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Representing Taxpayers During Summons and other IRS Interviews- Potted Plant v. Rambo

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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 "well 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));

(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.

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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 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;


(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*. 

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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).
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


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.

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.