

# Practice and Procedure Committee - Ethical Issues for Tax Practitioners

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## I. Overview

### A. Presenters

The presenters for today’s program provide a unique opportunity for tax practitioners to get an insider’s view of present and future regulation of the tax practice.

*Karen L. Hawkins* is the Director of the Internal Revenue Service Office of Professional Responsibility. In that capacity, she oversees regulation of practice before the IRS, including the tax opinion standards. In the morning plenary session, she will speak on the recently released proposed regulations to Sections 10.35–10.37, which regulate tax opinion practice. She also oversees the IRS’s attempt to register tax return preparers, which was struck down by the District Court of the District of Columbia in *Loving v. IRS*, Civil Action No. 12-385 (JEB), January 18, 2013.

*Eric Solomon*, is the director of Ernst and Young LLP’s National Tax Department and has more than 30 years of tax experience in private practice and government service. Mr. Solomon joined the Office of Tax Policy of the U.S. Treasury Department in 1999 and served in both the Clinton and George W. Bush administrations. He served in a variety of Treasury Department roles until December 2006, when he was confirmed as assistant secretary for tax policy, a position he held until January 2009. During this period, he was involved in the promulgation of the Circular 230 regulations regarding, among other matters, tax opinion.

We plan to address questions on the minds of Michigan tax practitioners, such as:

- Which standard applies? The differences between IRS and Michigan rules for conflict waivers and choice of law
- fees, price increases, and advertising
- monetary penalties: when and how they are applied
- trends in discipline today, including the status of the *Loving* litigation and the proposed amendments to Circular 230.

### B. Supplemental Materials

The following are supplemental materials, quoting or summarizing the authorities that will underpin the panel discussion, and appearing in the PowerPoint used during the session.

1. **Consider how State regulation of practice works for matters before the IRS and US Tax Court.** See Michigan Rules of Professional Conduct 5.5 and 8.5. Rule 8.5 was amended September 18, 2012, in ways relevant to tax practice.
  - a. **MiRPC 5.5. Unauthorized Practice of Law.** A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
  - b. **MiRPC 8.5 Jurisdiction. (a) Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. *A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.* (emphasis added)
  - c. **MiRPC 8.5(b) Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: for conduct in connection with a *matter pending before a tribunal*, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and for *any other conduct*, the rules of the jurisdiction in which the conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct; a lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur. *(emphasis added)*.
    - Application
      - Other state's rules when matter involves clients or attorneys in other states?
      - Circular 230?
      - Tax Court Rules?
    - Illustrative Comments to Rules

*A lawyer potentially may be subject to more than one set of rules of professional conduct that impose different obligations.* The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction. *Comment to MiRPC8.5 (emphasis added)*

Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interests of clients, the profession, and those who are authorized to regulate the profession. *Accord-*

*ingly, paragraph (b) provides that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct; makes the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions; and protects from discipline those lawyers who act reasonably in the face of uncertainty. Comment to MiRPC 8.5. (emphasis added)*

Paragraph (b)(1) provides, as to a lawyer's conduct relating to a proceeding pending before a tribunal, that the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in another jurisdiction, the lawyer shall be subject to the rules of that jurisdiction. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be either where the conduct occurred, where the tribunal sits, or in another jurisdiction. *Comment to MiRPC 8.5. (emphasis added)*

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear initially whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct actually did occur. *So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule. Comment to MiRPC 8.5 (emphasis added)*

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct and should avoid proceeding against a lawyer on the basis of inconsistent rules. *Comment to MiRPC 8.5. (emphasis added)*

## 2. Interpreting Rule 8.5 for Tax Practitioners - What Is a Tribunal?

**ABA Model Rules of Professional Conduct 1.0** (Michigan did not adopt this rule). (m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

- **Questions**

- Is the US Tax Court a "tribunal" for these purposes? If so, what are the implications for Michigan attorneys under these rules?

- Is the IRS a “tribunal” for these purposes? Does it depend what type of matter is involved? If not, what are the implications under these rules?
- Might the definition of “tribunal” differ in Michigan from ABA Model, other states, IRS view?

