



The IRS Examination - Responding to Document Requests, Interview Requests, Summonses and Third Party Contacts

Three (3) Free NY & NJ CLE, CPE, and EA CE Credits

Tax Professionals that attend the seminar are encouraged to accept a pro bono tax controversy case assignment from NYCLA, an ABA-sponsored Tax Court Pro Bono program or a NY or NJ Low-Income Tax Clinic

| WHEN | WHERE |
|---|--|
| <p>Tuesday, January 8, 2019</p> <p>Registration/Pizza @ 5:30 PM</p> <p>Seminar: 6:00 PM – 9:00 PM</p> | <p>Bergen Community College</p> <p>Ciarco Learning Center</p> <p>355 Main Street Room 102/103 Hackensack, NJ 07601</p> |

| Learning Objective | |
|--|---|
| This class will review the IRS examination, including: | |
| <p>Responding to Document Requests</p> <p>Responding to Interview Requests</p> | <p>Responding to Interview Requests</p> <p>Summonses and Third Party Contacts</p> |

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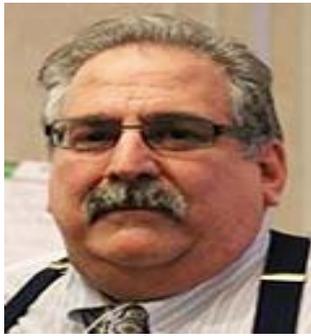
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TIMED AGENDA

The IRS Examination – Responding to Document Requests, Interview
Requests, Summonses and Third Party Contacts

January 8, 2019 (6 pm – 9 pm)

- 6:00 - 6:05 Introduction & Opening Remarks**
Frank Agostino, Esq., Agostino & Associates, PC
- 6:05 – 6:15 Preparing for the Audit**
Frank Agostino, Esq., Agostino & Associates, PC
- 6:15 – 6:45 IDR Considerations and Responding to the IDR**
Christina Sierra, Esq., Agostino & Associates, PC
- 6:45 – 6:55 IDR Enforcement Process**
Frank Agostino, Esq., Agostino & Associates, PC
- 6:55 – 7:05 Break**
- 7:05 – 7:30 Privileges, Rule 4.4 and Circular 230**
Joseph Stackhouse, Agostino & Associates, PC
- 7:30 - 7:45 I.R.C. § 982 and the Formal Document Request Overview**
Phillip Colasanto, Esq., Agostino & Associates, PC
- 7:45 – 7:55 Substantial Compliance and Quashing the FDR**
Frank Agostino, Esq., Agostino & Associates, PC
- 7:55 – 8:05 I.R.C. §§ 7811 and 7803, Form 911 and Translation Services**
Frank Agostino, Esq., Agostino & Associates, PC
- 8:05 – 8:15 Break**
- 8:15 – 8:30 IRS Summons Power and the Validity of the Summons**
Frank Agostino, Esq., Agostino & Associates, PC
- 8:30 - 8:55 The Summons Interview**
Phillip Colasanto, Esq., Agostino & Associates,
- 8:55 – 9:00 Closing Remarks and Questions and Answers**



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Profile

Frank Agostino is the president of Agostino & Associates, P.C., a law firm in Hackensack, New Jersey specializing in civil and white collar criminal litigation, tax controversies and tax planning.

Prior to entering private practice, Mr. Agostino was an attorney with the Internal Revenue Service's District Counsel in Springfield, Illinois and Newark, New Jersey. He also served as a Special Assistant United States Attorney, where he prosecuted primarily criminal tax cases.

As an adjunct professor, Mr. Agostino taught tax controversy at Rutgers School of Law and served as the co-director of the Rutgers Federal Tax Law Clinic.

Mr. Agostino is a frequent speaker and author on tax controversy and litigation matters. He serves on the Advisory Board of the Journal of Tax Practice and Procedure. Mr. Agostino is actively involved with the American Bar Association and the New York County Lawyers' Association.

Mr. Agostino is also the President of the Taxpayers Assistance Corp., which provides tax and legal advice to low income taxpayers in the NY/NJ area.

Recent Publications

- *Tax Practitioner's Guide to Identity Theft* (CCH Inc., 2017, ISBN 978-0-8080-4556-4)
- *Recent Developments in FATCA Compliance*, 93 TAXES 51 (July 2015)
- *A 21st-Century Approach to Litigating Valuation Issues*, 17 J. TAX PRAC. & PROC. 47 (Apr.-May 2015)
- *Reviving Disallowed Charitable Conservation Easement Deductions*, 146 TAX NOTES 449 (Apr. 27, 2015)
- *Be Prepared: The IRS's Duty to Foster Voluntary Compliance Through Code Secs. 6014(a) and 6020(a)*, 17 J. TAX PRAC. & PROC. 5 (Feb.-Mar. 2014)

Practice Areas

- Civil Tax
- Criminal Tax
- White Collar Defense

Education

- LL.M., Taxation, New York University School of Law
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Awards & Recognition

- Recipient, ABA's 2012 Janet Spragens Pro Bono Award
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Phillip Colasanto is an attorney at Agostino & Associates, P.C. where he focuses on tax controversy and litigation. Prior to coming to Agostino & Associates, Mr. Colasanto practiced civil litigation throughout New York and New Jersey. Mr. Colasanto has recently had articles published in Bloomberg BNA's Tax Management Real Estate Journal, and in the Journal of Tax Procedure and Policy. While practicing civil litigation, Mr. Colasanto was recognized by New York Verdict Search for having one of the highest verdicts in Richmond County. Mr. Colasanto is a graduate of New York Law School, where he was a John Marshall Harlan Scholar and a Senior Editor of the New York Law School Law Review.

Christina Sierra is an associate at Agostino & Associates, P.C. where she focuses on tax issues and controversies on the state and federal level. Ms. Sierra received a J.D. and LL.M. in Taxation from New York Law School.

Joseph A. Stackhouse, Jr. is an associate at Agostino & Associates, P.C. where he focuses on tax controversy. Mr. Stackhouse received his Juris Doctor degree and an LL.M in taxation from New York Law School. Mr. Stackhouse graduated with a B.B.A in Accounting and Legal Studies from Temple University.

POTTED PLANT V. RAMBO: SUMMONS INTERVIEW TECHNIQUES

I. POTTED PLANT V. RAMBO DEFINED:

- A. Potted Plant:** The potted plant metaphor dates back to a reference made by attorney Brendan V. Sullivan, attorney for Lieutenant Colonel Oliver North during the Iran-Contra Hearings. Daniel Inouye, chairman of the Iran Contra committee, admonished Mr. Sullivan that while Mr. North could object to questions, congressional rules prohibited the witness' lawyer from objecting. Mr. Sullivan responded to Mr. Inouye stating "[w]ell sir, I'm not a potted plant. I'm here as the lawyer. That's my job." See David H. Taylor, *Rambo as Potted Plant: Local Rulemaking's Preemptive Strike Against Witness Coaching During Depositions*, 40 Villanova Law Review, Issue 4, page 1057 fn.1.
- B. Rambo:** Rambo representation, on the contrary, is when the tax professional views his ethical responsibility for zealous representation as a call for scorched earth opposition tactics. Rambo advocacy preaches lack of cooperation with the IRS and incivility. *The Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 1456 F.R.D. 205, 216 (April 30, 1992).

II. INTERNAL REVENUE SERVICE SUMMONS POWER;

- A. I.R.C. § 7602:** “[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—“
- (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
 - (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such

person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

- (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.”
I.R.C. § 7602(a).

B. Limitations on summons power: the Internal Revenue Service (“IRS”) generally has broad summons power but it may not issue a summons in the following situations:

- (1) summoning a third party without giving the taxpayer reasonable notice (I.R.C. § 7602(c));¹
- (2) the IRS may not issue a summons or begin a summons enforcement action, under I.R.C. § 7604, if a Justice Department referral is in effect (I.R.C. § 7602(d));
- (3) the IRS may not use financial status or economic reality techniques to determine the existence of unreported income unless the Secretary has a reasonable indication that there is a likelihood of unreported income (I.R.C. § 7602(e)).

C. Service of summons: a summons, which must identify items to be produced with reasonable certainty, must be properly served on the taxpayer or third party.

¹ Prior notice to the taxpayer is not required if: 1) the taxpayer has previously authorized contact with the third party; 2) the Secretary determines for good cause shown that notice would jeopardize collection of any tax or such notice may involve reprisal against any person; or, 3) it is done with respect to any pending criminal investigation. I.R.C. § 7602(c)(3).

- (1) Service: a summons is properly issued if the Secretary serves an attested copy via delivery in hand to the person to whom it is directed or leaves a copy at such person's last and usual place of abode. I.R.C. § 7603(a). The certificate of service by the person serving the summons shall be evidence.
- (2) Service upon third party: summonses to third-party recordkeepers can be served as indicated above or by certified or registered mail to the last known address of the recordkeeper. I.R.C. § 7603(b).
 - a) Third-party recordkeeper: a third-party recordkeeper means:
 - i) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));
 - ii) any consumer reporting agency (as defined under section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)));
 - iii) any person extending credit through the use of credit cards or similar devices;
 - iv) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)));
 - v) any attorney;
 - vi) any accountant;

- vii) any barter exchange (as defined in section 6045(c)(3));
 - viii) any regulated investment company (as defined in section 851) and any agent of such regulated investment company when acting as an agent thereof;
 - ix) any enrolled agent; and
 - x) any owner or developer of a computer software source code (as defined in section 7612(d)(2)). I.R.C. § 7603(b)(2).
- (3) Summonses do not need to be served on persons of suitable age and discretion because: the purpose of an IRS summons is not to accuse but to inquire, United States v. Bisceglia, 420 U.S. 141, 146 (1975); and the summons itself is not self-executing and can only be enforced if the IRS brings an enforcement proceeding, which requires full service of process under Due Process principles. United States v. Samuels, Kramer & Co., 712 F.2d 1342, 1344 (9th Cir. 1983).

D. Time, Place, and Location:

- (1) The time and place for the examination must be reasonable, and so long as the taxpayer has been cooperative, the I.R.M. generally instructs agents to make the summons returnable at a place that suits the witness' convenience and at an office within the witness' commute area.
- a) Treas. Reg. § 301.7605-1 provides that a reasonable time for the examination is normal business hours, and that a reasonable place can be the IRS Office in the district where the taxpayer resides or at the taxpayer's place of business.

- b) The taxpayer may request that the IRS change the location of the examination. Requests are reviewed on a case-by-case basis. The IRS evaluates such requests based on the following factors:
 - i) the location of the taxpayer's residence;
 - ii) the location of the taxpayer's current principal place of business;
 - iii) the location at which the taxpayer's books, records, and source documents are maintained;
 - iv) the location at which the IRS can perform the examination most efficiently;
 - v) the IRS resources available at the location requested by the taxpayer; and
 - vi) any other factor indicating that conducting the examination at the location on the summons could pose an inconvenience to the taxpayer. Treas. Reg. § 301.7605-1(e).

- (2) I.R.M., pt. 25.5.3.4, *Time and Place of Examination Set by Summons* (Aug. 1, 2016), provides that the date of the examination must be 10 full days after service (excluding the date of service and including the date of appearance) and that the date set for appearance should not be on a Saturday, Sunday, or legal holiday.

- (3) In the case of a summons served on a third party, the taxpayer must be given notice of that summons within 3 days of the date on which the summons was served on the third party, and at least 23 days prior to the return date of the summons. I.R.C. §7609(a).

- (4) The time and place of examination shall be at such time and place as may be reasonable under the circumstances. I.R.C. § 7605(a).

E. Summons requirements: for a summons to be proper it must request information, and it must not be vague, overbroad, or overly burdensome. *See* United States v. Powell, 379 U.S. 48 (1964); United States v. Harrington, 388 F.2d 520 (2d Cir. 1968); United States v. Morton Salt Co., 388 U.S. 632, 652 (1950). IRS summonses must provide witnesses with a witness fee and, if books and records are requested, reimbursement for costs reasonably incurred in search for, reproducing, or transporting the summoned documents. I.R.C. § 7610.

