

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the Supreme Court of New Jersey

OPINION 51

**Enrolled Agents Licensed by the
United States Internal Revenue
Service May Prepare and File New
Jersey Transfer Inheritance Tax
Returns**

The Committee received an inquiry asking whether enrolled agents who are licensed by the United States Internal Revenue Service (IRS) may, like lawyers and certified public accountants (CPAs), prepare and file New Jersey Transfer Inheritance Tax returns for clients. While the preparation and filing of New Jersey Transfer Inheritance Tax returns is the practice of law, the Committee finds that it is in the public interest to permit licensed enrolled agents to engage in this conduct provided that the client is notified in writing before the enrolled agent begins work on the return that “review of the return by a qualified attorney may be desirable because of the possible application of legal principles in the preparation of the tax return.”

Deciding whether an activity is the unauthorized practice of law is a two-step process. First, the Committee decides whether the activity is the practice of law. Second, the Committee decides whether it is in the public interest to permit a nonlawyer to engage in that activity. “[I]n cases involving an overlap of professional disciplines we must try to avoid arbitrary classifications and focus instead on the public’s realistic need for protection and regulation.” *In re Application of New Jersey Society of CPAs*, 102 N.J. 231, 237 (1986).

The Committee previously found, in Opinion 10 (1972), that preparation and filing of a New Jersey Transfer Inheritance Tax return is the practice of law and only lawyers may perform this task. The New Jersey Society of CPAs challenged this decision. *In re Application of New Jersey Society of CPAs, supra*, 102 N.J. 231. The Supreme Court agreed that preparation and filing of a New Jersey Inheritance Tax Return is the practice of law but held that a licensed CPA may engage in this activity if the client has been notified that review of the return by a lawyer would be advisable. *Id.* at 241-42. The Court stated that this requirement of notification was “essential for the protection of members of the public who might otherwise be willing to rely entirely on the skill of the accountant to protect their interest.” *Id.* at 242.

The Court noted:

[T]he complexity of any Inheritance Tax Return will depend on numerous factors including the size of the estate, the domicile of the decedent, the nature of the assets constituting the estate, and the plan of disposition. It is indisputable that many estates are sufficiently simple, both with respect to the nature of the assets and the dispositive scheme, that a trained certified public accountant could prepare the Inheritance Tax Return without the assistance of counsel. By contrast, an estate with substantial and diverse property and business interests that uses relatively complex instruments of disposition, such as trusts and powers of appointment, to convey fee and contingent interests to a large group of beneficiaries of varying degrees of consanguinity will doubtless require competent legal advice in the preparation of the return. Between these extremes lies a myriad of estates, varying in complexity and requiring varying levels of professional sophistication in the preparation of the Inheritance Tax Returns.

[*Id.* at 240.]

The Court reviewed the regulatory framework governing certified public accountants, noting that there is a written examination in accounting, auditing, and other related subjects (*N.J.S.A. 45:2B-7*), procedures for certification (*N.J.S.A. 45:2B-8*), and disciplinary action by the New Jersey Board of Certified Public Accountants for unlawful acts (*N.J.S.A. 45:1-2.1 to -27*). *Id.* at 241. The Court concluded:

