

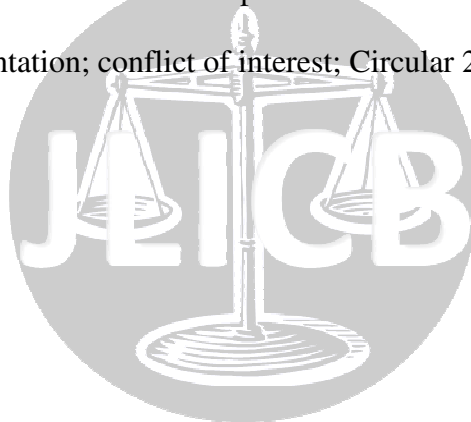
## Joint representation of multiple parties in tax proceedings

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### ABSTRACT

Joint representation occurs when a tax practitioner undertakes the concurrent representation of more than a single party to a controversy. Typically, a preexisting relationship between multiple clients leads to the employment of a particular tax practitioner or firm. The joint representation of multiple parties occurs frequently in practice, but the topic receives little media attention. The article first identifies four recurring situations in either domestic areas or corporate areas that the tax practitioner should understand. The article then exams the problems of joint representation from the perspectives of the Internal Service Revenue, the client and the tax professional respectively. After discussing the issues surrounding joint representation, some legal and ethical standards for review by the tax practitioners are discussed. In the conclusion of the article, a sample conflict waiver letter is provided.

Keywords: Joint representation; conflict of interest; Circular 230



## 1. Introduction

Joint representation, also known as multiple or dual representation, occurs when a tax practitioner undertakes the concurrent representation of more than one single party in a controversy. Typically, a preexisting relationship between the multiple clients leads to the employment of a single tax practitioner or legal firm. For example, an action by the Internal Revenue Service against several parties may have arisen from the same transaction or occurrence, prompting the parties to see professional guidance. A related situation involves the simultaneous representation of a taxpayer who is under investigation and a third-party witness, where the interview of the witness may have a substantial impact upon the case against the taxpayer. Rather than finding separate counsel to advocate conflicting positions, the parties may collectively agree to present a united front. The related parties may choose to be represented by one firm or practitioner, huddling together against the onslaught of the Internal Revenue Service.

The most common scenarios involve parties "married" under law, whether the marriage is domestic or corporate in nature. In the domestic arena, married or formerly married spouses often file joint returns for annual income taxes. When the returns are challenged and taxes and penalties are assessed, the spouses may turn to the same tax professional for advice and representation. The corporate situation generally involves a corporation and its shareholders, officers, or directors, all of whom have come under suspicion for either tax liabilities or suspect deductions.

The joint representation of multiple parties occurs frequently in practice, but the topic receives little media attention. Fellow practitioners may also be wary of publicly criticizing a common practice in the field. Regardless of the reason, the pitfalls of joint representation for clients and advocates alike warrant examination of the current state of the law.

## 2. Recurring Situations

Each of the following is a recurring scenario that the tax practitioner should understand.

### 2.1 Targets under Investigation and Third Party Witnesses

When the Internal Revenue Service makes use of its summons power, taxpayers under investigation have the right to be represented by counsel.<sup>1</sup> Those representatives may also represent third party witnesses that are summoned in the course of the same investigation. The taxpayer and the witnesses may be involved in the same closely held enterprise, facing the same exposure for tax liabilities. Counsel for the taxpayer may also wish to keep abreast of the testimony of the witnesses, exerting what influence they can over the interview process to minimize the damage done to the taxpayer client.

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<sup>1</sup> 5 USC § 555(b): A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented and advised by counsel or, if permitted by the agency, by other qualified representative.

## 2.2 Married Spouses Filing Jointly

The most common scenario appears to be when a married couple files a joint income tax return. Filing a joint income tax return subjects both spouses to joint and several liability for the taxable year<sup>2</sup>. When the Internal Revenue Service eventually challenges the returns, the taxpayers opt to use the same tax practitioner to represent both individuals in the proceedings. Frequently, the tax practitioner is also the same person that initially prepared the returns in question.