- (1) Taxpayers shall not be subjected to unnecessary examination or investigations and only one inspection shall be made of a taxpayer's books and records unless the taxpayer requests otherwise or the Secretary notifies the taxpayer in writing that an additional inspection is necessary.

F. Validity of the summons and the *Powell* test: in United States v. Powell, 379 U.S. 48 (1964), the Supreme Court established four criteria for determining whether a summons was valid:

- (1) there is a legitimate purpose for the IRS examination;
- (2) the information summoned may (not must) be relevant to that purpose;
 - a) The test for "relevancy" focuses upon "having the potential to shed light on any aspect of the taxpayer's return." United States v. Arthur Young & Co., 465 U.S. 805, 814 (1984).
- (3) the information is not already in the possession of the IRS; and
- (4) the IRS has complied with all administrative steps required by the Code and relevant Treasury Regulations.

III. CHALLENGING A SUMMONS:

- A. Enforcement of summons:** IRS summonses are not self-enforcing. The IRS must seek to enforce the summons in the appropriate United States district court. *See* I.R.C. § 7604. Taxpayers do not have the ability to challenge the summons until the IRS moves to enforce it.
- B. Quashing third-party summonses:** although taxpayers may not challenge summons they receive, they do have the right to challenge a summons sent to a third party if they are the target of the investigation. *See* I.R.C § 7609.
- (1) Taxpayer has 20 days from service to quash the proceeding by bringing an action in the U.S. district court. I.R.C. § 7609(b). Compliance with the 20-day limit should be strictly complied with because equitable tolling may not be available against the United States as a sovereign entity. *See* Villella v. United States, 2000 WL 9668773 (S.D.N.Y 2000).
 - (2) Notice of the summons is to be served on the taxpayer within three days of the date on which the summons is served on the third party but no later than 23 days prior to the date fixed in the summons as the date on which the examination is scheduled. I.R.C. § 7609(a)(1); Treas. Reg. § 301.7609-2(a)(2).
- C. Taxpayer options:** if the taxpayer does not want to wait for the IRS to begin an enforcement action then the taxpayer can seek assistance from the Taxpayer Advocate Service (“TAS”). The TAS assists taxpayers who are suffering or about to suffer a significant hardship. I.R.C. § 7811(a). A significant hardship includes an immediate threat of adverse action or irreparable injury to the taxpayer. I.R.C. § 7811(a)(2). Significant costs for professional representation constitute a proper basis for threatened or actual significant harm. I.R.C. § 7811(a)(2)(C). In order to seek assistance from the TAS, the taxpayer must file a Form 911, *Request for Taxpayer Advocate Service Assistance*.

IV. SUMMONS INTERVIEW:

A. Difference between summons interview and subpoena/deposition: summonses are not self-executing and if the taxpayer does not agree to voluntarily appear then the summons must be enforced to mandate an appearance. Aside from enforcing the interview, there are two main differences between a summons interview and a deposition:

- (1) I.R.C. § 7521(a) allows for the taxpayer to request a transcribed interview but a summons interview is not automatically transcribed.
- (2) I.R.C. § 7521(b) allows the taxpayer to terminate the interview at any time or consult with his professional at any time, which is not allowed during depositions.

B. Procedures for summons interview: the focal point of representing a taxpayer during a summons interview is to ensure that the taxpayer's rights are protected. This includes the right of the taxpayer to exercise self-help, *see Reineman v. United States*, 301 F.2d 267 (7th Cir. 1962), the right to refuse unreasonable requests, I.R.M., pt. 25.5.5.4.6 (April 30, 1999), and to suspend the summons interview. I.R.C. § 7521(b)(2); I.R.M., pt. 25.5.5.4.2(1),(2) (Dec. 18, 2015).

- (1) Scope: summons interviews are very broad, and have been described as "inquisitorial." The IRS has authority to inquire about any information or data which may relate to ascertaining the correctness of any return. The language "any return" suggests that even if the particular return or particular tax year was not mentioned directly in the summons itself, the IRS may ask questions at the interview about it. I.R.C. §7602; *United States v. Turner*, 480 F.2d 272, 278-9 (7th Cir. 1973); *DiPazza v. United States*, 415 F.2d 99, 103 (6th Cir. 1969); *Tillotson v. Boughner*, 225 F.Supp. 45, 46 (N.D.Ill. 1963).

- (2) Who may be present at summons interview: I.R.C. § 7521 and 5 U.S.C. § 555(b) provide that the taxpayer may be represented by tax counsel or by a tax professional at an IRS interview. The Taxpayer Bill of Rights similarly provides that the taxpayer may retain representation. I.R.M., pt. 25.5.5.4.2 (2), *Right to Be Represented by Counsel* (Dec. 18, 2015), recognizes the taxpayer's right to stop an interview to consult with his tax professional.
- a) Although I.R.C. § 7521 technically does not apply to interviews under an IRS Summons, as a practical matter, the taxpayer can refuse to answer questions unless the IRS allows the tax professional to accompany the taxpayer.
 - b) If the tax professional has caused "unreasonable delay or hindrance" to the IRS in its investigation, the IRS agent is permitted, with the consent of his supervisor, to notify the taxpayer of that determination and potentially exclude the professional, if necessary. I.R.C. §7521(c).
 - c) Where the IRS notifies the taxpayer that his representative is responsible for undue delay and hindrance, the IRS may use I.R.M. procedures to bypass the taxpayer's professional and potentially exclude him from the questioning.
 - d) A third party who receives an IRS Summons is similarly entitled to have a tax professional accompany him to the IRS interview. However, the taxpayer does not have a right to be present (or to have his tax professional present) unless the third party consents. United States v. Newman, 441 F.2d 165 (5th Cir. 1971).
 - i) I.R.M., pt. 25.5.5.5.7, *Third Party Witness's Choice of Representative* (Oct. 28, 2011) provides that the summoned witness may

consent to have observers present, including the taxpayer and his tax professional, provided that:

- (A) the observers are silent and do not participate in or disrupt the interview in any manner;
 - (B) the taxpayer being investigated provides written consent allowing the disclosure of return information to all attending the interview; and;
 - (C) the disclosure of that return information will not seriously impair federal tax administration.
- (3) Transcripts and recording interview: the IRS may record the interview if it gives the taxpayer advance notice and offers the taxpayer a transcript or copy of the recording at the taxpayer's expense. I.R.C. § 7521(a)(2). Aside from the IRS, any person compelled to submit testimony is entitled, as a matter of right, to a transcript of that testimony under federal law. If the taxpayer receives the IRS Summons, the tax professional should request that the IRS provide the taxpayer with a copy of the transcript of the proceeding. 5 U.S.C. § 555(c).
- a) The tax professional should consult with any third-party witness that receives an IRS Summons and ensure that person requests a transcript.
 - b) For non-criminal investigations, the taxpayer is entitled to make an audio recording of the interview, at his own expense, provided he gives the IRS advance notice. I.R.C. § 7521(a)(1). I.R.M., pt. 25.5.5.4.4, *Right to Make an Audio Recording of the Proceeding* (Dec. 18, 2015) acknowledges that the taxpayer may record the proceedings if notice is received at least 10 days before the interview. IRS Notice 89-51, *Procedures Involving Taxpayer Interviews*,

provides that the taxpayer may make an audio recording of the proceedings under the following conditions:

- i) The taxpayer or authorized representative supplies the recording equipment;
 - ii) The Service may produce its own recording of the proceedings (using the Service's equipment);
 - iii) The recording takes place in a suitable location, ordinarily in an Internal Revenue Service office where equipment is available to produce the Service's recording; and
 - iv) All participants in the proceeding other than Service personnel must consent to making the audio recording and all participants must identify themselves and their roles in the proceeding.
- c) It should be noted that the taxpayer may not make a video or film recording, nor record a telephone interview. *See* I.R.M., pt. 5.1.12.3.2, *Deny Requests for Video or Film Interviews* (Sep. 20, 2012); I.R.M., pt. 4.10.3.3.6(1), *Requests to Audio Record Interviews* (Feb. 26, 2016); I.R.M., pt. 5.1.12.3(3), *Taxpayer Recording of Interviews* (Aug. 5, 2014).
- (4) Objecting during the summons interview: the scope of questioning permitted by an IRS Summons is broad to ensure that the IRS enforcement powers are not unduly restricted at the investigatory stage. Nonetheless, the tax professional must be prepared to object when necessary to protect the client's rights, and avoid waiver of

privileges. All objections are permitted until the IRS gets an enforcement judgment from the court denying the objections. Alphin v. United States, 809 F.2d 236, 238 (4th Cir. 1987).

- a) If objections are deemed to hinder and/or delay the proceedings, the tax professional may ultimately be excluded from the interview. However, I.R.M., pt. 25.5.5.5.2(3), *Obstruction of Interview* (April 30, 1999) provides that the obstruction must be "active" before disqualification will be sought, and that the facts must "clearly indicate that [the attorney] has actively impeded the investigation."

C. Privileges to consider during summons interview: one of the major considerations whenever representing a client or tax professional undergoing a summons interview is how to invoke and protect privilege. Although there are several privileges, the most important for our purposes are: the Fifth Amendment privilege; the attorney-client privilege; the tax practitioner privilege; the joint-defense privilege; and the marital privileges.

- (1) Fifth Amendment: the most important privilege attorneys must assert is the Fifth Amendment privilege against self-incrimination. The Fifth Amendment privilege states that "no person shall be...compelled in any criminal case to be a witness against himself." *United States Const. Am. V.*
 - a) The IRS may deem a witness who fails to invoke his Fifth Amendment privilege as waiving it regarding further questioning on the same subject. However, courts generally construe the waiver narrowly. Rogers v. United States, 340 U.S. 367 (1951); Emspak v. United States, 349 U.S. 190 (1955).
 - b) The Fifth Amendment privilege is only validly invoked when the witness has a reasonable and good faith belief that answering a question would

create a "substantial hazard" of incriminating himself. United States v. Rendahl, 746 F.2d 553 (9th Cir. 1984); United States v. Neff, 615 F.2d 1235 (9th Cir. 1980); United States v. Schmidt, 816 F. 2d 1477 (10th Cir. 1984); Clark v. Commissioner, 744 F.2d 1447 (10th Cir. 1984).

- c) Fifth Amendment privilege must be asserted on a question-by-question basis during the interview or on a document-by-document basis prior to the interview. United States v. Bodwell, 66 F.3d 1000 (9th Cir. 1995); United States v. Allshouse, 622 F.3d 53 (3d Cir. 1980); United States v. Bell, 448 F.2d 40 (9th Cir. 1971); In re Lipnock, 831 F.2d 225 (11th Cir. 1987).
- d) The Fifth Amendment privilege does not apply when the compelled testimony could subject the witness to prosecution in a foreign country, as opposed to the United States. However, there is case law that provides that if the witness was compelled to give testimony to a foreign government in violation of the witness' Fifth Amendment rights, the compelled foreign testimony cannot be used in U.S. courts. United States v. Balsys, 524 U.S. 666 (1998); United States v. Allen, 864 F.3d 63 (2d Cir. 2017).
- e) We caution the tax professional that the Fifth Amendment privilege is personal to the taxpayer, and does not extend to testimony or production of documents by third parties. However, third-party testimony or production of documents may be protected by another privilege. Couch v. United States, 409 U.S. 322 (1973).

