

1996

Identifying and Resolving Conflicts of Interest in Representing Multiple Parties in Planning, Compliance, and Controversy Matters

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Repository Citation

Junghans, Paula M., "Identifying and Resolving Conflicts of Interest in Representing Multiple Parties in Planning, Compliance, and Controversy Matters" (1996). *William & Mary Annual Tax Conference*. 323.
<https://scholarship.law.wm.edu/tax/323>

**IDENTIFYING AND RESOLVING CONFLICTS OF INTEREST
IN REPRESENTING MULTIPLE PARTIES
IN PLANNING, COMPLIANCE AND CONTROVERSY MATTERS**

**WILLIAM AND MARY TAX CONFERENCE
Williamsburg, Virginia
December, 1996**

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This outline is adapted, in part, from materials prepared by Joseph H. Thibodeau, Denver, Colorado, "The Innocent Spouse Doctrine and Its Ethical Implications," used with permission of Mr. Thibodeau.

HYPOTHETICAL 1: CORPORATIONS AND SHAREHOLDERS

For some years, you have been the tax advisor to a closely held corporation. The founder of the business, X, is the sole shareholder; he remains active in the business but now wants to withdraw. A and B are officers, who handle most of the corporation's daily affairs. A and B propose to buy the business from X. A, B and X all ask you to advise them with respect to the proposed sale.

- A. What is your response?
- B. Does it matter whether you are an attorney or an accountant?
- C. Even if you do not advise them on the sale, can you prepare tax returns for any or all of the three?

The sale described above takes place. Several years later, the IRS audits the corporation and questions the transaction, proposing adjustments that would increase the tax liabilities of the corporation, A and B, but not X. This issue is one of many in the audit of the corporation. You represent the corporation in the audit.

- A. Can you continue your representation in the audit?
- B. If you can continue your representation, what steps should you take to address any conflicts issues?
- C. If the matter proceeds to litigation in the Tax Court, will you be able to represent the corporation in the Tax Court?

HYPOTHETICAL 2: SPOUSES - OMITTED INCOME

In January, 1992, Mr. Z was arrested for embezzling from his employer during the previous five years. Mrs. Z had no knowledge of the embezzlement prior to the arrest. During the prior years, Mrs. Z was not employed outside the home and was given a weekly allowance by her husband for household expenses. Mrs. Z charged on the couple's joint credit cards and the couple frequently dined and traveled, with Mr. Z paying all expenses in cash. The couple filed joint tax returns for all of the years; Mr. Z handled the preparation of the returns. In April, 1992, the parties filed a joint tax return for 1991, which reported \$100,000 of embezzlement income.

The IRS has issued a notice of deficiency to the parties, alleging that both of them are liable for tax on the embezzled funds, as well as for the civil fraud penalty. For 1991, the IRS asserts that Mr. Z received not the \$100,000 reported on the return, but \$150,000.

Mr. and Mrs. Z are still married, but are now impecunious. They ask you to represent both of them in responding to the notice of deficiency.

- A. Can you represent both of them? Either one?
- B. If so, what steps should you take to document the terms of the representation?
- C. What position is the IRS likely to take if you represent both and assert an innocent spouse claim as to Mrs. Z?
- D. What if you do not assert an innocent spouse claim as to Mrs. Z?
- E. Would it be appropriate to advise Mr. Z to concede the tax liability, and concentrate your representation on Mrs. Z?
- F. What if you were the return preparer?
- G. Would the result be different if Mr. and Mrs. Z were no longer married?

HYPOTHETICAL 3: SPOUSES - GROSSLY ERRONEOUS ITEMS

Mr. Q is self-employed and files a Schedule C as part of joint returns filed with his wife. For years, he has been deducting as "consulting fees" payments which were, the IRS asserts, gifts to his paramour. The IRS has now issued a notice of deficiency to both Mr. and Mrs. Q asserting a joint tax liability based on the disallowance of the deductions. Mr. Q wants to assert that the funds were, in fact, compensation for services rendered in the business. Mrs. Q wants to avoid any additional tax liability.

- A. Can you represent both Mr. and Mrs. Q in administrative proceedings before the IRS?
- B. Can you represent both Mr. and Mrs. Q in the Tax Court?
- C. If so, are there any limitations on your representation?
- D. What if you prepared the returns which are the subject of the notice of deficiency?

