

Ethical Issues in Advertising for Tax Attorneys

By Kevan P. McLaughlin¹

I. INTRODUCTION

Advertising is a way of life, for attorneys and all types of businesses alike, notwithstanding some institutional resistance from the former. But, before a lawyer decides to freshen up his or her website to boast accomplishments online, launch a billboard campaign, or use a lead generating or referral service, they must be conscious of unique ethical standards specific to tax attorneys.

Most California attorneys will, or at least should, already be familiar with ethical restrictions on advertising and solicitations. California, as with other states, has adopted professional ethical standards that address such activities. More specifically, Rule 1-400 (D) provides in relevant part that advertisements “shall not: (1) Contain any untrue statement; or (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.”² This, however, is far from the end of the restrictions imposed on a tax attorney. Instead the law, with varying degrees of overlap, imposes greater ethical considerations on our practice area when it comes to advertising.

This article presents an analysis of three important and unique ethical criteria tax lawyers must consider when advertising by reviewing and comparing overlapping rules in Title 31 CFR, Subtitle A, Part 10 (“Circular 230”),³ the California Rules of Professional Conduct, and other federal rules.

A. Circular 230 Section 10.30

Section 10.30(a)(1) of Circular 230 provides the general rule related to restrictions on advertising and solicitation, but in actuality encompasses two sub-components.

First, Section 10.30(a)(1) is the rule familiar to most attorneys, in that no communication or solicitation can contain a “false, fraudulent, or coercive statement or claim;

or a misleading or deceptive statement or claim.” On its face Section 10.30(a)(1) appears similar to California Rule 1-400(D)(2)⁴ and (5),⁵ American Bar Association (“ABA”) Model Rules 7.1⁶ and 7.3,⁷ and section 6157.1 of the California Business & Professions Code.⁸ The striking similarities then beg the question—to what extent can a tax lawyer rely on comments to the California Rules and ABA Model Rules for guidance on Circular 230? In September 2012, the Internal Revenue Service (“IRS”) proposed a series of changes to Circular 230.⁹ Among those changes, Section 10.35’s covered opinion standard was eliminated from Circular 230, opting instead for a rule almost identical to ABA Model Rule 1.1.¹⁰ Aside from the more recent amendments, other provisions of Circular 230 are almost mirror images to the ABA Model Rules.¹¹ With this growing trend towards Circular 230’s conformity with ABA Model Rule provisions, a practitioner may find some additional guidance in the latter’s comments.¹²

As such, the terms of “false” or “misleading” are undefined in Circular 230, thus a practitioner may be in need of clarification. A tax attorney, or any Circular 230 practitioner for that matter, may consider drawing from the comments of ABA Model Rule 7.1 to help define what is a “false” or “misleading” statement.¹³

Comparing and considering California Rule 1-400(D) and the ABA Model Rules also is important for tax attorneys, because Section 10.30(a)(2) provides that a practitioner’s solicitation for employment is impermissible if it violates a Federal or state rule—effectively incorporating by reference these standards.

The second sub-component of Section 10.30(a)(1) contains additional restrictions, including those on Enrolled Agents (“EA’s”), Registered Tax Return Preparers (“RTRP’s”), or Enrolled Retirement Plan Agents (“ERPA’s”) from using the term “certified” in their advertisements. Beyond the restrictions on using “certified,” EA’s, RTRP’s, and ERPA’s are also prohibited under Section 10.30(a)(1) from implying they have an employer/employee relationship with the IRS.¹⁴

Section 10.30 can be broken into two further sub-parts: (1) uninvited solicitations; and (2) fees. First, Section 10.30(a)(2) provides that no practitioner can “make, directly or indirectly an uninvited written or oral solicitation of employment in matters related to the IRS”. Furthermore,

Section 10.30(c) prohibits a practitioner from persisting “in attempting to contact a prospective client if the prospective client has made it known to the practitioner that he or she does not desire to be solicited.” These provisions are analogous to ABA Model Rule 7.3(b)(1).¹⁵

