



CaliforniaCPA



December 2005

Under Scrutiny

10 Rules to Follow if You're Involved in an IRS Criminal Investigation

by Dave Porter, Esq.

If you or your client ever are visited by IRS Criminal Investigation Division special agents, you'll realize it's not a normal life event. It's an experience governed by a set of rules with which you might not be familiar.

Or, you might be involved in an IRS criminal investigation in a different manner—as part of the defense team, asked to conduct forensic accounting and serve as an expert witness.

For more than 14 years, I've represented CPAs who were witnesses and targets of IRS criminal investigations, and I've retained CPAs as expert witnesses and forensic accountants. During this time, I've found that there are 10 rules CPAs should follow when dealing with a criminal investigation.

Some of these rules apply to CPAs who are targets of an investigation, some apply to CPAs as witnesses and still others apply to CPAs who might be asked to perform forensic accounting for an investigation.

Retain Counsel. The Sixth Amendment provides the right to counsel for a defense. Use this right. If you or your client are visited by an IRS Criminal Investigation Division special agent, you and your client need to be represented by an attorney who is experienced in handling criminal tax cases. Also, any knowledgeable tax attorney will refrain from representing both you and your client because of a potential or actual conflict of interest.

Do Not Speak. The Fifth Amendment provides that neither you nor your client can be compelled to be a witness against yourself in a criminal case. Don't help the government build a criminal case against you by voluntarily giving information. If you are approached and questioned by special agents, you should ask them for their business cards and politely state that you do not want to answer any questions and that your attorney will contact them. Your counsel will then communicate with the IRS.

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 (18 U.S.C. Sec. 1001). For example, if a special agent asks you if you know someone, and you do, but for some reason you respond "No," then you have committed a felony. The government can use a false statement against you to show you are attempting to conceal other criminal conduct. So, if you speak, tell the truth.

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However, the better advice is to follow the second rule and remain silent.

Do Not Alter or Destroy Evidence. It is a crime to obstruct justice by altering or destroying evidence [18 U.S.C. Sec. 1512(b)]. If the government cannot build a case based on past criminal acts, it may shift its focus to your conduct during the investigation to prosecute you for aiding and abetting in criminal violations involving the investigation. Also, if your client asks you about this subject, explain that they may not alter or destroy evidence. Otherwise, you could be involved in a potential conspiracy charge. Martha Stewart is just one recent defendant that was convicted of crimes committed after the investigation started.

Do Not Tamper With Witnesses. It is against the law to dissuade anyone from talking with special agents investigating a case or to tell them what to say [18 U.S.C. Sec. 1512(c)]. Your attorney can explain, though, that everyone has a right to choose to speak or not to speak to the government, or to the defense during the investigation. But your attorney should explain this, not you. Also, attorneys most likely will want a witness present—to protect themselves—when they talk with a witness. So, tread carefully. If a friend or potential witness asks you what to say if they're questioned about the investigation, tell them that your attorney does not want you to discuss the case and ask the person to call your attorney if they have any questions.

Determine Your Role and Whether You are a Target or a Witness. Your attorney will attempt to determine whether you are a target or a witness in a case. It is important to note that investigations often begin with one or more parties informed that they are a witness. However, as the investigation continues, some witnesses become targets. A witness has the right to claim the privilege against self-incrimination [Bellis v. United States, 417 U.S. 85 (1974)]. Witnesses also should make sure they remain such and do not do or say something to become a target. Witnesses also may want to obtain immunity (18 U.S.C. Sec. 6002 et seq). Attorneys should approach the prosecutor with this request, as there are different types of immunity.

Do Not Represent a Taxpayer in a Case That Has the Potential to Become a Criminal Investigation. Don't fool yourself into thinking you can represent a client in a matter, including a civil examination, that has the potential to become a criminal investigation. There is no client-accountant privilege in a criminal matter, so the CPA who prepared the client's tax returns usually is exposed to becoming a witness against the client.

Consequently, counsel for the client usually will recommend that the client retain a new CPA to prepare returns when a criminal investigation begins.

When the attorney retains the CPA, the attorney-client privilege can, under certain circumstances, be extended to the defense team's CPA [United States v. Kovel, 296 F.2d 918 (2nd Cir. 1961)].

Consider All Issues Before You Produce Information. You may be asked to produce evidence in the form of documents or testimony. After you have referred to the first two rules, if your counsel determines that you are a mere witness, you still may have to consider other issues before you comply.

A request for confidential client information raises ethical and fiduciary issues. The government often issues administrative summonses for records, which means you also could be subpoenaed to appear before a grand jury to testify and produce records. Also, the government or the defense could subpoena you to produce evidence and testify at a trial.

You should consult with your attorney prior to responding to these requests. If your attorney determines you can testify as a percipient fact witness, you should tell the truth and not think about which side called you as a witness. Be Prepared to Provide a Reliable Report if You are Asked to be an Expert Witness. If you are retained as an expert witness, you may be asked to

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prepare an expert report and testify in court, which will be exchanged with the opposing side. Federal Rule of Evidence 702 states, “if scientific, technical or other specialized knowledge will assist the trier of fact ... a witness qualified as an expert ... may testify thereto in the form of an opinion.”

Your expert report and your testimony in court must set forth your knowledge, experience and training and show that your analysis is (1) sufficiently based upon reliable facts or data; (2) the product of reliable principles and methods; and (3) applies the principles and methods reliably to the facts of the case.

Your expert report will be excluded from being admitted into evidence if you do not include these steps in your analysis.

Consider All Defenses if You are Retained as an Expert to Assist the Criminal Defense

Team. If you are assisting the defense team, you will be asked to interpret financial data, review documents and organize evidence. The defense team will collect evidence—both bad and good (exculpatory) facts—to learn about the case and be prepared to defend against potential criminal charges. You will have to understand the government’s method of proof.

For example, in a tax evasion prosecution, the government will attempt to prove its case through specific items, a bank deposits analysis or a net worth analysis. Also, you may be asked by counsel to develop a theme for the defense. For instance, will the defense be: lack of willfulness, mistake, ignorance, honest belief, lack of knowledge, technical tax-related defense, no tax due, no false statement or “it wasn’t me.”

A criminal investigation is governed by different rules compared with a civil examination. If you or someone you know is confronted by a potential IRS criminal investigation, or if a defense attorney approaches you to assist the defense team, follow the above steps to better address the situations.

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