HYPOTHETICAL 4: COMPLIANCE ISSUES

You represent two large nursing homes, each of which has a staff of some two hundred nurses. Client A treats its nurses as independent contractors, but Client B treats its nurses as employees. The nurses' duties, functions, and relationship to management are essentially identical in both nursing homes. You prepare the payroll tax returns and 1099s for both clients.

- A. Is this a problem?**
- B. If so, what should you do?**
- C. Assume that your research and evaluation of the circumstances lead you to conclude that the independent contractor position is correct, but that you know that the IRS is likely to assert the employee position in the event of an examination. Does this change your view?**
- D. If there is an examination of one or both clients, can you handle the audit(s)?**
- E. Even if you can, should you do so?**

I. APPLICABLE RULES

A. Circular 230

- 1. Applies to all practitioners before the Internal Revenue Service.**
- 2. §10.29, prohibits persons who practice before the Internal Revenue Service from representing conflicting interests except by express consent of all directly interested persons after full disclosure.**

B. Tax Court Rules

- 1. Tax Court Rule 201: practitioners before the Court must observe the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association (the "Model Rules").**
- 2. In 1990, the Court adopted a specific rule relating to conflicts of interest, Rule 24(f):**
 - (a) If any counsel of record (1) was involved in planning or promoting a transaction or operating an entity that is connected to any issue in a case, (2) represents more than one person with differing interests with respect to any issue in a case, then such counsel must either secure the informed consent of the client (but only as to items (1) and (2)); withdraw from the case; or take whatever other steps necessary to obviate a conflict of interest or other violation of the ABA Model Rules of Professional Conduct, and particularly Rules 1.7, 1.8, and 3.7 thereof. The Court may inquire into the circumstances of counsel's employment in order to deter such violations. See Rule 201.**
 - (b) Although conflict of interest situations are specifically addressed in rule 24(f), the Model Rules remain the primary framework under which conflicts are resolved.**

3. Model Rule 1.7: Conflict of Interest

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(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.

4. Model Rule 1.10: Imputed Disqualification

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person

in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

- (c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:
 - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.
- (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

5. **Model Rule 1.9: Conflict of Interest**

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client

or when the information has become generally known.

6. Model Rule 3.7: Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;**
- (2) the testimony relates to the nature and value of legal services rendered in the case; or**
- (3) disqualification of the lawyer would work substantial hardship on the client.**

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule. 1.9.

II. THE INNOCENT SPOUSE STATUTE - IRC §6013(e)

A. History

1. Innocent Spouse Act (1971) (Old Law)

a. Relief from joint liability if:

- (1) Joint return;**
- (2) Omission from gross income of more than 25% of that stated on the return;**
- (3) Innocent spouse didn't know/have reason to know of omission;**

- (4) Based on "all facts and circumstances" inequitable to hold "innocent spouse" liable. In particular did spouse receive "significant benefit" beyond normal support?

2. Tax Reform Act of 1984 - Elements

a. Joint return

- (i) The fact that an individual's name is signed to a return . . . shall be prima facie evidence for all purposes that the return . . . was actually signed by him. IRC §6064.

- (ii) This presumption is rebuttable, e.g. by:

●Evidence of duress: Stanley v. Comm'r, 81 T.C. 634 (1983); Pirnia v. Comm'r, T.C. Memo 1990-444; Hansen v. Comm'r, T.C. Memo 1976-84.

●Active refusal to sign the joint return: Anderson v. Comm'r, T.C. Memo 1984-82.

●Filing a separate return for the year at issue: Springman v. Comm'r, T.C. Memo 1987-474.

●Notifying the government of nonacquiescence: McCanless v. Comm'r, T.C. Memo 1987-573; Garland v. Comm'r, T.C. Memo 1977-373.

●History of separate returns: Carrick v. Comm'r, T.C. Memo 1991-502.

- Lack of involvement in return preparation: Wiener v. Comm'r, T.C. Memo 1971-56.

(iii) Conversely, a joint return may be found even absent the signature of one party, if it is determined that the parties intended to file a joint return. Relevant considerations include:

- Expressions of intent to file jointly: Guy v. Comm'r, 978 F.2d 934 (6th Cir., 1992)

- Filing of joint requests for extension: Ashworth v. Comm'r, T.C. Memo 1990-423.

