

# Full Text: Deposition Of The IRS's Jeanne S. Gessay.

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APR. 11, 1995

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===== **CASE NAME** =====

TAX ANALYSTS,

Plaintiff,

versus

INTERNAL REVENUE SERVICE,

Defendant.

===== **FULL TEXT** =====

Deposition of Jeanne Suzanne Gessay, witness called for examination by counsel on behalf of plaintiff, Bruce L. Stern, Esquire, pursuant to notice in the offices of Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, Room 3412, commencing at 9:30 a.m., Tuesday, April 11, 1995, before Paulette J. Blair, Notary Public in and for the District of Columbia.

APPEARANCES:

On behalf of Plaintiff, Tax Analysts:

Bruce L. Stern, Esquire and

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DEPOSITION OF JEANNE GESSAY

Direct Examination by Mr. Stern

Cross Examination None

P R O C E E D I N G S

9:42 a.m.

Whereupon,

JEANNE SUZANNE GESSAY

having been previously called, was duly sworn and testified as

follows:

MR. STERN: Good morning, Ms. Gessay. My name is Bruce Stern. I'm an attorney in the offices of William Lehrfeld. We represent the plaintiff in this matter, Tax Analysts.

Let me introduce the people sitting with me. This is Mr. Thomas Field, he's the executive director of Tax Analysts, as you know, the plaintiff in this case. On my immediate left is William Lehrfeld, my boss, also an attorney representing Tax Analysts in this matter.

I don't know if you've ever had your deposition taken before, either in your individual capacity or in your capacity as an employee of the IRS, but I thought I'd explain first some of the procedures involved in a deposition.

As you can see, your testimony is going to be recorded. You will have an opportunity, after the deposition is taken, to review the transcript that is taken today and make any changes you feel are appropriate. The deposition transcript will be provided to you, at your request, and that request must be made before the end of the deposition. If you like, we will provide it to you so you can review it, read through it, if you think there was a mistake made, you can change it, and a notation will be made of your changes and attached to the deposition.

[Editor's Notes: Changes noted by the witness, all of which have been accepted by plaintiff's counsel, have been incorporated in this transcript.]

MR. JACKEL: Perhaps we could get that on the record now.

MR. STERN: Sure.

MR. JACKEL: You understand that you are entitled to review the deposition, if you want to. Do you want to do that?

THE WITNESS: Yes, I would.

MR. STERN: Okay, we will definitely provide it to you in print format.

Your testimony is under oath. It's the same as giving testimony in a court. You've taken a pledge, so we would appreciate if any answer you give is to the best of your knowledge, correct and accurate. If you don't know the answer to any question we ask, please feel free to

state so. We don't want you to feel pressured, that you have to give an answer to anything. If you don't know the answer to a question, please feel free to say, "I don't know."

One other thing, also, when there's recorded testimony, it's difficult for the reporter to pick up, if you sometimes say, "Ah hah," or "Uh huh." "Yes, no," answers are probably the best. It's something we all do at times. In addition, a lot of people will nod their heads, "yes," or shake their heads, "no," again, the reporter can't pick that up. So, if you could say, "yes," or "no." Or, if I direct you to say, "yes," or "no," please don't be offended. It's just in trying to make sure that the record is clear and correct.

If you want to take a break at any time, or if you want to talk to your attorneys about any question I ask, outside of our presence, you can do one of two things: you can just say, "Can we go off the record," and we'll go off the record and we can leave the room, or you can step outside. Or you can take a minute and talk to your attorneys if you have any questions. If you would like a drink of water, or if you'd like to step outside, if you're just sick of answering my questions, we can also take a break at any time you want. Please feel comfortable asking me to take a break.

There are two types of objections in a deposition. Your attorneys may say -- or actually, the government's attorneys may object to a question I ask. This doesn't necessarily mean you are not required to answer the question. They may direct you not to answer a question. If an objection is raised where they direct you not to answer it, you are not required to answer that question. I don't know if that was clear, but if you have any questions, please feel free to ask Mr. Jackel, or any of the other attorneys who are here.

Do you have any questions regarding the deposition procedure of what's going to happen this morning at all?

THE WITNESS: No, I don't.

MR. STERN: Are you aware of the purpose of this lawsuit?

THE WITNESS: Generally, yes.

MR. STERN: So, you're aware that it's essentially an action of the Freedom of Information Act requesting information from the IRS?

THE WITNESS: Yes.

DIRECT EXAMINATION

BY MR. STERN:

Q Would you state your name for the record, please; and spell you first and last name.

A It's Jeanne -- and that's J-E-A-N-N-E, Suzanne -- and that's S-U-Z-A-N-N-E, Gessay, G as in George, E-S-S as in Sam, A-Y.

Q And where do you live?

A Annandale, Virginia.

Q Will you give us your address, please?

MR. JACKEL: I'm going to object. Her personal address is not an issue here, and we have understood that there's the possibility that these depositions are going to be published. We certainly don't want to invade her personal privacy in that way.

MR. STERN: Okay, let me -- the purpose of the question was just for background information, as well as -- perhaps, if you left the employ of the Internal Revenue Service. But, in light of Mr. Jackel's objection and since it will possibly be published, you don't have to answer that question. We'll withdraw that.

BY MR. STERN:

Q Are you appearing at this deposition today, pursuant to a subpoena which was served on you?

A Yes.

Q And did you receive a copy of that subpoena?

A No, I haven't. I personally have not received a copy of it.

Q You were advised of it?

A yes.

Q In your subpoena, a number of documents were requested in an exhibit which was attached. I understand that some of those exhibits are not being produced. Is that correct?

MR. JACKEL: For the record. I think that question is best answered by me.

MR. STERN: Okay.

MR. JACKEL: Most -- well, many of the documents in the subpoena are not in Ms. Gessay's custody or control. They are in the custody and control of the Internal Revenue Service and the documents that we've been able to obtain since the serving of the subpoena have been provided to counsel this morning. We will do our best to get the rest of those documents here in a timely manner.

MR. STERN: Great.

BY MR. STERN:

Q Is there any reason why you feel you should not be testifying here today, under oath? Are you on any medication or under the influence of any drugs or alcohol, which may affect your ability to testify?

A No.

