TAX LAWYERING & PROFESSIONAL RESPONSIBILITY IN FEDERAL TAX PRACTICE

Georgetown University Law Center
Graduate Program in Taxation
Fall Semester 2016
Adjunct Profs. Tran & Vitayanon

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Any oral or written statements or opinions made by the instructors in connection with this course represent their own personal views and do not expressly or impliedly constitute the official views of the U.S. Department of the Treasury, the Internal Revenue Service, or the Office of Professional Responsibility.

COURSE INFORMATION

Course Description: This course provides students with an opportunity to consider and address the ethical issues that attorneys frequently encounter in different kinds of modern-day tax practice, either tax planning or controversy.

To help students to grapple with these issues, both individually and in collaboration with fellow students, course will provide a legal framework and tools to analyze and address the tax lawyer's legal and professional obligations under the American Bar Association's Model Rules of Professional Conduct, as adopted by state disciplinary authorities, Treasury Department Circular No. 230 (the regulations governing practice before the Internal Revenue Service), and the Internal Revenue Code's penalty provisions.

Class Schedule: Wednesday evenings (7:55 p.m. – 9:55 p.m.)
Hotung International Law Building H5013

First Day of Class: Wednesday, August 31, 2016

NO CLASSES: Wednesday, November 23, 2016 (Thanksgiving)

Last Day of Class: Wednesday, November 30, 2016
Attendance Policy: This course relies to a large extent on in-class participation and discussion to enhance and enrich the learning experience. If you are unable or do not plan to attend a particular class, we request, as a matter of professional courtesy, that you notify us as soon as practicable, preferably by 9:00 a.m. on the day of the class, at the latest.

Course Materials: There is no required academic textbook for this course. Reading and writing assignments for each class will be made available electronically and posted on WestLaw’s TWEN by the Friday of the preceding week.

Grades: The final grade in the course will be based on performance on a take-home final examination (85%) and the instructors’ evaluation of the nature, quality, and extent of a student’s in-class participation (including preparation of reading assignments) and contribution to classroom discussion (15%).

Final Examination: Following the end of classes, there will be a written 24-hour take-home examination in this course. The primary objective of the course’s final examination is to determine the student’s knowledge and understanding of the main concepts involved in the regulation of ethics and standards of professional responsibility for Federal tax practitioners, and the student’s ability to identify, analyze, and form well-reasoned conclusions regarding the issues presented.

Students will be permitted, at any time during the final examination period, to download the final examination, and will be required within the 24-hour period to upload corresponding answer sheets.
COURSE SYLLABUS

CLASSES 1, 2 & 3 (AUG. 31ST, SEPT. 7TH, SEPT. 14TH):

THE SOURCES OF PROFESSIONAL REGULATION;
TAX PRACTITIONER’S PERSONAL AND PROFESSIONAL OBLIGATIONS

A. An Introduction to the Three Disciplinary Regimes

1. The Circular 230 Disciplinary Regime
   
   (a) Historical Origins and Background of Treasury Department Circular No. 230
       (Title 31 Code of Federal Regulations, Subtitle A, Part 10)

   (b) Overview of Circular 230 in Its Modern Form

   (c) Tax Professionals Authorized to Practice Before the IRS – Circular 230, Sections
       10.2 (“practice before the IRS”) and 10.3 (definitions of practitioner)

   (d) Violations Subject to Sanction & the Sciente Required to Establish a Violation –
       Circular 230, Sections 10.51 & 10.52

   (e) Willfulness and Willful Blindness


2. State Bar Disciplinary Regime
   
   (a) Limitations on the States’ Regulatory Authority

   (b) The Supremacy Clause and the Federal Preemption Doctrine


   (c) States’ Restrictions on the Unauthorized Practice of Law


   (d) States’ Jurisdiction Over Services Related to the Legal Practice of the Attorney

       ➢ READ: ABA Model Rule 5.7: “Responsibilities Regarding Law-Related Services”
(e) Dual Practitioner Rule

➢ **Optional Reading:** ABA Formal Op. 328 (June 1972)

3. **Internal Revenue Code (Title 26 of the United States Code) Penalty Regime**

B. **A Practitioner’s Personal Obligations as Professional Responsibilities**

1. **The Circular 230 Regime**

   (a) Circular 230, Section 10.51(a)(6) (willful failure to file Federal tax return in violation of the Federal tax laws & willful attempt to evade the assessment and payment of Federal tax)

   ➢ **READ:**
   
   - Director, OPR v. Practitioner H (Decision and Order on Default);
   - Director, OPR v. Practitioner C (Decision on Appeal);
   - Director, OPR v. Practitioner G (Initial Decision and Order);
   - Director, OPR v. Practitioner K, (Decision on Appeal).

