United States Tax Court
Washington, DC 20217

Pecan Ranch Family Trust, et al.,	)	
	)	
Petitioners	)	
	)	
v.	)	Docket Nos. 21716-18, 21882-18,
	)	21723-18.
Commissioner of Internal Revenue,	)	
	)	
Respondent	)	
	)	

O R D E R

On August 9, 2021, respondent filed a motion to disqualify counsel (respondent's motion), moving to disqualify both of petitioners' counsel of record--Messrs. Richard E. Young and Kenneth M. Horwitz.[1] Respondent moves to disqualify Messrs. Young and Horwitz due to the conflict of interest created by their alleged involvement in planning transactions at issue in these consolidated cases and their alleged status as likely necessary witnesses. The motion is predicated on Rules 24(g) and 201 and on Rules 1.7, 1.10, and 3.7 of the American Bar Association Model Rules of Professional Conduct (ABA Model Rules).[2]

On September 3, 2021, petitioners filed a response to motion to disqualify counsel. Petitioners argue that: (1) we should view the motion with suspicion as a trial tactic; (2) respondent has been dilatory in moving to disqualify petitioners' counsel of record; (3) petitioners have provided their informed written consent

[1]Cases of the following petitioners are consolidated for purposes of trial: Pecan Ranch Family Trust, docket No. 21716-18; Richard W. Bandler & Glenda W. Bandler a.k.a. Glenda W. Bradstock, docket No. 21882-18; and Richard W. Bandler, docket No. 21723-18.

[2]All Rule references are to the Tax Court Rules of Practice and Procedure (Rules) unless otherwise indicated, and all section references are to the Internal Revenue Code in effect at all relevant times.

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pursuant to Rule 24(g)(1); (4) respondent has not shown that Mr. Young was involved in planning a transaction connected to any issue in the consolidated cases; (5) respondent has not otherwise shown a current conflict of interest pursuant to Rule 1.7, ABA Model Rules; (6) Rule 24(g)(2) and Rule 3.7, ABA Model Rules, only prohibit counsel from advocating for a party at trial, not from otherwise serving as counsel; (7) Rule 24(g)(2) does not disqualify Messrs. Young and Horwitz because neither is likely to be a necessary witness, since the relevant evidence is obtainable from other sources or the evidence is materially uncontested; (8) disqualifying either Mr. Young or Mr. Horwitz would constitute a substantial hardship pursuant to Rule 24(g)(2)(a)(iii); and (9) respondent has not met his burden of proof to show a conflict of interest, a conflict of testimony, the fraud exception to the attorney-client privilege, or a fraudulent transfer.

Background

The following facts are drawn from the pleadings, the parties' filings, and the accompanying declarations and exhibits. These facts are stated solely for the purpose of ruling on respondent's motion, not as findings of fact in these consolidated cases.

During 2006 or 2007, Dr. Richard W. Bandler entered into an arrangement with Mr. Evan Wride--an accountant--under which Mr. Wride established four subchapter S corporations: Plains Properties, Inc., B.O.P., Inc., NLP Trance Formation, Inc., and Century Universal Health, Inc. (S Corporations). Mr. Wride wholly owned the S Corporations. Income derived from Dr. Bandler's speaking and writing activities was booked to one or more of the entities. The S Corporations paid business and personal expenses of Dr. Bandler and Dr. Glenda W. Bandler (Dr. Bradstock) and held assets for their personal use.[3] On September 20, 2013, Dr. Bandler and Dr. Bradstock formed the Pecan Ranch Family Irrevocable Trust (Trust) and Mr. Wride sold the S Corporations to the Trust for $100,000.

The Internal Revenue Service (IRS) initiated an examination of Dr. Bandler, Dr. Bradstock, and their related entities in 2011. Respondent's position is that all income derived from Dr. Bandler's speaking and writing activities is properly attributable to Dr. Bandler under theories of assignment of income and the sham corporation doctrine. Respondent's secondary position is that the Trust is liable as a transferee for Mr. Wride's flow-through tax liabilities of the S Corporations. The

[3]Dr. Richard W. Bandler and Dr. Glenda W. Bandler married in February 2007. We refer to Dr. Glenda W. Bandler as Dr. Bradstock (i.e., her maiden name) to avoid confusion.

years at issue in these consolidated cases are 2006 through 2013.