Q Did you discuss your appearance today at this deposition with any of your superiors or other people in the Exempt Organizations' Division?

A No.

Q You didn't speak with Marcus Owens or Jay Rotz or anybody about this deposition today?

A No, I just -- the only thing I did was I voice mailed them when I was told I would be deposed and said I would, but I've had no further discussions with them.

Q Okay.

Did you confer with counsel about this deposition?

A Yes.

Q Has anyone instructed you or advised you about any of the testimony that you're going to give today? Told you what to say or not to say?

MR. JACKEL: I'm going to object to the extent that you're asking for information that may come within the attorney/client privilege. You understand that some of the communications he's asking about may be attorney/client privilege. I'm going to advise you that you need not answer with respect to those things that are matters of advice between an attorney and a client.

So, with that qualification, you can answer the question.

THE WITNESS: I decline to answer the question.

BY MR. STERN:

Q Other than Internal Revenue Service attorneys, or Justice Department attorneys, has anyone advised you as to what you should testify about, or what you should not testify about in this deposition today?

A No.

Q I'd like to show you an Internal Revenue Service memorandum, dated April 10, 1995, which was produced to us this morning. I'd like to ask you if you've seen that document, or if it was provided to you prior to this deposition?

A I have a copy here -- signed copy -- that I received this morning. I had seen a draft, previously.

Q And, who prepared that draft for you? Do you know who prepared that draft?

A No, I do not know who prepared that draft.

Q When was that draft provided to you?

A I believe it was yesterday.

Q And, is this document -- this memorandum -- in its final format substantially similar to the draft you received yesterday? To the best of your knowledge?

A Yes.

MR. STERN: Would you mark this as Exhibit A, and place it in your deposition record.

(Whereupon, the document previously marked as Plaintiff's Exhibit A was entered into the record.)

BY MR. STERN:

Q Did you review any documents or materials in preparation of your deposition today?

A No, but I pulled some delegation orders and gave them to them, which I think some of which were furnished to you.

Q I think they were produced to us this morning.

And you presently work for the Internal Revenue Service?

A Yes.

Q And, what is your position -- official position -- and title?

A It's Chief, Exempt Organizations - Technical Branch 2.

Q And how long have you held this position?

A With that title it's been just -- I guess, probably about six or seven months. We just went through a reorganization.

Q And what was your title prior to that point?

A Chief, Exempt Organizations - Rulings Branch 2.

Q And how long were you Chief, Exempt Organizations - Rulings Branch 2?



A I had that title in two different positions due to reorganizations. One was approximately three years; and then, prior to that, approximately -- I recollect, right about two years.

Q Were your duties and responsibilities substantially the same?

A As chief --

Q Chief, Technical Branch 2 and also Chief, Rulings Branch 2.

A At one point, my duties changed substantially in that prior to the reorganization several years ago, I was managing a staff of three group managers and then became a first line supervisor. We did away with one level of management.

So, as the Chief of Branch -- of the Technical Branch, and when I had the title as Chief, Rulings, Branch 2, doing the same duties, I managed Tax Law Specialists directly.

Q In 1993, what was your title and position? Would that fall within the Rulings Branch Chief, at that point?

A Yes.

Q Okay. And, as Chief of Technical Branch and Chief of the Rulings Branch, can you explain what your duties and responsibilities are?

A Yes. Uhm, when cases come in to the Exempt Organizations Division, they're assigned to a specific Rulings or Technical Branch for consideration. It's my responsibility to manage the staff who works those rulings cases that are assigned to Branch 2, and to be responsible for all the administration -- see the administrative details are done; resolve any technical questions that may come up in individual work, and manage those individuals in terms of providing them support.

I'm responsible for their career development, for their training, and oversee the preparation of reports and all the management details that go into managing a caseload.

Q How many people work under you, and can you give us the titles of the type of people that work under you?

A I have a secretary, a reviewer. Currently, I have two senior Tax Law Specialists and ten Tax Law Specialists, I believe. That's my best recollection.

Q And how many years have you worked for the IRS?

A I've worked for the IRS since 1956.

Q And all in the Exempt Organization Division?

A No.

Q How long have you been working for the Exempt Organization Division or its predecessor, dealing with exempt organizations?

A I've been dealing with exempt organizations since 1961.

Q Okay. Who is your immediate supervisor?

A Jay Rotz.

Q And Mr. Rotz' title?

A He's the Executive Assistant for Technical to the Division Director in the Exempt Organizations' Division.

Q And Mr. Rotz' supervisor is?

A Marcus Owens.

Q And his title?

A He's the Director of Exempt Organizations' Division.

Q How many rulings branches are there?

A There are five technical branches.

Q I'd like to show you a directory, which is put out by Tax Analysts, and ask you to take a look at this.

To the best of your knowledge, does that generally show the organizational chart of the Exempt Organizations Division here at the IRS?

MR. JACKEL: I guess I should object. This doesn't look like a chart to me. This is a list.

BY MR. STERN:

Q Does this list generally show the organizational structure of the Exempt Organizations Division?

A Yes. And, looking at this list -- when I listed my employees, I forgot to list my Assistant Branch Chief. So, if I could make clear the record to that.

Q Sure.

MR. STERN: We'll just mark this, Exhibit B.

(Whereupon, the document previously marked at Plaintiff's Exhibit B was entered into the record.)

BY MR. STERN:

Q I'd like to change course a little bit here. I'm going to ask you a series of questions regarding the exemption application ruling process and would like you to answer to the best of your ability, if you know. If you don't know, please say, "I don't know," or --

Are you generally familiar with the IRS' internal practices and published procedures regarding its consideration of exemption applications, which are filed by entities seeking recognition as a tax exempt organization?

A Yes.

Q And this would include organizations which are described in Internal Revenue Code Section 501(c)(3)?

A Yes.

Q And can you tell us what, in your opinion, Section -- or experience -- Section 501(c)(3) means or the types of organizations that fall under that definition?

A They are charitable, religious, educational, scientific, testing for public safety. Okay.

Q Sure.

A I don't know if I've stated everything that's in the statute or not.

Q That's fine.

Do you know what the statutory qualifications for recognition as a Section 501(c)(3) organization are?

A Yes.