   (b) Circular 230, Sections 10.51(a)(1)-(3) & (a)(10) (criminal convictions, disbarment or suspension from practice by a licensing authority, body, court, or board & collateral estoppel effect thereof);

   ➢ **READ:** Director, OPR v. Practitioner B (Decision and Order)

2. **The State Bar Regime**

   (a) ABA Model Rule 8.4: Misconduct

   (b) Criminal Convictions for Tax-Related Crimes

   (c) Failure to File Individual Federal Income Tax Returns

   ➢ **READ:** Att’y Grievance Comm’n of Maryland v. Hoang, 72 A.3d 548 (Md. Ct. 2013).

   (d) Practitioner’s Failure to Pay Federal Income Taxes as Misconduct

   ➢ **READ:** Iowa Sup. Ct. Att’y Disciplinary Bd. v. Knopf, 793 N.W. 2d 525 (Iowa 2011).

   (e) Violations of Tax Laws as Crimes of Moral Turpitude
C. Competence and Due Diligence


(a) Circular 230, Section 10.22: Diligence as to Accuracy

(b) Circular 230, Section 10.34: Standards with Respect to Tax Returns, Documents, Affidavits and Other Papers

(c) Circular 230, Section 10.35: A New Provision on Competence

2. ABA Model Rules on Competence & Diligence

(a) ABA Model Rule 1.1: Competence

(b) ABA Model Rule 1.3: Diligence

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CLASS 4 (SEPT. 21ST)

CONFLICTS OF INTEREST

A. Conflicts of Interest

1. Circular 230’s Relevant Provisions on Conflicts of Interest

(a) Circular 230, Section 10.20: Information and Records to be Furnished to IRS & OPR Upon a Lawful and Proper Request

(b) Circular 230, Section 10.29: Conflicting Interests

2. ABA Model Rules’ Relevant Provisions on Conflicts of Interest

(a) ABA Model Rule 1.7: Conflict of Interest – Current Clients

(b) ABA Model Rule 1.8: Conflict of Interest – Current Clients: Specific Rules
(c) ABA Model Rule 1.9: Duties to Former Clients

(d) ABA Model Rule 1.13(a): Organization as Client

3. Specific Types of Conflicts

(a) Multiple Current Clients

➢ READ: Devore v. Comm’r., 963 F. 2d 280 (9th Cir. 1992)

(b) Personal Interest of the Practitioner


(c) Former Clients


(d) Changing Law Firms


CLASS 5 (SEPT. 28TH)

FIRM RESPONSIBILITIES, ATTORNEYS’ FEES & STANDARDS AS TO CLIENT FUNDS

A. Firm Responsibilities & Potential Imposition of Monetary Penalties


➢ READ: Circular 230, Section 10.36: Procedures to Ensure Compliance; Circular 230, Section 10.50(c): Authority to Impose Monetary Penalty

2. ABA Model Rules on Firm Responsibilities

READ:
- ABA Model Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers;
- ABA Model Rule 5.2: Responsibilities of a Subordinate Lawyer;
- ABA Model Rule 5.3: Responsibilities Regarding Non-lawyer Assistant
B. **Attorneys’ Fees**

1. **Requirements and Standards on Attorneys’ Fees**
   
   (a) ABA Model Rules’ Relevant Provisions on Attorneys’ Fees
   
   - **READ:** ABA Model Rule 1.5(a) & (b): Requirement of Reasonable Fees
   
   (b) Circular 230’s Relevant Provisions on Attorneys’ Fees
   
   - **READ:** Circular 230, Section 10.27(a): Prohibition on Charging “Unconscionable” Fees

