Department of the Treasury | Internal Revenue Service | Office of Chief Counsel

Notice

CC-2003-008

February 3, 2003

Subject: Ethical Obligations of Every Chief Counsel Attorney

Cancellation Date: Until Incorporation Into The CCDM

Purpose

This notice reminds all Chief Counsel attorneys of their obligation to adhere to the highest ethical standards in all aspects of their responsibilities, including representation of the Commissioner before the Tax Court.

Discussion

The Chief Counsel is the chief law officer for the Internal Revenue Service. As such, the Chief Counsel is empowered to represent the Commissioner in cases before the Tax Court, and to determine which civil actions should be litigated under the laws relating to the Internal Revenue Service, including making recommendations to the Department of Justice regarding those actions. I.R.C. § 7803(b)(2). In carrying out these duties, Chief Counsel attorneys must be mindful that they are acting on behalf of the Chief Counsel, not in their individual capacity, and that their actions reflect on the entire Office of Chief Counsel, the Service and the Treasury Department. See CCDM 35.8.12.14. Accordingly, Chief Counsel attorneys are expected to adhere to the highest standards of conduct, not simply conform to minimum professional obligations.

To help put this principle into practice, Chief Counsel attorneys are reminded that, in representing the Commissioner, they must conduct their activities in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association. Particular attention should be given to ABA Model Rule 3.3: Candor Toward the Tribunal; Rule 3.4: Fairness to Opposing Party and Counsel; Rule 4.1: Truthfulness in Statements to Others; and Rule 8.4: Misconduct. See Tax Court Rule 201. Our role as Chief Counsel attorneys is to ensure the uniform application of the tax laws and the fair disposition of cases.

ABA Model Rule 3.3 provides, in part, that a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. Rule 3.3 also requires a lawyer to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. In addition, Rule 3.3 prohibits a

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lawyer from offering evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. In this regard, a lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

As officers of the court, we have a special duty to avoid conduct that undermines the integrity of the adjudicative process. We should not allow a court to be misled by false statements of law or fact, or evidence that the lawyer knows to be false. We must ensure that our actions (or failure to act) preserves the sanctity of the court and safeguards the public's confidence in the judicial process.

ABA Model Rule 3.4 provides, in part, that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, and shall not counsel or assist another person to do so. Under Rule 3.4, a lawyer also shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. In the pretrial stage of a case, Rule 3.4 prohibits a lawyer from making a frivolous discovery request or failing to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party. At trial, Rule 3.4 precludes a lawyer from alluding to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, asserting personal knowledge of facts in issue except when testifying as a witness, or stating a personal opinion regarding the credibility of a witness.

ABA Model Rule 4.1 provides, in part, that in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person, or fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited under ABA Model Rule 1.6 regarding client-lawyer confidentiality.

ABA Model Rule 8.4 provides, in part, that it is professional misconduct for a lawyer to violate or attempt to violate the ABA Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another person. It is also professional misconduct under Rule 8.4 for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Similarly, under Rule 8.4, it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

The need to regularly review and re-enforce our ethical obligations, such as those discussed above, was driven home by the Ninth Circuit's recent opinion in Dixon v. Commissioner, No. 00-70858 (9th Cir. Jan. 17, 2003), http://www.ca9.uscourts.gov/ca9/newopinions.nsf/294160FF1751D1B888256CB10004A899/$file/0070858.pdf?openelement. In that opinion, the Ninth Circuit imposed sanctions against respondent because two Chief Counsel attorneys committed fraud on the Tax Court during the trial of the cases. Briefly, the Chief Counsel attorneys entered into secret settlements with two of the test case petitioners and a witness in the trial of a group of test cases intended to resolve a large tax shelter litigation project. Although the settlements were all different, some noteworthy terms included an agreement that the settled test cases would nonetheless proceed to trial; that the petitioners would testify for the respondent; and in one test case, that any deficiencies would be reduced by the amount of the petitioner's attorneys fees. With respect to the settling witness who testified for respondent at the trial of the test cases, the witness's deficiencies were conceded in full by respondent following the test case trial.

These settlements were not disclosed to the Tax Court or to the other taxpayers in the tax shelter litigation project who had agreed to be bound by the outcome of the test cases.

The misconduct came to light after the Tax Court rendered an opinion in favor of respondent. Following an evidentiary hearing that was mandated by the Ninth Circuit, the Tax Court held that the misconduct did not constitute a structural defect in the trial, but rather resulted in harmless error. The Tax Court concluded that no prejudice occurred because the misconduct did not alter the outcome of the trial on the merits. Hence, the Tax Court reinstated, in large part, its prior opinion and once again entered decisions against the test case petitioners. As a sanction, however, the Tax Court relieved the participants in the tax shelter of liability for the interest component of the addition to tax for negligence and for tax motivated interest. The Ninth Circuit reversed, holding that the misconduct constituted a fraud on the court justifying additional sanctions regardless of a showing of any prejudice attributable to the misconduct. According to the Ninth Circuit, the misconduct corrupted the adversarial nature of the proceeding, the integrity of witnesses and the ability of the trial court to judge impartially. The Ninth Circuit also stated that the misconduct defiled the sanctity of the court and the confidence of future litigants.

All Chief Counsel attorneys are directed to read the Dixon opinion, an electronic copy of which is attached. Dixon v. Commissioner, No. 00-70858 (9th Cir. Jan. 17, 2003), http://www.ca9.uscourts.gov/ca9/newopinions.nsf/294160FF1751D1B888256CB10004A899/$file/0070858.pdf?openelement. As the Chief Counsel stated in a recent speech, although "the incident occurred a number of years ago, * * * the lessons to be learned are fresh." Thus, it is worth repeating: All Chief Counsel attorneys are expected to carry out their responsibilities with the utmost integrity. Clearly, the conduct of the Chief Counsel attorneys in Dixon fell far short of those high standards. Misconduct, such as that described in Dixon, will neither be condoned nor tolerated by the Office of Chief Counsel, and anyone engaging in future misconduct should be forewarned that the Office will take appropriate disciplinary action, including possible termination of employment.

Questions concerning ethical matters related to tax litigation should be referred to the attorney's supervisor and Branch 3 of the Administrative Provisions and Judicial Practice Division of the Office of the Associate Chief Counsel (Procedure and Administration) [APJP Branch 3]. The telephone number for APJP Branch 3 is (202) 622-7940.

Attorneys who know of, or suspect, ethical violations of the ABA Model Rules in the conduct of Tax Court litigation should contact APJP Branch 3 in accordance with CCDM 35.5.21(13). APJP Branch 3 will inform the Associate Chief Counsel (Procedure and Administration), who serves as the Sanctions Officer for the Office of Chief Counsel. Allegations or evidence of an attorney's professional misconduct under the ABA Model Rules will also be referred through the appropriate management chain to the Deputy Chief Counsel (Operations) after coordination with the Claims, Labor & Personnel Law Branch of the Office of Associate Chief Counsel (General Legal Services).

For further information regarding this notice, contact William Heard at (202) 622-7950.

/s/
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(Procedure and Administration)