Q Can you tell us what those are?

A It must be organized and operated for Section 501(c)(3) purposes.

Q Are there other statutory requirements as well? Are there prohibitions against inurement, self-dealing or --

A I can't --

MR. JACKEL: I'm going to object here. You're asking her to interpret the statute.

MR. STERN: Sure. I'll withdraw that question. You don't have to answer that.

BY MR. STERN:

Q Now with the exception of churches and their integrated auxiliaries, are all organizations that would like to be qualified as Section 501(c)(3) organizations required to file an exemption application with the Internal Revenue Service?

A You're asking -- would you repeat that question again?

Q Sure, no problem.

With the exception of churches and their integrated auxiliaries, are organizations that wish to be recognized as exempt under Section 501(c)(3) required to file an exemption application with the IRS?

A No.

Q No, they are not. And under what circumstances is an organization not required to file an exemption application?

A Their gross receipts are less than \$5,000.

Q Okay. With that exception, with the \$5,000 -- let me repeat the question. I was mistaken.

With the exception of churches and their integrated auxiliaries, must organizations apply to the IRS for a letter ruling recognizing them as a 501(c)(3) organization?

(Pause.)

MR. STERN: Would you like for me to repeat it?

THE WITNESS: No.

MR. STERN: Okay. So, the answer to the question is, "No?" So I'm sure.

THE WITNESS: No.

MR. STERN: Okay. I wasn't sure what you were saying "no" to. Okay.

BY MR. STERN:

Q In what circumstances is a Section 501(c)(3) organization not required to file an exemption application with the IRS for a letter ruling recognizing its exempt status?

A When the gross receipts are less than \$5,000 and --

Q So, without an exempt application, how does the applicant obtain a letter ruling from the IRS recognizing its exempt status in that situation?

A I'm sorry. I didn't pick up on the reason for -- if you want a ruling letter, that holds -- a letter holding that you're recognized as exempt, then you must file an application for exemption.

Q Okay, and that exemption application for Section 501(c)(3) organizations is a Form 1023?

A Yes.

Q Are you aware of any organization that was recognized as a 501(c)(3) organization that did not file a Form 1023?

A Not to my knowledge.

Q Okay.

Now, when an organization files an exemption application, a Form 1023, must it file the application with the key District Office in which its principal place of business is located?

A Those are our general procedures, yes.

Q So, typically, an exemption application is filed with the key District Office?

A Yes.

Q In your experience with the IRS, what percentage of exemption applications would you say were filed with a key District Office as opposed to, say, being filed directly with the National Office? Ninety-five percent? Higher?

A I have never calculated or worked the statistics in terms of the percentage relating to cases filed in the National Office. Usually 95 percent is the general one we have in the back of our mind for cases worked in the field with 5 percent forwarded by the field to the National Office.

Q Sure. So it would be pretty rare if an organization filed its exemption application directly with the National Office, as opposed to the key District Office.

MR. JACKEL: I think you had the answer to that question, before, when you asked her for the percentage. I mean, whether -- if it's five percent, then whether that's rare or not is strictly a matter of one person's opinion.

BY MR. STERN:

Q In your opinion, would it be unusual for an applicant to file its exemption application directly with the National Office?

MR. JACKEL: I'm going to advise the witness that giving such an opinion is beyond the scope of her testimony authorization and, you know, it's up to you to decide whether to answer the question or not.

THE WITNESS: Perhaps we could chat about this.

MR. JACKEL: Could we go off the record?

MR. STERN: Off the record.

(Whereupon, counsel engaged in off-the-record discussion with witness.)

MR. STERN: Back on the record.

THE WITNESS: Would you repeat the question for me.

MR. STERN: Sure.

BY MR. STERN:

Q In your opinion, would you consider it unusual for an applicant for 501(c)(3) status to file its exemption application directly with the National Office instead of a key District Office?

A No.

Q Can you describe the circumstances under which an organization might file its exemption application directly with the National Office instead of filing it with its key District Office?

MR. JACKEL: I'm going to object. You're asking her to answer a hypothetical question. I'm fairly sure that you can ask the question in a concrete way.

MR. STERN: Well, I don't think it's hypothetical. She just stated that --

MR. JACKEL: You inserted the word "might" in that question. If you want to ask her about what's happened in the past, that's perfectly okay.

BY MR. STERN:

Q In your experience, can you describe the reasons why an organization might file -- would file -- its exemption application directly with the National Office instead of the key District Office.

MR. JACKEL: Same objection.

MR. LEHRFELD: Filed. Just, filed an exemption application.

BY MR. STERN:

Q In your experience, why did organizations which filed their exemption application directly with the National Office do so instead of filing it with their key District Office?

A I --

MR. JACKEL: To the extent that you're asking her to look into the minds of the people who have filed these things, I'm going to object. She can answer to the extent that she knows, of course, but you're asking -- the question literally asked for "Why did Organization X file their application in a certain way," and she may not know completely what their motivation was.

BY MR. STERN:

Q To the extent that you know?

A My experience -- I've experienced some applications coming directly into the National Office. Sometimes they're part of a request on a proposed transaction ruling where they have new -- created new entities, and they attach the applications for exemption for the new entities.

Sometimes, when there's a major disaster in the United States, there are organizations that are created that are anxious to get a very rapid ruling. While some of them might file in the key District Office, some of them come in directly to the National Office.



Q Now, are these filings with the National Office, is there a revenue procedure or other internal procedure for this type of filing?

A No, not that I'm aware of. But, what we do is we fall back onto our regular procedures.

Q And, what do you mean by that?

A What we do is contact the key District Office and ask them if they have any objection to our keeping that application for exemption and get them to transfer jurisdiction to us.

Q In your experience, has the National Office ever requested an applicant to file its exemption application with it, as opposed to a key District Office?

A Not to my knowledge.

Q I'd like to talk about the key District Office procedures regarding the handling of an exemption application now.

Once a key District Office receives an exemption application, do you know what happens? How do they process that application? What are the procedures?

A Yes, they -- they screen it to make sure its complete. They make sure the user fees are paid. They screen it to see if it's an issue that should come into the National Office.

Q When you say "they," who are you referring to? Is it immediate, when it's received by the key District Office, is it immediately signed to some person who makes this review? Do you know?