- History of joint returns: Depew v. Comm'r, T.C. Memo 1988-48; Ebeling v. Comm'r, T.C. Memo 1994-277.

- Contractual agreement to file jointly: Douglass v. Comm'r, T.C. Memo 1984-369.

- Lack of filing separate returns: Hayes v. Comm'r, T.C. Memo 1975-223; Hill v. Comm'r, T.C. Memo 1971-127.

- Power of Attorney: LaBelle v. Comm'r, T.C. Memo 1984-69.

b. Actual Knowledge that Return is Incorrect

(i) Knowledge of facts supporting understatement may preclude innocent spouse status, even without knowledge of tax consequences of transactions: Krause v. Comm'r, T.C. Memo 1991-13; Bents v. Comm'r, T.C. Memo 1990-487; Newton v. Comm'r, T.C.

Memo 1990-606; Mayworm v. Comm'r, T.C. Memo 1987 - 536.

c. Or, reason to know that there is a substantial understatement; may be present if a reasonable person under the circumstances of the spouse at the time of signing the return could be expected to know it was erroneous or that further investigation is warranted. Spouse's knowledge is measured in light of:

- (1) Education
- (2) Involvement with business, family affairs, finances: Kenney v. Comm'r, 1995-431; Shea v. Comm'r, 780 F.2d 561 (6 Cir., 1986); Coleman v. Comm'r, T.C. Memo 1988-538.
- (3) Extent of culpable spouse's deceit and ability to deceive: Porter v. Comm'r, T.C. Memo 1991-561; Whitten v. Comm'r T.C. Memo 1988-245; Zinser v. Comm'r, T.C. Memo 1987-256.
- (4) Culpable spouse indicted or convicted: Robinson v. Comm'r, T.C. Memo 1990-235.
- (5) Lavish, extravagant and unusual expenditures vs. ordinary support: Stevens v. Comm'r, 872 F.2d 1499 (11 Cir., 1989); Kistner v. Comm'r, T.C. Memo 1995; Sheckles v. Comm'r, T.C. Memo 1984-289.

d. Facts insufficient in and of themselves to justify lack of knowledge:

- (1) Failure to read and review the return: Stephens v. Comm'r, 90-1 USTC ¶50,228 (D.C. Va., 1990); Skelton v. Comm'r, T.C.

Memo 1988-136).

- (2) Lack of knowledge of legal consequences of the item in question: McCoy v. Comm'r, 57 T.C. 732; Mayworm v. Comm'r, *supra*; Purcell v. Comm'r, 826 F.2d 470 (6 Cir. 1987).

e. Inequitable to Hold Spouse Liable

- i. "Evidence of direct or indirect benefit may consist of transfer of property, including transfers . . . received several years after the year . . . [in issue, such as] an inheritance of property or life insurance proceeds which are traceable to items omitted from gross income." Regs. 1.6013-5(b).
- ii. Excess of "ordinary support"/lavish or unusual"? "[O]ne person's luxury can be another's necessity, and the lavishness of an expense must be measured from each family's relative level of ordinary support." Sanders v. Comm'r, 509 F.2d 162 (5th Cir., 1975)
- iii. Where error results from both partners' mutual misunderstanding of the tax law, it is not inequitable to hold both liable. Bokum v. Comm'r, 992 F.2d 1136 911 Cir. 1993); Lessinger v. Comm'r, 85 T.C. 824.
- iv. In addition to support whether or not "innocent spouse" realized addition or reduction to wealth. Purificato v. Comm'r, 93-2 USTC ¶50,607 (3rd Cir., 1993); Conti v. Comm'r, 84-2 USTC ¶9757 (D.C., Va., 1984); Nicholson v. Comm'r,

T.C. Memo 1993-183; Gill v. Comm'r, T.C. Memo 1993-274.