These cases can initially be differentiated on the basis of each spouse's relative level of involvement and financial sophistication. The husband and wife may have acted in concert while filing the questionable returns, with each party having full knowledge of the contents of the returns.<sup>3</sup> Alternatively, one spouse may be in an unequal position of control and knowledge regarding the suspect returns. Either the husband or the wife<sup>4</sup> may have overseen the preparation of the returns and only sought tacit acquiescence to the returns from the other spouse. Under limited circumstances, the other spouse may be eligible to claim "innocent spouse" relief from the Internal Revenue Service.<sup>5</sup>

## 2.3 Corporation and Shareholder/Officer/Director

A corporation cannot take action except through its duly authorized individual representatives. Joint representation issues arise when a corporation and its shareholder, officer, or director are both parties to a tax proceeding. A special problem occurs when the corporation is represented by its sole shareholder/officer. In such cases, the identity of the actual client can become confusing, leading to a quandary for the tax practitioner.

Many times, the Internal Revenue Service requests the personal returns of the shareholder officer. The practitioner needs to be extremely cautious in such situations. Certain questions should immediately arise: "Is there a Power of Attorney for the Individual?" "Does the tax practitioner represent only the corporation?" "Has the tax practitioner received a waiver for the release of personal information?" and "Who is the real client in such an audit?"

In *U.S. v. Powell*<sup>6</sup>, the tax practitioner was not required to provide the IRS with any documents that already were in possession. The practice of requesting personal returns

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<sup>2</sup> IRC § 6013(d) (3)

<sup>3</sup> See *U.S. v. Mooney*, 659 F.2d 496 (8th Cir. 1985), where both spouses participated in a construction supply and services business, preparing various documents and returns. Both were found guilty of criminal tax evasion.

<sup>4</sup> An example of this situation can be seen in the case of *Devore v. Commissioner*, 69 AFTR 2d 92-1236, 963 F.2d 280 (1992). Maria Cole, the widow of crooner Nat King Cole, found herself at odds with her new husband, the petitioner. The couple had been represented by the Coles' longtime attorney, who continued to represent the widow Cole after her first husband's death. Cole and Devore were divorced in 1978, but the same attorney continued to represent both parties throughout tax proceedings that lasted well after the divorce.

<sup>5</sup> IRS § 6013(e)

during an entity audit, while widely practiced, presents a potential minefield of conflict for the tax practitioner. Release of such information, if unauthorized, could lead to sanctions against the tax practitioner.

## 2.4 Partnerships

Partnerships also present huge conflicts of interest for the tax practitioner. The Tax Matters Partner (TMP) under the TEFRA Partnership Regulations has initial responsibility for response to the Internal Revenue Service. However, what happens when the TMP has a conflict of interest with other partners? In *Transpar Drilling Venture, 1982-12 v. Commissioner*, 147 F3rd 221 (2d Cir. 1998), it was held that when the TMP was under criminal investigation, the TMP's authority to bind the partnership evaporated. However, the U.S. Tax Court took another view. In *Phillips v. Commissioner*, 114 TC115 (2000), the Tax Court said that the TEFRA regulations were legislative and therefore, immune from attack as being invalid. This allows any action of the TMP to be undisturbed despite being under any criminal investigation.

What if the TMP is dissolved or nonexistent? The Court views the action to be against the partners (aggregate theory) and therefore, if the TMP is dissolved, the Service may still notice all partners. In *Chef's Choice Produce, Ltd. v. Commissioner*, 95 TC 388 (1990), the Tax Court maintained jurisdiction over the case although the TMP had been dissolved.

Conflict of interest issues abound when partners have certain legal duties to each other. Choice of tax forums in which to resolve the issues and a lack of congruence as to which argument is best for resolution of the tax issue may create these conflicts.

## 3. The Problem with Joint Representation

Joint representation is understandably rife with problems because such engagements usually arise in times of crisis. While the specific nature of the problem differs with the perspectives and goals of the involved parties, the heart of the matter rests in a conflict of interests. The chief concern is that a common practitioner cannot adequately represent the separate interests of multiple parties. A corollary to that concern is that taxpayers do not fully appreciate the hazards of joint representation, especially as it pertains to their individual cases and rights.

