

CC-2004-012

February 19, 2004

Subject: Legal Advice Questions & Answers **Cancel Date:** Upon incorporation into CCDM

Purpose

This notice addresses questions regarding how the Office of Chief Counsel renders legal advice, including when legal advice should be provided in writing and the effect of provisions requiring the release of documents to the public on the decision to provide legal advice.

Background

A number of questions have arisen regarding how the Office of Chief Counsel renders legal advice. These questions concern when legal advice should be provided in writing, and what effect, if any, the provisions requiring the release of documents to the public may have on the decision to provide written legal advice.

As attorneys in the Office of Chief Counsel, we are often requested to provide legal advice to the Internal Revenue Service, either directly or through other offices within Counsel. Circumstances may dictate that the legal advice be in writing, rather than oral. There are no hard and fast rules. Rather, our sound judgment must govern what is appropriate for the particular request and response. In other words, the facts and circumstances surrounding the matter will govern whether the legal advice should be in writing, including (1) the needs of the requester; (2) whether providing legal advice in writing, particularly in the case of a complex or lengthy advice, will reduce errors in understanding or following the advice; and (3) whether providing legal advice in writing will ultimately be the more efficient method for advancing the issue.

When circumstances suggest written advice is appropriate, both its format and the content should be responsive to the audience's needs. The Service, as well as our colleagues, often do not need a lengthy written analysis; rather the need may be to know just the conclusion. In such cases, drafting a lengthy written analysis may only delay delivery of the conclusion. In other situations, a more detailed analysis may be needed to explain the basis for the conclusion or the scope, applicability, or context of

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the advice. In some cases, such as in nondocketed large and complex cases, where advice is needed to resolve an issue or where it is desirable to have taxpayer input into the matter, it may be appropriate to issue the advice through the Technical Advice Memorandum or Technical Expedited Advice Memorandum procedures. Whether legal advice is required to be released to the public, however, must never be a factor in determining whether written legal advice is appropriate.

Set forth below, in a Question and Answer format, are the rules for rendering legal advice throughout the Office of Chief Counsel. These are not new rules but merely are a restatement of the rules we should have been operating under already. These questions and answers apply to advice rendered by the Office of Chief Counsel, whether by an Associate office or Field office unless the question states otherwise.

Providing Written Legal Advice

Q1. Does the Office of Chief Counsel have a policy that the Associate or Field offices should not be asked to provide written legal advice or should not provide written legal advice?

A1. No.

Q2. How do I decide whether to provide written legal advice?

A2. Legal advice should be provided in writing when it would be helpful and appropriate. Your principal guides will be the needs of the recipient of the legal advice, the nature of the question, and whether reducing the response to writing would be more effective than providing an oral response. You should always consult with the recipient to determine the nature and scope of the response that is needed and how the recipient plans to use the advice.

Q3. Should I consider whether a document must be released to the public in making a decision to ask for or give written legal advice?

A3. No.

Q4. I am a Field attorney who needs advice from an Associate office. I'm worried about asking for written advice on my case because it will be Chief Counsel Advice. What should I do?

A4. If you need legal advice from an Associate office, you should call or send an email to the responsible Associate office. After discussing the issue with that office and agreeing that the question requires written legal advice, you should then discuss the procedure for processing the legal advice, including whether the document would be released to the taxpayer and the public. If, for example, some portion of the response would involve law enforcement information which, if disclosed, could reasonably be expected to interfere with an open examination,

collection, criminal investigation, or judicial proceedings, you should discuss that concern with the Associate office attorney. To the extent the advice implicates these kinds of issues, it is appropriate to redact the written product. Similarly, if the advice involves attorney work product or some privileged matter that would suggest all or part of any written legal advice should not be released to the public, it should be redacted in whole or in part. In any case, the possibility that the advice will be released to the public should not be a consideration that prevents you from either seeking or receiving written legal advice.

Q5. Under what circumstances is it appropriate to provide written legal advice?

A5. The following considerations suggest that written legal advice is appropriate:

- The underlying question involves a novel or significant interpretation of the law.
- The advice implicates significant policy questions.
- The advice will have significant implications for how the Service implements a program.
- The advice involves considerations about whether change to an established position is warranted.
- The advice is intended for distribution beyond those involved in the matter for which the advice was sought.
- The recipient seeks an analysis of law that will be applied to different factual situations.
- It would be beneficial to make the content of the legal analysis generally available.
- The circumstances surrounding the request for advice require development of a precise analysis of the law and a record of that analysis.
- A writing that sets forth the application of the law to the facts will ensure that the rendered advice is understood.

If you determine that the legal advice should be in writing and the person requesting or responding to the request disagrees, you should discuss the disagreement with your manager, and the issue should be resolved, if necessary, through the reconciliation procedures.