A They have a number of people who work for them. They have people who are screeners, who make sure the applications are complete. I don't know if they have separate people who do -- who check for users' fees or not, or whether the screeners do that, also.

Then, they have technical screeners who determine what the issues are. And then those technical screeners may move the case into the National Office, or they may prepare a ruling, or they may assign it to a key District Office employee for development.

Q Let me just go back. So, when an application first comes in, it's reviewed by a screener, who will check to make sure the application's complete, perhaps, and so forth. Then, it's forwarded to a technical screener, who will review the application, perhaps for the legal issues, to determine whether it qualifies for (c)(3) status. Would that be a correct summation?

A They would review it to see whether -- what the technical issues are and whether it was a National Office case.

Q And would it -- what issues would make it a National Office case?

A The -- if there were no published precedents on the issue, or if it was required under the Manual to come in.

Q And what type of cases are required under the Manual to go to the National Office?

A I haven't read that list recently.

Q Sure.

A I can give you some examples.

Q That would be --

A For example, if they looked like a private school, that they might have to deny exemption to, then it ordinarily comes into the National Office. If it's a partnership issue under certain circumstances, it comes into the National Office. There are certain medical organizations that, to the best of my recollection, come in.

Q Are churches -- church applications required to be sent to the National Office or can the key District Office handle those?

A That's up to the key District Office.

Q Okay, so there's no mandatory requirement to send church applications to the National Office?

A Not to my knowledge.

Q Now, when a technical screener decides that a case should go to the National Office, can he or she make that decision? Or, does it have to be approved by somebody else?

A To the best of my recollection, I think there's someone else who signs off. I don't know if it's the tech staff or the manager or who signs off, but to the best of my recollection, I think there's somebody else who signs off.

Q And, is there a certain form which is used to send an application to the National Office?

A Yes.

Q Do you know the form number by chance, or its name?

A I think the number of the form is -- and I'm not sure my recollection is correct, we have so many form numbers. I think it's a Form 3778.

Q And, does the National Office have advance knowledge or notice that an application's coming; or are they just routinely sent?

A Most of them are routinely sent.

Q Okay, so no phone call or communication is sent saying, "We're sending you up an application from X, Y and Z." It's just kind of through the ordinary course of the Internal Revenue Service's operations it comes up?

A Yes.

Q Now, if a technical screener decides that a case needs further development, what happens then?

A It generally is assigned to a specialist in the key District Office to work the case.

Q And what does -- would this be a development specialist, or is their title just "specialist?" Do you know?

A I don't recollect the specific title, but it would not be development specialist. I don't recollect that term ever being used.

Q Sure. And, what does the specialist do with the application? How does he develop the file or work the case, as you put it?

MR. JACKEL: I'm going to object. That's a compound question. You've asked several already. Could you please just ask one question at a time?

MR. STERN: Sure.

BY MR. STERN:

Q What does a specialist do with the file?

A It reviews -- the person would review the file to determine whether there was sufficient information to resolve any technical issues they may have -- that might be raised on the reading of the application. They would do some research, if necessary. They would write a letter to the organization if they needed additional information; and sometimes they can put a ruling letter -- determination letter on it right away. Sometimes, at that stage, they may even determine it should be a National Office case, when they get in and develop the issue.

Q If a specialist decides to request additional information from the applicant, can he or she directly send that letter; or does that request need to be approved?

A I believe they can send it, directly.

Q And if a specialist decides that an applicant is entitled to a determination letter, recognizing its exempt status, what happens then? What is the review process?

A In the field?

Q Yes ma'am.

A To the best of my recollection, the specialist prepares the ruling letter. The manager might review it for procedural matters, to make sure that it's already to go and appropriate. I also believe that the tech staff does a sample review.

Q I'm not sure what you mean by "a sample review."

A A sample review is -- they don't review everything, but they review a certain portion of the cases.

Q And who will sign the determination letter that goes out?

A I don't know who signs it in the field.

Q When a specialist is reviewing an application in the application file, perhaps documents which have been submitted in support of the application, does he or she only review the material submitted by the applicant, or does counsel -- or does the specialist take into account, perhaps, third-party information?

A What do you mean by third-party information?

Q If, let's say, a member of Congress writes the IRS a letter supporting the exemption application. That would be one item of third-party information. Or, perhaps a newspaper article that is relevant or related to the application, which the specialist has seen. That type of third-party information, outside the scope of what has been provided directly by the applicant itself.

A They -- I don't know how much, if any, third-party information the field offices get in terms of congressional correspondence, or in terms of the application process, how much newspaper articles would be involved. So, I don't know what they specifically do with that information in the field.

Q Are you aware of any guidelines or procedures which explicitly restrict a District Office from considering third-party information?

A What do you mean by "considering third-party information?"

Q Considering the information when they're making a determination regarding the application, is there a requirement in the Manual or elsewhere which specifically says, "You may only consider the material submitted by the applicant."

A The material has to be part of the record and any information that's part of the record has to be shared with the applicant.

Q Okay. Perhaps my question here is a little unclear.

What forms -- my question kind of goes to -- as to what forms the record? Obviously, it's material the applicant or its attorneys provide. What else would constitute the record?

A The record is the application and the information.

Q Okay. And -- but if third-party information is received. Let's say congressional correspondence is received by the District Office, would that constitute part of the record?

A Not to my knowledge.

Q Is there anything in the Manual which says that would not be considered part of the record?

A Well, there are things in -- and I don't recollect just what they are specifically, for declaratory judgment purposes -- that clearly set out what is in the record in the Internal Revenue Manual.

Q In reviewing a file submitted by an applicant, or in reviewing an application, a specialist will create a number of internal documents. Is that correct?

A Yes.

Q Would these documents include an EO case history report?

A I believe that's a form that's used in the field.

Q How about a written determination checklist?

A Yes, I have seen checklists in field files.

Q And if there is a third-party contact, is there a document called "A memoranda of contact ruling," pending ruling?

A There may be, but I don't know.

Q And there may be transmittal letters in the file?

A The form that transmits it to the National Office, yes.

Q Are you aware of any other documents a specialist might create, which are related to an exemption application?