2. **Contingent-Fee Arrangements**
   
   (a) ABA Model Rules’ Relevant Provisions on Contingent Fees
   
   - **READ:** ABA Model Rule 1.5(c) & (d): Limits on Contingent-Fee Arrangements
   
   (b) Circular 230’s Fee Provisions
   
   - **READ:** Circular 230, Section 10.27(b): Limits on Contingent-Fee Arrangements; IRS Notice 2008-43: Contingent Fees under Circular 230

C. **Standards as to Client Funds & Tax Refunds**

   - **READ:** Circular 230, Section 10.31: negotiation of taxpayer checks; Circular 230, Section 10.51(a)(8): mismanagement of fees
A. Tax Return Preparers’ Ethical Duties and Responsibilities

1. Internal Revenue Code Penalties on Tax Return Preparers
   (a) I.R.C. Section 6694: Understatement of Taxpayer’s Liability by Tax Return Preparer


   (b) I.R.C. Section 6695: Other Assessable Penalties with Respect to Preparation of Tax Returns for Other Persons

2. IRS’s Preparer Tax Identification Number (“PTIN”) Regulations
   (a) IRS Notice 2011-6: Implementation of Rules Governing Tax Return Preparers
   (b) Brannen v. U.S., 682 F.2d 1316 (11th Cir. 2012)

3. The Loving v. IRS Decisions: The Limits of OPR’s Jurisdiction – Overview of Tax Return Preparer Regulatory Regime and the IRS’s Tax Return Preparer Initiative


4. Limited practice of tax return preparers


B. Appraisers’ Ethical Duties & Responsibilities as to Their Appraisals

1. Overview: Qualified Appraisers & Qualified Appraisals

   ➢ SKIM: Treas. Regs. § 1.170-13(c) (deductions in excess of $5,000 for certain charitable contributions of property made after December 31, 1984)

2. Circular 230 and OPR’s Disciplinary Jurisdiction Over Appraisers
3. **OPR’s Authority Under Circular 230 to Pursue Disqualification of Appraisers**

   ➢ **READ**: Circular 230, Section 10.60(b)

4. **Appraisers and the Internal Revenue Code (“I.R.C.”) Penalty Regime**

   (a) I.R.C. Section 6701(a): Penalties for Aiding and Abetting Understatement of Tax Liability

   (b) I.R.C. Section 6695A: Substantial and Gross Valuation Misstatements Attributable to Incorrect Appraisals

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**CLASSES 8 & 9 (OCT. 19TH & OCT. 26TH)**

**CLIENT CONFIDENTIALITY AND TAX PRACTITIONER PRIVILEGES; WITHDRAWAL**

A. **Attorney-Client Privilege**

   1. **Generally**

      (a) Federal Rules of Evidence: Rule 501, “Privilege in General”

      (b) Statutory Federal Tax Practitioner Privilege – 26 U.S.C. § 7525: Confidentiality Privileges Relating to Taxpayer Communications

   2. **Applicability of the Attorney-Client Privilege, Limitations**


B. **Federal Work-Product Doctrine**

C. Circular 230’s Relevant Provisions on Confidentiality & Privileges

 READ: Circular 230, Section 10.20: providing information and records to IRS upon a “lawful and proper request,” unless privilege applies; Circular 230, Section 10.21: knowledge of client’s omission

D. ABA Model Rules’ Relevant Provisions on Confidentiality & Privilege

 READ: ABA Model Rule 1.6: confidentiality of information; ABA Model Rule 1.6: confidentiality of information; ABA Model Rule 3.3: duty of candor towards the tribunal; ABA Model Rule 1.8(b): use of information that could put client at a disadvantage; ABA Model Rule 1.9(c): sharing information regarding former clients

E. I.R.C. Penalty Regime’s Safeguards to Protect Taxpayer Confidentiality

 READ: 26 U.S.C. § 7216: rules restricting disclosure or use of confidential taxpayer information by tax return preparers

F. Disclosure of Client’s Confidential Information & Communications

 READ: ABA Model Rule 1.6: confidentiality of information; ABA Model Rule 1.2(d): scope of representation and allocation of authority between a client and lawyer; ABA Model Rule 3.3: duty of candor towards the tribunal; ABA Model Rule 3.9: an advocate in non-adjudicative proceedings; ABA Formal Op. 92-366

