Schedule B … [Furthermore although] under Circular 230, Section 10.34(d), a practitioner may generally rely, in good faith and without verification, on information furnished by a client, good faith reliance contemplates that a practitioner will make reasonable inquiries when a client provides information that implies possible participation in overseas transactions/accounts subject to FBAR requirements.

The Far Reaching Consequences

OPR discipline may include censure, suspension or total disbarment from practice before the IRS, as well as monetary penalties.[10] OPR has published guidance[11] stating that an individual who has been suspended or disbarred may not:

- Prepare or file documents or correspond or communicate with the IRS.
- Render written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion.
- Represent a client at conferences, hearings and meetings.
- Execute waivers, consents or closing agreements; receive a taxpayer's refund check; or sign a tax return on behalf of a taxpayer.
- File powers of attorney with the IRS.
- Accept assistance from another person (or request assistance) or assist another person (or offer assistance) if the assistance relates to a matter

constituting practice before the IRS, or enlist another person for the purpose of aiding and abetting practice before the IRS.

Currently there is no prohibition on the preparation of returns, but this will no longer be true when the proposed changes to Circular 230 implementing the registered tax preparer rules are finalized.[12] All of this can be bad enough, but the collateral consequences can be even worse. OPR is authorized to provide notice of the sanctions to appropriate state licensing authorities, *i.e.*, state bar associations and accountancy licensing boards.[13] This can in turn result in the loss of one's license to practice law or accountancy depending upon the nature of the underlying violation and state law.

> If OPR does pop up, it is critical that a concerted defense be raised as quickly as possible. The far reaching consequences of OPR discipline are too extensive for half measures.

If a practitioner is disbarred or suspended then he or she becomes a pariah since no other practitioner may "accept assistance from or assist any person who is has been disbarred or suspended if the assistance relates to a matter constituting practice before the IRS."[14]

The Process

Practitioners may come to the attention of OPR in a number of ways including:

- Complaints from clients and third parties;[15]
- Internal referrals from IRS employees; and
- Information received from state bar associations and other professional licensing associations.

An attorney within OPR reviews allegations set forth in any referral to OPR. Historically, if the evidence indicates the allegations, taken as true, would constitute a violation of Circular 230, an allegation letter would be sent to the practitioner informing him or her of the charges and affording the individual the right to respond in writing or by requesting a conference with OPR.[16] OPR procedure has changed in some ways with the new Director. In cases of tax noncompliance, *i.e.*, nonfiling or nonpayment by the practitioner of his own taxes, OPR has several approaches. The office is sending out "soft letters" to practitioners who have self-corrected their noncompliance prior to OPR contact, using the notice as a chance to "gently warn them" about remaining compliant.[17]

OPR is also issuing soft 60-day letters for practitioners who are current in their filing obligations, but may have noncompliance issues for past years. This "letter gives them a short period of time to clean up their act. If they do then no further action is taken by OPR." The final option OPR uses in some circumstances is entering into a deferred discipline agreement. If the practitioner become compliant and remain so for five years, the disciplinary action is dropped and won't become public.[18]

Currently, if OPR is conducting an investigation in a "conduct" case, *i.e.*, possible misconduct other than tax noncompliance, OPR's first contact with a practitioner is not the traditional allegation letter, but rather a "pre-allegation notice letter," which notifies the practitioner of the investigation and invites the practitioner to submit any relevant information. If the practitioner's information does not resolve the matter, OPR sends an allegation letter specifying suspected violations of Circular 230. The practitioner may submit an additional response and may request a conference to be conducted in OPR's Washington, DC, office or by telephone.[19] If the practitioner's response does not fully resolve the issue, the practitioner's case file is presented to a panel of OPR attorneys for review and discussion, and to propose a disciplinary sanction.[20]

In both tax noncompliance cases and conduct cases, when the practitioner's appearances before the IRS have been infrequent or nominal and the practitioner has expressed an intention to refrain from practice in the future, OPR will consider the practitioner's offer of a deferred disciplinary agreement whereby a consent sanction will become effective only in the event of the practitioner's continued misconduct.[21]

It is critical that at each stage in the process the practitioner provide a written response to OPR. The cases are replete with examples of practitioners who ignored letter after letter from OPR, and only at the very last second filed a belated and generally not convincing response. While there is no way of knowing for certain, it is likely that many of those cases could have been resolved with much less stringent discipline had the practitioner come in early.

