OFFICE OF
CHIEF COUNSEL

**DEPARTMENT OF THE TREASURY**
**INTERNAL REVENUE SERVICE**
**WASHINGTON, D.C. 20224**

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: DEBORAH A. BUTLER
ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT: VEBA Litigation

This Field Service Advice responds to your memorandum dated January 4, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

A =
B =
C =
Attorney 1 =
Attorney 2 =
Case 1 =
Case 2 =

ISSUE:

Is District Counsel ethically constrained from conducting discussions with Attorney 1.

CONCLUSION:

District Counsel is not ethically constrained from conducting discussions with Attorney 1

FACTS:

There are numerous court cases pending involving voluntary employee beneficiary associations (VEBA), including cases 1 and 2. District Counsel was contacted by Attorney 1 regarding information that A, this attorney's new client, might be willing to share with the Internal Revenue Service (Service). At the time of this contact, this client's identity was not known and Attorney 1 had yet to make an appearance in any of the court cases.

A had certain concerns regarding the cases. A was upset with Attorney 2, who was the attorney of record in cases 1 and 2, because of that attorney's representations and advice concerning discovery responses. As a result, A hired an expert to evaluate the VEBA transactions. Attorney 1 advised that A was interested in sharing information regarding the discovery responses including the fact that Attorney 2 prevented A from fully and truthfully responding to discovery and sharing the expert's report concluding that VEBA's are scams. In return, A would settle the case treating the VEBA program as nonqualified deferred compensation, deductible by the corporation and taxable to the shareholder/employee, but with A not being liable for additions to tax. An acceptance of this offer by the government represents a full concession on the part of A except for the penalties. This offer is identical to the offer currently available with Appeals.

Attorney 1 has now made appearances in cases 1 and 2 on behalf of A, B and C. The Court has granted Attorney 2's motions to withdraw from cases 1 and 2.

LAW AND ANALYSIS

The relationship between a lawyer and a client is one of agent and principal. In re Artha Management, Inc., 91 F.3d 326, 328 (2d Cir. 1996). There is a strong presumption that an attorney who enters a general appearance has his client's authorization to do so. Bethlehem Steel Corporation v. Devers, 389 F.2d 44, 45 (4th Cir. 1968); Gray v. Commissioner, 73 T.C. 639, 646 (1980). Furthermore, Model Rules of Professional Conduct Rule 4.2 provides the general rule that an attorney is prohibited from ex parte communications with the opposing party when that party is represented by counsel. Fu Investments Co., Ltd. v. Commissioner, 104 T.C. 408, 411 (1995).

Clearly, District Counsel cannot directly contact any of the opposing parties in cases 1 and 2. Given the fact that Attorney 1 is now the only attorney of record, District Counsel can contact Attorney 1 concerning cases 1 and 2. Finally, we would advise Attorney 1 that the Appeals' settlement offer is still outstanding and is not conditioned upon A providing information to the Service.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

Not applicable.

Please call if you have any further questions.

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