### 3. **ABA Model Rules of Professional Conduct**

#### **Questions.**

- Why are they relevant to tax practice, even when they conflict with our State’s rules of conduct?
  - See Mi RPC 8.5 Comment, above
  - Tax Court Rule 201

(a) General: Practitioners before the Court shall carry on their practice in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association.

- What are the important areas of difference for tax practitioners?
- What best practices are advised?

### 4. **Conflicts of Interest and Conflict Waivers**

#### **Michigan RPC 1.7.**

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

#### **ABA Model RPC 1.7**

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, *confirmed in writing.*  
(*emphasis added*)

**Circular 230 10.29.**

(b) Notwithstanding the existence of a conflict of interest under paragraph (a) of this section, the practitioner may represent a client if—

(1) The practitioner reasonably believes that the practitioner will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law; and

(3) Each affected client waives the conflict of interest and gives informed consent, *confirmed in writing by the affected client, at the time the existence of the conflict of interest is known by the practitioner. The confirmation may be made w/in a reasonable period after the informed consent, but in no event later than 30 days.*

(c) Copies of the written consents *must be retained by the practitioner for at least 36 months from the date of the conclusion of the representation of the affected clients and the written consents must be provided to any officer or employee of the IRS on request. (emphasis added)*

**5. General Duties and Regulation of Solicitation, Fees and Record-Keeping**

**Circular 230 10.27.**

**Fees.** (a) In general. A practitioner may not charge an unconscionable fee in connection with any matter before the IRS.

(b) Contingent fees. (1) Except as provided in paragraphs (b)(2)(3) and (4) of this section, a practitioner may not charge a contingent fee for services rendered in connection with any matter before the IRS.

(2)–(4) [permit contingent fees for services rendered in connection with IRS the Service’s examination of, or challenge to original or amended tax returns, certain claims for refund or credit, judicial proceeding under IRC.]

(c)(1) Contingent fee is any fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge by the IRS or is sustained either by the IRS or in litigation. A contingent fee includes a fee that is based on a percentage of the refund reported on a return, that is based on a percentage of the taxes saved, or that otherwise depends on the specific result attained. A contingent fee also includes any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client’s fee in the event that a position taken on a tax return or other filing is challenged by the IRS or is not sustained, whether pursuant to an indemnity agreement, a guarantee, rescission rights, or any other arrangement with a similar effect.

(c)(2) Matter before the IRS includes tax planning and advice, preparing or filing or assisting in preparing or filing returns or claims for refund or credit, and all matters connected with a presentation to the IRS or any of its officers or employees relating to a TP’s rights, privileges, or liabilities under laws or regulations administered by the IRS. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the IRS, rendering written advice with respect to any entity, transaction, plan or arrangement, and representing a client at conferences, hearings, and meetings.

### **Circular 230 10.28. Return of Client Records.**

(a) In general, a practitioner must, at the request of a client, promptly return any and all records of the client that are necessary for the client to comply w/his or her Federal tax obligations. The practitioner may retain copies of the records returned to a client. The existence of a dispute over fees generally does not relieve the practitioner of his or her responsibility under this section. Nevertheless, if applicable state law allows or permits the retention of a client's records by a practitioner in the case of a dispute over fees for services rendered, the practitioner need only return those records that must be attached to the TP's return. The practitioner, however, must provide the client w/reasonable access to review and copy any additional records of the client retained by the practitioner under state law that are necessary for the client to comply w/his or her Federal tax obligations.

(b) *...Records of the client* include all documents or written or electronic materials provided to the practitioner, or obtained by the practitioner in the course of the practitioner's representation of the client, that preexisted the retention of the practitioner by the client. The term also includes materials that were prepared by the client or a 3d party (not including an employee or agent of the practitioner) at any time and provided to the practitioner w/r/t the subject matter of the representation. The term also includes any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the practitioner, or his or her employee or agent, that was presented to the client w/r/t a prior representation if such document is necessary for the TP to comply w/his or her current Federal tax obligations. *The term does not include any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the practitioner or the practitioner's firm, employees or agents if the practitioner is withholding such document pending the client's performance of its contractual obligation to pay fees with respect to such document. (emphasis added)*

### **Circular 230 10.31. Negotiation of Refund Checks.**

A practitioner who prepares tax returns may not endorse or otherwise negotiate any check issued to a client by the government in respect of a Federal tax liability.