- (2) Attorney-client: the attorney-client privilege is another critical privilege that must be protected when the taxpayer is subject to IRS questioning. The attorney-client privilege is the “oldest of the privileges for confidential communications” 8 John Henry Wigmore, Evidence § 2290. “Its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Upjohn Co. v. United States, 449 U.S. 383 (1981).
- a) The attorney may also assert the attorney client privilege to protect himself during questioning. Fisher v. United States, 425 U.S. 391 (1976); In re Grand Jury Subpoenas Dated October 22, 1991 and November 1, 1991, 959 F.2d 1158 (2d Cir. 1992); In re Grand Jury Proceedings on February 4, 1982, 759 F.2d. 1418 (9th Cir. 1985).
 - b) A taxpayer or attorney may invoke the attorney-client privilege if:
 - i) The taxpayer was a client of the attorney, or sought to become the attorney’s client;
 - ii) The attorney was offering counsel in his capacity as an attorney and was admitted to practice law in the jurisdiction where counsel was given; and
 - iii) The taxpayer and attorney communicated for the purpose of receiving and giving legal counsel. United States v. Lawless, 709 F.2d 485 (7th Cir. 1983).
 - c) Typically, communications held while a third party is present will effectively waive the privilege.
 - d) If the attorney is complicit in some criminal activity on the part of the client, the attorney may

be able to assert a Fifth Amendment privilege to protect himself. However, the crime-fraud exception prevents the application of the attorney-client privilege and Fifth Amendment privilege where the IRS establishes that the client communicated with the attorney to commit a crime or fraud rather than for legal advice. In re Grand Jury Investigation (the Corporation), 87 F.3d 377 (9th Cir. 1996); United States v. Zolin, 491 U.S. 554 (1989).

- e) Kovel Extension of the Attorney-Client Privilege:
 - i) Under United States. v. Kovel, 296 F.2d 918 (2d Cir. 1961), the attorney-client privilege may extend to communications made by an attorney's client to an accountant the attorney employs as part of obtaining legal advice from the attorney.
 - ii) A Kovel Agreement is where an attorney hires an accountant to assist the attorney in counseling the client. Accountants who perform work subject to a "Kovel Agreement" are also protected by the attorney-client privilege.
- (3) Tax Practitioner: I.R.C. § 7525(a)(1) provides that "With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney."
- a) I.R.M., pt. 25.5.5.4.3 (1)(b), *Privileged Communications and Summons* (Dec. 18, 2015) recognizes the extension of the attorney-client

privilege to non-attorney professionals, as provided by I.R.C. § 7525, when the following conditions are met:

- i) the person is a tax professional as defined by I.R.C. § 7525;
 - ii) the client came to the tax professional for tax advice unrelated to a tax shelter; and
 - iii) the matter is not criminal.
- b) When the tax professional himself is the person who receives the summons, he must be prepared to protect the taxpayer's rights by asserting the privilege on the taxpayer's behalf.
- (4) Common interest/Joint defense: another privilege sometimes applicable is the Common Interest, or Joint Defense, Privilege. This privilege extends the attorney-client privilege to allow attorneys representing different parties with common interests to collaborate without waiving either of their privileges. *See, e.g., United States v. Hsia*, 81 F.Supp.2d 7, 16 (D.D.C. 2000); *Power Mosfet Techs. v. Siemens AG*, 206 F.R.D. 422, 424 (E.D. Tex. 2000).
- a) To establish the existence of a joint defense privilege, the party asserting the privilege must show that:
 - i) the communications were made in a joint defense effort;
 - ii) the statements furthered the effort; and
 - iii) the privilege has not been waived. *Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 126 (3d Cir. 1986).

- (5) Marital: there are two relevant marital privileges: the spousal communications privilege and the spousal immunity, or spousal adverse testimonial, privilege.
- a) The Spousal Communications Privilege protects information privately disclosed between husband and wife in the confidence of the marital relationship. United States v. Brock, 724 F.3d 817, 820 (7th Cir. 2013)(citing Trammel v. United States, 445 U.S. 40, 51 (1980) and Blau v. United States, 340 United States 332, 333 (1951)); United States v. Lofton, 957 F.2d 476, 477 (7th Cir. 1992).
 - i) Either spouse may invoke this privilege to prevent the other from testifying about confidential and private communications between the spouses.
 - ii) The spousal communications privilege survives divorce.
 - iii) This privilege applies only to communications between the spouses and does not protect observations or other non-verbal conduct.
 - iv) As with the attorney-client privilege, the spousal communications privilege is waived if the communication is made in the presence of a third party.
 - b) The Spousal Immunity, or Spousal Adverse Testimonial, privilege protects a witness spouse from giving compelled testimony against the other spouse in a criminal proceeding.
 - i) The privilege may only be asserted by the spouse being compelled to testify.

- ii) This privilege does not survive if the marriage ends, but it protects all facts - not just communications.
 - iii) If an ex-spouse is not friendly toward the tax professional's client, outreach should still be made to see if the spouse would invoke the privilege.
 - iv) Quite often spouses, and even separated spouses, find it beneficial to invoke the spousal immunity privilege. One spouse's wrongdoings tend to affect the other spouse in unexpected ways.
- c) Regarding both marital privileges, the tax professional must be careful to protect the taxpayer from waiver of the privileges.

V. AFTER THE INTERVIEW:

- A. **Litigation:** after the summons process, litigation may ensue. If a taxpayer does not comply during the summons and interview process, how can/will that impact future litigation?
- B. **Greenberg's Express:** Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324 (1974), generally stands for the proposition that the Tax Court will not look behind the notice of deficiency. So, as a preliminary matter, the Tax Court will not look to what happened during the summons and interview process to resolve the issues before the court. *See also* United States v. Nordberg, 1996 WL 170119 (D. Mass. 1996); Federal Deposit Insurance Corp. v. Berling, 2015 WL 3777408 (D. Colo. 2015).
- C. **I.R.C. § 7491:** allows the taxpayer, after presentation of credible evidence with respect to any factual issue relevant to ascertaining tax liability, to shift the burden of proof onto the Secretary if: the taxpayer complied with the requirements under Title 26 to substantiate any item; and maintained all required

records and cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews. This provision applies to any court proceeding. I.R.C. § 7491(a). The taxpayer is able to shift the burden of proof by showing compliance during the interview process.

(1) Kohler v. Commissioner, T.C. Memo. 2006-152: burden of proof shifted to the IRS because petitioner introduced credible evidence regarding substantiation, maintained the required books and records, and cooperated with the Commissioner's reasonable requests.

D. I.R.C. § 982: if taxpayer does not substantially comply with any formal document request ("FDR") then any court having jurisdiction over a civil proceeding in which the FDR applied shall prohibit the taxpayer from introducing any foreign-based documentation requested by the FDR.

Preparing for the Audit

- After the a client receives an audit notice:
 - Trust but verify
 - Interview the taxpayer;
 - Review client correspondence received from IRS;
 - Obtain and review Wage & Income and account transcripts of account;
 - File a Freedom of Information Act request.

Complete the Fact-finding Needed to Determine the Appropriate Course of Action

- Review the Information Provided by the Taxpayer, including most recent tax returns
- Review and Understand the W&I Transcripts and the Record of Account
- Review and understand every code on the transcripts and know where the taxpayer is in the process.
- Review the material in the IRS FOIA response
- Review the Client's Credit Reports
- Review the results of Westlaw and TLO searches

Information Document Requests

The Information Document Request (IDR):

- ✓ Provides a check list to assist in organizing documents
- ✓ Each IDR # helps to track the audit
- ✓ Documents the deadline to be ready or have information to IRS
- ✓ Gives you a “road map” to what the IRS agent is looking for.

Information Document Requests (IDR)

- IRS IDRs must be narrowly tailored to issues.
- IDRs must be written using clear and concise language.
- IRS cannot go on fishing expeditions.
- IDRs can be problematic.
- Discussion with the Taxpayer about IDRs is VERY IMPORTANT:
 - Discuss how the issue is related to the IDR.
 - Discuss how the information requested is related to the issue under consideration and why it is necessary.
 - What documents does the Taxpayer have?
 - What documents do not exist?
 - What documents cannot be produced?

Important Questions To Consider

- After consultation with Taxpayer, determine what information you will produce.
 - Should you put them in order?
 - Is the IRS asking you to make summaries?
 - Is there a mileage log issue?
 - Do you need to recreate documents?
 - What if there are no receipts?
 - What should you do if the auditor keeps asking for more information? (i.e. you are now on IDR number 8)
 - What should you do if the auditor is getting into a sensitive area?
 - Can you say no?

IRS's Recognition of Limits

- I.R.M., pt. 25.5.4.2(5) states “[a] summons can only require a witness to appear on a given date to give testimony and to bring existing books, papers, and records. A summons cannot require a witness to prepare or create documents, including tax returns that are not currently in existence”.
- It then reiterates, “[b]y issuing an administrative summons, the Service cannot force a taxpayer to create a document, including a Collection Information Statement or a delinquent tax return.” I.R.M., pt. 25.5.4.2.1(1).

25.5.4.2.1 (10-04-2006)

a) Collection

1. By issuing an administrative summons, the Service cannot force a taxpayer to create a document, including a Collection Information Statement or a delinquent tax return. However, if a summoned taxpayer is willing to do so, collection personnel are authorized to:
 - A. Prepare or assist the taxpayer in preparing such statements or returns based on the records produced.
 - B. Prepare summaries or lists from books, papers, records, and testimony obtained at the time of examination.

Limits on IRS's Authority

- Under the authority granted in I.R.C. § 7602(a)(1) & (2), IRS is authorized to request the production of “books, papers, records, or other data.”
- Congress did not authorize IRS to require the creation of documents or other data for examination. I.R.C. § 7602, *United States v. Brown*, 536 F.2d 117 (6th Cir. 1976).
- The courts have held that when the government seeks either oral testimony or the generation of new documents, the requests are not enforceable. *Id.*, 536 F.2d at 123; *United States v. O'Shea*, 662 F.Supp.2d 535, 549 (S.D.W.Va. 2009).

Acceptable Backup

- The receipt and the form of payment;
- If a credit card is used be sure to show the taxpayer is the holder of the card;
- When a receipt is from a store such as Costco, it will be needed with explanations;
- When no receipt is present it will be at the auditors discretion to allow;
- What if there are no documents?
- *Note: though they want original receipts the auditors understand that originals do not hold up well, and will accept copies in most cases.*

Mileage Log

- Whether claiming standard mileage rate or actual expenses a mileage log is needed.
- The more detail the better: who, where, and why;
- The total mileage driven will also need to be supported, have repair receipts available to show the odometer reading;
- What if there is no mileage log? Should the taxpayer create one?

Best Practices and Traps for IDRs

- Once a document is turned over, an admission is put in writing, a spreadsheet is created at the examiner's request, or a recorded interview is complete, you CANNOT take back the document, the admission, the spreadsheet, or the interview responses.
- Turn over only what is asked, required, and not privileged.

Responding to IDRs

- Creating a "Record"
 - Responses create an administrative record of the matter
 - Written Responses
 - Interview Responses
 - Documents
 - How to Respond to the Questions Asked
 - Direct and complete responses
 - Avoid tangential and expansive remarks unrelated to the question
 - Assert Appropriate Privileges
 - Attorney/client privilege
 - Work Product

IDR Enforcement Process

- **3 Step Process:**
 - Delinquency Notice;

- Pre-summons Letter; and
- Summons

I.R.M., pt. 4.46.4.6 (12-13-2018)

Information Document Request Process

- The Information Document Request (IDR) Process will be used for all LB&I examinations. The IDR Process is a structured process used when gathering information during an examination. It is intended to encourage collaboration between the taxpayer and the IRS to discuss and determine the necessary information for proper issue development.
- General procedures and enforcement procedures are part of the IDR Process found in *Exhibit 4.46.4-1* and *Exhibit 4.46.4-2*.

