Fu Inv. Co. v. Commissioner, 104 T. C. 408 (1995)

The Model Rules of Professional Conduct do not prohibit ex parte communications with former employees of a corporate party, but such communications must respect the attorney-client privilege.

Summary

In Fu Inv. Co. v. Commissioner, the U. S. Tax Court addressed whether the IRS could engage in ex parte communications with former employees of a corporation involved in a tax dispute. The court held that Model Rule 4. 2 does not apply to former employees, allowing such communications, but emphasized that the IRS must avoid eliciting privileged information. The petitioners failed to show that a protective order was necessary to prevent disclosure of privileged communications, as their assertions were too general. This case clarifies the scope of attorney-client privilege in the context of former corporate employees and outlines the precautions required during ex parte interviews.

Facts

Fu Investment Co. , Ltd. , and Coco Palms Investment, Inc. , filed petitions in the U. S. Tax Court challenging IRS determinations that they were liable for withholding income tax. The IRS sought to interview three former employees of the petitioners—a former secretary and two accounting supervisors—regarding the matters in dispute. The petitioners moved for a protective order to prevent these ex parte communications, arguing that the former employees had been privy to privileged attorney-client communications.

Procedural History

The petitioners filed motions for a protective order in the U. S. Tax Court after the IRS attempted to interview their former employees. The court heard arguments from both sides and reviewed declarations submitted by the petitioners' counsel. The case was assigned to Chief Special Trial Judge Peter J. Panuthos, and the court ultimately issued orders denying the petitioners' motions for a protective order.

Issue(s)

1. Whether Model Rule 4. 2 prohibits ex parte communications with former employees of a corporate party.
2. Whether the petitioners provided sufficient evidence to justify a protective order to prevent disclosure of privileged communications during ex parte interviews with former employees.

Holding

1. No, because Model Rule 4. 2 does not extend to former employees, as they are not

© 2025 SCOTUSreports.com. All rights reserved.

considered a “party” and do not possess managerial responsibilities on behalf of the organization.
2. No, because the petitioners’ general assertions about privileged communications were insufficient to warrant a protective order under the circumstances presented.

Court’s Reasoning

The court relied on the text and official comment of Model Rule 4. 2, which does not prohibit ex parte communications with former employees of a corporate party. The court noted that former employees no longer have managerial responsibilities or the ability to bind the organization, thus falling outside the scope of the rule. The court also emphasized that the attorney-client privilege does not protect underlying facts known by former employees, only the communications themselves. The petitioners’ general assertions about privileged communications were deemed insufficient to justify a protective order, as they did not provide specific details about the alleged privileged communications. The court stressed that while ex parte communications are permissible, the IRS must ensure that these interviews do not elicit privileged information and must adhere to the Model Rules of Professional Conduct.

Practical Implications

This decision clarifies that attorneys may engage in ex parte communications with former employees of a corporate party without violating Model Rule 4. 2. However, attorneys must take precautions to avoid eliciting privileged information and must inform former employees of their role and the adversarial nature of the proceedings. This ruling impacts how attorneys approach witness interviews in corporate litigation, requiring them to balance the need for information with respect for the attorney-client privilege. It also underscores the importance of specificity when asserting privilege claims in motions for protective orders. Subsequent cases have followed this precedent, reinforcing the distinction between current and former employees in the context of ex parte communications.

© 2025 SCOTUSreports.com. All rights reserved.