

BUSINESS LAW NEWS

THE STATE BAR OF CALIFORNIA • ISSUE 4 2005

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THE BUSINESS LAWYER'S TEN COMMANDMENTS TO LIVE BY IN A CRIMINAL TAX INVESTIGATION

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Many practitioners have heard of the ten deadly sins of misconduct that can get an Internal Revenue Service representative terminated. This article also involves the IRS, but focuses on what to do if you are involved in a criminal investigation. Violating any of the ten rules in this article will increase the chances that the target of the investigation will become a defendant and subsequently convicted.

The Ten Commandments are a list of religious and moral imperatives that feature prominently in some form or another in many religions. They are rules to live by. If you are ever visited by Special Agents from the IRS Criminal Investigation Division, you will realize it is not a normal life event. You may even ponder the meaning of life and probably ask for help from a higher power. If indeed you have entered the world of a criminal tax investigation, you are involved in something that is governed by rules you may not be familiar with and you should seek guidance to help you through the process.

It is getting more common to see lawyers involved as targets in federal tax investigations, in addition to being legal representatives. (In other words, sometimes you are the

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taxpayer that the IRS is investigating.) Here are ten rules that the business lawyer should generally follow if he or she is confronted by a federal criminal tax investigation.

1. Retain counsel. The Sixth Amendment provides the right to have the assistance of counsel for your defense. Use this right. Only a fool has himself for a client. If you or your client is visited by a Special Agent from the Criminal Investigation Division, then you must face the reality that you are involved in a serious matter. A taxpayer needs to be represented by an attorney who is experienced in handling criminal tax cases in order to mount a strong defense.

You have the right to remain silent. Use it. You should not help the government to build a criminal case against you by voluntarily giving them information.

2. Do not speak. The Fifth Amendment provides that a person cannot be compelled to be a witness against him or her self in a criminal case. You have the right to remain silent. Use it. You should not help the government to build a criminal case against you by voluntarily giving them information. If you are approached and asked questions by a Special Agent, you should ask the Special Agent for his or her business card and politely state that you do not want to answer any questions and you will have your attorney contact the agent. If you are representing a taxpayer in a criminal tax investigation, then you should be the one handling the communication process with the IRS and your client should not speak to them.

3. Do not bear false witness or lie. It is a felony to make a false statement or use a false document in any matter involving the IRS no matter how small. See 18 U.S.C. Section 1001. For example, if a Special Agent asks you if you know something, and indeed you know, but you are nervous and for some reason you say that you do not know, then you have committed a crime. Also, the government can use a false statement against you to show you are attempting to conceal other criminal conduct. If you speak, then tell the truth. However, the better advice is to follow the second commandment and remain silent.

4. Do not alter or destroy evidence. It is a separate crime to obstruct justice by altering or destroying evidence. See 18 U.S.C. Section 1512(b). Refrain from these activities. If the government cannot build a case based on past criminal acts, it may shift its focus to your conduct during the investigation in an attempt to prosecute you for something else. Martha Stewart, Frank Quattrone and Arthur Andersen, LLP (just to name a few recent noteworthy defendants) were convicted of crimes that were committed after

the investigation started. Also, if you are representing a client who asks you about this subject, you must affirmatively explain that it is unlawful for them to alter or destroy evidence. (You may want to have another attorney from your firm or an investigator present when you explain this, since you need to protect yourself from being implicated in a subsequent offense if your client does something foolish during the investigation.)

5. Do not tamper with witnesses. It is against the law to dissuade anyone from talking with the Special Agents investigating the case, or telling a witness what to say. See 18 U.S.C. Section 1512(c). This is not to say that your attorney can't explain that anyone has a right to choose to speak or not to speak to the government or to the defense during the investigation. However, only the legal representative, not the target, should explain this to a third party. Also, just to point out how serious this issue can be, even the legal representative will most likely want an investigator present when the attorney talks with a witness to protect the attorney from an accusation of influencing the witness and to corroborate the witness testimony. Warn your client that if a friend or potential witness asks them what to say about the investigation, your client should politely tell the person that their attorney does not want them to discuss the case for their own good, and your client should ask the person to call you if they have any questions. As the representative, you should be happy to talk with any witness. You should urge other potential targets and significant witnesses to obtain their own counsel.