Tax practitioners must be able to identify the possible conflict, obtain the necessary waivers from the involved parties or recuse themselves from the representation. In circumstances where the taxpayer waives the issues of conflict, Circular 230 provides that the tax practitioner must obtain written consents from all the parties and retain copies of the written consents for a minimum of 36 months from the date of the conclusion of

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<sup>6</sup> See *U.S. v. Powell*, 379 U.S. 48, 57-58 (1964). Powell, the taxpayer, refused to produce records that had been once previously examined to the Special Agent. The Court of Appeal ruled in favor of the taxpayer. It reasoned that since the returns in question could only be reopened for fraud. In order to establish a prima facie case for enforcement of a summons, the Government must make a "minimal showing" that (1) the summons is for a legitimate purpose, (2) the material being sought is relevant to the investigation, (3) the information is not already in the IRS's possession, and (4) the administrative steps required by the Internal Revenue Code have been followed.

the representation of the affected clients. The written consents must also be provided to any officer or employee of the IRS upon request.

### 3.1 IRS Perspective

Though the methods of the Service are not always clear, the goal of the IRS is very straightforward: to collect the maximum possible amount of taxes. For all the rhetoric about customer service<sup>7</sup> and concern for the individual taxpayer, the mission of the Service has not changed since its inception. Joint representation only presents a problem to the Internal Revenue Service when it interferes with their prime directive.

The Service may take issue with the joint representation of related parties because of concern over the disclosure of information. Usually at the summons enforcement level, counsel for both taxpayers under investigation and witnesses intervene with varying levels of interference. As noted in *Saltzman*, "[i]n egregious cases, the Service has instituted actions to disqualify or exclude counsel."<sup>8</sup> Conflict issues have risen to such a level that the new Circular 230 rules have been adopted (see comments in paragraph 3 "The Problems with Joint Representation")

### 3.2 Client Perspective

Taxpayers who enter into a joint representation frequently do not appreciate the potential hazards of such representation. The reason they entered such an arrangement may have been financial, in that hiring and paying multiple tax professionals seemed prohibitive. A common misconception on the part of taxpayers is that only one position should be advanced for all of the involved taxpayers, since the potential tax liability arose from the same transactions. In reality, each taxpayer may have very different arguments to advance in the protection of their individual interests.

The relationship of the parties has a great deal to do with how the clients perceive a joint representation. If the taxpayers are acting in cooperation with one another, a joint representation may seem like the ideal solution. As Justice Frankfurter noted in *Glasser v. United States*,<sup>9</sup> co-defendants may actually benefit from the presentation of a united defense against a common attack. "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common

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<sup>7</sup> "IRS tries to change image with radio ads". The Atlanta Journal and Constitution. August 1, 2000. "In an effort to shed its tough-cop image, the Internal Revenue Service is rolling out an advertising campaign emphasizing its approachable customer service side. As part of the effort, the agency recently spent \$1.2 million on radio ads directed at small businesses, focusing on the benefits for employers of filing quarterly tax forms electronically. One ad says: "You know, the 'S' in IRS stands for service." The spots started airing in June on the ABC, CBS, and Premier radio networks and will run for two weeks at the end of the next three fiscal quarters."

<sup>8</sup> Saltzman, Michael I. *IRS Practice and Procedure*. Rev. 2<sup>nd</sup> ed. Valhalla, NY: Warren, Gorham & Lamont, 2002.

<sup>9</sup> *Glasser v. United States*, 315 U.S. 60, 86 L.Ed.680, 62 S.Ct. 457 (1942).

attack."<sup>10</sup> In such cases, the decision to undertake joint representation becomes more akin to trial strategy than to an ethical dilemma.