### **Circular 230 10.51(a) Incompetence and disreputable conduct.**

(5) Solicitation of employment as prohibited under §10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the IRS or officer or employee thereof.

### **Circular 230 10.30. Solicitation.**

(a)(1) A practitioner may not, with respect to any IRS matter, in any way use or participate in the use of any form or public communication or private solicitation containing a false, fraudulent, or coercive statement or claim; or a misleading or deceptive statement or claim...[R]egistered tax return preparers,

in describing their professional designation, may not utilize the term “certified” or imply an employer/employee relationship with the IRS.... An example of an acceptable description for registered tax return preparers is “designated as a registered tax return preparer with the IRS.”

(a)(2) A practitioner may not make, directly or indirectly, an uninvited written or oral solicitation of employment in matters related to the IRS if the solicitation violates Federal or State law or other applicable rule, e.g., attorneys are precluded from making a solicitation that is prohibited by conduct rules applicable to all attorneys in their State(s) of licensure. Any lawful solicitation made by or on behalf of a practitioner eligible to practice before the IRS must, nevertheless, clearly identify the solicitation as such and, if applicable, identify the source of the information used in choosing the recipient.

(b) *Fee information.*(1)(i) A practitioner may publish the availability of a written schedule of fees and disseminate the following fee information—(A) Fixed fees for specific routine services.(B) Hourly rates.(C) Range of fees for particular services.(D) Fee charged for an initial consultation.(ii) Any statement of fee information concerning matters in which costs may be incurred must include a statement disclosing whether clients will be responsible for such costs.(2) *A practitioner may charge no more than the rate(s) published under paragraph (b)(1) of this section for at least 30 calendar days after the last date on which the schedule of fees was published. (emphasis added)*

### **Michigan RPC 7.2:**

**Advertising** (a) Subject to the provisions of these rules, a lawyer may advertise. (b) *A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used. (emphasis added)*

### **Circular 230 10.30**

#### **(c) Communication of fee information.**

Fee information may be communicated in professional lists, telephone directories, print media, mailings, and electronic mail, facsimile, hand delivered flyers, radio, television, and any other method. The method chosen, however, must not cause the communication to become untruthful, deceptive, or otherwise in violation of this part. A practitioner may not persist in attempting to contact a prospective client if the prospective client has made it known to the practitioner that he or she does not desire to be solicited....

....In the case of radio and television broadcasting, *the broadcast must be recorded and the practitioner must retain a recording of the actual transmission. In the case of direct mail and e-commerce communications, the practitioner must retain a copy of the actual communication, along with a list or other description of persons to whom the communication was mailed or otherwise distributed. The copy must be retained by the practitioner for a period of at least 36 months from the date of the last transmission or use. (emphasis added)*

**(d) Improper associations.** A practitioner may not, in matters related to the IRS, assist, or accept assistance from, any person or entity who, to the

knowledge of the practitioner, obtains clients or otherwise practices in a manner forbidden under this section.

### Question

- If your partner solicits his nontax litigation clients and doesn't keep records 3 years, can you use him on a tax file?
- To what extent has the Office of Professional Responsibility been applying the fee and solicitation rules against practitioners? What are future plans in this regard?

## 6. Competence

- **Michigan RPC 1.1.**

**Competence.** A lawyer shall provide competent representation to a client. A lawyer shall not:

(a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;

(b) handle a legal matter without preparation adequate in the circumstances; or

(c) neglect a legal matter entrusted to the lawyer.

- **Circular 230 Proposed 10.35.**

**Competence.** (a) A practitioner must possess the necessary competence to engage in practice before the IRS. Competent practice requires the knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.

- **Question**

- Comments to the proposed changes to Circular 230 have focused on how the competence will be applied. Any thoughts on this?
- What is the status of the proposed changes to the Circular 230 opinion standards?
- What rules should practitioners be applying today?