A My recollection is that they have a form for inputting it into the system, a control system.

Q Okay.

A That's the only one that I can recollect now.

Q Okay.

Just to make sure I'm clear on this point, when a specialist determines that a favorable determination letter should be issued to the applicant, is that reviewed by his supervisor? Or, who has the final -- let me correct the question. I don't want to ask a compound question here.

Who has the final authority, in the District Offices, to issue a favorable determination letter to an applicant?

A I believe it's reviewed by the manager for procedural matters.

Q So the manager would ultimately have ultimate authority to decide whether a favorable determination letter is issued or not?

A I think that may be so, but I'm not that familiar with all the procedures in terms of -- of --

Q I understand.

And, I believe you stated previously when a 501(c)(3) application is filed by a church, the District Office isn't required to file -- to send it up to the National Office. Is that correct?

A No. I mean -- yes, it -- the church is not -- I mean, the District is not required to send a church application into the National Office.

Q And if a church application is referred to the National Office, is it -- are the procedures the same for sending a regular application up to the National Office, or are there any different procedures?

A It would be the same procedures.

Q Do you know who at the key District Office would have final authority to refer a church application to the National Office?

A I do not know who has final review over things coming into the National Office.

Q Now when a case is referred to the National Office by one of the District Offices, is there a transmittal memo prepared; or, what documents are prepared and sent on to the National Office?

A Yes, there is a transmittal. You had asked that earlier and I didn't remember the -- I wasn't positive of the form number.

Q Is it just a form, or is there an explanation of the case and the issues involved?

A The key District Office, if they're sending it up based on the fact that they don't think it's covered by a precedent, generally attaches a page or puts on the form the reason why they're sending it into the National Office.

Q So a transmittal memo may say, or a transmittal form may say, "No precedent." Would that be correct?

A Yes.

Q And what other -- what else might it say if, say, it was covered by precedent, but it was an issue the key District Office, perhaps, didn't feel like deciding or felt it was worthy of National Office review, what would the memo say?

MR. JACKEL: I'm going to object again. You keep asking these questions in terms of hypotheticals. You can ask what the procedures are, but you seem to be asking -- you know -- "how would things be treated, if certain things happened?" And, you know, I would just rather have you ask her, you know, "what are the procedures and how are things handled?"

MR. STERN: Okay.

BY MR. STERN:



Q So, we can go back and repeat a little bit, can you tell me the reasons why a District Office would refer an exemption application to the National Office?

A I believe I've answered that previously, and I hope I recollect the same things, because I do not have a total recollection of what's in the Internal Revenue Manual. Quite frankly, if I need to get some information, I pull my Manual.

But, if there's lack of precedent or problem with the case the District has difficulty resolving the issue, they can send it in -- and that's any case. Then there are others that are specified in the Manual, and I think I gave an example of private schools, partnership issues where there are problems in the medical organizations in terms of some of the partnerships. Those kinds of issues are spelled out in the Manual.

Q In your experience, when the case is referred by a District Office, will it have a -- include in the transmittal memo, a detailed description of the issues presented, or will it just be a cursory statement, or not statement at all?

A That there is.

Q Who in the National Office receives applications sent up by the District Offices?

A You mean who actually, physically receives them?

Q Where do they go to?

A They come into our Records and Control Section.

Q And then what happens with them?

A They're controlled in terms of put into a system so that we can locate them.

Q Are they sent to an Assignments Branch, or anything like that?

A We have an assignment officer.

Q Is that where the application goes next after it's controlled?

A Yes.

Q And what does the assignment officer do with the application?

A It assigns -- or, she assigns them to any one of the technical branches.

Q And what is the decisionmaking process for referring it to one of the technical branches?

A Some of the technical branches are responsible for certain subsections of the Code. They would receive those applications that come in. The others are assigned. Cases are assigned, primarily, based on workload.

Q Is your branch responsible for a certain subsection of the Code?

A Yes.

Q And what is that?

A Section 501(c)(4), 501(c)(8), (10), (19), private schools.

Q Do you receive applications submitted by other organizations than those you just described as well?

A Oh yes.

Q And that would include applications filed by (c)(3)s?

A Yes.

Q Including churches?

A Yes.

Q Is there a technical branch which is responsible, or has responsibility for the subsection of churches?

A Only one -- you're asking is only one branch responsible?

Q Right.

A No.

Q So there isn't, like, you're responsible, primarily, for -- you have a specialty in subsection (c) (4). Another technical branch doesn't have a subspecialty in churches?

A No, not to my knowledge.

Q Okay. So, if an application comes in and it doesn't need to be designated to a technical branch because of its subspecialty, it will generally be referred to on a numbers basis on who has the greatest caseload and who has the availability?

A Generally, yes.

Q Do you know if the assignments officer has any formal criteria for designating or distributing applications to the technical branches?

A I believe she has a list of the subsections which are assigned to each of the technical branches.

Q Are there special procedures for applications dealing with sensitive, complex, urgent or nonroutine cases?

MR. JACKEL: That is a quite complicated question. Could you break it down?

MR. STERN: Absolutely.

BY MR. STERN:

Q Does the EO Division have any special procedures or policies to deal with applications which are sent that involve sensitive issues?

A Special procedures?

Q Yes.

A Not to my knowledge.

Q How about with complex cases?

A Not to my knowledge.

Q Case where expedited processing has been requested?

A Not to my knowledge -- I take that back. We have a rev. procedure that deals with how we handle an expedited case and what the criteria are for expedite cases. But, in terms of assigning it to any specific individual, no.

Q Okay. And, when the assignment officer sends the technical branch a case, an application which has been sent up, what is the procedure? How does that happen?

A She writes on the inventory card the branch she's sending it to, she puts it in the mail to us and enters it into the computer.

Q Is the only form that's created at that point the inventory card?

A Yes.

Q Is that an IRS form, or is it a special card?

A It's just a printout from our computer system, so that it's a paper record of what she has in the computer.

Q If congressional correspondence, or other third-party contacts, are received by your office in relation to an exemption application which has been referred to you, what do you do with that document?

A We have a control, and we respond to it.

Q Now, does that document and your response become part of the administrative record?

A I believe it's in a separate file of its own.

Q So it's separate and apart from the administrative file which is created for the organization?

