

On May 5, 2014, the New Jersey Department of Taxation issued the following release:

Notice
Transfer Inheritance Tax
IRS Enrolled Agents Permitted to Prepare and File New Jersey
Transfer Inheritance Tax Returns

On March 21, 2014, the New Jersey Judiciary’s Committee on the Unauthorized Practice of Law issued [Opinion 51](#) wherein the Committee found that it is in the public’s interest to permit enrolled agents licensed by the Internal Revenue Service (IRS) to prepare and file New Jersey transfer inheritance tax returns on behalf of clients.

In 1972 the Committee determined that because of the legal principles involved, the preparation and filing of New Jersey transfer inheritance tax returns is the practice of law and can only be performed by lawyers. In 1986, the New Jersey Supreme Court agreed, but held that a licensed CPA may do so if the client has been notified that review of the return by a lawyer would be advisable.

In reaching its recent opinion, the Committee reviewed the requirements necessary for an enrolled agent to obtain and maintain a license from the IRS. IRS enrolled agents are licensed by the Internal Revenue Service through background evaluation and examination. Such licensed agents are required to complete continuing education courses, and comply with the duties of IRS Circular 230 (Regulations Governing Practice before the Internal Revenue Service). The Committee found that, like CPAs, enrolled agents are capable of filing a New Jersey transfer inheritance tax return, and, as long as enrolled agents follow the same client notification requirements that New Jersey CPAs are required to follow under N.J.A.C. 18:26-12.2, the public interest is protected.

Under the provisions of N.J.A.C. 18:26-12.2(a)1.iv, before beginning work on a New Jersey transfer inheritance tax return, CPAs, and now enrolled agents, must notify the client in writing 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.” A copy of the properly executed notification must be filed with the transfer inheritance tax return.

The Division is in the process of revising the regulation to indicate that it applies to enrolled agents.

For more information, refer to the IRS web site pertaining to the [Enrolled Agent Program](#).

Last Updated: Friday, 05/09/14

This announcement followed this publication in the New Jersey Law Journal, dated April 1, 2014 which stated:

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(March 31, 2014)

Issued by UPLC March 21, 2014

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW
Appointed by the Supreme Court of New Jersey

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 state 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 possibility 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. Will & Co. 97 N.J. 242, 246 (1984) (citing Restatement (Second) of Torts Sect. 299A (1965)). An accountant's failure to consult counsel 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. sect. 330; 31 C.F.R. sect. 10.4. Licensed enrolled agents must complete continuing education courses every three years. 31 C.F.R. sect.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. Sects. 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."

Enrolled Agents are now permitted to prepare New Jersey Transfer Inheritance Tax Returns. How did this happen? Here is the background story.

In 2012, at a general membership meeting some members of the New Jersey Society of Enrolled Agents asked whether EAs could prepare New Jersey Inheritance Transfer tax returns. I thought the answer was yes since state licensed CPAs can and do prepare these returns. The returns I had done up to that point in time had always been under the direction of the attorney associated with the family. It wasn't until our NJSEA member, Sal Cascone, brought to our attention that EAs were not permitted to prepare NJ Inheritance Transfer tax returns by statute. Sal contacted his local legislator, Assemblywoman Mary Pat Angellini. She investigated the issue and sent Sal the following letter dated June 8, 2012 (see attachment).

I was not willing to take this response as the final answer. I researched the New Jersey statutes and found that in 1986, the CPAs were granted a specific waiver based on their professional credentials and with the provision that certain language be inserted into their Engagement Letters notifying their respective clients that legal council may be required to review their situation.

In June 2013, I decided to research this issue further. After reading the opinion given to the CPAs, I contacted the New Jersey Committee on the Unauthorized Practice of Law. I spoke with the Committee's administrative director and explained the reason for my call. I received a very sympathetic hearing after explaining what an Enrolled Agent is and the functions we perform. I was asked to write a letter to the Committee proposing EAs inclusion similar to CPAs and to provide complete documentation and information regarding our licensing procedures, our continuing education requirements, and our disciplinary body for administration. The Committee on the Unauthorized Practice of Law meets quarterly. Therefore, our information packet was required to be delivered by August 18th, 2013 in order for the Committee to consider our proposal as part of its September agenda.

I contacted Michael Nelson, the Executive Director of NAEA and explained my proposal. NAEA provided me with additional materials and guidance. The NJSEA board appointed 2 additional members, Vice President David Tolleth, and member JoAnn Weiner, to assist me with the language and content of the letter and putting the packet together for submission. The attached cover letter was submitted with the NJSEA's official request for consideration.

The packet was timely delivered and was placed on the Committee's agenda. I received the attached letter from the Committee, dated August 23rd, 2013. However, the Committee was unable to fully consider our proposal and extended their deliberations until their December, 2013 meeting.

December came and went as did January. In February, I contacted the Committee's administrator and was told that the decision had been reached but that the findings and

decision could not be made public until the Committee's report was written, reviewed and approved. February passed as did most of March.

The envelope arrived with the decision dated March 23th (see attached letter). As the late Paul Harvey would say, "Now you know the rest of the story".