G. Withdrawal from Representation of Client

 READ: 
  o ABA Model Rule 1.6: confidentiality of information;
  o ABA Model Rule 1.16 (“noisy” withdrawal);
  o ABA Model Rule 1.2(d) (crime-fraud exception);
  o In re Disciplinary Action Against Fuller, 621 N.W.2d 460 (Minn. 2001).
A. Tax Shelters

1. Economic Substance Doctrine
   - Codification of the Economic Substance Doctrine
   - Reportable Transactions & Listed Transactions Lecture
   - **READ:** Section 7701(o); Form 8886: Reportable Transaction Disclosure Statement *(skim)*; IRS Notice 2009-59: Listed Transactions *(skim)*; 31 U.S.C. § 330(d)

2. Current & Prior Rules on Covered Opinions & Other Written Advice Under Circular 230
   - **READ:** Circular 230, Section 10.35 (Rev. 8-2011) (“former Section 10.35”); Circular 230, Section 10.37 (Rev. 8-2011) (“former Section 10.37”); Circular 230, Section 10.37 (Rev. 6-2014)

3. Procedures to Ensure Firm Compliance with Circular 230
   - **READ:** Circular 230, Section 10.36 (Rev. 6-2014)

4. Other Circular 230 Provisions Relevant to Tax Shelters
   - **READ:** Circular 230, Section 10.51(a)(7): willfully advising another on an illegal plan to evade Federal taxes

5. Relevant I.R.C. Penalties Imposed on Tax Advisors
   - **READ:** 26 U.S.C. § 6700 (promoting a tax shelter); 26 U.S.C. § 6707 (failure to furnish information regarding reportable transaction); 26 U.S.C. § 6707a: (penalty for failure to include reportable transaction with return); 26 U.S.C. § 6708 & 6112: (penalty imposed on material advisors of reportable transactions)
CLASS 11 (NOV. 9TH)

FORMAL ADMINISTRATIVE DISCIPLINARY PROCEEDINGS UNDER CIRCULAR 230

A. Circular 230 Formal Administrative Disciplinary Procedures

1. Expedited Suspension (“XP”) Proceedings – Circular 230, Section 10.82

2. Formal Administrative Disciplinary Proceedings Before the Administrative Law Judge

   (a) Circular 230, Sections 10.60-10.81: Subpart D (Rules Applicable to Disciplinary Hearings)

   (b) Administrative Law Judge (“ALJ”) – Authority and Powers

   (c) Pre-Hearing Procedures, Complaint, Answer, and Discovery

   (d) Motion for Summary Adjudication & Other Dispositive Motions

   (e) Standard of Proof and Rules of Evidence

   (f) Written Decision of the ALJ

3. Appeals from Decision of ALJ – Treasury Appellate Authority

4. Final Decision of the Agency

5. Federal Judicial Review Under Administrative Procedure Act (“APA”)

CLASS 12 (NOV. 16TH)

SPECIAL ETHICAL DUTIES OF GOVERNMENT ATTORNEYS & FEDERAL COURT INJUNCTIVE ORDERS TO ENFORCE CIRCULAR 230

A. Intra-Governmental Duties to Report Evidence of Misconduct or Fraud to Authorities


2. U.S. Treasury Department Employees’ Ethical Obligations

3. Referrals from IRS Personnel to OPR – Circular 230, Section 10.53

B. Special Rules & Ethical Considerations

1. Restrictions on Practice after Leaving the Government


3. Privacy Act

C. Judicial Remedies to Restrain Practitioner Misconduct

(a) Federal Court Petitions for Injunctive Relief Pursuant to 26 U.S.C. § 7408;

(b) Federal Court Petitions for Injunctive Relief Pursuant to 26 U.S.C. § 7407


D. Instructors’ In-Class Review Session

THANKSGIVING BREAK – NO CLASSES MEET ON NOV. 23RD
CLASS 13 (NOV. 30TH)

REVIEW AND PUTTING IT ALL TOGETHER

END OF SYLLABUS