A Yes.

Q Is that pursuant to revenue procedure at all, or set out in the Internal Revenue Manual?

A I don't recollect.

Q Okay.

When you're considering an application -- let me -- strike that for a second.

In your experience in considering exemption applications, have you been contacted by law enforcement officials regarding a pending application?

A You're asking me if I have ever been contacted?

Q Right.

A By law enforcement officials? (Pause.)

I have 34 years, and I'm trying to think if it's ever happened. Sometimes state authorities call and contact -- law officials, not to my knowledge.

Q Okay.

You stated that if a congressional correspondence is received, or perhaps correspondence from the Treasury Department -- let me go back. Again, I don't want to make a compound question here.

Do you receive correspondence from the Treasury Department considering an application which has been filed and is under your review?

A What do you mean by Treasury correspondence?

Q Outside the Internal Revenue Service, do you ever receive correspondence from officials of the Treasury Department regarding an application pending before you?

A I still don't know what you mean by correspondence from Treasury?

Q Let's say a letter from someone in the Treasury Department saying, "We would like you to consider this application on an expedited basis and we believe it should be -- the organization should be recognized as exempt."

A No, I have not received such a correspondence from a Department of Treasury official.

Q Do you ever received correspondence from the White House, or any other Executive agency regarding applications pending before you?

A (Pause.) Not, uhm -- not to my -- I think back, way back in history, there may have been some contacts from a particular White House, but, nothing that's -- I wouldn't say, "never, never," but certainly nothing in the last 20 years.

Q Okay. Congressional correspondence, do you receive congressional correspondence, frequently, with respect to exemption applications which are pending before you?

A Sometimes.

Q And, the Internal Revenue Service's policy is to send a reply?

A Yes.

Q Do you prepare that reply, or is there a special division or officer who handles that matter?

A The Tax Law Specialist to whom the case is assigned -- if it's on a case -- would handle that correspondence. If it's a general issue, then I would assign it to a Tax Law Specialist.

Q So, the Tax Law Specialist has authority to respond to congressional correspondence filed in support of an exemption application?

A The Tax Law Specialist would be the person to whom it would be assigned for drafting a reply.

Q And who -- is the reply reviewed by yourself or your superiors?

A No.

Q When you say "drafting," that implied to me it was a first draft, perhaps.

A It is a first draft.

Q Okay. Who reviews that letter?

A The branch reviewer.

Q And does the branch reviewer have ultimate authority to decide whether a congressional reply would be sent or not?

A Yes, and he has the responsibility -- he makes the decision as to whether or not he's signing it for me or not.

Q So, he has authority to sign under your name?

A Yes.

Q When third-party contacts are made, including congressional correspondence, is there any log or notation made in the administrative file regarding the contact.

MR. JACKEL: Let me interject here. I've been told that you've been using the terms "administrative record" and "administrative file," in a more or less interchanging manner. If you could explain, perhaps what you mean in your question?

MR. STERN: Sure.

BY MR. STERN:

Q Does the term "administrative file," hold a significance to you?

A Yes.

Q Could you describe what an administrative file is?

A An administrative file is the file the Tax Law Specialist has and builds during the processing of the case.

Q Would the administrative file contain all documents relevant to the consideration and review?

A Generally, yes.

Q Are there other files which are made by the IRS during the review of an application?

A Not to my knowledge.

Q So, there's one file, which is the administrative file?

A Yes.

Q With the -- but, excluded from this file would be the congressional correspondence and the replies thereto?

A I believe -- it's my recollection that what we do is set up separate administrative files on those./

Q So then, essentially, there are two administrative files, or more?

A Right. I'm -- but, the administrative file is on the congressional, not on the case, the second one.

Q Let me try and clarify this a little bit. I'm a little bit confused.

There's one administrative file, which contains all the documents relating to the exemption application which is pending. Is that correct?

A Yes.

Q But this file doesn't contain congressional correspondence and replies. That would be correct?

A It's my understanding we usually create a separate administrative file for those. They are separately controlled and responded to.

Q So, you have an administrative file for X, Y, Z Charity. A second -- assuming -- let me take back assuming.

If correspondence is received from a congressman regarding X, Y, Z Charity's application, a separate file is created for the correspondence and the IRS' reply. Is that correct?

A Yes.

Q But this file would have no -- would not be associated with the administrative file of X, Y Z Charity?



A Not to my knowledge.

MR. LEHRFELD: May I ask a question?

MR. JACKEL: Wait a minute. Is Mr. Stern conducting the deposition, or are you conducting the deposition? I don't want a tag team going here. It's hard enough to go through this process all day fielding questions from one attorney.

MR. STERN: Just one second.

(Whereupon, counsel engaged in off-the-record discussion.)

MR. STERN: Back on the record.

BY MR. STERN:

Q When the IRS sends a reply to a congressional inquiry, you stated earlier that in cases under your control, your signature would be affixed to that letter. Is that correct?

A Yes.

Q Do you also sign the determination letter, or actually the ruling letter, which went to the applicant as well?

A Would I -- I do not sign every ruling letter that goes out of my branch.

Q Okay. Are some of the ruling letters which goes out of your branch signed by your superiors?

A What do you mean by "superiors?"

Q Are any of the ruling letters which go out of your branch signed by the Assistant Commissioner?

A Not to my knowledge.

Q Are any of the ruling letters which go out of your branch signed by the Director of the Division?

A Not to my knowledge.

Q Are any of the ruling letters which go out of your branch signed by the Executive Assistant to the Director, who I believe now is Mr. Rotz?

A They may be.

Q If a ruling letter is to be signed by Mr. Rotz, or the Executive Assistant to the Director, would he also sign a reply to congressional correspondence?

A Would you explain what you mean?

Q Sure.

The authority to sign a congressional reply, does that always fall to the person who's going to sign the ruling letter, or can it be signed by a subordinate?

A It can be signed by a subordinate.

Q Now, the administrative file which is created with respect to congressional correspondence and supplies -- I just want to make sure this is clear -- it is not associated with the organization's administrative file?

A Not to my knowledge.

Q Okay.

If a congressional letter is received, and the congressman -- when a congressional letter is received, and a congressman encourages the Service to recognize the organization as exempt, is it the IRS' policy to consider that document as a paper filed in support of the exemption application?

