When You Become Caught in the Cross-Hairs of an Innocent Spouse Case

*By Steven L. Jager**

Steven L. Jager gives a first-person account of what it was like having the wrath of the Non-Requesting Spouse aimed squarely at the practitioner. Steve shares insights into being accused of practicing law without a license when he was exercising his non-attorney tax practice rights authorized by Circular 230.

Beware, for they say there is no wrath like a woman scorned, but "they" have never met the Non-Requesting Spouse in an Innocent Spouse case! As the "superheros" that our clients perhaps imagine us to be, few of us can truly be prepared for becoming a target of a very angry man or woman (or his or her lawyer) who is undergoing a nasty, contentious and bitter divorce. By writing this article, I wish to bring awareness and warning to other practitioners so that no other fellow practitioner will become caught off guard as I surely did the first time that I encountered the wrath of an angry (soon-to-be) ex.

Many of us study about "Innocent Spouse" relief, learning the particulars of Code Sec. 6015, but no continuing education classes, no code sections, nor any regulations, Revenue Procedures—not even the Internal Revenue Manual itself—had anything helpful to offer to prepare me for the blasts of fury and vitriol that can spurt from such an engagement, which can be very hurtful emotionally and do real damage professionally.

I remember the very first time I had occasion to assist an "innocent spouse," nothing bad happened. My client was given relief and she was happy and I was happy. I even got paid. Of course, I did not realize it then, but that case was the *exception* and clearly not typical. In that case, I was *unopposed* by the Non-Requesting Spouse as he was nowhere to be found. He had gone to prison (and may even have died for all I know), but that case, as emotional as it was, did not

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have any blow-back on me. Of course, I had to convince the IRS to grant relief to my client, but at least there was no furious ex-spouse trying to intervene and resist my efforts.

More typical, however, is the case where a couple is undergoing a divorce and only becomes even more bitter and contentious as soon as you file the Form 8857 for the Spouse (or more accurately, his/her lawyer) who retains you. PLEASE be mindful that the best practice is to be engaged by the client's lawyer under a Kovel arrangement.[1] Whereas we typically use the Kovel arrangement when we are trying to obtain the protection of the attorney–client privilege for the client, in this situation, we are focused on being able to assert that our services are being provided to the lawyer as a necessary adjunct to his/her providing of legal services in representing his/her client. This is a key distinction, but the privilege is only the icing on the cake. The "prize" here is that YOU as the CPA or EA are clearly not practicing law, but rather, you are assisting the lawyer in practicing law.

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Why the distinction? Invariably, the angry spouse—if he/she puts YOU in the cross-hairs—will likely argue that you are practicing law without a license. And if that happens, you should assume that it will happen on multiple fronts, especially if the angry Non-Requesting Spouse uses his or her lawyer to level the complaint against you. It will come up during the family court proceeding, it will come up in the U.S. Tax Court proceeding (if there is one) and there may well be a State Bar investigation, a complaint made to the State Board of Accountancy (if you are a CPA), and conceivably, also a complaint filed with the IRS Office of Professional Responsibility (if you are an EA or a CPA). This is a coordinated, multi-pronged attack, for which you will need to notify your malpractice insurance carrier. At best, you will become distracted from your work of trying to help and assist your client. Mentally and emotionally, you will find yourself in an excruciatingly uncomfortable position; untenable even, so let me "unpack" and dissect those sentences above and provide a bit more context and clarification.

