

REGULATING TAX PRACTITIONERS: “CH-CH-CH-CHANGES, TURN AND FACE THE STRANGE”

Linda Galler: Professor of Law, Maurice A. Deane School of Law at Hofstra University

Christopher S. Rizek: Member & General Counsel, Caplin & Drysdale, Chartered

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Topics

- Loving, Ridgely, Sexton: changes in the scope of IRS authority to regulate
- Schaeffler, AD Investment, Eaton: changes in discovery rules for client-practitioner communications
- Circular 230: changes to regulations governing practice before the IRS

Changes in the Scope of IRS Authority to Regulate

Sources of Professional Regulation: What Rules Apply to Me?

- State Courts/Bar Associations – Rules of Professional Conduct, ethics opinions (applicable to attorneys)
- AICPA Code of Professional Conduct and Statements on Standards for Tax Services (applicable to CPAs)
- IRC provisions – e.g., Section 6694
- Circular 230 – Regulations governing practice before the IRS (applicable to all practitioners)

Sources of Professional Regulation: Uncertain which applies?

- Suppose you're trained as a lawyer, working in an accounting firm?
 - "Some" of the ABA Model Rules may still apply. See Preamble [3] to Model Rules; ABA Formal Op. 336 (1974)
- Suppose you're not actively "representing" a client before the IRS (i.e. not in Exam, Appeals, seeking a ruling, etc.), but advising on returns and transactions?
 - This is the Ridgely issue, discussed below

Sources of Professional Regulation: What to do when the rules conflict?

- Follow the “most restrictive” rule
- Example: conflicts that can be “waived” (consented to by the clients)
 - ABA Model Rule 1.7(b) requires “informed consent, confirmed in writing” – with no temporal restrictions
 - Most states follow that; but some (e.g., D.C.) don’t technically require a writing
 - Circular 230 §10.29: consent at the time conflict becomes known, confirmed in writing within 30 days; copies retained for at least 36 months after conclusion of representation; must be provided to IRS on request

Circular 230 – Loving, Ridgely, and aftermath

- There are two sources of IRS’s authority to regulate practitioners.
- 5 U.S.C. § 500 broadly authorizes attorneys to practice before all Federal agencies and CPAs to practice before the IRS.
- 31 U.S.C. § 330 specifically deals with the regulation of practice before the Department of the Treasury.

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