In the event that taxpayers sit as adversaries, jockeying for position, the problem of joint representation often occurs as an afterthought, as simply another issue to be raised on appeal. Here, separate, independent counsel better serves the taxpayers from the onset. Courts are inclined to be unsympathetic to later claims of ineffective assistance of counsel based on a perceived conflict of interest.<sup>11</sup> A court may require a showing of extraordinary circumstances to even consider whether a taxpayer was prejudiced by his form tax professional's conflict of interest.<sup>12</sup>

### 3.3 Tax Professional Perspective

Financial and practical considerations may drive the decision to undertake a joint representation. Pressure to undertake a joint representation comes from both internal and external sources. A tax professional who has advised a client and his corporation may not wish to part with any portion of the fees generated by representing both entities. A possible specter looming from advising a client to seek additional counsel is the potential loss of the client's business to the new counsel. Though it is hoped that professionalism and integrity would prevail over blatant self-interest, such ideals do not always intrude on decisions that may affect potential fees.

On the other hand, it may be the clients who insist on a joint representation, not wanting to spend additional funds. The tax practitioner may have represented the parties over many years, creating a comfortable working relationship and developing intimate knowledge of the inner workings of the clients. Especially in times of trouble, the clients may feel uncomfortable and anxious about trying to get acquainted with a new set of advisors.

## 4. Legal Standards

Tax practitioners can find guidance for navigating the treacherous waters of joint representation from several sources, but bright-line rules are rare. The tax practitioner faces the unenviable task of balancing the business aspects of tax practice against that of professional responsibility. In the end, the decision whether to undertake a joint representation lies more in the discretion of the tax practitioner and his or her malpractice risk aversion level, rather than in any codification of law or ethics.

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<sup>10</sup> *Id.* at 92.

<sup>11</sup> See *Mooney* (note 3, *supra*), where wife's claim of ineffective assistance of counsel was denied. In that case, separate counsel represented the wife, after the initial appearances before the magistrate.

<sup>12</sup> See *Devore* (note 4, *supra*), where taxpayers were divorced and stood in substantially unequal positions, though still represented by the same attorney.

#### 4.1 Right to Counsel

The right to be represented by counsel in tax proceedings springs from several sources. The Administrative Procedures Act provides a right to counsel for any "Person compelled to appear before a government agency or representative thereof."<sup>13</sup>

Regardless of the specific forum, taxpayers are also assisted by the protective guarantees of the U. S. Constitution when facing actions by the government. In particular, the Sixth Amendment is applied regularly to cases where joint representation is involved. It provides that "the accused shall enjoy the right ... to have the Assistance of Counsel for his defense" in all criminal prosecutions.<sup>14</sup> Generally, the right to assistance of counsel includes the right to counsel of the defendant's choosing. Although the text of the Sixth Amendment does not explicitly grant such free choice as an absolute right, various circuits have held it to be so.<sup>15</sup>

#### 4.2 Disqualification

Perhaps the greatest penalty for the tax practitioner is to be disbarred from practice before the IRS. Second to that drastic measure would be the disqualification of a practitioner or firm from the representation of a client. Once disqualified, the practitioner could no longer work on behalf of the client, and consequently, could generate no further billings to the client. Even worse, once a tax practitioner is disbarred from practice before the IRS, that practitioner cannot work for a firm that does practice before the Service.

The Internal Revenue Service has adopted procedures to guide its agents on how to handle joint representation situations.<sup>16</sup> Upon learning of a joint representation, the IRS agent is to begin the interview by ascertaining whether the taxpayer is aware of the potential for a conflict of interest. This raises some serious ethical issues. The Service does not represent the taxpayer and has no grounds upon which to question the taxpayer as to a possible conflict issue. The Service is also not the judge as to whether a conflict is present. The conflict of interest issue is only in the hands of the taxpayer. If the taxpayer has not considered these issues or does not waive the conflicts, then the interview can be postponed to give the taxpayer an opportunity to seek other counsel. If the taxpayer still wishes to continue with the current counsel and there are no other impediments or obstructions presented by the tax professional, the interview may continue. Again, an issue is raised as to what might be an "impediment or obstruction". Does this imply that the Service has taken the role of arbiter and unilaterally decides what is "good" or "not good" for the taxpayer? If the taxpayer raises legitimate Constitutional issues, is the taxpayer to be viewed as an obstructionist?