6. Determine your role and whether you are a target or a mere witness. It is important to note that many investigations begin by having a person advised that they are a witness. A witness still has the right to claim the privilege against self-incrimination. *Bellis v. United States*, 417 U.S. 85 (1974). At the same time, the witness wants to make sure he or she remains a witness and does not do or say something to become a target. The witness may want to attempt to obtain immunity. See 18 U.S.C. Section 6004. Only an experienced attorney should approach the prosecutor with a request for immunity as there are different types of immunity and you have to know what to ask for ahead of time.

7. Do not hire an accountant directly to represent the taxpayer in any matter that has the potential to turn into a criminal investigation. Don't fool yourself into thinking you can have the accountant who prepared the tax returns represent the taxpayer in a matter (even a civil examination) that has even the slightest potential to become a criminal investigation. There is no client-accountant privilege in a criminal matter. Therefore, if an audit turns into a criminal investigation, the tax preparer can be compelled (by the court) to become a witness against the taxpayer. If an accountant is to be

engaged as part of the team to represent the taxpayer, then the attorney should retain the accountant directly so that information can be shielded from a forced disclosure. By having an attorney retain a new accountant, the attorney-client privilege can be extended in this context to shield confidential information from being disclosed. See *United States v. Kovel*, 296 F.2d 918 (2ND Cir. 1961). There are strategies for hiring an accountant (even multiple accountants) to represent the taxpayer in a civil examination when you know that the taxpayer has a potential criminal problem. However, this is a sensitive strategy that should be used only by an experienced tax attorney along with an experienced accountant. The attorney hides (sort of like the wizard behind the curtain in the Wizard of Oz) and controls the representation through the accountant (retained by the attorney) who has to "walk on eggshells" to try and keep the audit from becoming a criminal referral.

8. Actively investigate the case. Investigating the case is not only a job for the government; it is also a job for the defense. Counsel should collect evidence to try to learn about the case and be prepared to defend against potential criminal charges. Counsel should try to track the government's movements, interview witnesses, and review financial documents to diligently discover both good (exculpatory evidence) and bad facts.

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9. Form a theme for the defense and a strategy for dealing with the government. As legal counsel, you will have to determine if you want to start selling your defense right away or wait to pull the rabbit out of the hat at trial. For instance, will the defense be: lack of willfulness, mistake, ignorance, honest belief, lack of knowledge, no tax due, no false statement, or it wasn't me? This will depend on the specific evidence in the case and also the government representatives involved. Some counsel believe it's productive to open the lines of professional communication with the government about the case. Others like to "freeze-out" the government and play their cards close to the vest. In either case, counsel should ask the Special Agent not communicate with the taxpayer directly and only to contact you instead. (Actually, you want to tell the Special Agent this in writing and make it crystal clear not to go near your client.) Also, counsel should ask the Special Agent and the Assistant U.S. Attorney assigned to the case about their specific goals and the status of the case.

10. Consider other things that might be necessary in your case to effectively represent the taxpayer. Every case is different. I have seen and used many creative tactics that result in having an investigation never result in an indictment, and in having a criminal case dismissed before a trial begins. Most people are familiar with the saying, “There is no opportunity like the present.” If the defense has a difficult case, counsel should consider strategies to attempt to kill the case before it proceeds any further. The government does not have the resources to take every case to trial. It usually proceeds with the cases it believes it has the easiest chance of winning and which have the potential of being a deterrent against other taxpayers. Counsel may want to consider filing motions depending on the stage of the case, that request the return of property seized by the government, quash summonses, involve grand jury proceedings, exclude evidence based on illegal search and seizure, request discovery, or more particularizes the government’s case, just to name a few. Counsel may also have to confront other tangential issues such as how to or whether to file tax returns (current ones) during the investigation.

An IRS criminal investigation is governed by many unique rules. If you or someone you know is confronted by a federal tax investigation, you now hopefully have a glimpse of some of the pitfalls and the seriousness of the matter. Hopefully, this background will give you the wisdom to deal with a criminal tax investigation wisely. ■