UNITED STATES TAX COURT
WASHINGTON, DC 20217

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WILLIAM CAVALLARO, DONOR, ET AL.,	)	
	)	
Petitioners,	)	
	)	
v.	) Docket Nos. 3300-11,	3354-11.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER

Now before the Court are respondent's motion (filed August 14, 2012) to compel production of petitioners' correspondence with their estate-planning lawyers and petitioners' motion (filed August 21, 2012) to compel production of respondent's correspondence with his expert. Both motions seek documents in the possession, custody, or control of the other party; both motions allege the recent service of trial subpoenas duces tecum, which the Court is asked to enforce; neither motion describes attempts at informal discovery of the documents now sought; and neither motion alleges service of any document request under Rule 72. The motions will be denied for the following reasons:

1. The parties now attempt eleventh-hour discovery without having first complied with the Court's requirement of "informal consultation or communication". Rule 70(a)(1).

2. Under the Court's scheduling order served April 26, 2012, motions to compel were due June 22, 2012. The pending motions are therefore untimely.

3. The issues to which the documents now sought relate were well known by the parties before that June 22 deadline:

a. Respondent states that petitioners produced on August 9, 2012, notes from their estate planning lawyers that were allegedly inconsistent with petitioners' allegations. However, it has long been respondent's position that estate planning distorted petitioners' factual position. Respondent does not show that he attempted discovery, believed that everything had been produced, and was surprised at seeing notes that should have been produced earlier. Rather, respondent's showing is simply that the notes that petitioners recently produced gave respondent the idea for discovery requests that had not been served timely.

b. Petitioner points to respondent's statement in his pretrial memorandum filed August 13, 2012, that counsel had given certain instructions to the expert witness. Petitioner intimates that this revelation prompts a need for discovery not previously perceived,

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and we assume that counsel's instructions to an expert can constitute "facts or data" or "assumptions" that are discoverable under Tax Court Rule 70(c)(4)(B)(i) or (ii). However, Mr. Bello's report served May 17, 2012, clearly indicated that he had not interviewed petitioners or their allies. Discovery could have been undertaken timely as to the reason for that course, but petitioner does not allege any such attempts. Moreover, on July 26, 2012, petitioners deposed Mr. Bello, and he stated that he relied on the opinion of respondent's counsel that the affidavits submitted by William and Kenneth Cavallaro were false and that interviews with anyone who worked at Knight or Camelot would be unreliable. (Depo. Tr. 200-204). Therefore, as of the date of Mr. Bello's deposition, petitioners were on notice of respondent's instructions about assumptions or facts relied on in Mr. Bello's expert report. The fact that they waited over three weeks and filed the motion to compel one week before trial seems to indicate that the need for this information was far from urgent.

4. The parties' need for the information sought in their motions is far from obvious:

a. Respondent already possesses the notes that (he says) contradict petitioners' position. This would seem adequate, but respondent wants "a complete picture". However, one can only speculate whether additional documents would contain genuinely useful additional information, as opposed to information that is cumulative or irrelevant. The hope of finding more information could well have justified a discovery request (and, in due course, a timely motion to compel), but it does not warrant the last-minute briefing and deciding of discovery issues on the brink of trial.

b. Petitioner's motion is principally devoted to assailing the credibility of respondent's expert's report, in light of respondent's (voluntary) statement in his pretrial memorandum. If we assume that petitioner's critique is valid, it hardly warrants more discovery. The fact has been disclosed (by respondent), and petitioners can make their point.

5. The parties now attempt to use a trial subpoena duces tecum served on a party (or his agent) to accomplish discovery that should ordinarily be conducted under Rules 70 and 72 (which, among other things, provide for a 30-day response time and provide cut-offs sufficiently in advance of the trial to enable deliberate action by the parties and deliberate decision-making by the Court). Ordinarily, discovery from a party should be conducted under the discovery rules, and trial subpoenas duces tecum should be used to obtain information from <u>non</u>-parties. Ordinarily, the use of a trial subpoenas duces tecum to obtain information from a party would involve an evasion of the discovery procedures that the Rules intend for parties. If there is an exceptional circumstance in which a subpoena duces tecum served on a party is proper, that circumstance is evidently not present here.

For the foregoing reasons, it is

ORDERED that respondent's motion to compel (filed August 14, 2012) and petitioners' motion to compel (filed August 21, 2012) are both denied. However, it is further

ORDERED that each party shall bring to the trial the documents sought by the other parties' motion to compel. This will enable reference to those materials in the event that the testimony or contentions at trial prompt any reconsideration of the rulings in this order.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
August 21, 2012