

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

JOHN R. FLETCHER & JO ANN FLETCHER,)	
)	
Petitioners,)	
)	
v.)	Docket No. 13040-15.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER TO SHOW CAUSE

This case is calendared for trial at the Court’s trial session commencing September 10, 2018, in Los Angeles, California. The petition in this case was filed on May 18, 2015, on behalf of petitioners by Jeffrey L. Davidson. This case has been continued on five occasions, most recently on petitioners’ motion filed March 13, 2018. In that motion to continue Mr. Davidson stated: “I have recently encounter additional health problems which have prohibited my ability to prepare this case for trial. I expect to have thoracic surgery in early April.” Mr Davidson also stated: “I expect to resume my duties by mid-May, and this case can be set for trial in the Fall.” Accordingly, the Court granted petitioners’ motion to continue this case from the April 16, 2018, trial session in Los Angeles, California.

By order dated May 7, 2018, the parties were each required to file a memorandum by July 10, 2018. The order directed that the memorandum should set forth the issues of fact and law; provide a clear and concise exposition of the party’s position and the theory underlying that position with respect to each issue; explain any anticipated expert witness testimony; and describe the status of trial preparation. The May 7, 2018, order also provided that the statement of issues would control the admissibility of evidence at trial and that “neither party will be allowed to advance a position or theory underlying that position with respect to any of the issues” that is different from the positions set forth in the memorandum.

On July 10, 2018, respondent filed his memorandum as directed by the May 7, 2018, order. Petitioners failed to file a memorandum or otherwise request an extension of time to file a memorandum.

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On July 16, 2018, the Court held a conference call with the parties. During the conference call Mr. Davidson stated that he failed to timely file the memorandum because his secretary was out the office and she did not correctly calendar the memorandum due date. Mr. Davidson explained that he did not have thoracic surgery in April as stated in his motion to continue filed March 13, 2018. He stated that he still needs to have follow-up tests and indicated that the surgery, although not yet scheduled, makes it uncertain whether he will be able to participate in a trial during the September 10 trial session. Mr. Davidson indicated that his health problems have impeded his ability to conduct discovery in this case. Finally, Mr. Davidson stated that petitioners, who were divorced at the time of filing the petition, are “split” on whether he may continue to represent them. He explained that he has advised petitioners regarding potential conflicts in representing them in this case but does not have their consent in writing. Mr. Davidson also provided a noncommittal response as to whether either petitioner plans to seek spousal relief pursuant to section 6015.¹

Rule 24(g) provides in pertinent part:

If any counsel of record * * * represents more than one person with differing interests with respect to any issue in a case, * * * then such counsel must either secure the informed consent of the client * * *; withdraw from the case; or take whatever other steps are necessary to obviate a conflict of interest or other violation of the ABA Model Rules of Professional Conduct, and particularly rules 1.7, 1.8, and 3.7 thereof.

Rule 201(a) provides that practitioners before the Court shall carry on their practice in accordance with the letter and spirit of the Model Rules. We have the power to compel withdrawal of a taxpayer’s counsel if his or her representation would violate the Model Rules. See Rule 24(g); Para Techs. Tr. v. Commissioner, T.C. Memo. 1992-575, 1992 WL 237247, at *3.

Model Rule 1.7 is entitled “Conflict of Interest: Current Clients”. It prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest. Model Rule 1.7(a). As relevant herein, Model Rule

¹Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the relevant years, and all Rule references are to the Tax Court Rules of Practice and Procedure.

1.7(a) provides: “A concurrent conflict of interest exists if: (1) [t]he representation of one client will be directly adverse to another client; or (2) [t]here is a significant risk that representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client”.

“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.” Model Rule 1.7 cmt. [1]. “A conflict of interest may exist before representation is undertaken, in which event the representation must be declined unless the lawyer obtains the informed consent of each client”. Model Rule 1.7 cmt. [3]; see also Model Rule 1.7(b). Some conflicts, however, are not consentable. See, e.g., Model Rule 1.7(b)(3), Model Rule 1.7 cmt. [17] (“when the clients are aligned directly against each other in the same litigation”). If the conflict is consentable, then, under the Model Rules, the lawyer may continue to represent the affected clients if, among other things, he secures informed written consent of each affected client. See Model Rules 1.7(b)(4). Rule 24(g) allows a lawyer to represent persons with differing interests with respect to any issue in a case if he secures the informed consent of the client. In Harbin v. Commissioner, 137 T.C. 93, 99 (2011), we held that Rule 24(g) requires “informed written consent”. (Emphasis added.)

In Gebman v. Commissioner, T.C. Memo. 2017-184, at *26, the Court held that an attorney has a conflict of interest within the meaning of Model Rules where the attorney initially represented a married couple, and subsequently the attorney only represented the wife in the same matter in which her interests were materially adverse to the husband. The Court held that the attorney must obviate that conflict by withdrawing as the wife’s counsel or taking other steps to obviate that conflict. Id. at *27.

Additionally, Model Rule 1.16(a)(2) provides that “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if * * * the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.” “A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.” Model Rule 1.16 cmt. [1].

Mr. Davidson filed the petition in this deficiency case representing to the Court that he was counsel of record for petitioners John R. Fletcher and Jo Ann Fletcher nka Jo Ann Lynne, and a lawyer-client relationship was established. At the time of filing the petition petitioners were no longer married. Mr. Davidson

has not confirmed that he has obtained “informed written consent” of petitioners or that any potential conflict is consentable. Mr. Davidson also indicated that petitioners are “split” on his continued representation. Although we are left to wonder what exactly that means, in cases such as this there is a significant probability that the interests of John R. Fletcher and Jo Ann Fletcher may be materially adverse. Mr. Davidson has not demonstrated to the Court that any conflict of interest has been obviated as required by Model Rule 1.7 and Rule 24(g).

Furthermore, Mr. Davidson’s admitted inability to conduct discovery, his March 13, 2018, motion for a continuance, and his uncertainty as to his availability for a trial date in September 2018 all resulting from his ongoing health issues implicate the provisions of Model Rule 1.16(a)(2).

Mr. Davidson’s attention is called to section 6673(a)(2) which provides that whenever it appears to the Court that any attorney admitted to practice before the Tax Court has multiplied the proceedings in any case unreasonably and vexatiously, the Tax Court may require that such attorney pay personally the excess in costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.

For cause it is,

ORDERED: That on or before July 30, 2018, Mr. Davidson shall show cause in writing why he should not withdraw or be withdrawn from this case, explaining therein (1) whether he has obviated any conflict as required by Model Rules 1.7 and Rule 24(g), and (2) whether his ongoing health issues materially impair his ability to competently and promptly represent petitioners in the light of Model Rule 1.16(a)(2) and Rule 201(a). It is further

ORDERED: That, in addition to regular service, the Clerk of the Court shall serve a copy of this order on each petitioner at the following addresses:

John R. Fletcher
28925 Pacific Coast Highway
Malibu, California 90265

Jo Ann Fletcher
29507 Harvester Road
Malibu, California 90265

(Signed) Michael B. Thornton
Judge

Dated: Washington, D.C.
July 17, 2018