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ETHICAL PROBLEMS
IN FEDERAL
TAX PRACTICE

*Fifth
Edition*



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Ethical Problems in Federal Tax Practice

Fifth Edition

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Published by Wolters Kluwer in New York.

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Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-0816-9

Library of Congress Cataloging-in-Publication Data

Wolfman, Bernard, 1924-2011 author.

Ethical Problems in federal tax practice / Bernard Wolfman, Late Fessenden Professor of Law Emeritus, Harvard Law School; Deborah H. Schenk, Marilyn and Ronald Grossman Professor of Law Emerita, NYU Law School; Diane Ring, Professor of Law, Boston College Law School. — Fifth Edition.

pages cm

ISBN 978-1-4548-0816-9

1. Taxation—Law and legislation—United States. 2. Legal ethics—United States.
3. Tax consultants—Legal status, laws, etc.—United States. I. Schenk, Deborah H., 1947- author. II. Ring, Diane M., author. III. Title.

KF6289.W65 2015

343.7304—dc23

2014044965



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In memory of our co-author, colleague, and teacher,
Bernard Wolfman
D.H.S. and D.M.R.

To Proctor, Bebeth, and Courtney
D.H.S.

To Liam, Caroline, and Anna
D.M.R.

Preface

Bernard Wolfman, one of the original co-authors of *Ethical Problems in Federal Tax Practice*, passed away in 2011. Nevertheless, he remains as a co-author of this edition of the book because we continue to draw heavily on his original vision and contributions to the text. Bernie was, of course, a giant in the field of legal ethics and *the* giant in the field of tax ethics. In 1985, when he and his original co-author, James Holden, had the inspiration to publish a casebook limited to ethical problems in tax practice, it was a decidedly radical idea. There were numerous ethics casebooks, but the notion of limiting one to a specialized field of practice had many detractors. Bernie believed, correctly in our view, that ethics is best learned in the context in which it will be practiced. He was convinced that the prism of tax practice is a useful one through which to explore the most practical as well as the most abstract and philosophical of ethical concerns. He pioneered a course in tax ethics at Harvard and used the original edition of this casebook to put into practice what he believed. He (and we) found that a professional responsibility course taught from this vantage can provide insights and principles that are applicable in virtually any area of law practice as well as insights that are peculiar to tax practice. Similar courses are now taught at many law schools. Bernie was a mentor for both of us and helped to shape not only this casebook but also our views about legal ethics. We are grateful for his lasting impact on us and on this book.

This edition, like all previous editions, is based on Bernie and Jim's original idea that the study of legal ethics is best undertaken by focusing on the type of practice in which students will engage. Thus, it carries out the promise of its title. It provides a framework and a source of materials for the study of the ethical problems that a lawyer faces in federal tax practice.

In the six years since the prior edition, much has stayed the same — tax lawyers continue to face complex and challenging ethical problems. But much has also changed. As law firms have expanded and become global entities, the ethical problems faced by lawyers have taken on new dimensions and become ever more complex. This edition includes a new Chapter 8, which considers issues in a global practice environment. Although the foundational ethical rules guiding tax practice remain the same in a global setting, there are both new questions and new contexts that warrant the tax advisor's attention. Many tax lawyers now practice in firms with a multinational practice and some U.S. tax lawyers practice overseas with law or accounting firms — both of which present ethical challenges. And many tax lawyers

who have only a domestic presence will work on cross-border transactions that give rise to special reporting rules and obligations.

Another salient change in the last decade is the presence of technology in the practice of law. The ubiquitous use of e-mail and social media presents new contexts in which ethical questions arise. Chapter 7, which focuses on the business of law practice, considers not only the familiar questions involving advertising and solicitation, but also ethical problems that have arisen in the age of technology. The availability of technology has also made it much easier to outsource legal work. This chapter takes up questions, such as fee sharing, that emerge from the increased engagement with those outside the lawyer's own firm in the performance of work for the client.

The structure of the book will be familiar to those who have used prior editions. Throughout the book we have maintained the underlying theme of role differentiation that brings to the fore the somewhat differing standards that govern the tax lawyer as advocate from those that govern the tax lawyer as advisor. This reflects the approach taken by the Model Rules, which has standards of conduct that are not quite the same for advisor and advocate. Following an introductory chapter that provides a general professional and philosophical perspective, there are four chapters that study the tax lawyer in her performance of the four overlapping roles that she commonly plays: tax return preparation and advice, audit and litigation, tax planning and advice, and formulating tax policy. The following chapter deals with the frequent situation where the client is an entity — either a corporation or the government. Although the structure is the same, here too there are changes. Circular 230, the document governing practice before the IRS, has been amended and those changes are incorporated herein. And the more fundamental question of whose practice the IRS can regulate has become a pressing issue.

The materials that we have included are not exhaustive. Every student should acquire a copy of the Model Rules of Professional Conduct (and perhaps the ethical rules that are effective in the state in which he or she will practice). Students will find other helpful materials in the Appendix.

Deborah Schenk
Diane Ring

December 2014

Acknowledgments

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