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<sup>13</sup> 5 USC § 555(b).

<sup>14</sup> U.S. Const. amend. VI.

<sup>15</sup> See *Backer v. Comm.*, 275 F.2d 141 (5<sup>th</sup> Cir. 1960), and *U.S. v. Diozzi*, 807 F.2d 10, T.C. Memo 85-2017 (1<sup>st</sup> Cir. 1986). See also *U.S. v. Stein*, No. 05 CRIM. 888 (S.D.N.Y., 2005)

<sup>16</sup> IRM 25.5.5, Dual Representation (Apr. 30, 1999).

Disqualification of counsel is ordinarily only to be sought in extreme circumstances since the conflict of interest issue is held by the taxpayer and not the Service. One example of the type of egregious circumstance that warrants disqualification is where the attorney actively obstructs the interview process.<sup>17</sup> Active obstructions include refusing to allow the witness to answer any questions, making baseless objections, and asserting frivolous claims or privileges on behalf of the witness. As long as the witness and his counsel act in a professional manner, it would appear that the interview can proceed with counsel of the witness' own choosing being present.<sup>18</sup>

### **4.3 Ethical Considerations**

Ethical rules propounded by various entities play an important role in governing the conduct of all professionals engaged in tax practice. The American Bar Association has adopted the *Model Rules of Professional Conduct* as a standard for judging the conduct of attorneys, applicable across all areas of practice. The related rules are discussed here as an example of the kind of professional ethics rules that impact tax practitioners who undertake joint representations.

Circular 230 is the name given to the regulations put forth by the Treasury Department governing the practice of tax professionals before the Internal Revenue Service. In addition to the discipline that may be imposed for violations of ethical rules, these regulations also list sanctions that can be imposed on tax practitioners who violate the rules regarding tax practice. Although Circular 230 must defer to the Constitution when representation issues arise, waiver of these issues may be dangerous as the case moves forward.

#### **4.3.1 Model Rules of Professional Conduct**

The American Bar Association, through the Center for Professional Responsibility, promulgates the Model Rules of Professional Conduct.<sup>19</sup> The Model Rules contain both mandatory and aspirational rules to govern the conduct of attorneys in the practice of law. Many jurisdictions have now adopted the Model Rules, at least in part, to guide attorneys licensed in their respective states.

Of particular relevance to joint representation are Rules 1.7, 1.8 and 1.13.<sup>20</sup> Rule 1.7 serves as the basis for Section 10.29 of Circular 230, which copies the language almost verbatim and is further discussed below. The Comments to the Model Rules

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<sup>17</sup> IRM 25.5.5.2, Obstruction of the Interview (Apr. 30, 1999).

<sup>18</sup> See, e.g., the judge's comments in *Backer v. Comm.*, 275 F.2d 141 (5th Cir. 1960).

<sup>19</sup> Center for Professional Responsibility (American Bar Association) and American Bar Association. House of Delegates. Annotated Model Rules of Professional Conduct. 5th ed. Chicago, Ill.; Center for Professional Responsibility, American Bar Association, 2003.

<sup>20</sup> Rule 1.7 and 1.8 govern conflicts of interest with respect to current clients. Rule 1.13 governs situations when an organization, e.g. a corporation or partnership is the client.



provide more detailed guidance as to the application of the rules to an actual practice setting.

Rule 1.13<sup>21</sup> (Organization as Client) instructs attorneys to treat the entity as separate from the duly authorized officers through which it acts.<sup>22</sup> Other provisions of this rule make clear that there is to be a distinction between representation of the entity and the individuals through whom it acts.

#### 4.3.2 Circular 230

Circular 230 contains the Treasury Department Regulations regarding practice before the Internal Revenue Service. It incorporates the rules governing the authority to practice before the IRS, the duties and restrictions related to such practice, and the sanctions for violating those rules. Under continuing comment and revision, these Treasury Regulations contain a single section on the subject of joint representation, under the caption of "Conflicting Interest".<sup>23</sup> The rule regarding conflicting interests states "a practitioner shall not represent a client in his or her practice before the Internal Revenue Service if the representation involves a conflict of interest." A conflict exists if one of two cases holds true:

- (1) The representation of one client will be directly adverse to another client; or another client, a former client or a third person or by a personal interest of the practitioner.
- (2) There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person or by a personal interest of the practitioner.

