

You advise that you began representing two taxpayers in 1985 who were formerly married and had filed joint tax returns for the tax years 1981 and 1982. Your representation included the writing of a protest letter to the Internal Revenue Service and appearance at the appeals level on your client's behalf. When you were employed by the taxpayers, there did not appear to be a conflict with your representation of both. The IRS was basically contesting business expenses and various deductions. However, since your initial representation, the Internal Revenue Code has been revised to include a more liberal provision for the "innocent spouse rule." This rule allows the spouse filing a joint return to escape a liability under certain circumstances, thereby making the remaining taxpayer solely liable for the taxes, penalties and interest.

You recently met with the Internal Revenue Service, and an agent suggested that the more liberalized "innocent spouse rule" may be applicable to one of your clients. You advise that a successful argument using the "innocent spouse rule" would resolve one taxpayer of all liability.

You pose the following questions:

1. Whether there is a conflict of interest in representing both taxpayers and arguing the "innocent spouse rule" for the one spouse;
2. Even if there is a conflict in continuing to represent both taxpayers and arguing the "innocent spouse rule," whether this disclosure to the client and consent to further representation is sufficient to continue the representation of both; and
3. If continued representation of both taxpayers is not permissible, whether it would be permissible to continue to represent the taxpayer who is not the beneficiary of the "innocent spouse rule."

The Committee will respond to your questions in the order presented.

DR:5-105(B) states: "A lawyer shall not continue multiple employment if the exercise of his independent, professional judgment on behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR:5-105(C)." DR:5-105(C) states that in situations covered by DR:5-105(A) and (B), a lawyer may represent multiple clients if it is obvious he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent, professional judgment on behalf of each.

With regard to your first question, since arguing the "innocent spouse rule" for one client may adversely affect the other, the Committee opines that unless disclosure is made to both clients and both clients consent to the representation, it would be improper for you to continue the multiple representation.

In response to your second question, continued representation of both would be proper only if disclosure is made to both clients and both client's consent.

With regard to your last question, DR:5-105(D) states that "A lawyer who has represented a client in a matter shall not thereafter represent another person in the same

or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure." The Committee opines that you must obtain the consent of the former client before proceeding in your representation of the other client.

Committee Opinion

June 14, 1988