MR. JACKEL: Excuse me. I object. This business about congressional inquiries has gone on for a very long time. Can you tell me why you think congressional inquiries are relevant to whether a closing agreement can be disclosed under (4)?

MR. STERN: Yes. What we are trying to do is build the IRS' processes and procedures for considering and reviewing exemption applications which have been forwarded to the National

Office. Part of this review process -- part of the documents which are submitted in support of that are documents from congressmen or other outside sources. We're trying to determine what documents were created in support of -- or may have been created in the IRS' routine practice of building the administrative file, and how those documents may affect its ultimate determinations with respect to organizations, including the entry of closing agreements.

MR. JACKEL: And, how would that bear on the issue of whether a closing agreement can or should be disclosed under the Freedom of Information Act.

MR. STERN: The basis for the closing agreement here, and whether it -- all right, we'll switch topics for a minute. Hang on for a second.

(Whereupon, counsel engaged in off-the-record discussion.)

MR. STERN: Ms. Gessay, we've been going at this for about an hour now. Would you like to take a break?

THE WITNESS: Yes.

MR. STERN: Okay, that will be great. We'll go off the record now.

(Break.)

MR. STERN: Okay, we're back on the record.

BY MR. STERN:

Q Ms. Gessay, if information is received by the IRS from congressional or other third-party sources, is that information ever reassociated with the organization's administrative file?

A (Pause.) If we receive congressional -- if we receive concrete information about an organization and it -- from a third party, or a congressman, and we think that has bearing on the application for exemption, we would take steps to share that with the organization and make it part of the administrative file.

Q And, what do you mean by "concrete information?"

A Well, if somebody asks us what the status of an organization is, we wouldn't. But suppose somebody sends us newspaper articles or information on an organization that we think should be part of the administrative record, then we would ask the organization about it and make it part of the administrative record.

Q So, to include material in the administrative record, you first ask the applicant itself?

A Yes.

Q And, if the applicant states that it does not want the material included in its administrative record, what happens then?

A We don't ask it, if they want it included in the administrative record; we ask it, if that information is true and then we put their answer in the administrative record.

Q Okay.

After a ruling letter is issued by your branch, does the branch purge the administrative record at all?

A When the Tax Law Specialist prepares the recommendation and submit it to review, our instructions indicate that they should remove any extraneous material from the file, duplicate copies, envelops, all that; so that only the official documents are in the file.

Q And, official documents would include the documents submitted by the applicant and materials received by the IRS regarding the application, which it has contacted the applicant about?

A Yes.

Q And any internal control forms which were created, as well?

A Right. Internal control forms are part of the administrative file but not necessarily part of the administrative record.

Q Can you describe the routing process for an administrative record, after a ruling letter is issued?

A When the letter is signed, it crosses the secretary's desk who has responsibility for determining whether it's a declaratory judgment case that we have to hold a file for a certain number of days. If it's something that is closed -- is closed and we don't have to suspend the file for any reason, then it goes to our record section who closes their records and mails the letter.

Then, we have a procedure now -- we don't keep paper records. They're -- they used to be microfiched, now I think they're put on disks and it goes into our files.

Q And when the records' people review the file, or the people who copy it onto the disks, do they purge the file at all? Do they have the authority to do that? Or is it only done by the Tax Law Specialist?

A It's done by the Tax Law Specialist. Sometimes they might question whether a document is necessary to be duplicated, if it's a duplicate.

Q Just so I'm clear, the Tax Law Specialist who is responsible for the case and its handling, is also the one who purges the file?

A Yes.

Q Within the last three years, have you participated in a conference with persons outside the Exempt Organization's Division regarding applications which were pending before you?

A What type of conferences are you --

Q Conferences regarding the pending application and the IRS' consideration of it?

A Yes I have attended conferences.

Q And, in these conferences, do you memorialize the conference and what was discussed?

A Yes.

Q And, is that included in the administrative record?

A Yes.

Q To the best of your knowledge, does the branch -- does your branch, or the Exempt Organization's Division, or the Office of the Assistant Commissioner have an explicit or implicit policy to bundle cases involving affiliated or related organizations?

A What do you mean by bundle?

Q Bundle the consideration of, say, related taxpayers, associate the cases together?

A If we have related cases, ordinarily they're assigned to the same Tax Law Specialist.

Q Is that a policy that's in the Manual, or is it more of a practice that's employed by your division?

A I would say it's a practice.

Q When you receive an exemption application for review, is it customary for you to receive directions from your superiors regarding the handling of that case?

A A new application for exemption? No.

Q So, it is not customary?

A No.

Q Can you explain the policy as to why exemption applications are bundled?

MR. JACKEL: Uhm, could we go off the record for a second?

MR. STERN: Sure.

(Whereupon, counsel engaged in off-the-record discussion.)

MR. STERN: Back on the record.

MR. JACKEL: Okay, I just want to point out, you've chosen this term "bundled," and you seem to be freighting it with some sort of technical meaning. She's testified that there really isn't a policy regarding bundling.

MR. STERN: Sure.

MR. JACKEL: It's just an informal practice. I just want her answers to be read in that light.

MR. STERN: Yes, I can rephrase the gist. I understand your concern.

BY MR. STERN:

Q What's the rationale behind bundling cases? Just to expedite matters?

A When you say "bundling," I'm assuming you mean assigning the same related cases to the same Tax Law Specialist. That Tax Law Specialist has done some research on the issues and in many cases the transactions are interrelated, and so it's assigned to the same Tax Law Specialist.

Q Are you aware of any church application? I mean, an application for exemption which is filed by a church, which resulted in a favorable ruling letter being issued where instructions were given to the Tax Law Specialist regarding the handling of that case?

A What do you mean by "instructions?"

Q That the Tax Law Specialists were directed to issue a favorable ruling letter to the applicant?

A (Pause.) We have review procedures which we may get, or something is subject to division -- or is being reviewed at the division level. We may get a recommendation that something be done. Each Tax Law Specialist makes their own decision when they prepare a ruling.

Q So you're not aware of any situation where a Tax Law Specialist was directed not to review a case file, an administrative file, and -- I'll leave it at that.