- f. "Substantial Understatement"**
 - i. "Substantial" if it exceeds \$500**
 - ii. "Understatement" includes only the tax due**
 - (1) cf. "Liability for taxes" used elsewhere in §6013(e) which includes tax, penalties and interest**
 - iii. Applicable to all understatement**
 - (1) Gross income omission**
 - (2) Erroneously claimed deduction, credits, bases**
 - iv. Impacts lower income taxpayers, again, more severely**
- g. Grossly Erroneous Items**
 - i. Most significant change in TRA '84**
 - (1) Originally (1971), relief afforded only where gross income in excess of 25% of that stated on the return was omitted**
 - (2) Added deficiencies from erroneous deductions, credits and bases**
 - ii. "Any claim of a deduction, credit, or basis by such spouse in an amount for which there is no basis in fact or law." §6013(e)(2)(B).**
 - iii. Innocent spouse relief may be denied where deficiency results from deductions which were**

incorrect, but not grossly so, i.e. "frivolous, fraudulent or phoney." Douglas v. Comm'r, 86 T.C. 758; Edwards v. Comm'r, T.C. Memo 1995-335; Calhoun v. Comm'r, T.C. Memo 1992-189.

h. Adjusted Gross Income Computations

a. "Preadjustment year adjusted gross income - "PAYAGI"

(1) Liability for which relief is sought must exceed:

- (a) 10% of "PAYAGI", if "PAYAGI" is \$20,000 or less;**
- (b) 25% of "PAYAGI", if "PAYAGI" exceeds \$20,000**

(2) Liability = Tax, penalty and interest

- (a) (§6013(e)(4)(A) and 6013(e), ¶1)**
- (b) Farmer v. United States, 794 F.2d 1163 (6th Cir. 1986)**

III. AREAS WHERE CONFLICTS ARISE BETWEEN SPOUSES

A. Dual Representation in Innocent Spouse Cases

- 1. Devore v. Commissioner, 92-1 U.S.T.C. ¶50,258 (9th Cir. 1992): Court remanded for a determination of whether the taxpayer had been prejudiced by prior counsel's joint representation of him and his wife in Tax Court.**
- 2. Wilson v. Commissioner, 500 F.2d 645 (2d Cir. 1974): Tax Court decision vacated and wife permitted to present evidence of conflict in representation by attorney who failed to advise Court of annulment of taxpayers' marriage.**
- 3. Tavlian v. Commissioner, F.3d 282 (9th Cir. 1995): Rejecting Devore, the Court denied the claimed dual representation**

conflict, where the lawyer immediately withdrew from representing one of the spouses when their interests diverged.

4. In re Freytag, 1993 WL 471317, 93 USTC ¶50,531 (Bankr. N.D. TX 1993): Court held that spouse was not prejudiced by joint representation, even though her innocent spouse claim was not raised at trial.
5. Turner v. United States, 553 F. Supp. 347 (W.D. Va. 1982): Spouse was not prejudiced by attorney's alleged failure to raise the innocent spouse issue.
6. Allinson v. Commissioner, T.C. Memo 1994-304: 8 years after piggyback agreement in shelter case, wife moved to re-open to assert innocent spouse claim (which may well have prevailed since Court found no economic substance to question deal) - Court denied motion because wife had independent counsel in divorce proceedings, which included allocation of tax liabilities.

IV. IRS POSITION

- A. The Internal Revenue Service has promulgated a procedure for its attorneys to inquire whether taxpayer's counsel may have a conflict of interest in any tax litigation matter.
- B. IRM (35) 515 (January 24, 1996)¹ provides that IRS attorneys should "seek assurances" from petitioner's counsel that a potential conflict of interest has been resolved."
- C. The manual provision directs IRS counsel who believes a potential conflicts situation exists to draft a letter to taxpayers' counsel in the form set forth at IRM EXH (35) 500-19, and to send that draft letter to the Field Service Division for review prior to sending it to petitioners' counsel. Similarly, a motion to disqualify petitioners' counsel must be reviewed by Field Service prior to filing.
- D. Some practitioners report receipt of such letters which have not been reviewed by Field Service, or which do not conform with the formal set out in the manual.

doc. #16001.

¹ Full copy of the manual provision is annexed to this outline.