I.R.M., pt. 4.46.4.6.1 (12-13-2018)

General IDR Procedures

- A paper or electronic Form 4564, *Information Document Request (IDR)*, should be used to request information from the taxpayer. Three copies of the form should be prepared and distributed as follows:
 - The original will be given to the taxpayer.
 - A copy of the IDR (paper or electronic) will be filed in the IDR Log (if a paper log is maintained). The team coordinator is responsible for maintaining the IDR Log. Appropriate information should be listed in the log as IDRs are issued. The case manager is responsible for ensuring that the IDR Log is properly, accurately, and timely completed. IMS is used to track IDR status and enforcement.
 - A copy of the IDR (paper or electronic) will be maintained by the issuing examiner with the issue workpapers. IMS is also used for this purpose.
- IDRs are an important part of the information gathering process during any examination. When issuing IDRs, LB&I examiners must follow the requirements for issuing IDRs that are described in *Exhibit 4.46.4-1*, Requirements for Issuing IDRs.
- If a taxpayer indicates that any requested information will not be provided without a summons, then the IRS should move directly to issue a summons.

I.R.M., pt. 4.46.4.6.3 (12-13-2018)

LB&I IDR Enforcement Process

- IDRs must be in compliance with the general IDR procedures of I.R.M., pt. 4.46.4.6.1 before the IRS can issue a summons based on the IDR and later seek summons enforcement. The process for enforcing delinquent IDRs from delinquency to summons issuance has three graduated steps:
 - a Delinquency Notice
 - a Pre-Summons Letter

- a Summons
- This process is mandatory and has limited exceptions. It requires LB&I managers at all levels to be actively involved early in the process and ensures that Counsel is prepared to support IDRs through the issuance of a summons when necessary. If, during the discussion of an IDR, a taxpayer indicates that the requested information will not be provided without a summons, then the IDR enforcement procedures do not apply and the IRS should move directly to issue a summons.
- The timing of the enforcement process is described in *Exhibit 4.46.4-2*, IDR Enforcement Process.

4.46.4.6 (12-13-2018)

2. Information Document Request Process

1. The Information Document Request (IDR) Process will be used for all LB&I examinations. The IDR Process is a structured process used when gathering information during an examination. It is intended to encourage collaboration between the taxpayer and the IRS to discuss and determine the necessary information for proper issue development.
2. General procedures and enforcement procedures are part of the IDR Process found in *Exhibit 4.46.4-1* and *Exhibit 4.46.4-2*.

4.46.4.6.1 (12-13-2018)

a) General IDR Procedures

1. A paper or electronic Form 4564, Information Document Request (IDR), should be used to request information from the taxpayer. Three copies of the form should be prepared and distributed as follows:
 - A. The original will be given to the taxpayer.
 - B. A copy of the IDR (paper or electronic) will be filed in the IDR Log (if a paper log is maintained). The team coordinator is responsible for maintaining the IDR Log. Appropriate information should be listed in the log as IDRs are issued. The case manager is responsible for ensuring that the IDR Log is properly, accurately and timely completed. IMS is used to track IDR status and enforcement.
 - C. A copy of the IDR (paper or electronic) will be maintained by the issuing examiner with the issue workpapers. IMS is also used for this purpose.
2. IDRs are an important part of the information gathering process during any examination. When issuing IDRs, LB&I examiners must follow the requirements for issuing IDRs that are described in *Exhibit 4.46.4-1*, Requirements for Issuing IDRs.
3. If a taxpayer indicates that any requested information will not be provided without a summons, then the IRS should move directly to issue a summons.

4.46.4.6.2 (12-13-2018)

b) The Initial Transfer Pricing Documentation IDR

1. See IRM 4.61.3 regarding Issuing the Initial Transfer Pricing Documentation IDR for requesting the Taxpayer's IRC 6662(e) Documentation and the Transfer Pricing Examination Process guide for further processes for IRC 482 exams. The Initial Transfer Pricing Documentation IDR (see IRM 4.60.8.2) is issued in the following circumstances:
 - A. For examinations arising under approved LB&I campaigns, examination team members will follow the specific guidance for the Initial Transfer Pricing Documentation IDR provided for within the campaign. If no such guidance is provided, the procedures in item b. below, will apply.
 - B. For examinations with initial indications of transfer pricing compliance risk (considering the volume and type of transactions), Transfer Pricing Practice (TPP) and/or Cross Border Activities (CBA) Practice Area employees will issue the Initial Transfer Pricing Documentation IDR if assigned to the case. If TPP or CBA resources are not assigned as a consultant or team member to the case, the Initial Transfer Pricing Documentation IDR will not be issued.
 - C. In all circumstances, time expended for the issuance of the Initial Transfer Pricing Documentation IDR will be charged to SAIN 003 Preliminary Exam Time; UIL 00000.00-00 – Administrative Procedures until the examination team decides the issue will be developed and then the appropriate international UIL code (i.e., 9411, 9422, 9423) should be used.

4.46.4.6.3 (12-13-2018)

c) IDR Enforcement Process

1. IDRs must be in compliance with the general IDR procedures of IRM 4.46.4.6.1 before the IRS can issue a summons based on the IDR and later seek summons enforcement. The process for enforcing delinquent IDRs from delinquency to summons issuance has three graduated steps:
 - A. a Delinquency Notice
 - B. a Pre-Summons Letter
 - C. a Summons

This process is mandatory and has limited exceptions. It requires LB&I managers at all levels to be actively involved early in the process and ensures that Counsel is prepared to support IDRs through the issuance of a summons when necessary. If, during the discussion of an IDR, a taxpayer indicates that the requested information will not be provided without a summons, then the IDR enforcement procedures do not apply and the IRS should move directly to issue a summons.

2. The timing of the enforcement process is described in *Exhibit 4.46.4-2, IDR Enforcement Process*.

4.46.4.7 (12-13-2018)

3. Issue Management and Development

1. The issue manager is responsible for ensuring that the issue team is held accountable for the development of their respective issue(s). In addition, the issue manager must keep the case manager informed of the progress of the issue(s) and must inform the case manager of any potential impact the issue(s) may have on the case timeline. Any conflicts between the issue manager and the case manager about the development of an issue should be elevated to senior management.

4. Note:

If no issue manager is designated, the case manager is by default the issue manager.

2. The issue manager has primary responsibility for managing the issue(s) as described in IRM 4.46.1, LB&I Examination Process, General Information and Definitions.
3. In addition to the case manager responsibilities described in IRM 4.46.1, the case manager will support the issue manager in developing the issue(s).
4. Each issue will be risk assessed and evaluated as facts are developed. Information provided by taxpayers such as presentations, IDR responses or tax workpapers will be considered by the issue team for purposes of continuing, expanding, narrowing or dropping the issue(s).
5. Issue development should be monitored and documented contemporaneously. Methods to monitor include:
 - Taxpayer status meetings/discussions
 - Internal team meetings/discussions
 - On-site visits and case or issue reviews (See *Exhibit 4.46.4-5*)
 - Mid-cycle risk analysis
 - Conference calls/instant messaging
 - IBMIS reports
 - IMS Team website
6. The issue team will consult with SMEs and Counsel as needed.
7. To facilitate early issue resolution, NOPAs will be issued as soon as a tax determination is made or by the milestone date, whichever is sooner. NOPAs should not be held until the end of the examination.
8. The issue team must advise the taxpayer when a determination is made, or that no adjustment will be proposed and the issue is closed.

4.46.4.8 (12-13-2018)

5. Case Monitoring and Management

1. The case manager and team coordinator will monitor various aspects of the examination, and solicit the issue team's participation as needed. Monitoring the

progress of the examination is essential as the case manager must respond to changing circumstances.

2. The case manager will collaborate with issue managers on the progress and development of the issues. When changes are made that impact the ECD, the case manager will discuss changes with the issue managers and the taxpayer.
3. If extending an issue timeline requires extending the case timeline and the ECD, the issue manager will explain to the case manager the reason for extending the issue timeline and will also prepare a revised issue timeline with a written explanation. Once that issue manager and the case manager agree that extending the ECD is appropriate, they will follow practice area policy for requesting approval to extend the ECD and, if necessary, the statute of limitations.

4.46.4.9 (12-13-2018)

6. Continuous Risk Analysis

1. Examiners must use their professional judgment to determine which issues will continue to be examined or modified in scope. A change of issue team members or availability may necessitate a change in scope. New information discovered by LB&I during an examination may necessitate expanding or modifying the examination plan, including the addition of new issues to the examination plan.
2. When a new issue(s) is discovered during the examination, the case manager will follow LB&I policy to add new issue(s) to the examination plan.
3. New information provided by the taxpayer that could result in a refund will require a valid informal claim if there is nexus with an issue identified for examination; otherwise, a formal claim is required if the information is provided after the initial period to submit informal claims. Also see IRM 4.46.3.7, LB&I Claims Process.
4. The exam team will collaborate with the taxpayer to appropriately modify an existing timeline or establish an issue team and timeline when adding a new issue.
5. To ensure consistency and obtain additional technical expertise, Counsel and other technical experts should be consulted. This will enable the issue team to make the most effective and efficient decision for the government.
6. Materiality and compliance considerations will be evaluated when conducting the risk analysis for each issue. As soon as a determination is made, the issue team will timely inform the taxpayer whether an issue is being added, continued, expanded, narrowed, or dropped.
7. As new information is received, such as responses to IDRs, the issue team will risk-assess each issue on a continuous basis. The issue team will analyze the information and determine whether to continue or modify the examination procedures and issue timeline.
8. The issue team will keep the taxpayer informed of the status of each issue through discussions and/or scheduled meetings. These discussions should be interactive and provide the taxpayer an opportunity to submit additional supporting documentation, clarify any facts and explain their tax position. These interactive discussions should promote an efficient examination.

9. All parties should work together to resolve issues at the earliest appropriate point in the execution phase of the examination.

4.46.4.10 (12-13-2018)

7. Written Acknowledgment of the Facts (AOF)

1. Obtaining a written acknowledgment of facts was derived from a best practice of issuing a draft 886-A. This process will be used by LB&I issue teams on all potentially unagreed issues, unless an exception is met.
2. The purpose of issuing the pro-forma AOF IDR is to ensure the issue team has considered all the relevant facts before making a final tax determination on the issue. This may avoid subsequent delays in the examination and minimizes the possibility that a case will be returned from Appeals.
3. LB&I requires that all information, including all relevant facts and supporting documentation, be submitted to LB&I for consideration in the development of an issue. The taxpayer is responsible for ensuring the relevant facts have been provided to LB&I, so that the law may be applied to the full set of facts.
4. The issue team should collaborate with the taxpayer to develop all relevant facts before issuing a NOPA. The issue team is expected to conduct on-going interactive discussions throughout the execution phase to resolve any factual disputes and discuss tax positions on issues examined.
5. The acknowledgment of facts pro-forma IDR (*Exhibit 4.46.4-3*) will include a draft Form 886-A as an attachment. The draft Form 886-A will contain all sections as outlined in IRM 4.46.6.11, Explanation of Items: Form 886-A. This process will allow the issue team to address any additional or disputed facts identified by the taxpayer before completing the final Form 886-A and issuing a NOPA.
6. The taxpayer's response to the AOF IDR must be documented in the case file.
7. Although an AOF IDR is not required for agreed issues, a draft 886-A may be issued as a best practice.
8. The taxpayer must be informed that the case will be returned for additional development if the taxpayer provides materially new information after a case is closed to Appeals. See 8.7.11.5.3, Returning a Case to LB&I.
9. The issue team will strive to include all relevant facts in the draft Form 886-A; however, an issue team is not limited to the information contained in the draft Form 886-A when preparing the final Form 886-A. If additional information is included when the NOPA is issued, the taxpayer still retains a right to respond to that information in a written protest.
10. The issue manager will review the taxpayer's response to the acknowledgment of facts to assess the strengths and weaknesses of each side's position and to determine if the issue can be resolved at the examination level. In addition, the issue manager will ensure that all additional or disputed facts identified by the taxpayer in their AOF response are considered or addressed in the final 886-A/NOPA.