Second, Section 10.30(b)-(c) controls what, and how, fee information can be advertised. Practitioners are permitted under Circular 230 to advertise their fees, so long as they are fixed fees for specific routine services, hourly rates, a range of fees for particular services, or fees charged for an initial consultation. Practitioners also must be conscious of other restrictions on fees. While Section 10.30(b)-(c) discusses what and how fee information can be communicated, Section 10.27 contains other restrictions. Importantly, Section 10.27 prohibits a practitioner from charging an “unconscionable fee,” but does not define the term. Similar to the reliance on ABA Model Rule 7.1’s comments for purposes of Section 10.30(a)(1), a tax attorney could consider California Rule 4-200 for guidance.¹⁶

Advertisements about fees can nevertheless be made in professional lists, telephone directories, print media, mailings, electronic mail, facsimile, hand delivered flyers, radio, or television under Section 10.30. However, if a tax lawyer chooses to use direct mail or electronic advertisements, they are required to maintain a copy of the advertisement, including the list or description of the recipients, for at least three years. Practitioners should note that this requirement is one year longer than that imposed by the State Bar of California.¹⁷ If a tax lawyer chooses to advertise using radio or television, Section 10.30(c) requires them to keep a copy of a recorded broadcast with no apparent end-date. Moreover, like California Rule 1-400 (Standards) (14), a practitioner also must include a statement under Section 10.30(b)(1)(ii), disclosing if a client will be responsible for costs that may be incurred in the matter. If a tax lawyer chooses to advertise his or her fees, Section 10.30(b)(2) further prohibits the lawyer from charging more than the advertised rates for 30 days following the last date it is published. This rule should be compared to California Rule 1-400 (Standards) (16), which imposes considerably greater time restrictions on honoring advertised fees.

Finally, practitioners also need to be conscious of other unique features of Section 10.30. For example, Section 10.30(a)(1) applies to *any* IRS matter. So, advertising or solicitations regarding audit defense or Offers in Compromise are subject to the same standards as those for tax return preparation services. Furthermore, Section 10.30(d) prohibits a practitioner from associating with someone who violates the ethical rules related to advertising. If a person (or entity), such as a lead generating firm obtains clients in violation of Section 10.30, a practitioner is prohibited from assisting or accepting assistance from the violator. Thus, if a

company generates leads by advertising “Our team of former IRS tax attorneys can help,” and that statement is false or misleading, the practitioner who accepts those leads could violate Circular 230 independently of the lead generator.

B. Circular 230 Section 10.51(a)(5)

Violations of Section 10.30 become sanctionable under Section 10.51(a)(5).¹⁸ However, practitioners must be conscious of a possible broader application of Section 10.51(a)(5). Where Section 10.30 applies to solicitations and advertisements, Section 10.51(a)(5) covers other potentially incompetent or disreputable conduct. The connotation of actions covered by Section 10.30 implies communications to prospective clients, whereas Section 10.51(a)(5) expressly applies to “the use of false or misleading representations with intent to deceive *a client or prospective client* in order to procure employment.” Thus, advertisements to an existing client-base for additional work, if false or misleading, also can subject the practitioner to discipline under Section 10.51(a)(5) where it may not have under Section 10.30 alone.¹⁹

In addition to covering new and existing clients, Section 10.51(a)(5) also prohibits the practitioner from conveying that they can improperly obtain a special result from the IRS. This provision is analogous to ABA Model Rule 8.4(e), which prohibits an attorney from stating or implying “an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.”²⁰

C. United States Code Section 333

In addition to the restrictions found in Circular 230, tax lawyers have additional ethical issues related to advertisement as found within section 333 of Title 31 of the United States Code (“Section 333”). While Circular 230 covers communications and solicitations by those who practice before the IRS, Section 333 is much broader. The general rule provides that *no one* can use the words “Department of the Treasury,” or any name, title, symbol, emblem, seal, badge, or initial, of any subdivision thereof (*i.e.*, IRS²¹) in *any* advertisement, solicitation, business activity, or product if doing so reasonably could “be interpreted to construed as conveying the false impression that such advertisement, solicitation, activity, or product is in any manner approved, endorsed, sponsored, or authorized, or associated with” the Department of the Treasury or IRS.²²

Several recent plea agreements highlight factual situations that give rise to a Section 333 violation. In *U.S. v. Brown*,²³ the defendant used the IRS insignia on two fraudulent faxes, sent to Wells Fargo Bank and TransUnion to claim his tax lien had been removed. Similarly, in *U.S. v. Dumstorff*,²⁴ the defendant used the U.S. Treasury symbol on two counterfeit certificates of deposit as collateral to fraudulently obtain an

\$850,000 loan. In the context of advertisements then, a tax attorney should be conscious of how the use of, for example, the IRS seal on a website, could reasonably be interpreted by the public.