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Internal Revenue Manual
 Part: 35 Tax Litigation
 Chapter: (35)500 Trial Preparation
 Section: (35)510 Preliminary Considerations (8-31-82)

Sub-Section: (35)515 Ethical Considerations--Innocent Spouses and Other Conflicts (1-24-96)

(1) In appropriate cases, we should seek assurances from petitioners' counsel that a potential conflict of interest has been resolved. This is necessary to protect the integrity of the settlement and litigation process and to ensure that the proceedings in which we are involved are conducted consistently with the highest standards of ethical conduct. Where a conflict of interest is not addressed, a petitioner may later attempt to be relieved from an adverse settlement or judgment on the grounds of the conflict. On occasion, courts have overturned entered decisions because of defects in representation. See *Devore v. Commissioner*, 963 F.2d 280 (9th Cir. 1991); *Wilson v. Commissioner*, 500 F.2d 645 (2d Cir. 1974).

(2) Attorneys should be aware of the process of considering potential conflict of interest situations in the National Office. Because all matters involving potential conflicts of interest may lead to a request that some form of sanctions be imposed against an opposing counsel, the provisions of the Civil Justice Reform Executive Order apply. See (35)5(21)1 et. seq. All matter submitted for review under this section should first be submitted to the Field Service Division, Procedural Branch, for initial review. After that branch's review, if it is determined that further action is needed, the branch will refer the matter to the General Legal Services Division for review and approval of any recommended action or correspondence. Finally, all proposed actions or proposed correspondence in ethics matters must be approved by the Assistant Chief Counsel (Field Service), in his or her capacity as sanctions officer.

(3) One common example of an issue in which a conflict of interest may arise is in the area of innocent spouse claims. The innocent spouse provisions create potential conflicts where one professional represents both spouses with respect to a joint return. For example, section 6013(E) (2) of the Internal Revenue Code provides that the items with respect to which innocent spouse relief is sought must be "grossly erroneous," or without basis in fact or law. Plainly, there is a conflict of interest where a single representative argues that the deductions are correct and at the same time that they are "grossly erroneous" so that one spouse is entitled to relief under section 6013. More subtle conflicts are created by the other requirements of section 6013(E), that the innocent spouse not know of the understatement of the tax, and that it would be inequitable to hold the proposed innocent spouse liable for the tax. To establish one of these elements, evidence of concealment by the noninnocent spouse, or of lack of benefit to the innocent spouse, may have to be produced. Facts that support these conclusions might also tend to support the imposition of penalties against the noninnocent spouse.

(4) Tax Court Rule 24(f)(2) provides that:

If any counsel of record . . . represents more than one person with respect to any issue in a case, . . . then such counsel must either secure the informed consent of all such persons or, if such consent is not obtained, file a statement with the court explaining the reasons therefor.

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consent of the client . . . ; withdraw from the case; or take whatever other steps are necessary to obviate a conflict of interest or other violation of the ABA Model Rules of Professional Conduct, and particularly Rules 1.7, 1.8 and 3.7 thereof. The Court may inquire into the circumstances of counsel's employment in order to deter such violations. See Rule 201. Rule 201 provides that the letter and spirit of the ABA Model Rules of Professional Responsibility are to govern practice before the Tax Court, and that the court may require statements under oath regarding the circumstances of counsel's employment. ABA Model Rule 1.7 is a broad prohibition against conflicts which applies to all representation. See ABA Model Rule 1.7.

(5) ABA Model Rule 1.7 may be violated if one practitioner represents both spouses where the underlying deficiency is contested and the innocent spouse defense is available. If it appears that there is a potential conflict of interest, we should seek assurances from petitioners' counsel that his or her clients have been informed of the potential conflict of interest and have consented to the representation. Because of the potential for prejudice to the petitioners, every effort should be made to identify, raise, and resolve conflict of interest issues at the earliest possible opportunity. A sample letter for this purpose is set forth at Exhibit (35)500-19. Depending on the facts of the case, it may be appropriate to insert additional language into the letter.

(6) A conflict of interest also arises where petitioner's counsel is called as a witness. If the trial attorney anticipates calling petitioner's counsel as a witness, such counsel is generally prohibited from representing petitioner in the proceeding. Tax Court Rule 24(f); and ABA Model Rule 3.7(a). It is important for the trial attorney to raise the conflict of interest issue promptly to ensure that the court does not view respondent's intended use of petitioner's counsel as a witness as a prejudicial trial tactic. See *Duffey v. Commissioner*, 91 T.C. 81, 84 n.2 (1988). In no event may the trial attorney list opposing counsel as a potential witness in the trial memorandum without following these procedures for notifying petitioner's counsel.