This leaves the question of who should respond to OPR. It is very tempting for the accused practitioner

to misapprehend the seriousness of the situation. After all, it's just a late tax return, a disgruntled client or an overzealous IRS agent who set this ball in motion; "Surely with my years of experience and skill in handling tax matters I can respond and wrap this matter up without spending money on expensive attorneys." Sadly this is not generally the case. Substantive tax knowledge does not prepare one for negotiating and ultimately litigating a case with and against OPR. Disciplinary proceedings have their own set of conventions, and knowledge of the Internal Revenue Code does not equate with an understanding of OPR procedures and rules.[22] Practitioner's counsel must have a complete understanding of IRS practices and procedures, tax law, Circular 230 and the rules of evidence.[23] Additionally, as discussed below, the later stages of an OPR adjudication are conducted pursuant to Section 556 of the Administrative Procedures Act (APA).[24] IRM 39.4.1.6 (08-11-2004) contains the following list of "core references materials:"[25]

- 31 U.S.C. § 330 (formerly 31 U.S.C. § 1026, 5 U.S.C. § 261, Act of July 7, 1884, ch. 334, § 3, 80 Stat. 378; the Treasury Practice statute)
- 5 U.S.C. § 500 (the Agency Practice statute)
- 29 U.S.C. §1242
- 31 C.F.R. Part 10, Treasury Circular 230 (Cat. No. 16586R), as amended.
- Rev. Proc. 81-38 (Limited Practice Without Enrollment)(Pub. 470), 1981-2 C.B. 592
- 26 C.F.R. Part 601, Subpart E Conference and Practice Requirements)
- Rev. Proc. 68-29 (describing role of witnesses; superseded)
- Form 2848, Power of Attorney and Declaration of Representative
- Pub 947, Practice Before the IRS and Power of Attorney
- Treasury Order No. 150-02
- Treasury Order No. 107-04
- General Counsel Order No. 9.

If the case is not resolved within OPR the next step is that OPR will refer the matter to the attorneys within General Legal Services (GLS) a division of the Office of Chief Counsel.[26] OPR will refer disciplinary cases to the GLS Area Counsel in whose geographic area the practitioner resides along with its file.[27] Among the items included in the file are:

- The practitioner's "last known address"
- The practitioner's professional certification status
- Gap tax year information (when the case is based upon allegations of noncompliance with the tax laws)
- Plain English transcripts (Certificate of Assessments and Payments under blue cover seal) for relevant tax years
- Plain English summary of the case
- Names and phone numbers of OPR personnel making the referral, and such information for any other relevant Service personnel
- A history of prior settlement discussions
- Settlement parameters that are acceptable to OPR.[28]

Within 28 days after receiving the case, the GLS attorney will review the case file and contact OPR to discuss any issues, related litigation questions and the need for any additional documents or other information. No later than seven days after completing the initial review and having received any information requested from OPR, the GLS attorney must send a letter to the practitioner. This letter will advise the practitioner that OPR has forwarded the case to the Office of Chief Counsel for litigation and that a complaint will be filed promptly in the absence of a settlement.[29]

Before filing the complaint, the GLS attorney will allow the practitioner 21 days to respond. If the practitioner responds in good faith to the letter within 21 days, then the GLS attorney has another 21 days in which to negotiate a settlement. Any additional time to negotiate a settlement must be approved by OPR.[30]

If a settlement cannot be reached, the GLS attorney is given 21 days to issue a complaint.[31] The complaint must provide a clear and concise statement of the facts and the law that are the basis for the proceeding.[32] The complaint is sufficient if it fairly informs the practitioner of the charges against him or her so that he or she is able to prepare the defense.[33] The complaint must specify the sanction sought, and if the sanction sought is a suspension, the duration of the suspension sought must be specified.[34]