A question presented is, given the requirement that subject material must *reasonably* convey a connection between the advertiser and the IRS or Department of the Treasury, can a practitioner disclaim away any affiliation? Title 31 appears to say no: "Any determination of whether a person has violated [Section 333(a)] shall be made without regard to any use of a disclaimer of affiliation with the United States Government or any particular agency or instrumentality thereof."²⁵ However, the Federal Trade Commission ("FTC") may say yes. The FTC has weighed in on what advertisements could reasonably be interpreted to convey the false impression a product violated Section 333(a) in the context of the U.S. Mint. The FTC emphasizes a review based on the "net impression" made as a whole, rather than isolated words or phrases, and a balance with First Amendment principles. Pursuant to the FTC, whose "experience is particularly relevant," disclaimers are carefully examined "to make sure they are sufficiently clear and prominent to convey the qualifying information effectively." However, any such disclaimer must still be sufficiently noticed and understood by the consumer for it to be effective. Although the FTC's opinion related to the U.S. Mint, its interpretation may provide the foundation for the defensible use of a disclaimer. In essence it would appear that, according to the FTC, a disclaimer cannot be brushed aside as it contributes to the whole message, and may negate the reasonableness of any interpretation of associated advertisement notwithstanding Section 333(b).

A practitioner who does violate Section 333 may face *significant* consequences, both civil and criminal. Civilly, the punishment can be up to \$5,000 for each use of any impermissible material, or in the case of an impermissible broadcast or telecast, up to \$25,000 for each use. In determining the imposition of a civil penalty, the assessing official is instructed to consider a variety of relevant factors, including the scope of the misuse, the purpose and/or nature of the misuse, the extent of the harm caused by the misuse, the circumstances of the misuse, and the benefit intended to be derived from the misuse.²⁶

Criminally, a practitioner who knowingly violated Section 333 can face a fine of up to \$10,000 for each impermissible use, or in the case of an impermissible broadcast or telecast, up to \$50,000 for each use, and/or one-year imprisonment. In *U.S. v. Brown*, the U.S. District Court for the Central District of California articulated a three-part test for a defendant to be guilty of the misuse of any prohibited names, titles, symbols, emblems, seals, badges, or initials: (1) the accused must knowingly use a prohibited

word or symbol; (2) during a business transaction; (3) in a manner which could reasonably be interpreted or construed as conveying the false impression that the item is approved, endorsed, sponsored, or authorized by, or associated with the Department of the Treasury.²⁷

If a civil or criminal penalty under Section 333 is sustained against a practitioner, they could furthermore be subject to discipline for violations of Circular 230 pursuant to Section 10.51(a)(1), (2), (3), and (12). This is especially true with the delegation of authority to the IRS to enforce Section 333.²⁸

II. CONCLUSION

With ever-evolving outlets for attorney advertising, lawyers face a growing number of ethical considerations. This is true of tax attorneys, but unlike other legal sub-disciplines, we must take stock of additional ethical rules and abide by their tangled web or proceed with peril.

ENDNOTES

1. Kevan P. McLaughlin (J.D., LL.M) is the founder of McLaughlin Legal in San Diego, California. The author can be reached at (858) 678-0061 or at kevan@mclaughlinlegal.com.
2. California R. of Prof'l Conduct 1-400.
3. Unless otherwise indicated, "Circular 230" and any "Section" references are to the consolidation of the regulations governing the practice before the IRS as published in 31 C.F.R. Subtitle A, Part 10.
4. California R. of Prof'l Conduct 1-400(D)(2) ("A communication or a solicitation (as defined herein) shall not . . . Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public").
5. California R. of Prof'l Conduct 1-400(D)(5) ("A communication or a solicitation (as defined herein) shall not . . . Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.").
6. Model Code of Prof'l Conduct R. 7.1 ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.").
7. Model Code of Prof'l Conduct R. 7.3.
8. Cal. Bus. & Prof. Code § 6157.1 ("No advertisement shall contain any false, misleading, or deceptive statement or omit to state any fact necessary to make the statements made, in light of circumstances under which they are made, not false, misleading, or deceptive.").
9. REG-138367-06, 77, Fed. Reg. 57055 (Sept. 17, 2012).