Should a conflict exist, a practitioner may still represent both clients if the following three requirements are met:

- (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 gives informed consent, confirmed in writing by each affected client, at the time the existence of the conflict of interest is known by the practitioner. The confirmation may be made within a reasonable period after the informed consent, but in no event later than 30 days.

The written consent required by Circular 230 Sec. 10.29 (b) (3) (requirement (c) above) may vary in form. The practitioner should draft a letter to the client stating the conflict, as well as the possible implications of the conflict, and submit the letter to the client for the client to countersign. Unlike the American Bar Association's (ABA's) Model Rules of Professional Conduct (Model Rule 1.7), which permits affected clients to provide informed consent verbally if the consent is contemporaneously documented by

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<sup>21</sup> Rule 1.13(a): A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

<sup>22</sup> Treasury Department Circular 230 can be found at 31 FR 10773, Aug. 13, 1966, as amended at 57 FR 41093-41096, Sept. 9, 1992; revised by T.D. 9011, 67 F.R. 48760-48780, July 26, 2002.

<sup>23</sup> *Id.*, at § 10.29 – Conflicting interests.

the practitioner in writing, a verbal consent followed by a confirmation letter authored by the practitioner will not satisfy requirement (c) above unless the confirmatory letter is countersigned by the client.

The Service says that it is not the intention of IRS to sanction minor technical violations of Circular 230 Sec. 10.29 when there is little or no injury to a client, the public, or tax administration. However, if a client fails to return the confirmatory writing to the practitioner, notwithstanding the practitioner's documented good faith effort to obtain the client's signature, the practitioner would not be subject to a sanction if practitioner promptly withdrew from representation upon the failure to receive the client's written confirmation within a reasonable period.

As can be seen from the clear text of the regulations, the existence of a conflict does not mandate an automatic withdrawal from representation. A conflict of interest can be "cured" if the practitioner reasonably believes he can continue to represent both clients and the clients give their informed consent in writing.

A key determination to be made under this rule is whether the practitioner can actually provide adequate representation to each client, in light of their conflicting positions. The current case law sets an indefinite threshold for the level of conflict that precludes a tax practitioner from representing two opposing positions simultaneously. At a certain point, the unequal positions of the clients create a need for separate advocates to fully develop and advance the strongest available arguments for each client.

Another consideration is whether the clients are truly informed of the potential pitfalls of joint representation and make a valid consent to such an arrangement. Even a cursory survey of court opinions in this arena would reveal a palpable lack of understanding on the part of the taxpayers. It would seem as if the taxpayers had no idea that they may lose on the merits of their case. Having been rebuffed during the initial rounds of hearings, the taxpayers seem to scramble for any possible relief, even to the point of blaming their chosen counsel for rendering ineffective assistance or operating under a conflict.

Subpart C of Circular 230 details the sanctions available for violations of the regulations<sup>24</sup>. Disbarment, mentioned above, is the most draconian penalty put forth. A tax practitioner may also face suspension or censure for violations of the regulations. Any such sanctions cannot be imposed without due process of law, which contemplates proper notice and an opportunity for a hearing.<sup>25</sup>

## 5. Review of Selected Case Law

Few decisions have come out of the Court of Appeals in this area of law. *Backer v. Commissioner*, 275 F.2d 141, 1960 U.S. App. LEXIS 5335, 5 A.F.T.R.2d 824, 60-1 U.S. Tax Cas. P99285 (5<sup>th</sup> Cir. Ga. 1960) remains a viable case, even after 46 years on the books. In *Backer*, the Court interpreted the Administrative Procedures Act to allow witnesses before the Internal Revenue Service to retain the same counsel as the taxpayer under investigation. This decision reaffirms the right to counsel of one's choosing,

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<sup>24</sup> See note 23, supra at §§ 10.50 through 10.53

<sup>25</sup> *Id.* at § 10.50(a)

making it possible to undertake joint representation. The only caveat for tax practitioners is that disqualification is also available in appropriate cases, to encourage civility and efficiency of process.