The complaint must allege that the practitioner has engaged in practice before the IRS and was eligible to so practice at the time of the alleged violation.[35] Service of the complaint is made by certified mail sent to the practitioner's last known address as determined under Code Sec. 6212.[36] Not picking up certified mail from OPR isn't a good idea, especially since if the certified mail is not claimed or accepted, or is returned undelivered, service may be made on the practitioner, by mailing the complaint by first class mail to the last known address and service is considered complete when mailed.[37]

An answer must be demanded, either in the complaint itself or in a separate paper attached to the complaint, and notify the practitioner of:

- The time for answering the complaint, which may not be less than 30 days from the date of service of the complaint;
- The name and address of the ALJ with whom the answer must be filed;
- The name and address of the person representing OPR to whom a copy of the answer must be service; and
- That a decision by default may be rendered against the practitioner in the event an answer is not filed as required.[38]

Within 10 days of service of the complaint, the GLS attorney must serve the practitioner with evidence in support of the complaint.[39] The practitioner's answer must be filed with the ALJ, and served on the Director of OPR within the time specified in the complaint which is generally 30 days. However, the practitioner may request an extension from the ALJ.[40] The answer must contain a statement of facts that constitute the practitioner's grounds of defense. General denials are not permitted. The practitioner must specifically admit or deny each allegation set forth in the complaint, except that the practitioner may state that he is without sufficient information to admit or deny a specific allegation.[41]

The practitioner may not deny a material allegation in the complaint that the practitioner knows to be true, or state that the practitioner is without sufficient information to form a belief, when the practitioner possesses the required information. The practitioner also must set forth affirmatively any special matters of defense on which he relies.[42] Failure to deny or respond to allegation is a deemed admission.[43] Failure to timely answer may result in a default, and is considered an admission of the allegations in the complaint and the waiver of a right to a hearing.[44] OPR may, but is not required to, file a reply to the answer.[45]

Once a complaint is filed either party may file motions including a motion for summary judgment.[46] Generally motions practice is in writing; however, the ALJ may permit oral argument on any motion.[47]

Discovery is available but only at the discretion of the ALJ, and upon written motion demonstrating the relevance, materiality and reasonableness of the requested discovery.[48] Discovery is limited to depositions, and answers to requests for admissions.[49] Requests for admissions are limited to a total of 30, including any subparts within a specific request unless the ALJ orders otherwise.[50] There is no provision for interrogatories or requests for production of documents. However, Section 10.73(d)(3)(i) permits the disclosure of returns or return information under Code Sec. 6103(l)(4) solely for use in the proceedings, and only to the extent that the Secretary of the Treasury, or delegate, determines that the returns or return information are or may be relevant and material to the case. This authority has been delegated to the GLS attorney handling the case.[51]

The Hearing

The Government has the burden of proof on all material allegations of the complaint put in issue by the practitioner.[52] The standard of proof depends on the punishment requested by OPR. If the sanction is censure or a suspension of less than six months' duration, then the allegations must be established by the preponderance of the evidence. If the sanction is a monetary penalty, disbarment or a suspension of six months or longer duration, an allegation of fact that is necessary for a finding against the practitioner must be proven by clear and convincing evidence in the record.[53] The rules of evidence are not applicable, but the ALJ may exclude evidence that is irrelevant, immaterial, or unduly repetitious.[54]

The date and place of hearing are generally arranged by agreement between the GLS attorney, the ALJ, and the practitioner's counsel.[55] Generally the hearing should be held within 180 days of the filing of the answer.[56] The hearings are required to be stenographically recorded, and transcribed, and the testimony of witnesses is taken under oath.[57] Witnesses are subject to cross examination.[58] Official documents, records and papers of the IRS or OPR are admissible in evidence without the production of an officer or employee to authenticate them.[59] Depositions and admissions are also admissible.[60]

The hearings are held before an ALJ who does not work for either the IRS or the Treasury Department. Instead, the ALJ is selected from other federal agencies and generally have no tax experience at all.[61] While the lack of an understanding of the substantive tax law is generally not a huge problem, it must also be remembered that the ALJ will not have any familiarity with the standards in the tax community regarding reasonable practices. Expert testimony may therefore be helpful and appropriate.[62]