Many certified public accountants are qualified, both by training and experience, to prepare Inheritance Tax Returns for most estates. Recognition of the skills possessed by a substantial number of certified public accountants compels the conclusion that the public interest would best be served by permitting certified public accountants to prepare and file Inheritance Tax Returns without the supervision of an attorney, subject to the condition that the client be notified in writing, before the certified public accountant commences work on the return, that review of the return by a qualified attorney may be desirable because of the possible application of legal principles to the preparation of the tax return. Notification to clients concerning the possible need for review of the return by a qualified attorney is essential for the protection of members of the public who might otherwise be willing to rely entirely on the skill of the accountant to protect their interest. Such notification is also consistent with the professional obligation of accountants to perform their services subject to a standard of care commensurate with the skill and knowledge normally possessed by members of their profession in good standing. *Levine v. Wiss & Co.*, 97 N.J. 242, 246 (1984) (citing *Restatement (Second) of Torts* § 299A (1965)). An accountant's failure to consult counsel or to advise a client of the need to obtain legal advice with respect to certain Inheritance Tax Returns could constitute a deviation from the accountant's standard of care and result in civil liability. *Cf. Rosenblum v. Adler*, 93 N.J. 324, 344 (1983) (accountant engaged in performing services as independent auditor required to exercise normal professional skill and care). We assume that certified public accountants will be aware of the boundaries of their own professional skills and will recommend consultation with counsel whenever the complexities of particular Inheritance Tax Returns indicate that legal advice is desirable. *Cf. Rosenberg by Rosenberg v. Cahill*, 99 N.J. 318, 333 (1985) (standard of care applicable to chiropractors imposes a duty "to examine and diagnose a patient to determine whether a condition is appropriate for chiropractic treatment, and, if it is not, to refer the patient to another kind of medical practitioner.").

[*Id.* at 241-42.]

Following the Court's decision, the Division of Taxation amended its regulation to provide that it will accept Transfer Inheritance Tax returns only from the personal representative of an estate, an heir or other real party in interest, lawyers, and CPAs provided the CPA has notified the client of the desirability of consulting with a lawyer. *N.J.A.C.* 18:26-12.2(a)1.

Inquirer claims that enrolled agents are comparably qualified and should also be permitted to prepare and file New Jersey Transfer Inheritance Tax returns. To obtain an enrolled agent license from the IRS, the applicant must not have engaged in prior misconduct and must

successfully complete a three-part IRS test on individual and business tax returns (or have an unblemished record as a former IRS employee). 31 U.S.C. § 330; 31 C.F.R. § 10.4. Licensed enrolled agents must complete continuing education courses every three years. 31 C.F.R. § 10.6(e); see generally www.irs.gov/tax-professionals/enrolled-agents. Enrolled agents are bound by IRS Circular 230, are monitored by the IRS Return Preparer Office, and are subject to discipline by the IRS Office of Professional Responsibility. 31 C.F.R. §§ 10.1 and 10.50.

The Committee considered whether it is in the public interest to permit licensed enrolled agents to prepare and file New Jersey Transfer Inheritance Tax returns. In assessing whether the public needs to be protected, the Committee balanced the relevant factors, including “the likelihood of any demonstrable harm to the members of the public who employ the services of the alleged unauthorized practitioners, the cost savings accruing to those members of the public, the voluntary nature of the decision to accept legal services from a person other than a lawyer, and the extent of the service recipient’s knowledge of the risks involved in proceeding without a lawyer.” Michels, *New Jersey Attorney Ethics*, Section 39:4, p. 950 (Gann 2011).

The Committee considered the guidance provided by the New Jersey Supreme Court in *In re Application of New Jersey Society of CPAs*, reviewed the licensing standards, continuing education requirements, and regulatory and disciplinary framework for licensed enrolled agents, and also made informal inquiry of tax professionals, tax lawyers, and tax regulators. The Committee finds that, like CPAs, qualified enrolled agents are generally capable of handling this type of tax return for less complex estates and, if the enrolled agent notifies the client in writing that review of the return by a lawyer may be advisable, the public interest is protected. The Committee cautions that when the disposition plan of an estate is complex, preparation and filing of the return requires the discretion and judgment of a lawyer and an enrolled agent may violate his or her professional responsibilities if the enrolled agent does not consult with counsel.

In sum, while the filing of New Jersey Transfer Inheritance Tax returns is the practice of law, the Committee finds that it is in the public interest to permit licensed enrolled agents to engage in this conduct provided that the client is notified in writing before the enrolled agent begins work on the return that “review of the return by a qualified attorney may be desirable because of the possible application of legal principles in the preparation of the tax return.”