Q6. What should I do if I ask an Associate office for written legal advice, and they believe that oral advice is sufficient?

A6. You should discuss the disagreement with your manager, and the issue should be resolved, if necessary, through the reconciliation procedures.

Q7. Once I determine, in consultation with the recipient of the advice, that written legal advice is appropriate, do I need to prepare a document that thoroughly sets out all of the facts I know, all of the relevant law, and a detailed analysis?

- A7. The extent and scope of the response provided should be tailored to the needs of recipient. If the recipient needs written confirmation that a procedure was legal or that a particular course of action poses no significant impediments, then there may be no need to provide more than a brief statement of the law and analysis along with the conclusion. If there is disagreement among various offices about the correct interpretation of Code provisions, then a lengthier discussion of the law and the analysis driving an office's interpretation would be appropriate. In this type of document, there might be no need to reiterate the facts in any detail or to apply the law to a specific set of facts.
- Q8. If written legal advice is appropriate, does the Office of Chief Counsel have a preference regarding the procedures to be followed in providing that advice?
- A8. Yes. When written legal advice is appropriate concerning taxpayer specific matters in nondocketed cases, the Associate offices should give strong consideration to providing the advice under the Technical Advice Memorandum or Technical Expedited Advice Memorandum procedures. These procedures are preferable since they permit the taxpayer to have input into the facts and the position the Service should take. It is recognized, however, that not all issues in nondocketed cases are appropriate for the TAM or TEAM procedures.
- Q9. Is there a specific format for written legal advice that is Chief Counsel Advice?
- A9. Yes. If written legal advice is determined to be appropriate and it would be Chief Counsel Advice as described in Q&A 14, the memorandum format should be used.
- Q10. Is it true that we don't do FSAs anymore?
- A10. No. While we no longer refer to the written legal advice prepared by the Associate offices for the Field as FSAs, Associate offices continue to provide written legal advice. The content of that advice should be determined by the facts and circumstances of the matter, and what will best serve the needs of the Office of Chief Counsel and the Service.
- Q11. I have heard the terms RAM, BAM, and SAM used. What exactly do these terms mean?
- A11. These catchy acronyms were adopted by some as a short hand reference to various categories of advice that might be given by an Associate office. These acronyms referred to reviewed advice memorandums, to background advice memorandums, and to strategic advice memorandums, respectively. These are not categories of advice that we issue, as was explained in Chief Counsel Notice 2003-002 (December 11, 2002). The only type of advice that is issued is legal advice. The needs of the recipient of the legal advice should drive the content of

the response. These terms, although catchy, are misleading *and* they should not be used.

Release of Legal Advice to the Public

Q12. Must all written legal advice I give be released in accordance with section 6110?

A12. The law recognizes that certain types of legal advice are informal in nature and need not be released to the public. One example is legal advice that can be rendered in less than two hours by a National Office component even if it is reduced to writing. Other types of written legal advice may be protected from release by the work product doctrine, such as advice in a docketed case, or an appropriate privilege. In addition, advice that is predecisional or that is rendered internally among National Office groups in considering the request for advice also need not be released to the public. Other types of written advice, such as the legal advice given by Field offices (and which is not reviewed by the National Office), do not constitute agency law and need not be released to the public. The content of the advice and the circumstances surrounding the advice, and not the form or label it is given, determine whether it must be partially or wholly released to the public.

Q13. I've heard that certain types of written advice rendered by an Associate office need not be released to the public. What are they?

A13. Written documents involving the following need not be released to the public: Legal advice that can be prepared in less than two hours.

- Advice that involves more than two hours of work but does not fall within the definition of Chief Counsel Advice under section 6110(i)(1)(A) (see Q&A 14 below).
- Advice that is written between Associate offices, or between an Associate office and Division Counsel headquarters office.

Q14. What are some examples of a response that does not fall within the definition of Chief Counsel Advice?

A14. If the legal advice **does not convey** (i) a legal interpretation of a revenue provision; (ii) a position or policy concerning a revenue provision, or (iii) a legal interpretation of State law, foreign law, or other Federal law relating to the assessment or collection of any liability under a revenue provision, it is **not** Chief Counsel Advice under section 6110. Examples of responses that are not Chief Counsel Advice under this definition are:

- A simple reference to the Internal Revenue Code, IRM, CCDM, regulations, rulings, cases, or written legal advice that has previously been released to the public.

- A simple statement of agreement that a particular course of action is appropriate that is unaccompanied by an analysis of the applicable law, a statement of, or interpretation of, any revenue provisions.
- Responses dealing with or which include only factual matters without any legal analysis.
- Advice on general legal services matters.

Q15. Once I spend more than two hours responding to a request from a Field office for legal advice, is there a requirement that I prepare a formal memorandum?

