

BOOK REVIEW

Ethical Problems in Federal Tax Practice, BERNARD WOLFMAN & JAMES P. HOLDEN, Michie Bobbs-Merrill Law Publishers, Charlottesville, Virginia, 1981. Pp. xxiii, 275.

This book contains materials for an academic course in professional responsibility in federal tax practice. Professors Wolfman and Holden proceeded from the premise that federal tax practice is a useful vehicle for studying many of the ethical problems involved in lawyering. Based on this work, I fully agree. The book is intended for use in a course in the undergraduate law curriculum, substituting for the usual professional responsibility course with a general focus. It is also intended for use in a more advanced, specialized curriculum, such as an LL.M. taxation program.

The main text, divided into seven chapters, comprises 275 pages. The 63 pages of appendices include source materials such as Circular 230¹ (the Treasury rules pertaining to practice before the Internal Revenue Service), the Preparer Rules² (imposing penalties on income tax preparers for understatement of liability) and the Regulations Concerning Post Employment Conflict of Interest.³ The bulk of the textual materials is comprised of factual situations involving federal tax. Occasionally the authors resort to analogous non-tax materials. Sprinkled throughout the text are a fair number of problems, many of which will be excellent for student preparation and classroom discussion.

Chapter one, entitled "A Perspective," is a good way to begin. It contains excerpts from several authors which attempt a jurisprudential explanation of the role of the attorney in society and which seek to interrelate "professional ethics" with "moral principle."

Chapters two through five concern the four major roles of the tax attorney. The first is that of income tax preparer. The materials include a discussion of the liability of income tax preparers under the recently enacted Preparer Rules,⁴ and a discussion of the "reasonable basis" standard for taking a legal position on behalf of a client.

¹ 31 C.F.R. § 10.0-.93 (1979).

² I.R.C. §§ 6694-6695 (1976 & Supp. III 1979).

³ 5 C.F.R. § 737.1-.13 (1979). A student will also need a copy of the ABA's MODEL CODE OF PROFESSIONAL RESPONSIBILITY. It is an essential source for all lawyers, and extensive references are made to the Code throughout the text.

⁴ I.R.C. §§ 6694-6695 (1976 & Supp. III 1979).

The second role is that played in audits and in litigation. Here, the authors focus on problems involving conflicts of interest and preservation of client confidences. Considerable attention is paid to the timely debate on the merits of the proposed Model Rules of Professional Conduct⁵ which lean far more toward disclosure of confidences than the existing Canons of Professional Responsibility.⁶

The third role is that of tax planner or adviser. Much of the material in this chapter is devoted to the ethical responsibility of the tax lawyer preparing legal opinions in connection with tax shelter offerings where proposed tax benefits will often be the deciding inducement for the investor. Here, the lawyer has a special obligation, beyond that to the promoter of the offering, not to mislead the public as to the likelihood of success in attaining the tax benefits. Highlighted are recent responses of the Treasury⁷ and the American Bar Association⁸ to the abuses in the area. The authors also present other interesting ethical problems, such as those involved in building evidence to prove a client's state of mind and in negotiating a transaction with a lawyer uninformed about tax implications.

The fourth role is that of a formulator of tax policy. In seeking to change or mold tax policy, the lawyer may be acting for an individual client or he may be acting in the interest of the general public, as in his bar association activities. A number of issues arise. When does a lawyer's espousal of reforms in the tax law conflict with his duty to individual clients? Should a lawyer represent a private client in supporting legislation which he believes not to be in the public interest? What duty does the organized bar have to protect the general public interest in taking positions on tax legislation?

Chapter six is concerned with the role of the tax lawyer in Government, especially with respect to the ethical problems arising when a lawyer leaves Government service and enters the private realm. The book presents the maze of federal statutes and regulations governing post employment conflict of interest.⁹ One of the interesting problems explored is the extent to which a law firm is precluded from representing a client if a member of the firm is barred from the case because of a conflict of interest arising from former employment with

⁵ MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1980).

⁶ E.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1979).

⁷ E.g., Proposed Amendment to Circular 230, 45 Fed. Reg. 58,594 (1980), forbidding, *inter alia*, the issuance of a tax shelter opinion unless the lawyer concludes that it is more likely than not that the bulk of the tax benefits are allowable under the tax law.

⁸ E.g., ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 346 (1981).

⁹ E.g. 18 U.S.C. §§ 202, 205, 207, 208 (1976); Regulations Concerning Post Employment Conflict of Interest, 5 C.F.R. § 737.1-.13 (1979).

the Government. Should the firm be absolutely barred, or can screening procedures be effectively implemented to avoid any apparent conflict of interest?

Chapter seven, the longest chapter by far, concerns problems of the organized profession. There is a lengthy presentation on the possible unauthorized practice of law by accountants. Since both lawyers and accountants become extensively involved in tax matters (accountants are authorized to practice before the Internal Revenue Service), an understanding of the proper role of each is of more than minor importance. In addition, the authors outline the various existing state plans concerning lawyer specialties, present a series of interesting malpractice cases involving tax issues, and discuss issues concerning advertising, attorney discipline, and the availability of legal services to the destitute, i.e., law school tax clinics.

I would pose a few mild criticisms. Some of the chapters on the roles of the tax attorney are on the sketchy side, especially in relation to the rather lengthy chapter seven on the organized profession. This lack of balance may be due to the difficulty in finding good tax material in every area. I would also prefer to see more problems presented for solution.¹⁰ An extensive problem approach appears to be the most effective pedagogical tool in a course like ethics because of the problem-oriented nature of the subject and the need to spur lagging student interest in third year, when a course in professional responsibility will most likely be taken. Also, more consideration should have been given to the question of the obligation of the tax lawyer to the "system" in his dealings with his client. This is an important question in light of the widespread cynicism about the equity of the tax system and the looseness of attitude on the part of many generally "principled" persons towards their tax obligations.

Apart from these few blemishes, inevitable in the first edition of a case book in a somewhat new field, the authors are eminently successful in what they set out to do—develop a professional responsibility course from the perspective of the federal tax law. The coverage of subject matter compares favorably with casebooks dealing generally with professional responsibility.¹¹ It is especially good for the ethical problems faced generally by the legal adviser in business and government regulated arenas. The book provides flexibility for the offering

¹⁰ See the extensive problem approach of Professors Morgan and Rotunda in their textbook. T. MORGAN & R. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* (2d ed. 1981).

¹¹ Compare *id.* with A. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* (1976).

of a professional responsibility course. Students who are strongly interested in tax or business law should have the option to take this course rather than a course in general professional responsibility. Gearing an ethics course to the substantive area in which one intends to practice will heighten student interest. On the graduate level, this book should be a useful tool for encouraging further research and writing in an area that constitutes a significant part of law practice and is pervaded with difficult ethical issues. The studying of ethical issues from a specialized substantive viewpoint will develop overall depth to the study of ethical responsibility.

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