

**PITFALLS IN REPRESENTING  
A CLIENT BEFORE THE IRS**

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There are numerous pitfalls for the practitioner who represents a client before the IRS. Some of the more common pitfalls are:

I. NOT KNOWING WITH WHOM YOU ARE DEALING.

Determine the position/title of the IRS person with whom you are dealing. Watch out that you are not dealing with a special agent of the Criminal Investigation Division in a case which you believe is being handled as a routine audit or collection matter. If a special agent is investigating your client, your client has a serious problem. It is the goal of the special agent to put your client in jail.

II. FAILING TO RECOGNIZE CONSEQUENCES OF REFUSING TO EXTEND OR EXTENDING STATUTE OF LIMITATIONS.

Know the consequences of refusing to extend the statute of limitations. In an audit context, refusal means a 90-day letter will be sent. In other words, litigation becomes imminent. Extending the statute means delay and additional interest charges.

III. FAILING TO DESIGNATE PAYMENTS TO THE IRS.

Any time money is sent to the IRS, instructions as to how the payment should be applied should be on the check. Consider also sending a cover letter with the same instructions. This is especially important in a situation where a business is failing and your client faces personal exposure for taxes that have been withheld from employees but not paid over. In such circumstances, consider designating payments to be applied against the "trust fund" portion so that your client's personal exposure is reduced by the amount of the payment. If your client plans to file for bankruptcy, attempt to designate payments to the most recent nondischargeable taxes rather than those older liabilities which are dischargeable.

IV. CONCEDING AN ASSESSMENT WHEN THERE ARE PROCEDURAL IRREGULARITIES.

Especially when the IRS is demanding money from your client when there has been no previous contact, the IRS may have no right to collect the funds due to procedural irregularities. Always consider whether the statute of limitations is open. In addition, the IRS may not be able to prove it mailed the necessary notices or that it sent them to the proper address.

V. PROCEEDING TO APPEALS OFFICE WITHOUT REVIEWING ENTIRE TAX RETURN.

Examining agents miss issues. Appealing an issue that has been raised by an agent may lead to a review of the return by a more sophisticated IRS employee. Before appealing an adverse determination by an agent consider the issues the agent may have missed. There is no sense making a bad situation worse. Following the refund procedures may be safer.

VI. FAILING TO CONSIDER STOPPING INTEREST.

At any stage during the course of an IRS audit, your client can make a deposit or payment with the IRS for the purpose of stopping interest. Because the audit process can take years before final resolution, your client needs to know about this option.

VII. RELYING ON IRS ADVICE.

Generally, reliance on the advice of the IRS is no excuse if the IRS gives you erroneous advice. Thus, although IRS personnel can be a useful source of guidance and information, it is wise to take what you are told with a grain of salt.

VIII. FAILING TO USE FREEDOM OF INFORMATION ACT.

When you become involved in an IRS matter, especially at a late date, the more you know about what happened the better off you are. Freedom of Information Act requests unlock the door to what happened before you became involved. This information is particularly useful in representing someone against whom the trust fund recovery penalty has been imposed or someone who has a history of dealing with the Collection Division.

IX. IGNORING IRS DEADLINES.

In a collection context especially, it is important to respond in a timely manner. When the notice says "Notice of Intent to Levy" and provides a thirty-day deadline for a CDP appeal, the IRS means it. When the IRS sends a 90-day letter to your client (giving your client the opportunity to contest an audit determination in Tax Court), the ninety days cannot be extended although in some circumstances the 90-day letter can be revoked.

X. COOPERATING WITH SPECIAL AGENTS.

Representing a client in an IRS criminal investigation is different from representing a client when the case is in civil channels. Cooperation is the general rule in a civil matter. However, in a criminal case, a decision to cooperate is made only after weighing all the pros and cons.

XI. NOT CONSIDERING POTENTIAL CONFLICT OF INTEREST ISSUES.

There are potential conflict of interest issues in the most basic of situations. For example, in representing a married couple in resolving an IRS audit dispute, the representative must always be alert to the innocent spouse argument. Even if there is no conflict at the start, the situation must constantly be reevaluated since the relationship between the spouses can change. The spouses may be “in this together” at the start but at a later point in time one spouse may want nothing to do with the other, perhaps *because* of the tax issues involved.