Let us begin with the basics. Both CPAs and EAs are granted the privilege to practice before the IRS—CPAs by virtue of the State License granted to them and EAs by the credential granted to them by the IRS as an Agency in the Executive branch of the Federal Government. Treasury Circular 230[2] lays out this practice privilege and prescribes and regulates the obligations, duties and responsibilities of these tax professionals, which include CPA's, Enrolled Agents among a few others (including attorneys, which are not relevant for this particular article). When either a CPA or an Enrolled Agent files an Innocent Spouse Claim, that claim is made on an IRS Form 8857. The Spouse for whom the claim is brought is known as the "Requesting Spouse," (or "RS") and the other spouse becomes labeled the "Non-Requesting Spouse" (or the "NRS"). Once the claim is filed with the IRS, the NRS is notified and has the right[3] and will be given the opportunity to "intervene." This right is grounded in the Code[4] and will be further protected and enforced, if needed, by the U.S. Tax Court.[5]

The "takeaway" here is that when you file a claim for Innocent Spouse relief and begin to advocate for your client, your biggest adversary is not necessarily the IRS but rather the NRS who if he/she objects, will do so with a fury, a vengeance and an ugliness that is not for the faint of heart, and once that door opens, there is no looking back. Their objection, ostensibly, will be a legal one (*i.e.*, grounded in "RS should not be granted relief because … "), and THAT argument is something legitimate that you can and should prepare for, BUT what of the angry spouse that feels so angry that he or she (or their own divorce lawyer) suggests that you have "crossed the line" from your licensed practice of taxation to the unlicensed practice of law, which has happened to me, and which can happen to you.

If that does happen to you, you will need to defend yourself, as unfortunately, even Investigators from the Board of Accountancy may not be fully informed about tax practice, as I learned from my own experience that many of the Investigators that conduct these investigations have financial auditing backgrounds and may not be well-versed in tax practice. And, keep in mind that the (presumably) more sophisticated divorce lawyer will launch the attack with simultaneous and coordinated complaints made to the Board of Accountancy, the State Bar, and will bring up accusations at their first opportunity in the Family Court, and if the U.S. Tax Court is involved, in that forum as well.

You should not attempt to defend yourself without a lawyer, and if you have malpractice insurance, you should notify your carrier who will retain a lawyer to work with you. Your defense will be that you were not practicing law, and as alluded to earlier, you have been assisting your client's divorce lawyer, as stated in your engagement agreement, in *their* rendering of services to the client. Moreover, your defense will also be rooted in a 1963 U.S. Supreme

Court case, *Sperry v. Florida ex rel. Florida Bar*,[6] in which the U.S. Supreme Court held that a practitioner is not engaged in the unauthorized practice of law when his/her work is authorized by Congress. Do not get confused by the fact that both the Florida Supreme Court and the U.S. Supreme Court were involved in this litigation. In *Sperry*, the Florida Bar was challenging the practice of a non-lawyer who was otherwise authorized to practice patent law before the U.S. Patent Office. The Florida Bar contended, and the Florida Supreme Court agreed, that the Patent practitioner was practicing law, BUT because non-lawyers could become authorized to practice before the Patent Office by a legislative act of the U.S. Congress, the *U.S. Supreme Court* held that the Florida Bar could not deny to "those failing to meet its own qualifications the right to perform acts within the scope of the Federal authority."[7] You must, therefore, make the connection that you filed the Innocent Spouse claim on an *IRS Form* (the Form 8857), and that, as a practitioner authorized under Circular 230, by virtue of the authority granted to the IRS by the U.S. Congress, you are legally *practicing tax* before the IRS and are not, therefore, in violation of the unauthorized practice of law.

What recourse do you have against the Non-Requesting Spouse and/or his attorney? Truly, none, at least in California. The law considers it "protected speech" when one files a complaint with a State Regulatory Agency in good faith.[8]