A recent U. S. District Court case emphasizes the possibility of waiving conflicts of interest and the right to conflict-free representation. In *U.S. v. Stein*, No. 05 CRIM 888 (S.D.N.Y., 2005), the Court denied a government motion to disqualify an attorney who represented an alleged co-conspirator of the taxpayer in a tax fraud scheme. The Court made several inquiries into whether the waiver was knowingly and intelligently waived. The Court noted that its duty of inquiry was not to ensure that the defendant was protected from his own foolish choices, but that the defendant properly made the choice.

The decision from the Ninth Circuit in *Devore v. Comm.*, 963 F.2d 280, 69 A.F.T.R.2d 92-1236 (9<sup>th</sup> Cir. 1992), gives insight into what showing must be made to prevail on an ineffective assistance of counsel claim based on a conflict of interest. Here, the clients were divorced, but still represented by joint counsel in tax proceedings stemming from tax returns filed during their marriage. The attorney had a long-standing professional relationship with the wife, pre-dating the marriage in question. The Court found that the husband was in a substantially weaker position in comparison to the other spouse. The husband was unsophisticated in tax matters and excluded from the financial affairs of the wife. The husband was granted an evidentiary hearing to determine whether he was actually prejudiced by the attorney's conflict of interest and to establish the reasonableness of his failure to retain independent counsel.

## 6. Conclusion

Joint representation of multiple clients provides both opportunity and danger. Practitioners who can successfully navigate the pitfalls inherent to joint representation do a great service to their clients in providing necessary counsel in a more efficient manner. The dangers lie chiefly in misjudging the impact of the conflict of interest on each putative client's case and proceeding without careful consideration at the risk of malpractice. Some cases cannot be handled under a joint representation because of the specific situation, while other cases present themselves as prime candidates. With the threat of disbarment from practice before the IRS, it behooves the tax practitioner to go beyond a mere financial calculus in deciding to take on multiple clients, but to also analyze the ethical ramifications of undertaking a joint representation.

## Appendix I - Conflict Waiver

### Conflict Representation of Multiple Clients

Conflict issues are very fact specific. It is for that reason that a blanket form is not appropriate, particularly in the area of waiving future conflicts of interest. In order to consent to a conflict of interest, clients must discuss with the representative the specific issues causing the conflict and potential adverse consequences of a waiver to the client. The same is true for a client's consent to disclosure of confidential information. A universal form simply cannot provide the kind of detailed information that would be required for a client to be adequately informed in making a waiver of conflict of interest. A client's signature on a blanket form should never be considered to constitute an adequate, informed waiver, without full client discussion to the consequences of the specific waiver.

### Sample Letter

You have asked us to represent you [Client A] and [Client B] jointly in connection with [full description of a tax matter]. We would be pleased to do so, subject to the following understandings.

Although the interest of [Client A] and [Client B] in this matter are generally consistent, it is recognized and understood that differences may exist or become evident during the course of our representation. Notwithstanding these possibilities, [Client A] and [Client B], have a single tax professional to represent them jointly in connection with [full description of matter]. Potential conflicts of interest, including but not limited to: \_\_, etc...

Accordingly, this confirms the agreement of [Client A] and [Client B] as to our joint representation of them in connection with the above-described tax matter. This will also confirm that [Client A] and [Client B] have each agreed to waive any conflict of interest arising out of the joint representation, and that each will not object to, our representation of the other in the matter described herein.

It is further understood and agreed that we may freely convey necessary information provided to us to the Internal Revenue Service by one client to the other, and that there will be no secrets as between [Client A] and [Client B] unless both of you expressly agree to the contrary.

If you need to edit the terms of this letter, or wish to discuss any related issues, please contact us at your earliest convenience. However, if you agree that the foregoing accurately reflects our understanding, please sign and return the enclosed copy of this letter.

Signed \_\_\_\_\_

Name \_\_\_\_\_

Date \_\_\_\_\_

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