11. If the taxpayer does not respond by the agreed upon date, the examination should not be delayed. The issue manager will discuss the lack of response with the taxpayer and will issue the NOPA if the taxpayer does not intend to respond.
12. The AOF IDR may not be appropriate for all potentially unagreed issues in certain circumstances. The following should be considered when determining not to issue an AOF IDR:
 - A. The presence of fraud
 - B. The likelihood that a statutory notice will be issued due to an imminent statute
 - C. Extenuating circumstances such as risk of harm to the development of the issue

The issue team manager in consultation with the case manager should advise senior management of the reason(s) not to issue the AOF IDR. The decision to not issue the AOF IDR must be documented in the workpapers.

13. The AOF IDR may not be required for a NOPA assessing penalties. The issue manager, in consultation with the case manager, will apply the guidance discussed in this section to determine if it is appropriate to issue the AOF IDR on the assertion of penalties.

4.46.4.10.1 (12-13-2018)

a) Hold Issue Discussions

1. Discussions held early and often with the taxpayer during issue development will enable the issue team to make a timely tax determination for that issue. The issue team will conduct issue discussions, share the proposed tax determination and solicit feedback on the taxpayer's position before issuing a final NOPA. All issue team members will discuss the tax issue in an open and transparent manner. Issue discussions provide an opportunity for the issue team to:
 - Ensure all relevant facts have been developed
 - Explain LB&I's tax determination for that issue
 - Understand the taxpayer's tax position
 - Strive to reach agreement on the issue

4.46.4.10.2 (12-13-2018)

b) Draft Form 886-A Explanation of Items

1. The issue team will prepare and provide to the taxpayer a draft Form 886-A containing all facts and will solicit the taxpayer's written acknowledgment of the facts on potentially unagreed issues.
2. A draft Form 886-A should be prepared following the format outlined in IRM 4.46.6.11. The draft should be reviewed by the issue manager prior to issuance to the taxpayer.

4.46.4.10.3 (12-13-2018)

c) Issue the Draft Form 886-A with a Pro-Forma AOF IDR

1. Use a pro-forma AOF IDR (see *Exhibit 4.46.4-3*) along with the Form 886-A to solicit a written acknowledgment of the facts. The draft Form 886-A and the purpose of the AOF IDR will be discussed with the taxpayer. The discussion will also establish a reasonable time for the taxpayer to respond.
2. Explain to the taxpayer that the pro-forma AOF IDR will not be followed by a summons and that their response to the AOF IDR does not indicate agreement to the issue or any proposed adjustments. The purpose of the pro-forma AOF IDR is to acknowledge that all relevant facts have been identified and provide the taxpayer the opportunity to submit additional relevant facts and supporting documentation or to identify disputed facts.
3. The taxpayer should review the draft Form 886-A and acknowledge the relevant facts using one of the options shown on the AOF IDR.
4. If the response is not received by the response date, do **not** follow the IDR enforcement process. The issue manager should inquire about the reasons for the delay and determine if the taxpayer intends to respond. The taxpayer's response or lack of response to the IDR will be noted in the Form 886-A when the NOPA is issued.
5. Use the alpha indicator prefix AOF in IMS to identify this IDR as one that will not be subject to the IDR enforcement process.

4.46.4.10.4 (12-13-2018)

d) Incorporate the Taxpayer's Response in the Final Form 886-A Issued with the NOPA

1. The issue team will ensure that all relevant facts have been incorporated and considered in the final Form 886-A. A statement indicating the taxpayer's response to the IDR must be included in the opening of the Facts section. The issue team will determine the appropriate explanation when incorporating the taxpayer's response to the AOF IDR.
2. In addition, an explanation of whether the issue team agrees or disagrees with the additional or disputed facts provided by the taxpayer must be included. The issue team will identify the additional or disputed facts provided by the taxpayer in a subsection of the Facts section in the final Form 886-A or, if voluminous, include the taxpayer's response as an attachment to the final Form 886-A. It is impossible to capture every scenario you may encounter; however, some examples are provided for options to use in documenting the response.
 - A. **Example 1: Taxpayer Agrees with the Facts**"The taxpayer was issued IDR AOF#___ on January 1, 20xx to acknowledge all relevant facts have been provided. The taxpayer agreed with the facts as written."

- B. **Example 2: Taxpayer Provided Additional Facts** "The taxpayer was issued IDR AOF# __ on January 1, 20xx to acknowledge all relevant facts have been provided. The taxpayer provided additional facts, which LB&I has taken into consideration. The tax determination was modified to reflect the additional facts provided; however, the issue remains unagreed. The additional facts provided by the taxpayer are detailed in the Facts section." OR "...are included as an attachment."
 - C. **Example 3: Taxpayer Identifies Disputed Facts** "The taxpayer was issued the IDR AOF# __ on January 1, 20xx to acknowledge all relevant facts have been provided. The taxpayer identified disputed facts. The disputed facts have been included in a subsection at the end of the Facts section." OR "...have been included as an attachment to the Form 886-A."
 - D. **Example 4: Taxpayer Did Not Respond to the Pro-Forma IDR** "The taxpayer was provided the IDR AOF# __ on January 1, 20xx to acknowledge all relevant facts have been provided. The taxpayer did not respond to the IDR by the agreed upon response date. A follow-up discussion between the taxpayer and the issue manager was held on January 15, 20XX. During the discussion the taxpayer stated that..."
3. The issue manager will ensure that all relevant facts, including additional and/or disputed facts, are appropriately considered in determining LB&I's tax position before the issue team issues the NOPA. The issue manager must approve the potentially unagreed NOPA before issuing to the taxpayer.

4.46.4.11 (03-01-2006)

8. Penalty Consideration

- 1. The Service maintains an ongoing effort to develop, monitor and revise programs designed to assist taxpayers in complying with legal requirements and avoiding penalties. As indicated in Policy Statement P-20-1, the Service uses penalties to encourage voluntary compliance.
- 2. Policy Statement P-20-1 also states that the IRS administers a penalty policy that is designed to:
 - A. Ensure consistency
 - B. Ensure accuracy of results in light of the facts and the law
 - C. Provide methods for taxpayers to have their interests heard and considered
 - D. Require impartiality and commitment to achieve the correct decisions
 - E. Allow for prompt reversal of initial determinations when sufficient information has been presented to indicate that the penalty is not appropriate
 - F. Ensure that penalties are used for their proper purpose and not as bargaining points in the development or processing of cases

4.46.4.11.1 (12-13-2018)

a) Examiner Responsibility

1. The examiner is responsible for identifying the appropriate penalties, determining whether to assert penalties, and accurately calculating the penalty amount.
2. The examiner will inform the taxpayer as early as possible when and why penalties are being considered. The examiner will provide the taxpayer an opportunity to respond to the assertion based on facts and law.
3. Examiners must document the reasons for imposing or not imposing penalties and the manager's involvement on Form 9984, Examining Officer's Activity Record, and in the workpapers related to the penalty under consideration. See IRM 20.1.5.1.4, Managerial Approval of Penalties, for additional guidance.
4. Consult with Counsel or a penalty subject matter expert, if needed.
5. The pro-forma AOF IDR may not be required for a NOPA assessing penalties. See *IRM 4.46.4.10* for additional guidance.

4.46.4.11.2 (12-13-2018)

b) Managerial Involvement

1. The case manager and issue manager must be actively involved with the development of all penalty issues. Coordination with Criminal Investigation and penalty SMEs may be required.
2. The issue manager in collaboration with the case manager must approve:
 - Any penalty asserted
 - Any case where there is a substantial understatement of tax and no penalty proposed
3. For LB&I cases, the issue manager must approve penalties in writing. For purposes of IRC 6751(b)(1), the issue manager is the immediate supervisor of the issue team members determining the assertion or non-assertion of penalties. All penalty determinations must be documented on the penalty lead sheets.
4. The LB&I Issue Management System (IMS) provides lead sheets based on the standard audit index number (SAIN) entry for the penalty issue. SAIN 011 is used to approve penalties in LB&I. IMS forms may be approved with a digital or physical signature.
5. For more information, see IRM 20.1.5.1, Penalty Policy.

Rule 4.4, Circular 230 and Privileges

No Delay Tactics

- Model Rule 4.4(a):

9. *Transactions With Persons Other Than Clients*

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

-
- Circular 230
 - 10.23 Prompt disposition of pending matters. A practitioner may not unreasonably delay the prompt disposition of any matter before the Internal Revenue Service.

Circular 230

§ 10.20

Information to be furnished.

(a) To the Internal Revenue Service.

(1) A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.

(2) Where the requested records or information are not in the possession of, or subject to the control of, the practitioner or the practitioner's client, the practitioner must promptly notify the requesting Internal Revenue Service officer or employee and the practitioner must provide any information that the practitioner has regarding the identity of any person who the practitioner believes may have possession or control of the requested records or information. The practitioner must make reasonable inquiry of his or her client regarding the identity of any person who may have possession or control of the requested records or information, but the practitioner is not required to make inquiry of any other person or independently verify any information provided by the practitioner's client regarding the identity of such persons.

(3) When a proper and lawful request is made by a duly authorized officer or employee of the Internal Revenue Service, concerning an inquiry into an alleged violation of the regulations in this part, a practitioner must provide any information the practitioner has concerning the alleged violation and testify regarding this information in any proceeding instituted under this part, unless the practitioner believes in good faith and on reasonable grounds that the information is privileged.

(b) Interference with a proper and lawful request for records or information. A practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the Internal Revenue Service, its officers or employees, to obtain any record or

information unless the practitioner believes in good faith and on reasonable grounds that the record or information is privileged.

Privileges

- Must consider privileges including:
 - Fifth Amendment privilege;
 - attorney-client privilege;
 - the tax practitioner privilege;
 - the joint-defense/common interest privilege; and
 - marital privileges; and
 - work product doctrine.

Tax Practitioner Privilege

- I.R.C. § 7525(a)(1) entitles to tax practitioner to the same common law protections that would be recognized between an attorney and a client, if:
 - the person is a tax professional as defined by I.R.C. § 7525;
 - the client came to the tax professional for tax advice unrelated to a tax shelter; and
 - the matter is not criminal.

IRC 7525 (a) Uniform application to taxpayer communications with federally authorized practitioners

(1) General rule

With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

(2) Limitations Paragraph (1) may only be asserted in—

- (A) any noncriminal tax matter before the Internal Revenue Service; and
- (B) any noncriminal tax proceeding in Federal court brought by or against the United States.

(3) Definitions For purposes of this subsection—

- (A) Federally authorized tax practitioner

The term “federally authorized tax practitioner” means any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31, United States Code.

(B) Tax advice

The term “tax advice” means advice given by an individual with respect to a matter which is within the scope of the individual’s authority to practice described in subparagraph (A).

(b) Section not to apply to communications regarding tax sheltersThe privilege under subsection (a) shall not apply to any written communication which is—

(1) between a federally authorized tax practitioner and—

(A) any person,

(B) any director, officer, employee, agent, or representative of the person, or

(C) any other person holding a capital or profits interest in the person, and

(2) in connection with the promotion of the direct or indirect participation of the person in any tax shelter (as defined in section 6662(d)(2)(C)(ii)).

Fifth Amendment Privilege

- The Fifth Amendment privilege states that “no person shall be...compelled in any criminal case to be a witness against himself.” *United States Const. Am. V.*
- The IRS may deem a witness who fails to invoke his Fifth Amendment privilege as waiving it regarding further questioning on the same subject.
- The Fifth Amendment privilege is only validly invoked when the witness has a reasonable and good faith belief that answering a question would create a "substantial hazard" of incriminating himself.
- The Fifth Amendment privilege does not extend to testimony or production of documents by third parties. However, third-party testimony or production of documents may be protected by another privilege. Couch v. United States, 409 U.S. 322 (1973).
- Fifth Amendment privilege must be asserted on a ***question-by-question basis*** during the interview or on a document-by-document basis prior to the interview.
- The Fifth Amendment privilege does not apply when the compelled testimony could subject the witness to prosecution in a foreign country, as opposed to the United States.
- However, if the witness was compelled to give testimony to a foreign government in violation of the witness’ Fifth Amendment rights, the compelled foreign testimony cannot be used in U.S. courts.