10. Compare IRB 2012-40 (Oct. 1, 2012) with Model Code of Prof'l Conduct R. 1.1.
11. Compare Section 10.29 with Model Code of Prof'l Conduct R. 1.7.
12. E.g., compare Model Rules of Prof'l Conduct R. 7.3 cmt. 5 with Section 10.51(a)(5) (Application to former or current clients).
13. See Model Rules of Prof'l Conduct R. 7.1 cmts. 2 ("A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation."), 3 ("An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.")
14. These types of designation restrictions have not gone unchallenged. In *Inst. of Certified Practitioners, Inc. v. Bentsen*, 874 F. Supp. 1370 (N.D. Ga. 1994), an academic organization who certified tax professionals to use a "CPTx" designation unsuccessfully sought to enjoin the IRS from enforcing the Circular 230 prohibition against using the term "certified." Somewhat similar, in *Carberry v. State Bd. of Accountancy*, 33 Cal. Rptr. 2d 788 (Cal. Ct. App. 1994) (*Carberry v. State Bd. of Accountancy*, 28 Cal. App. 4th 770 (1994)?), an individual challenged a prohibition against using the term "accounting" service in business advertisements. In *Carberry* the practitioner, who was an EA admitted to practice before the IRS, operated a sole proprietorship in San Francisco called "Citizens Accounting & Tax Service." The California State Board of Accountancy ordered Carberry to stop using "accounting" because he was not a CPA pursuant to Business & Professions Code § 5058. See also Cal. Code Regs., tit. 16, § 2. Following the earlier holding in *Moore v. California State Bd. of Accountancy*, 2 Cal. 4th 999 (Cal. 1992), certiorari denied 507 U.S. 951 (1993), the court ultimately sided with the California State Board of Accountancy. The *Carberry* opinion is also important because the California Court of Appeals held that Section 10.30 did not preempt state laws from regulating tax practitioners—all the more reason for tax lawyers to be equally conscious of applicable provisions of the California Rules of Professional Conduct.
15. Model Code of Prof'l Conduct R. 7.3(b)(1).
16. California R. of Prof'l Conduct 4-200(B) ("Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following: (1) The amount of the fee in proportion to the value of the services performed. (2) The relative sophistication of the member and the client. (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member. (5) The amount involved and the results obtained. (6) The time limitations imposed by the client or by the circumstances. (7) The nature and length of the professional relationship with the client. (8) The experience, reputation, and ability of the member or members performing the services. (9) Whether the fee is fixed or contingent. (10) The time and labor required. (11) The informed consent of the client to the fee.")
17. California R. of Prof'l Conduct 1-400(F).
18. "Incompetence and disreputable conduct for which a practitioner may be sanctioned under Section 10.50 includes, but is not limited to—Solicitations of employment as prohibited under Section 10.30."
19. See also Section 10.50(a) ("The Secretary of the Treasury, or delegate . . . may censure, suspend, or disbar any practitioner from practice before the [IRS] if the practitioner . . . with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client.")
20. Model Code of Prof'l Conduct R. 8.4(e).
21. See 31 C.F.R. § 27.3(a)(1) (the services, bureaus, offices, and subdivisions include "'Department of the Treasury,' 'United States Secret Service,' . . . 'Internal Revenue Service, . . .';" thus, the abbreviations or initials covered also include "IRS.")
22. 31 U.S.C.A. § 333(a).
23. *U.S. v. Brown*, 2007 WL 2718625 (C.D. Cal. 2007).
24. *U.S. v. Dumstorf*, 2008 WL 5208774 (W.D. Ky. 2008).
25. 31 U.S.C.A. § 333(b).
26. 31 C.F.R. § 27.4
27. *U.S. v. Brown, supra*.
28. Treas. Direct. 15-43.