XII. NEEDING TO GET INFORMATION FROM THE IRS BUT NOT HAVING A POWER OF ATTORNEY.

To represent your client before the Internal Revenue Service, you must have a power of attorney. IRS Form 2848 is used. The IRS will not disclose information about a taxpayer to someone who does not have a power of attorney because of the rules prohibiting disclosure of confidential information. Especially if you are dealing with a collection problem that needs fast attention, be sure to obtain the power of attorney immediately. Keep in mind that there is no prohibition on your giving information to the IRS without a power of attorney; only on the IRS giving information to you. Ways around power of attorney problems include faxing the power of attorney form to the IRS or having your client on the phone line while you deal with the IRS.

XIII. NOT BEING CIVIL TO AN OBNOXIOUS REVENUE OFFICER.

IRS collection personnel have a difficult job. Although most go about their job in a professional manner, some do not. Avoid the temptation to respond in kind to an obnoxious revenue officer. It only makes it more difficult to deal with the revenue officer. There is always the remedy of going over the revenue officer’s head to the supervisor or filing a collection appeal.

XIV. SENDING IMPORTANT CORRESPONDENCE TO THE IRS BY REGULAR MAIL.

Send important correspondence to the IRS by certified mail, return receipt requested. The IRS is a big organization. Letters get lost. A related point is that it is often important to establish a paper trail especially in connection with filing tax returns and responding to IRS collection notices.

XV. IGNORING POSSIBILITY OF BANKRUPTCY IN A COLLECTION CONTEXT.

There is a common perception that bankruptcy accomplishes nothing when the IRS is involved. There are a number of exceptions, but generally income taxes more than three years old are dischargeable in bankruptcy. Personal liability for failure to pay over withholding taxes (“trust fund recovery penalty”) is not dischargeable. In addition, bankruptcy can provide “breathing room” in negotiations with the IRS by stopping the IRS in its tracks and by providing a longer payment period.

XVI. SIGNING DOCUMENTS ON YOUR CLIENT’S BEHALF.

Avoid the possibility that your client may complain at a later date that you were not authorized to sign, for example, a consent to extend the statute of limitations, an agreement form settling a case or an installment payment agreement. Get your client’s signature on all important documents even though the power of attorney authorizes you to sign.

XVII. ASSUMING A DECISION IS FINAL WHEN IT IS NOT.

Before conveying news to your client, be sure that your IRS contact has decision-making authority. IRS employees have supervisors. Especially in connection with settlements, your contact person may be overruled. The flip side of the coin is that if you do not like the decision of the person with whom you are dealing, ask to talk to the person’s supervisor.

XVIII. FAILING TO ASK FOR IRS SUMMONS.

Assume the IRS informally asks your client for information or documentation with respect to another taxpayer. If your client’s relationship to the person being examined is important, consider obtaining authorization from the party or requesting an IRS summons requiring that the information be turned over.

XIX. BECOMING A TARGET YOURSELF.

Assume your client has a messy IRS collection situation and fears losing everything to the IRS. Your client asks you about putting assets in the names of family members and about leaving off the financial statement “assets which the IRS will never find out about anyway.” Avoid the temptation to tell your client what your client wants to hear. Collection personnel have a way of uncovering assets and take a dim view of attempts to put assets out of reach of the IRS.

XX. ALLOWING YOUR CLIENT TO TALK TO THE IRS.

Rarely can your client add anything to what you would say or put it in better words. Clients quite often are good at innocently saying the wrong thing. A false statement may

constitute a separate criminal offense. You should know the facts before going into a meeting with the IRS and be the spokesperson yourself.

XXI. FAILING TO RESPOND TO COLLECTION NOTICES FROM OGDEN.

Consider responding in writing to every collection notice your client receives. Develop and convey a plan for getting the IRS paid and start sending money. Interest and penalties add up quickly. Responding in writing usually will head off an attempt by the IRS to levy on wages and bank accounts, prior to the involvement of a revenue officer.

XXII. THINKING THE IRS WILL ACCEPT AN OFFER IN COMPROMISE “JUST BECAUSE.”

Many offers are rejected immediately because it clearly is not in the best interest of the IRS to accept them. Avoid the situation where you bill your client for preparing an offer that is rejected on its face. Do the analysis necessary to determine the value of the client’s assets and the client’s future income potential. The client must offer at least the sum of these two items for the offer to have a chance of acceptance.