In 2013, to assist with tax controversy and other tax planning matters, Dr. Bandler and Dr. Bradstock retained the law firm of Glost, Phillips & Murray, P.C. (GPM). Messrs. Young and Horwitz are both attorneys with GPM. To show Messrs. Young and Horwitz's involvement in planning transactions that are connected to an issue in these consolidated cases, respondent provided, in part, the following documents: (1) a Form 2848, Power of Attorney and Declaration of Representative, which was submitted to the IRS on April 8, 2013, authorizing Mr. Horwitz and Mr. T. Daniel Britain--another attorney at GPM--to represent Dr. Bandler before the IRS; (2) an email, dated April 15, 2013, showing that Mr. Horwitz attempted to gain access to bank accounts held by the S Corporations; (3) an invoice from GPM to Dr. Bandler and Dr. Bradstock, dated, June 1, 2013, showing that Mr. Horwitz advised Dr. Bandler and Dr. Bradstock on the formation of the Trust;[4] and (4) a partial transcript of a deposition of Dr. Bandler, conducted on April 19 through April 23, 2021, in which Dr. Bandler states that either Mr. Horwitz or Mr. Brittani advised him on the sale of the S Corporations to the Trust.

In preparation for these consolidated cases, respondent discovered a $625,000 money transfer, executed on December 4, 2013, from Jon's Training & Marketing, Inc.--another entity established by Mr. Wride--to GPM's client trust account for Dr. Bandler and Dr. Bradstock. Respondent also discovered a corresponding money transfer of $625,000, executed on March 26, 2014, from the client trust account to a bank account held by one of the S Corporations, Plains Properties, Inc. To show Mr. Horwitz's involvement in these money transfers, respondent provided emails, dated from December 2 through December 4, 2013, showing that Mr. Horwitz facilitated the December 4, 2013, money transfer.

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[4]The invoice shows an entry for Mr. Young, but the entry does not appear related to an issue in the consolidated cases. The entry provides: "Received and reviewed Donna's memo on California judgment research. Office conference with Ken re[:] same. Phone conference with Ken and client re[:] same, status and strategy for other research claims."

Petitioners also provided invoices from GPM to Dr. Bandler and Dr. Bradstock, dated August 1and October 1, 2013, which similarly show that Mr. Horwitz advised Dr. Bandler and Dr. Bradstock on the formation of the Trust and the sale of the S Corporations to the Trust.

Discussion

I. Rule 201: Conduct of Practice Before the Court

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

II. Rule 24(g)(1): Conflict of Interest

Rule 24(g)(1) addresses, in part, the duty of a counsel of record who was involved in planning a transaction that is connected to an issue in the case. It provides, in relevant part:[5]

> If any counsel of record (A) was involved in planning or promoting a transaction or operating an entity that is connected to any issue in a case, or (B) represents more than one person with differing interests with respect to any issue in a case, then that counsel must either secure the client's informed written consent; 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. See Rules 1.7 and 1.8, ABA Model Rules of Professional Conduct.

Respondent has not shown that Mr. Young was involved in planning a transaction that is connected to any issue in these consolidated cases. Conversely, respondent has shown Mr. Horwitz to have been involved in: (1) the formation of the Trust; (2) the sale of the S Corporations to the Trust; and (3) the money transfers of $625,000. Messrs. Young and Horwitz obtained from petitioners a broad written consent, which includes statements that petitioners read documentation from respondent asserting conflicts of interest under Rule 24(g)(1). Further, respondent has not established any other concurrent conflict of interest

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[5] Rule 1.7, ABA Model Rules generally provides, in part, that an attorney shall not represent a client if the representation involves a concurrent conflict of interest. Rule 1.10, ABA Model Rules generally provides, in part, that while attorneys are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, ABA Model Rules.

under Rule 1.7 or Rule 1.10, ABA Model Rules. On the basis of the arguments and documents before us, we conclude that petitioners' written consent is sufficient to obviate the conflicts of interest with respect to Mr. Horwitz and Mr. Young under Rule 24(g)(1).

III. Rule 24(g)(2): Counsel as Witness

Rule 24(g)(2) limits the circumstances in which an attorney may act as both an advocate and a witness at a trial. It provides, in relevant part:[6]

> (A) Counsel may not represent a party at trial if the counsel is likely to be a necessary witness within the meaning of the ABA Model Rules of Professional Conduct unless: (i) the testimony relates to an uncontested issue; * * * or (iii) disqualification of counsel would work substantial hardship on the client. See Rule 3.7, ABA Model Rules of Professional Conduct.
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> (B) Counsel may represent a party at trial in which another professional in the counsel's firm is likely to be called as a witness unless precluded from doing so under the ABA Model Rules of Professional Conduct. * * *

The first step in our analysis is to determine whether either Mr. Young or Mr. Horwitz is likely to be a necessary witness. This inquiry is "subject to particularly strict judicial scrutiny" because of "the[] potential for abuse." See Coutsoubelis v. Commissioner, T.C. Memo. 1993-457, at *40-*41 (ruling that the

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[6] Rule 3.7, ABA Model Rules, is substantially similar to Rule 24(g)(2). Rule 3.7, ABA Model Rules, provides, in relevant part:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
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> (1) the testimony relates to an uncontested issue;
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> * * *
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

model rules "were not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel").