Attorney-Client Privilege

- The attorney-client privilege is the “oldest of the privileges for confidential communications” 8 John Henry Wigmore, Evidence § 2290. “Its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” UpJohn Co. v. United States, 449 U.S. 383 (1981).

- A taxpayer or attorney may invoke the attorney-client privilege if:
 - The taxpayer was a client of the attorney, or sought to become the attorney's client;
 - The attorney was offering counsel in his capacity as an attorney and was admitted to practice law in the jurisdiction where counsel was given; and
 - The taxpayer and attorney communicated for the purpose of receiving and giving legal counsel. United States v. Lawless, 709 F.2d 485 (7th Cir. 1983).

The attorney may also assert the attorney client privilege to protect himself during questioning. Fisher v. United States, 425 U.S. 391 (1976)

Kovel Extension of Attorney-Client Privilege

- Under United States. v. Kovel, 296 F.2d 918 (2d Cir. 1961), the attorney-client privilege may extend to communications made by an attorney's client to an accountant.
 - Accountant must be employed by attorney for purposes of providing legal advice.

Kovel Agreement

A Kovel Agreement is where an attorney hires an accountant to assist the attorney in counseling the client. Accountants who perform work subject to a "Kovel Agreement" are also protected by the attorney-client privilege.

Common Interest/Joint Defense Privilege

- This privilege extends the attorney-client privilege to allow attorneys representing different parties with common interests to collaborate without waiving either of their privileges.
- To establish the existence of a joint defense privilege, the party asserting the privilege must show that:
 - the communications were made in a joint defense effort;
 - the statements furthered the effort; and
 - the privilege has not been waived. Matter of Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986).

Marital Privilege

Spousal Communications Privilege

- The Spousal Communications Privilege protects information privately disclosed between husband and wife in the confidence of the marital relationship.

- Either spouse may invoke this privilege to prevent the other from testifying about confidential and private communications between the spouses;
- The spousal communications privilege survives divorce;
- This privilege applies *only to communications* between the spouses and does not protect observations or other nonverbal Conduct; and
- As with the attorney-client privilege, the spousal communications privilege is waived if the communication is made in the presence of a third party.

Spousal Immunity Privilege

- The Spousal Immunity, or Spousal Adverse Testimonial, Privilege protects a witness spouse from giving compelled testimony against the other spouse in a criminal proceeding.
 - The privilege may only be asserted by the spouse being compelled to testify;
 - This privilege does not survive if the marriage ends, but it protects all facts – not just communications;
 - If an ex-spouse is not friendly toward the tax professional's client, outreach should still be made to see if the spouse would invoke the privilege; and
 - Quite often spouses, and even separated spouses, find it beneficial to invoke the spousal immunity privilege. One spouse's wrongdoings tend to affect the other spouse in unexpected ways.

Work Product Doctrine

- Strongest Privilege
 - Protects items prepared in “anticipation of litigation”
 - Fact work-product
 - Opponent can discover fact work-product if they demonstrate a need and that the information cannot be obtained from other sources without undue hardship.
 - Opinion work-product
 - Mental impressions, thoughts, legal strategies of the attorney.
 - Almost absolute protection against discovery.

I.R.C. § 982 and Formal Document Requests

I.R.C. § 982

If the *taxpayer fails to substantially comply with any formal document request arising out of the examination* of the tax treatment of any item . . . *any court having jurisdiction of a civil proceeding* in which the tax treatment of the examined item is an issue *shall*

prohibit the introduction by the taxpayer of any foreign-based documentation covered by such request. I.R.C. § 982(a).

- I.R.C. § 982 prohibits the taxpayer from introducing foreign-based documentation (any document which is outside the United States and may be relevant or material to the tax treatment of an examined item, I.R.C. § 982(d)(1)) into civil proceedings if the Service requested the documentation using a Formal Document Request (FDR) unless the taxpayer does the following:
 - Complies substantially with the FDR;
 - Establishes reasonable cause for failure to comply

Reasonable cause exception

1. In general Subsection (a) shall not apply with respect to any documentation if the taxpayer establishes that the failure to provide the documentation as requested by the Secretary is due to reasonable cause.
2. Foreign non-disclosure law not reasonable cause
 - For purposes of paragraph (1), the fact that a foreign jurisdiction would impose a civil or criminal penalty on the taxpayer (or any other person) for disclosing the requested documentation is not reasonable cause.

Formal Document Request

- The term “formal document request” means any request (made after the normal request procedures have failed to produce the requested documentation) for the production of foreign-based documentation which is mailed by registered or certified mail to the taxpayer at his last known address and which sets forth—
 - (A) the time and place for the production of the documentation,
 - (B) a statement of the reason the documentation previously produced (if any) is not sufficient,
 - (C) a description of the documentation being sought, and
 - (D) the consequences to the taxpayer of the failure to produce the documentation described in subparagraph (C).

Issuing an FDR When a U.S. Taxpayer is Unresponsive to an IDR

During an exam, when foreign-based documentation requested by an Information Document Request (“IDR”) was not sufficiently provided, issuing an FDR is one means to obtain it. Congress provided for FDRs “to discourage taxpayers from delaying or refusing disclosure of certain foreign-based information to the IRS.”

Example Circumstances Under Which Process Applies

- Following is a nonexclusive list of issues for which FDRs may be valuable:
 - Subpart F
 - Investment of earnings in US property

- Foreign tax credits
- Dividend repatriations
- Debt v. equity
- Loan v. dividend
- Limitations on deductions for related-party payments
- Ownership of foreign bank accounts and assets
- Ownership of foreign trusts
- Investments in partnerships, disregarded entities, foreign corporations, and passive foreign investment companies
- Exchange rate calculations for earnings and profits, foreign taxes, and other transactions.

Criteria for Issuing FDR

- The following criteria must be met before issuing an FDR:
 - An IDR issued was not responded to or the response was not sufficient.
 - The requested documents “may be relevant” or material to the tax treatment of an examined item.
 - The documents requested are located outside the U.S., i.e., foreign-based documentation.
 - The requested foreign-based documentation is held by a foreign entity, whether or not controlled by the U.S. Taxpayer (“UST”).

Foreign-based Documentation

Any documentation which is outside the United States and which may be relevant or material to the tax treatment of the examined item.

Foreign-based Documentation Held by a Foreign Entity

- If a UST owns (directly) a controlling interest (i.e., greater than 50%) in a foreign affiliate which has custody or control over documents, UST has the power to provide copies of those documents to the Service.
- When UST owns (directly) less than a controlling interest in a foreign affiliate, UST’s power to provide documents held by the foreign affiliate to the Service depends on the facts and circumstances.

I.R.C. § 982(e) - Suspension of Statute of Limitations

- If any person takes any action as provided in subsection (c)(2), the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which the proceeding under such subsection, and appeals therein, are pending.

I.R.C. § 6038A(e)

- Agreement to treat corporation as agent
 - The rules of paragraph (3) shall apply to any transaction between the reporting corporation and any related party who is a foreign person unless such related party agrees (in such manner and at such time as the Secretary shall prescribe) to authorize the reporting corporation to act as such related party's limited agent solely for purposes of applying sections 7602, 7603, and 7604 with respect to any request by the Secretary to examine records or produce testimony related to any such transaction or with respect to any summons by the Secretary for such records or testimony. The appearance of persons or production of records by reason of the reporting corporation being such an agent shall not subject such persons or records to legal process for any purpose other than determining the correct treatment under this title of any transaction between the reporting corporation and such related party.

Substantial Compliance with FDR

- If compliance was substantial, all requested foreign-based documentation is admissible, even those that were not provided. If compliance was not substantial, none of the foreign-based documentation requested is admissible to a court having jurisdiction over a civil proceeding, even those that were provided.

Quashing the FDR

- Within 90 days of the FDR being issued, a UST can file a petition to quash the FDR with a U.S. District Court having jurisdiction. If the petition is granted, the FDR is voided.
- In any proceeding to quash, the U.S. may counterclaim to enforce the FDR.
- The same requirements for court enforcement of a summons apply to that of a FDR, being:
 - there is a legitimate purpose for the investigation;
 - the material sought is relevant to that purpose;
 - the material sought is not already within the IRS's possession; and
 - those administrative steps which are required by the I.R.C. have been taken.

Petition to Quash

- The petition to quash suspends the running of the 90-day response period for the FDR while any action and any appeals on the petition are pending.
- Also, the petition suspends the statute of limitations on assessment and collection under § 6501 while any action and any appeals on the petition are pending.

Determining Reasonable Cause

- A court's assessment of a UST's reasonable cause involves consideration of the following:
 - whether the request was reasonable in scope,
 - whether the requested documents were available in the US and, thus, subject to summons,
 - the reasonableness of the requested place of production, and
 - control over the foreign entity in possession of the documents.

Minority Ownership

- Minority ownership by a taxpayer can prevent it from producing certain records held by a foreign entity. However, taxpayers may hide behind that status to avoid producing records. Thus, whether minority status is reasonable cause is based on the facts and circumstances.

FDRs and *Greenberg's Express*

- *Greenberg's Express* generally stands for the proposition that when de novo review is applied, the Tax Court will not focus upon what transpired prior to the notice of deficiency. *Greenberg's Express, Inc. v. Commissioner*, 62 T.C. 324 (1974).
- *Greenberg's Express* may not apply in international cases where an FDR has been issued.

The IRS Examination - Responding to Document Requests, Interview Requests, Summonses and Third Party Contacts

Frank Agostino, Esq.
Phillip Colasanto, Esq.
Christina Sierra, Esq.
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January 8, 2019

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Potted Plant v. Rambo

- Potted Plant: sit idly by, do not object, be seen and not heard.
- Rambo: zealous advocacy, objecting whenever possible, directing client not to answer questions, leaving interview, if necessary.

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Preparing for the Audit

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Preparing for the Audit

- After the a client receives an audit notice:
 - Trust but verify
 - Interview the taxpayer;
 - Review client correspondence received from IRS;
 - Obtain and review Wage & Income and account transcripts of account;
 - File a Freedom of Information Act request.

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Complete the Fact-finding Needed to Determine the Appropriate Course of Action

- Review the Information Provided by the Taxpayer, including most recent tax returns
- Review and Understand the W&I Transcripts and the Record of Account
- Review and understand every code on the transcripts and know where the taxpayer is in the process.
- Review the material in the IRS FOIA response
- Review the Client's Credit Reports
- Review the results of Westlaw and TLO searches

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Information Document Requests

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Information Document Requests (IDR)

The Information Document Request (IDR):

- ✓ Provides a check list to assist in organizing documents
- ✓ Each IDR # helps to track the audit
- ✓ Documents the deadline to be ready or have information to IRS
- ✓ Gives you a "road map" to what the IRS agent is looking for.

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Information Document Requests (IDR)

- IRS IDRs must be narrowly tailored to issues.
- IDRs must be written using clear and concise language.
- IRS cannot go on fishing expeditions.
- IDRs can be problematic.

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Information Documents Requests (IDR)

- Discussion with the Taxpayer about IDRs is **VERY IMPORTANT**:
 - Discuss how the issue is related to the IDR.
 - Discuss how the information requested is related to the issue under consideration and why it is necessary.
 - What documents does the Taxpayer have?
 - What documents do not exist?
 - What documents cannot be produced?

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Important Questions To Consider

- After consultation with Taxpayer, determine what information you will produce.
 - Should you put them in order?
 - Is the IRS asking you to make summaries?
 - Is there a mileage log issue?
 - Do you need to recreate documents?
 - What if there are no receipts?
 - What should you do if the auditor keeps asking for more information? (i.e. you are now on IDR number 8)
 - What should you do if the auditor is getting into a sensitive area?
 - Can you say no?