After the hearing, the parties are given an opportunity to submit proposed findings of fact and conclusions along with supporting reasons to the

ALJ.[63] The ALJ will usually require the filing within a specific time after receipt of the hearing transcript. Legal issues should be briefed.[64] Within 180 days after the receipt of the findings, the ALJ is supposed to enter a decision which must set forth a statement of findings and conclusions along with the reasons for making the findings, along with either a dismissal of the complaint (hopefully), or an order for punishment.[65] If there is no appeal, the decision of the ALJ becomes final 30 days after the ALJ's decision.[66]

Appeals

Either party may file an appeal of the ALJ's decision.[67] The appeal is filed along with a brief with the Director of OPR within 30 days of the date that the decision of the ALJ is served on the parties.[68] The standard of review requires the appellant to establish that the decision was clearly erroneous. Issues that are exclusively matters of law will be reviewed *de novo*.[69] Sanctions are reviewed de novo,[70] and may be increased or decreased from the original decision.[71] If on appeal it is determined that there are unresolved issues raised by the record, the case may be remanded to the ALJ to elicit additional testimony or evidence.[72] The appeal is supposed to be decided within 180 days after its receipt.[73]

The appeal is to the Secretary of the Treasury or his delegate.[74] The responsibility for deciding the appeal has been delegated to the so-called "Appellate Authority," who currently is Ronald Pinsky.[75] He does not report to anyone within the Office of Chief Counsel or the IRS with respect to those matters delegated to him as the Appellate Authority. The Appellate Authority's delegated authority is separate and apart from his other assigned duties within the Office of Chief Counsel.[76] Until the early 2000s, the appellate authority was generally handled by Treasury's Office of General Counsel. The appointment of a counsel from one of the IRS's operating divisions has caused some concern in the tax community because of the potential for the appearance of a conflict of interest.[77]

A practitioner can appeal the final decision by the appellate authority to the federal district court.[78] Generally judicial review is limited to determining whether the decision by the Appellate Authority was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law or not supported by substantial evidence.[79]

Conclusion

Obviously practitioners should avoid conduct which might subject them to OPR scrutiny. If OPR does pop up, it is critical that a concerted defense be raised as quickly as possible. The far reaching consequences of OPR discipline are too extensive for half measures.

Endnotes

1 The enabling legislation for the Circular 230 regulations appears in title 31, United States Code, section 330. All section references herein are to Circular 230, except as otherwise stated.

2 For example, the statutes of limitations that govern tax cases are not applicable to OPR investigations.

3 Section 10.1(a)

4 About the Office of Professional Responsibility, available online at *www.irs.gov/taxpros/agents/article/0,,id=176297,00.html*.

5 Section 10.3.

6 Section 10.50(b).

7 Section 10.50.

8 Section 10.50(c).

9 IR-2010-82, July 6, 2010.

10 Section 10.50.

11 Guidance on Restrictions During Suspension or Disbarment, available online at *www.irs.gov/taxpros/agents/article/0,,id=228588,00.html*.

12 *See* Sections 10.3 through 10.6 of the proposed changes to Circular 230.

13 Section 10.80. California CPAs themselves may be required to report an OPR suspension or disbarment to the State Board of Accountancy. *See* Cal. Business & Professions Code Section 5063(a)(3).

14 Section 10.24.

15 The IRS Web site provides that a complaint should be in letter format and should include the tax practitioner's name, address, telephone number, designation (*i.e.*, attorney, CPA, enrolled agent, etc.), a detailed description of the allegations and any documents that support those allegations. Available online at *www.irs.gov/taxpros/agents/article/0,,id=123392,00.html*.

16 *See www.irs.gov/taxpros/agents/article/0,,id=123392,00.html*.

17 It is unclear whether a practitioner who enters into an installment agreement to pay his taxes is considered to be "in compliance." However, the current Director has been quoted as saying: "I am not part of the collection division of the IRS," *OPR Finding Creative Ways to Handle Case Backlog, Director Says.* 2009 TNT 185-11 (Feb. 28, 2009).

18 2009 TNT 133-2 *More Talk of Monetary Sanctions from OPR.* (July 15, 2009).