(7) As soon as possible after the trial attorney determines that it may be necessary to call petitioner's counsel as a witness, he or she must notify petitioner's counsel by letter of the conflict, and request that petitioner's counsel withdraw from the representation. Under Rule 24(f), while informed consent of the client may eliminate the need to withdraw in some conflict of interest situations, this option is not available for the attorney as witness. Thus, if opposing counsel does not withdraw, the matter must be brought to the court's attention. A sample letter, addressed to opposing counsel, for use in this situation is set forth in Exhibit (35)500-20.

(8) When a potential conflict of interest is involved, the field office must send a draft of the proposed letter referred to in paragraphs (5) and (7), along with a brief memorandum outlining the background of the case, to the Chief, Procedural Branch, Field Service Division, 1111 Constitution Ave., N.W., Washington, D.C. 20224. The review steps outlined in paragraph (2) will be taken, and the Procedural Branch will respond to the submitting office on an expedited basis after receipt of the draft.

(9) The Model Rules provide a caution in approaching these sensitive questions in their statement "that resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation"

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Comment, Rule 1.7. The procedure of writing to counsel is designed to encourage opposing counsel to consider and deal with the problem in a manner consistent with Rule 1.7. If opposing counsel's response is inadequate to allay our concerns, for example, if no evidence that both spouses have waived the conflict is provided, further action may be considered. The matter may be brought to the court's attention either informally via a conference call with the judge or formally through a motion to disqualify opposing counsel under Rule 24(f). Whether and how to proceed further depends on a weighing of all factors including the nature of opposing counsel's response and the apparent severity of the conflict. The field office must consult with the Procedural Branch before making a decision in this regard.

(10) Prior to filing a motion to disqualify opposing counsel because of a conflict of interest, the field office must forward an unsigned draft of the motion, along with a memorandum outlining the background of the case, to the Chief, Procedural Branch in the national office for review. The review process described in paragraph (2) will be followed. Generally, the motion will be returned to the field office for signature and mailing to the Tax Court. On occasion, depending on the circumstances, and after consultation with the field office reviewer, the motion may be signed by an appropriate official in the national office.

(11) Additional discussion of these issues in the tax shelter context is located at (35)3(12)(10).

IRM (35)515

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Internal Revenue Manual
Part: 35 Tax Litigation
Chapter: (35)500 Trial Preparation

Exhibit (35)500-19 (1-24-96)

Conflict of interest situations where petitioners' counsel represents both spouses and the innocent spouse defense is at issue.

[See (35)515]

Office Letterhead
Petitioners' Counsel
Address
In re:

Tax Payer and Spouse Payer v. Commissioner
T.C. Docket No. XXXX-9X

Dear Sir/Madam:

As you know, the above cases have been calendared for trial at the Tax Court's trial session in [place] beginning [date].

You have asserted in Docket No. XXXX-9X that Spouse Payer is entitled to relief under I.R.C. s 6013(E) as an innocent spouse with respect to the joint income tax returns which are also the subject of the tax liability of Tax Payer in Docket No. XXXX-9X. Because the issue is one of shifting the tax liability from one petitioner to another, both of whom you represent, it could appear that your representation of the parties in these separate cases presents a conflict of interest. In this regard, please see Rule 1.7 of the American Bar Association Model Rules of Professional Conduct, which rules have been adopted by the Tax Court. Tax Court Rules 24(f) and 201.

* * * * *

By bringing this matter to your attention, I am not suggesting that you have acted or are acting improperly in this case. My only concern is to avoid the possibility of collateral attack on a decision of the Tax Court on this issue.020

I request your assurance that you have consulted with Spouse Payer and Tax Payer on the matter of the potential conflict and that they have agreed to your representation in their respective cases after this consultation. I wish to bring this sensitive matter to your attention at an early date before the parties engage in settlement negotiations and/or trial preparation. Please respond to this request as soon as possible.

1 Additional material may be inserted here as appropriate, depending on the facts of the case.

2 This paragraph may be deleted where there is an egregious conflict of interest.

Sincerely yours,