If it seems as though a multi-pronged, coordinated attack is daunting, it is, BUT let me let you in on some hard-won insight. If the Non-Requesting Spouse ONLY attacks by filing a complaint with the State Board of Accountancy, while that may seem like a lighter load, it is truly a blessing if complaints are filed with both the Board of Accountancy as well as the State Bar, and here is why: from my own experience here in California, many of the Board of Accountancy investigators are not that well-informed on income taxation practice as noted above, and an investigation can stretch out to what seems like an eternity—upward to a year. In contrast, the State Bar investigators are VERY well-informed as to what constitutes the practice of law and will likely be over in a matter of a few weeks or a couple of months. When this happened to me, I was able to utilize the State Bar Investigator's conclusion that I had not engaged in the practice of law, and when I then presented his conclusory letter to the State Board of Accountancy Investigator, she essentially had no choice but to close-out the complaint against me. That truly was poetic justice, and I only wish that the complaint had been made to the State Bar much earlier in the process as it would likely have shortened my agony significantly. Of course, in addition to making the *Sperry*[9] arguments, I had to persuade the State Bar Investigator that I had not "crossed the line" by making legal conclusions in my client's innocent spouse case, but that was relatively simple as I had utilized my own "best practices" as recited here, which I cannot overemphasize the importance of.

First, as mentioned earlier, become engaged directly by the Lawyer for your client, the innocent spouse—either his/her divorce lawyer if the divorce is then pending—or another lawyer if the divorce is no longer pending, but a *Kovel*[10] arrangement is vitally important. And have your *actions* indicate that you are working for the lawyer on behalf of the client. Demonstrate this by prominently cc'ing that lawyer on all correspondence (including emails) that you write during this engagement, particularly whenever you engage with the IRS as the advocate for the Requesting Spouse.

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Secondly, ask the lawyer to review all of the forms or schedules that are to be submitted to the IRS, and IF the Tax Court is already involved, please be very careful to have every document reviewed by the Lawyer, especially if you are helping to draft any of the Pleadings, such as a Petition or any Motions. Although this should go without saying, please never even try to write anything for any court unless you have been thoroughly trained to do so and can do so competently. But even if you feel competent to do the writing, ALWAYS have your work reviewed and keep a log as evidence of these reviews.

Be careful whenever it seems that you are reaching a legal conclusion. For example, if it becomes important to distinguish community from separate property, ask the lawyer to first issue such a written conclusion and then "piggy-back" on the lawyer's conclusion. For example, assume that your client resides in a community property state and that the IRS Revenue Officer is considering levying upon the proceeds from the sale of the principal residence, even when your client may not be liable (or fully liable) for the debt if granted relief. You know that

under the community property rules, even the non-liable spouse's portion of the home can be captured, but what if you believe that the home is NOT a community asset? The Revenue Officer will ask you to make your argument to him/her in writing. Instead of writing to the Revenue Officer, "please do not levy upon the marital home that is owned by Mr. and Mrs. Taxpayer, as it is not a community property asset," FIRST ask the lawyer to write a letter or Memorandum which expresses the legal conclusion that the home is not a community property asset and the reason for that conclusion, and then, when you do write to the IRS Revenue Officer, you can write, something like, "as concluded by Mr. Lawyer, legal counsel for my client, that the home is not a community property asset of Mr. and Mrs. Taxpayer," followed of course by whatever the appropriate legal argument is, assuming that it is correctly stated (as you report it to be stated, but you—the mere CPA or EA—are not the one reaching the legal conclusion).

Finally, if you do a lot of representation work, consider becoming admitted to practice in the U.S. Tax Court. Since I am now admitted to the Court, I have been able to see how truly frustrated a Non-Requesting Spouse can become when he/she or his/her lawyer realizes that my Tax Court admission forecloses any such "official" complaint.

ENDNOTES

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1 *L. Kovel*, CA-2, 62-1 USTC ¶9111, 296 F2d 918, 9 AFTR2d 366.

2 Treasury Circular 230, Title 31, Code of Federal Regulations, Subtitle A, Part 10.

3 Reg. §1.6015-6.

4 Code Sec. 6015(e)(4).

5 *See* Tax Court Rule 325(a) and 325(b).

6 *Sperry v. Florida*, SCt, 373 US 379.

7 *Id.*

8 Common Interest Privilege, California Civil Code, §47(c).

9 *See supra* note 6.

10 *See supra* note 1.