A15. No.

Q16. I received a call from a Field attorney and was able to provide advice in less than two hours because the question had been addressed in a background memorandum I had prepared in another case. The Field attorney asked that I send him this memorandum and understands that it reflects my research and conclusions on the issue, since it has never been formally adopted as the views of my office. Can I do this?

A16. Yes. You are not providing the Field attorney with a document that falls under the definition of Chief Counsel Advice.

Q17. Same scenario as Q. 16, but the Field attorney wants my notes because they need an analysis of the issue that reflects the views of my office.

A17. If the Field attorney needs an analysis of the issue, you should prepare an appropriate response for the Field. If that document is Chief Counsel Advice, it should then be processed, as appropriate, for public release.

Q18. Should I provide legal advice that must be released to the public under the provisions of section 6110 by email?

A18. No. Email is generally not an appropriate format for providing lengthy, detailed advice, particularly where that advice should be released to the public. If an email message providing legal advice that must be released to the public is inadvertently sent, it should be prepared for release to the public.

Q19. If I am a National Office attorney and I provide legal advice in an email message, must I prepare that message for release?

A19. If the email took less than two hours to prepare or would not fall within the definition of Chief Counsel Advice, it does not have to be released to the public. See Q&A 12, Q&A 13. If, however, the legal advice provided in an email falls within the definition of Chief Counsel Advice, it should be released under the provisions of section 6110.

Q20. Other than taxpayer identifying details, what other information need not be publicly disclosed when I prepare written legal advice for release?

A20. Information that is privileged can be redacted from documents prepared for release. For example, documents written in docketed cases or cases designated for litigation may be subject to the work product doctrine and not released. Law enforcement information which, if disclosed, could reasonably be expected to interfere with an examination, collection, criminal investigation, or judicial proceedings can be redacted prior to release. For example, information that reveals the following can be redacted:

- The scope, direction, and limits of the investigation or proceeding
- The identity of cooperating witnesses and/or informants
- Physical and/or testimonial evidence gathered to date and the reliance placed by the government upon that evidence
- Litigating strategies, strengths and weaknesses of the case
- The methods and subjects of surveillance.

Q21. Is assertion of the attorney work product doctrine limited to documents prepared in connection with docketed cases or cases designated for litigation?

A21. No. Assertions of attorney work product doctrine outside of these circumstances, however, should only be made if, after careful consideration of the totality of the circumstances, there is a reasonable anticipation of litigation. Some examples of this are: the taxpayer's representative states an intention to litigate the matter or the taxpayer has litigated the issue in prior audit cycles. Any assertion of the work product doctrine outside of docketed cases or cases designated for litigation should be coordinated with the Associate Chief Counsel (Procedure & Administration).

Conference Memoranda and Briefing Memoranda

Q22. Are conference memoranda and briefing memoranda Chief Counsel Advice?

A22. No.

Q23. What is a conference memorandum?

A23. A conference memorandum is:

- A memorandum that is prepared to reflect the decisions made at a briefing of a National Office executive that will be shared with all participants in the conference.
- A memorandum prepared to reflect the discussion of a group of National Office and Field attorneys who are working on a case or program issue that is provided only to the participants to provide them with a sense of what was agreed to at the conference.

Q24. What is a briefing memorandum?

A24. A briefing memorandum, also known as a briefing paper, is a predecisional document prepared in preparation for a briefing of a National Office executive that will be shared with the participants in the conference. These may also be referred to as talking points.

Q25. Can I share conference memoranda, briefing papers, and talking points with someone who is involved in preparing them or is working on the case that was the subject of the briefing if they did not participate in the briefing?

A25. Yes. These documents can be shared with those who assist in preparing them or who is involved in the case that is the subject of the briefing. These documents, however, should not be shared with others who did not attend the briefing, are not involved in the case that is the subject of the briefing, or did not assist in preparing the documents.

Drafts of Written Legal Advice

Q26. Can drafts of legal advice be shared with the office requesting the advice?

A26. Yes. Sharing drafts may assist in the finalization of advice, including clarifying issues or the facts. Of course, a draft is not a final product and may not be relied upon. Sharing drafts, including the analysis and the proposed conclusion, is not a basis for the withdrawal of the request for advice. The legal advice memorandum will be completed and issued to the requesting office in the normal course.

Effect of Written Legal Advice

Q27. I have heard people refer to the Service position as stated in a particular Chief Counsel Advice. Is that correct?

A27. No. The analysis of the law and the conclusions in Chief Counsel Advice do not establish the position of the Service. These types of documents reflect the analysis and conclusions of a particular office within Chief Counsel, or they may restate or interpret the position of the Service as set out in some form of published guidance or case law.