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IRS's Recognition of Limits

- I.R.M., pt. 25.5.4.2(5) states “[a] summons can only require a witness to appear on a given date to give testimony and to bring existing books, papers, and records. A summons cannot require a witness to prepare or create documents, including tax returns that are not currently in existence”.
- It then reiterates, “[b]y issuing an administrative summons, the Service cannot force a taxpayer to create a document, including a Collection Information Statement or a delinquent tax return.” I.R.M., pt. 25.5.4.2.1(1).

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Limits on IRS's Authority

- Under the authority granted in I.R.C. § 7602(a)(1) & (2), IRS is authorized to request the production of “books, papers, records, or other data.”
- Congress did not authorize IRS to require the creation of documents or other data for examination. I.R.C. § 7602, *United States v. Brown*, 536 F.2d 117 (6th Cir. 1976).
- The courts have held that when the government seeks either oral testimony or the generation of new documents, the requests are not enforceable. *Id.*, 536 F.2d at 123; *United States v. O’Shea*, 662 F.Supp.2d 535, 549 (S.D.W.Va. 2009).

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Acceptable Backup

- The receipt and the form of payment;
- If a credit card is used be sure to show the taxpayer is the holder of the card;
- When a receipt is from a store such as Costco, it will be needed with explanations;
- When no receipt is present it will be at the auditors discretion to allow;
- What if there are no documents?
- *Note: though they want original receipts the auditors understand that originals do not hold up well, and will accept copies in most cases.*

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Mileage Log

- Whether claiming standard mileage rate or actual expenses a mileage log is needed.
- The more detail the better: who, where, and why;
- The total mileage driven will also need to be supported, have repair receipts available to show the odometer reading;
- What if there is no mileage log? Should the taxpayer create one?

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Best Practices and Traps for IDRs

- Once a document is turned over, an admission is put in writing, a spreadsheet is created at the examiner's request, or a recorded interview is complete, you CANNOT take back the document, the admission, the spreadsheet, or the interview responses.
- Turn over only what is asked, required, and not privileged.

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Responding to IDRs

- Creating a “Record”
 - Responses create an administrative record of the matter
 - Written Responses
 - Interview Responses
 - Documents
 - How to Respond to the Questions Asked
 - Direct and complete responses
 - Avoid tangential and expansive remarks unrelated to the question
 - Assert Appropriate Privileges
 - Attorney/client privilege
 - Work Product

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IDR Enforcement Process

- **3 Step Process:**
 - Delinquency Notice;
 - Pre-summons Letter; and
 - Summons.

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I.R.M., pt. 4.46.4.6 (12-13-2018) Information Document Request Process

- The Information Document Request (IDR) Process will be used for all LB&I examinations. The IDR Process is a structured process used when gathering information during an examination. It is intended to encourage collaboration between the taxpayer and the IRS to discuss and determine the necessary information for proper issue development.
- General procedures and enforcement procedures are part of the IDR Process found in *Exhibit 4.46.4-1* and *Exhibit 4.46.4-2*.

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**I.R.M., pt. 4.46.4.6.1 (12-13-2018)
General IDR Procedures**

- A paper or electronic Form 4564, *Information Document Request* (IDR), should be used to request information from the taxpayer. Three copies of the form should be prepared and distributed as follows:
 - The original will be given to the taxpayer.
 - A copy of the IDR (paper or electronic) will be filed in the IDR Log (if a paper log is maintained). The team coordinator is responsible for maintaining the IDR Log. Appropriate information should be listed in the log as IDRs are issued. The case manager is responsible for ensuring that the IDR Log is properly, accurately, and timely completed. IMS is used to track IDR status and enforcement.
 - A copy of the IDR (paper or electronic) will be maintained by the issuing examiner with the issue workpapers. IMS is also used for this purpose.
- IDRs are an important part of the information gathering process during any examination. When issuing IDRs, LB&I examiners must follow the requirements for issuing IDRs that are described in *Exhibit 4.46.4-1, Requirements for Issuing IDRs*.
- If a taxpayer indicates that any requested information will not be provided without a summons, then the IRS should move directly to issue a summons.

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**I.R.M., pt. 4.46.4.6.3 (12-13-2018)
LB&I IDR Enforcement Process**

- IDRs must be in compliance with the general IDR procedures of I.R.M., pt. 4.46.4.6.1 before the IRS can issue a summons based on the IDR and later seek summons enforcement. The process for enforcing delinquent IDRs from delinquency to summons issuance has three graduated steps:
 - a Delinquency Notice
 - a Pre-Summons Letter
 - a Summons
- This process is mandatory and has limited exceptions. It requires LB&I managers at all levels to be actively involved early in the process and ensures that Counsel is prepared to support IDRs through the issuance of a summons when necessary. If, during the discussion of an IDR, a taxpayer indicates that the requested information will not be provided without a summons, then the IDR enforcement procedures do not apply and the IRS should move directly to issue a summons.
- The timing of the enforcement process is described in *Exhibit 4.46.4-2, IDR Enforcement Process*.

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**Rule 4.4, Circular 230 and
Privileges**

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No Delay Tactics

- Model Rule 4.4(a):
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 - 10.23 Prompt disposition of pending matters. A practitioner may not unreasonably delay the prompt disposition of any matter before the Internal Revenue Service.

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Circular 230

- 10.20(a)(3): When a proper and lawful request is made by a duly authorized officer or employee of the Internal Revenue Service, concerning an inquiry into an alleged violation of the regulations in this part, a practitioner must provide any information the practitioner has concerning the alleged violation and testify regarding this information in any proceeding instituted under this part, **unless the practitioner believes in good faith and on reasonable grounds that the information is privileged.**
- 10.20(b) Interference with a proper and lawful request for records or information. A **practitioner may not interfere, or attempt to interfere,** with any proper and lawful effort by the Internal Revenue Service, its officers or employees, to obtain any record or information **unless** the practitioner believes in good faith and on reasonable grounds that the **record or information is privileged.**

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Privileges

- Must consider privileges including:
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 - and
 - marital privileges; and
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 - the person is a tax professional as defined by I.R.C. § 7525;
 - the client came to the tax professional for tax advice unrelated to a tax shelter; and
 - the matter is not criminal.

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Fifth Amendment Privilege

- The Fifth Amendment privilege states that “no person shall be...compelled in any criminal case to be a witness against himself.” *United States Const. Am. V.*
- The IRS may deem a witness who fails to invoke his Fifth Amendment privilege as waiving it regarding further questioning on the same subject.

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Fifth Amendment (cont'd)

- The Fifth Amendment privilege is only validly invoked when the witness has a reasonable and good faith belief that answering a question would create a "substantial hazard" of incriminating himself.
- The Fifth Amendment privilege does not extend to testimony or production of documents by third parties. However, third-party testimony or production of documents may be protected by another privilege. Couch v. United States, 409 U.S. 322 (1973).

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Fifth Amendment (cont'd)

- Fifth Amendment privilege must be asserted on a **question-by-question basis** during the interview or on a document-by-document basis prior to the interview.

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Fifth Amendment (cont'd)

- The Fifth Amendment privilege does not apply when the compelled testimony could subject the witness to prosecution in a foreign country, as opposed to the United States.
- However, if the witness was compelled to give testimony to a foreign government in violation of the witness' Fifth Amendment rights, the compelled foreign testimony cannot be used in U.S. courts.

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Attorney-Client Privilege

- The attorney-client privilege is the "oldest of the privileges for confidential communications" 8 John Henry Wigmore, Evidence § 2290. "Its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383 (1981).

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Attorney-Client (cont'd)

- A taxpayer or attorney may invoke the attorney-client privilege if:
 - The taxpayer was a client of the attorney, or sought to become the attorney's client;
 - The attorney was offering counsel in his capacity as an attorney and was admitted to practice law in the jurisdiction where counsel was given; and
 - The taxpayer and attorney communicated for the purpose of receiving and giving legal counsel. United States v. Lawless, 709 F.2d 485 (7th Cir. 1983).

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Attorney-Client (cont'd)

- The attorney may also assert the attorney client privilege to protect himself during questioning. Fisher v. United States, 425 U.S. 391 (1976)

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Kovel Extension of Attorney-Client Privilege

- Under United States v. Kovel, 296 F.2d 918 (2d Cir. 1961), the attorney-client privilege may extend to communications made by an attorney's client to an accountant.
 - Accountant must be employed by attorney for purposes of providing legal advice.

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Kovel Agreement

- A Kovel Agreement is where an attorney hires an accountant to assist the attorney in counseling the client. Accountants who perform work subject to a "Kovel Agreement" are also protected by the attorney-client privilege.

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Common Interest/Joint Defense Privilege

- This privilege extends the attorney-client privilege to allow attorneys representing different parties with common interests to collaborate without waiving either of their privileges.
- To establish the existence of a joint defense privilege, the party asserting the privilege must show that:
 - the communications were made in a joint defense effort;
 - the statements furthered the effort; and
 - the privilege has not been waived. Matter of Bevil, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986).

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Marital Privilege

- Two different privileges:
 - spousal communications privilege;
 - the spousal immunity, or spousal adverse testimonial, privilege.

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Spousal Communications Privilege

- The Spousal Communications Privilege protects information privately disclosed between husband and wife in the confidence of the marital relationship.
 - Either spouse may invoke this privilege to prevent the other from testifying about confidential and private communications between the spouses;
 - The spousal communications privilege survives divorce;
 - This privilege applies *only to communications* between the spouses and does not protect observations or other nonverbal Conduct; and
 - As with the attorney-client privilege, the spousal communications privilege is waived if the communication is made in the presence of a third party.

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Spousal Immunity Privilege

- The Spousal Immunity, or Spousal Adverse Testimonial, Privilege protects a witness spouse from giving compelled testimony against the other spouse in a criminal proceeding.
 - The privilege may only be asserted by the spouse being compelled to testify;
 - This privilege does not survive if the marriage ends, but it protects all facts – not just communications;
 - If an ex-spouse is not friendly toward the tax professional's client, outreach should still be made to see if the spouse would invoke the privilege; and
 - Quite often spouses, and even separated spouses, find it beneficial to invoke the spousal immunity privilege. One spouse's wrongdoings tend to affect the other spouse in unexpected ways.

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Work Product Doctrine

- Strongest Privilege
 - Protects items prepared in "anticipation of litigation"
 - Fact work-product
 - Opponent can discover fact work-product if they demonstrate a need and that the information cannot be obtained from other sources without undue hardship.
 - Opinion work-product
 - Mental impressions, thoughts, legal strategies of the attorney.
 - Almost absolute protection against discovery.

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I.R.C. § 982 and Formal Document Requests



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I.R.C. § 982

- If the *taxpayer fails to substantially comply with any formal document request arising out of the examination* of the tax treatment of any item . . . *any court having jurisdiction of a civil proceeding* in which the tax treatment of the examined item is an issue *shall prohibit the introduction by the taxpayer of any foreign-based documentation covered by such request.* I.R.C. § 982(a).



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Introduction

- I.R.C. § 982 prohibits the taxpayer from introducing foreign-based documentation (any document which is outside the United States and may be relevant or material to the tax treatment of an examined item, I.R.C. § 982(d)(1)) into civil proceedings if the Service requested the documentation using a Formal Document Request (FDR) unless the taxpayer does the following:
 - Complies substantially with the FDR;
 - Establishes reasonable cause for failure to comply.



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Reasonable cause exception

1. In general Subsection (a) shall not apply with respect to any documentation if the taxpayer establishes that the failure to provide the documentation as requested by the Secretary is due to reasonable cause.
2. Foreign non-disclosure law not reasonable cause
 - For purposes of paragraph (1), the fact that a foreign jurisdiction would impose a civil or criminal penalty on the taxpayer (or any other person) for disclosing the requested documentation is not reasonable cause.

