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ETHICAL CONSIDERATIONS IN REPRESENTING NONPROFIT ORGANIZATIONS

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I. INTRODUCTION.

A. Overview of Outline.

This outline discusses selected rules of professional responsibility of special relevance to legal advisors who represent of nonprofit organizations. The presentation of relevant rules is intended to be neither exhaustive nor cursory. The outline serves as both a primer on certain professional responsibility matters, and a more detailed examination of particular issues of interest.

This outline employs the following abbreviations: (1) "TDRPC" means the Texas Disciplinary Rules of Professional Conduct; (2) "IRC" means the Internal Revenue Code of 1986, as amended; and (3) "IRS" means the Internal Revenue Service.

B. Sources of Law Discussed.

1. The TDRPC

Every attorney representing a nonprofit organization must adhere to state rules of professional responsibility. The TDRPC govern Texas attorneys.

a. In General,

The TDRPC set forth "minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action," TDRPC, *Preamble*, ^ 7. The TDRPC and its comments "constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment." *Id.* The TDRPC "define proper conduct for purposes of professional discipline." TDRPC, *Preamble*, ^ 10.

b. Relevance of TDRPC Comments.

The official comments to the TDRPC often "are permissive, defining areas in which the lawyer has professional discretion." TDRPC, *Preamble*, ^ 10. Further, they "frequently illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules." *Id.* However, "no disciplinary action may be taken for failure to conform to the Comments " *Id.*

2. Circular 230.

Attorneys and accountants who represent clients in a variety of tax matters must also adhere to the requirements governing practitioners in Circular 230, Regulations Governing Practice before the Internal Revenue Service. *See generally* 31 C.F.R. pt. 10 (as amended June 12, 2014). The Office of Professional Responsibility ("OPR") administers and enforces the regulations comprising Circular 230. 31 C.F.R. § 10.1(a).

The statutory authority for regulating practice is 31 U.S.C. § 330, which authorizes the Treasury Secretary to "*regulate the practice of representatives of persons* before the Department of the Treasury." 31 U.S.C. 330(a)(1) (emphasis added).

- The statute further empowers Treasury to require a representative to demonstrate good character, good reputation, qualifications and competency "before admitting a representative to practice." 31 U.S.C. 330(a)(2)(A)-(D).
- The Secretary of the Treasury "may suspend or disbar from practice before the Department, or censure, a representative" on grounds of (1) incompetence, (2) disreputableness, (3) violation of regulations prescribed under 31 U.S.C. § 330, and (4) "with intent to defraud, willfully and knowingly" misleading or threatening the person represented (or to be represented). 31 U.S.C. § 330(b).
- The Secretary may also impose a monetary penalty on any representative with respect to whom grounds exist for suspension or disbarment from practice before the IRS. *See id.*
 - "If the representative was acting on behalf of an employer or any firm or other entity in connection with the conduct giving rise to such penalty, the Secretary may impose a monetary penalty on such employer, firm, or entity if it knew, or reasonably should have known, of such conduct." *Id.*
 - "Such penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty and may be in addition to, or in lieu of, any suspension, disbarment, or censure of the representative." *Id.*

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