One central issue in these consolidated cases is whether the Trust is liable as a transferee for Mr. Wride's flow-through tax liabilities of the S Corporations. The Commissioner may assess transferee liability under section 6901 against a party if three distinct requirements are met: (1) the transferor must be liable for the unpaid tax; (2) the party must be a transferee under section 6901 pursuant to Federal tax law principles; and (3) the party must be subject to liability under the applicable State law or State equity principles. Swords Trust v. Commissioner, 142 T.C. 317, 336 (2014). Respondent argues that the transfer of the S Corporations to the Trust was a fraudulent or constructively fraudulent transfer under the Texas Uniform Fraudulent Transfer Act (TUFTA). See Cullifer v. Commissioner, T.C. Memo 2014-208, at *70, aff'd, 651 F. App'x 847 (11th Cir. 2016). We note that respondent bears the burden of proving that the Trust is liable as a transferee. See sec. 6902(a); Swords Trust v. Commissioner, 142 T.C. at 336.

Respondent has not shown that Mr. Young could provide relevant and material testimony regarding any issue in these consolidated cases. Respondent has not provided any evidence that Mr. Young advised petitioners on the various transactions related to the S Corporations and the Trust. Accordingly, we conclude that Mr. Young is not likely to be a necessary witness under Rule 24(g)(2).

Respondent has shown that Mr. Horwitz advised petitioners on various transactions related to the S Corporations and the Trust. The advice that Dr. Bandler and Dr. Bradstock received when the Trust purchased the S Corporations is relevant and material to the application of section 6901 and determination of a fraudulent or constructively fraudulent transfer under TUFTA. See Cullifer v. Commissioner, T.C. Memo. 2014-208, at *18-*19. Petitioners argue that Mr. Horwitz is not a necessary witness because the relevant and material evidence is obtainable from other sources. This argument, however, is undercut by the following considerations: (1) Mr. Wride passed away on November 21, 2014; (2) Dr. Bandler and his colleague Mr. John J. La Valle have indicated a lack of knowledge or understanding of the various transactions related to the S Corporations and the Trust; and (3) Mr. Horwitz was a principal tax advisor to petitioners and their related entities when the transactions related to the S Corporations and the Trust occurred. Accordingly, Mr. Horwitz's testimony is uniquely valuable in these consolidated cases and is unattainable elsewhere.

We are unable to determine at this time, however, whether Mr. Horwitz is likely to be a necessary witness. It is also unclear at this time whether the parties can agree to facts that would render Mr. Horwitz's testimony duplicative or related

to an uncontested issue (i.e., for purposes of Rule 24(g)(2)(A)(i)). The determination of whether Mr. Horwitz is likely to be a necessary witness will be made following submission to the Court of an executed stipulation of facts and the parties' pretrial memoranda. Because we cannot yet determine whether Mr. Horwitz is likely to be a necessary witness, we need not consider at this time whether Mr. Horwitz's testimony would be protected by attorney-client privilege.

Accordingly, it is

ORDERED that respondent's motion to disqualify counsel, filed August 9, 2021, is denied at this time, subject to the qualifications set forth below. It is further

ORDERED that, in accordance with Rules 24(g) and 201, Mr. Young is not disqualified from advocating for petitioners at any trial in these consolidated cases, nor from otherwise serving as counsel. It is further

ORDERED that Mr. Horwitz is not disqualified from serving as counsel on the basis of Rule 24(g)(1) and may serve as counsel for petitioners except to the extent he may be limited pursuant to Rule 24(g)(2), as determined by the Court at a later time. It is further

ORDERED that the determination of whether Mr. Horwitz is likely to be a necessary witness, in accordance with Rule 24(g)(2) and Rule 3.7, ABA Model Rules, will be made following the submission to the Court of a duly executed stipulation of facts and the parties' pretrial memoranda. It is further

ORDERED that Mr. Horwitz shall be presumed as likely to be a necessary witness, in accordance with Rule 24(g)(2) and Rule 3.7, ABA Model Rules, if he is identified as a "will call" witness in the pretrial memorandum of either party. If so designated, petitioners may challenge such designation under the applicable legal doctrine.

(Signed) Alina I. Marshall
Judge