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Formal Document Request

- The term “formal document request” means any request (made after the normal request procedures have failed to produce the requested documentation) for the production of foreign-based documentation which is mailed by registered or certified mail to the taxpayer at his last known address and which sets forth—
 - (A) the time and place for the production of the documentation,
 - (B) a statement of the reason the documentation previously produced (if any) is not sufficient,
 - (C) a description of the documentation being sought, and
 - (D) the consequences to the taxpayer of the failure to produce the documentation described in subparagraph (C).

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Issuing an FDR When a U.S. Taxpayer is Unresponsive to an IDR

- During an exam, when foreign-based documentation requested by an Information Document Request (“IDR”) was not sufficiently provided, issuing an FDR is one means to obtain it. Congress provided for FDRs “to discourage taxpayers from delaying or refusing disclosure of certain foreign-based information to the IRS.”

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Example Circumstances Under Which Process Applies

- Following is a nonexclusive list of issues for which FDRs may be valuable:
 - Subpart F
 - Investment of earnings in US property
 - Foreign tax credits
 - Dividend repatriations
 - Debt v. equity
 - Loan v. dividend
 - Limitations on deductions for related-party payments
 - Ownership of foreign bank accounts and assets
 - Ownership of foreign trusts
 - Investments in partnerships, disregarded entities, foreign corporations, and passive foreign investment companies
 - Exchange rate calculations for earnings and profits, foreign taxes, and other transactions.

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Criteria for Issuing FDR

- The following criteria must be met before issuing an FDR:
 - An IDR issued was not responded to or the response was not sufficient.
 - The requested documents “may be relevant” or material to the tax treatment of an examined item.
 - The documents requested are located outside the U.S., i.e., foreign-based documentation.
 - The requested foreign-based documentation is held by a foreign entity, whether or not controlled by the U.S. Taxpayer (“UST”).

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Foreign-based Documentation

- Any documentation which is outside the United States and which may be relevant or material to the tax treatment of the examined item.

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Foreign-based Documentation Held by a Foreign Entity

- If a UST owns (directly) a controlling interest (i.e., greater than 50%) in a foreign affiliate which has custody or control over documents, UST has the power to provide copies of those documents to the Service.



Foreign-based Documentation Held by a Foreign Entity

- When UST owns (directly) less than a controlling interest in a foreign affiliate, UST's power to provide documents held by the foreign affiliate to the Service depends on the facts and circumstances.



I.R.C. § 982(e) - Suspension of Statute of Limitations

- If any person takes any action as provided in subsection (c)(2), the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which the proceeding under such subsection, and appeals therein, are pending.



I.R.C. § 6038A(e)

- Agreement to treat corporation as agent
 - The rules of paragraph (3) shall apply to any transaction between the reporting corporation and any related party who is a foreign person unless such related party agrees (in such manner and at such time as the Secretary shall prescribe) to authorize the reporting corporation to act as such related party's limited agent solely for purposes of applying sections 7602, 7603, and 7604 with respect to any request by the Secretary to examine records or produce testimony related to any such transaction or with respect to any summons by the Secretary for such records or testimony. The appearance of persons or production of records by reason of the reporting corporation being such an agent shall not subject such persons or records to legal process for any purpose other than determining the correct treatment under this title of any transaction between the reporting corporation and such related party.

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Substantial Compliance with FDR

- If compliance was substantial, all requested foreign-based documentation is admissible, even those that were not provided. If compliance was not substantial, none of the foreign-based documentation requested is admissible to a court having jurisdiction over a civil proceeding, even those that were provided.

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Quashing the FDR

- Within 90 days of the FDR being issued, a UST can file a petition to quash the FDR with a U.S. District Court having jurisdiction. If the petition is granted, the FDR is voided.

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Quashing the FDR

- In any proceeding to quash, the U.S. may counterclaim to enforce the FDR.
- The same requirements for court enforcement of a summons apply to that of a FDR, being:
 - there is a legitimate purpose for the investigation;
 - the material sought is relevant to that purpose;
 - the material sought is not already within the IRS's possession; and
 - those administrative steps which are required by the I.R.C. have been taken.

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Petition to Quash

- The petition to quash suspends the running of the 90-day response period for the FDR while any action and any appeals on the petition are pending.
- Also, the petition suspends the statute of limitations on assessment and collection under § 6501 while any action and any appeals on the petition are pending.

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Determining Reasonable Cause

- A court's assessment of a UST's reasonable cause involves consideration of the following:
 - whether the request was reasonable in scope,
 - whether the requested documents were available in the US and, thus, subject to summons,
 - the reasonableness of the requested place of production, and
 - control over the foreign entity in possession of the documents.

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Minority Ownership

- Minority ownership by a taxpayer can prevent it from producing certain records held by a foreign entity. However, taxpayers may hide behind that status to avoid producing records. Thus, whether minority status is reasonable cause is based on the facts and circumstances.

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FDRs and *Greenberg's Express*

- *Greenberg's Express* generally stands for the proposition that when de novo review is applied, the Tax Court will not focus upon what transpired prior to the notice of deficiency. *Greenberg's Express, Inc. v. Commissioner*, 62 T.C. 324 (1974).
- *Greenberg's Express* may not apply in international cases where an FDR has been issued.

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I.R.C. §§ 7811 and 7803 and Form 911

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Translation and Interpreting Services

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Document Translation Services

- IRS translation and interpreting services are offered free to taxpayers if they qualify as someone whose primary language is not English.
- The IRS provides translations in French, Haitian/Creole, German, Italian, Portuguese, Arabic, Iranian Farsi, Spanish, and several African languages.

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Document Translation Services

- After a request for translation is made by a taxpayer, the IRS employee can submit a request for translation using *Form 14078, Request for Translation and/or Quality Review of Non-Vital Documents*.

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IRS OPI Service

- The IRS also provides an over-the-phone interpreter service (i.e., OPI).
- OPI is a telephone interpreter-assisted service provided through the IRS that allows IRS employees to communicate with taxpayers through interpreters who speak over 350 languages.

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IRS OPI Service

- All IRS organizations and their agents must make these free language services available to LEP taxpayers.
- If an IRS employee refuses to provide an LEP taxpayer with the benefit of the free services TAC recommends that the taxpayer file Form 911.

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Summonses

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IRS Summons Power

- I.R.C. § 7602: for the purposes of ascertaining the correctness of any return, the Secretary is authorized:
 - To examine any books, papers, records, or other data that may be relevant or material;
 - Summon the person liable for tax or required to perform the act, or any officer or employee of such person, to give testimony, as may be material and relevant; and
 - To *take such testimony* of the person concerned, *under oath*, as may be relevant or material to such inquiry.

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IRS Cannot Issue Summons

- IRS cannot issue a summons:
 - of a third party without giving the taxpayer reasonable notice (I.R.C. § 7602(c));
 - if a Justice Department referral is in effect (I.R.C. § 7602(d)); and

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Summons Requirements

- For a summons to be proper it must request information, and it must not be vague, overbroad, or overly burdensome. *See United States v. Powell*, 379 U.S. 48 (1964).

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Validity of Summons

- Powell requirements:
 - there is a legitimate purpose for the examination;
 - the information summoned may (not must) be relevant to that purpose;
 - the information is not already in the possession of the IRS; and
 - the IRS has complied with all administrative steps required by the Code and relevant Treasury Regulations.

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Time and Place of Exam

- I.R.M., pt. 25.5.3.4, provides that the date of the examination must be 10 full days after service and that the date set for appearance should not be on a Saturday, Sunday, or legal holiday.
- In the case of a summons served on a third party, the taxpayer must be given notice of that summons within 3 days of the date on which the summons was served on the third party, and at least 23 days prior to the return date of the summons. I.R.C. § 7609(a).
- The time and place of examination shall be at such time and place as may be reasonable under the circumstances. I.R.C. § 7605(a).

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Summons Interview

- Not self-executing;
- I.R.C. § 7521(b) allows the taxpayer to terminate the interview at any time or consult with his professional at any time, which is not allowed during depositions.
- Taxpayer has right to exercise self-help, *see Reineman v. United States*, 301 F.2d 267 (7th Cir. 1962); to refuse unreasonable requests, I.R.M., pt. 25.5.5.4.6; and to suspend the summons interview. I.R.C. § 7521(b)(2); I.R.M., pt. 25.5.5.4.2(1),(2).

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Scope of Summons Interview

- The IRS has authority to inquire about any information or data which may relate to ascertaining the correctness of any return. The language "any return" suggests that even if the particular return or particular tax year was not mentioned directly in the summons itself, the IRS may ask questions at the interview about it. I.R.C. §7602; United States v. Turner, 480 F.2d 272, 278-79 (7th Cir. 1973).
- Inquisitorial and very broad.

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Participants

- I.R.C. § 7521 and 5 U.S.C. § 555(b) provide that the taxpayer may be represented by tax counsel or by a tax professional at an IRS interview.
- If the tax professional has caused "unreasonable delay or hindrance" to the IRS in its investigation, the IRS agent is permitted to notify the taxpayer of that determination and potentially exclude the professional, if necessary. I.R.C. § 7521(c).
 - I.R.C. § 7803(a)(3)(I)-right to representation.

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Present at Third-Party Interview

- A third party who receives an IRS Summons is similarly entitled to have a tax professional accompany him to the IRS interview. However, the taxpayer does not have a right to be present (or to have his tax professional present) unless the third party consents. United States v. Newman, 441 F.2d 165 (5th Cir. 1971).

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Observers

- I.R.M., pt. 25.5.5.5.7, provides that the summoned witness may consent to have observers present, including the taxpayer and his tax professional, provided that:
 - the observers are silent and do not participate in or disrupt the interview;
 - the taxpayer being investigated provides written consent allowing the disclosure of return information to all attending the interview; and;
 - the disclosure of that return information will not seriously impair federal tax administration.

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Transcribing Interview TP

- I.R.C. § 7521(a) allows for the taxpayer to request a transcribed interview but a summons interview is not automatically transcribed;
 - Need to give 10 calendar days notice. *See* Notice 89-51; Keene v. Commissioner, 121 T.C. 8 (2003).

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Transcribing Interview IRS

- I.R.C. § 7521(b) allows the IRS to record an interview if:
 - The taxpayer is informed prior to the interview; and
 - Upon request of taxpayer, provides the taxpayer with a copy of the transcript, so long as taxpayer reimburses for the copying cost.

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Transcripts and Recording

- For non-criminal investigations, the taxpayer is entitled to make an audio recording of the interview, at his own expense, provided he gives the IRS advance notice. I.R.C. § 7521(a)(1).
 - 10 days advanced notice is required. I.R.M., pt. 25.5.5.4.4 (Dec. 18, 2015).
- Film and video recordings are not allowed. See IRM, pt. 5.1.12.3.2, *Deny Requests for Video or Film Interviews* (Sep. 20, 2012).

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Audio Recordings

- Cannot audio record over telephone.
- IRS Notice 89-51 provides requirements for making an audio recording:
 - The taxpayer or authorized representative supplies the recording equipment;
 - The Service may produce its own recording of the proceedings;
 - The recording takes place in a suitable location; and
 - All participants in the proceeding other than Service personnel must consent to making the audio recording and all participants must identify themselves and their roles in the proceeding.

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Objecting During Interview

- All objections are permitted until the IRS gets an enforcement judgment from the court denying the objections. Alphin v. United States, 809 F.2d 236, 238 (4th Cir. 1987).

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Objections (cont'd)

- If objections are deemed to hinder and/or delay the proceedings, the tax professional may be excluded from the interview. I.R.M., pt. 25.5.5.2(3), provides that the obstruction must be "active" before disqualification will be sought, and that the facts must "clearly indicate that [the attorney] has actively impeded the investigation."

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Questions?

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New York, NY 10278

January 14, 2019
January 28, 2019
February 11, 2019
March 11, 2019

Contact Jeffrey Dirmann, Esq. at (201) 488-5400, Ext 119 or
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