19 Available online at *www.irs.gov/taxpros/agents/article/0,,id=228679,00.html*.

20 *IRS Publication 4693, Office of Professional Responsibility Brochure* (June 2008).

21 Available online at *www.irs.gov/taxpros/agents/article/0,,id=228679,00.html*.

22 For example, statements of contrition may be treated as admissions which can come back to haunt the practitioner.

23 Although the rules of evidence do not apply in OPR hearings, the ALJ will almost certainly be trained as a lawyer and be very familiar with the rules of evidence and may bring the litigator's prejudice against hearsay statements with him or her.

24 Section 10.71(a).

25 To that list one definitely should add the final agencies decisions issued by OPR, available online at *www.irs.gov/taxpros/actuaries/article/0,,id=183923,00.html*.

26 *See* IRM 39.4.1.3 (5-18-2009).

27 *Id.*

28 *Id.*

29 IRM 39.4.1.3(10)-(11) (5-18-2009).

30 *Id.*

31 IRM 39.4.1.3(12) (5-18-2009).

Endnotes

[32] Section 10.62(a).
[33] *Id.*
[34] Section 10.62(b).
[35] IRM 39.4.1.3(12) (5-18-2009).
[36] *See* Section 10.63 (a)(2).
[37] Section 10.63(a)(2)(ii).
[38] Section 10.63(c).
[39] Section 10.63(d); IRM 39.4.1.3(123 (5-18-2009). Good practice suggests filing a Freedom of Information Act Request early on to make sure that all file materials are received. Keep in mind that issues may arise if the information requested is tax information of another party (*e.g.*, the practitioner's client). Discovery is also available in OPR proceedings. Section 10.71(a).
[40] Section 10.64(a).
[41] Section 10.64(b).
[42] *Id.*
[43] Section 10.64(c).
[44] Section 10.64(d).
[45] Section 10.66.
[46] Section 10.68.
[47] Section 10.68(c)(2).
[48] Section 10.71(a).
[49] *See* Section 10.71(a).
[50] Section 10.71(c).
[51] *See* IRM 39.4.1.2(2) (5-18-2009).
[52] IRM 39.4.1.3.5 (08-11-2004).
[53] Section 10.76(b).
[54] Section 10.73(a).
[55] IRM 39.4.1.3.5(1) (08-11-2004). In the absence of an agreement the hearing will be held in Washington, D.C. Section 10.72(e).
[56] Section 10.72(a)(2).
[57] Section 10.72(a)(3). It is an open question as to how one obtains the testimony of a recalcitrant witness since Circular 230 has no provision for subpoenaing witnesses.
[58] Section 10.72(b).
[59] Interestingly argument on objections are not to be recorded or transcribed unless the ALJ orders them to be recorded. Section 10.73(f)
[60] Section 10.73(b) and (c).
[61] *See Decision on Appeal, Director, OPR v. Francis*, No. 2004-9, at 17. (Feb. 4, 2008).
[62] *See Director, OPR v. Sykes*, No. 2006-1 (Jan. 29, 2009).
[63] Section 10.75.
[64] *See* IRM 39.4.1.3.6 (05-18-2009).
[65] Section 10.76(a)(1).
[66] Section 10.76(d).
[67] Section 10.77(a).
[68] Section 10.77.
[69] Section 10.78(b).
[70] *Decision on Appeal, Director, OPR v. De Liberty*, No. 2007-08 (July 2008).
[71] *See Decision on Appeal, Director, OPR v. Kilduff,* No. 2008-12, at 6 (Jan. 20, 2010); *See also Francis, supra* at 18.
[72] Section 10.77(b).
[73] Section 10.77(a).
[74] Section 10.77(a).
[75] *See* Chief Counsel Notice CC-2010-017 (Sept. 22, 2010). Ronald Pinsky is an assistant division counsel for tax litigation in the Small Business/Self-Employed Division. *See* Coder, *IRS Designates New Appeals Reviewer for OPR Cases*, 2009 TNT 125-1 (July 2, 2009).
[76] *Id.*
[77] *See* Coder, *supra* note 75.
[78] *See* APA sections 702 and 704.
[79] APA section 706.