A I'm not aware of any direction ever being given that told a Tax Law Specialist not to review an administrative file in preparing their recommendation on a case.

Q So, you're not aware of any exemption application which was filed where the Tax Law Specialist was instructed not to review the application for the issue of inurement?

A No.

Q Or, commerciality?

A No.

Q When a development letter is issued by the National Office, does the Tax Law Specialist's name, who's responsible for the case, generally appear on the first page in the upper right-hand corner?

A Yes.

Q And that would be true of the ruling letter which was issued as well?

A No.

Q No. Whose name would appear on the first page of the ruling letter?

A That might be the reviewer.

Q In the ordinary church application case, the Tax Law Specialist reviews the application first. Is that correct? Reviews the administrative file, first, and makes a tentative determination?

A Yes.

Q And then is it subject to your review?

A It's subject to branch review.

Q What constitutes branch review?

A It goes to the branch reviewer.

Q Does the branch reviewer have final authority to determine whether a favorable ruling letter will be issued?

A He makes the decision as to whether he's willing or she's willing to sign off, and has the authority to fix my signature to a ruling letter.



Q After the branch reviewer decides that he or she will sign off on the letter, what happens to it next?

A If they sign off on it, then that's the end of it. It's mailed and goes out.

Q Under your signature?

A Yes.

Q So, ordinarily, you would not review the application or the administrative file?

A That's correct.

Q So, in the ordinary situation, there are two reviewers on a church application, the Tax Law Specialist and the branch reviewer?

A There's an initiator and a reviewer.

Q What is the initiator?

A That's the Tax Law Specialist.

Q To your knowledge, does your branch or the Exempt Organizations' Division have a secure file cabinet for confidential or sensitive information?

A Our doors must be locked at all times if we're not in our offices.

Q And is all information, including what may be deemed as sensitive information, relating to a church application given to the Tax Law Specialist? Or, are there occasions when a Tax Law Specialist is not given the complete administrative file?

A To my knowledge, they're given the complete administrative file.

Q During the development of an administrative file, what internal forms or documents might the Tax Law Specialist reviewing it create?

A They would prepare an information letter, if they needed additional information. At the time they're ready to resolve the technical issue, they would prepare a memorandum for file

supporting their conclusions.

Q And, would this --

A Then they would prepare whatever action they're taking.

Q And that memorandum to file would be reviewed by the branch reviewer, subsequently?

A Yes, it would be subject to review, along with the outgoing document.

Q When a favorable ruling letter is issued, is that memorandum to file part of the administrative record or file which is kept?

A Yes.

Q In your personal experience, have you ever assigned a case to a Tax Law Specialist which contained a closing agreement, or closing agreements, which were attached to it?

A At the time they are --

Q Right.

A -- it was assigned? Not to my knowledge.

Q Does the Exempt Organizations' Division ever designate cases as being sensitive?

A What do you mean by sensitive?

Q Involving sensitive issues or information which should be kept confidential, to an utmost degree, perhaps?

A I don't know. We have cases that we consider the issues are extremely difficult, or the organization's receiving widespread publicity, that type of thing, yes.

Q Does your division, at all, use color codes or any other sort of indicator -- outward indicators -- to show the degree of importance, or significance, or sensitivity of a case?

A No, not to my knowledge.

Q Does a branch reviewer have ultimate authority to decide whether a favorable ruling letter will be issued?

A When they review a ruling, they make the decision as to whether they're willing to sign off on it, or whether it should be subject to further review.

Q And, if a branch reviewer determines it should be subject to further review, what happens to the case then?

A It goes forward to the division review staff.

Q And, what does the division review staff do at that point?

A They review the case file.

Q And, can you tell me, who constitutes the division review staff that would review an application?

A Currently, in the last reorganization, a new branch was set up, a review branch. It's headed by Dave Jones, and there are a number of senior Tax Law Specialists who are assigned to that branch as reviewers.

Q And if the division review staff decides that a favorable ruling letter should be issued, do they have final authority to issue that letter?

A Yes, they do.

Q Is there a review procedure, at all, for the division review staff, if they're unsure as to the proper disposition of an issue before them?

A Do we have --

Q Can the division review staff go to higher authority for guidance?

A Certainly.

Q And, who would they go to?

A They would go to their manager. They might suggest a technical issue meeting be held in the branch where all the management staff is involved. They might recommend the case be coordinated with the chief counsel's office. They might brief the Division Director or the Executive Assistant, or they might come back and discuss it with the Branch Chief before they make a final decision.

Q On these technical issue meetings, who is involved in these?

A The -- usually the technical people who are handing the case. And that they're open to anybody who has an interest in the issue. It's issue oriented.

Q Do these occur often?

A Not very often.

Q You also said that the staff can coordinate a meeting with the chief counsel's office. Under what circumstances would they do that?

A If they thought the matter was going to be litigated. If it was a declaratory judgment matter, we quite often -- we're required to coordinate those with them. If they think they need advice of counsel, chief counsel's office is our counsel on technical matters.

Q Are these meetings arranged often?

A Sometimes they -- I have no idea how often they are arranged. Sometimes they're informal. Sometimes it's formal referrals.

Q If there's a formal referral to the chief counsel's office, is there a record of that kept in the administrative file?

A Yes.

Q And that becomes part of the administrative record?

A I don't know whether it's part of the administrative record or not.

Q In the situation where there's a technical issue meeting, is there a record of that kept in the administrative record?

A In the administrative record? That I don't know, whether it would be part of the administrative record or not.

Q How about in the situation where the Director is consulted or his Executive Assistant, on a matter. Is a record of that kept in the organization's administrative record?

A The administrative record, now, we're talking about? That, I don't know.

Q Okay.

Ms. Gessay, I apologize. I wasn't clear. I was intermixing the terms again, administrative record and administrative file.

With respect to conferences with the chief counsel's office, is documentation regarding those conferences contained in the administrative file?

A Yes.

Q Would the same be true of documentation regarding technical issue meetings?

A Yes, except --

Q If the Division Director or his Executive Assistant is consulted on an issue, are records regarding that meeting contained in the administrative file?

A I would think that they might be, but I wouldn't know for sure.

Q Do tax law --

A I don't know if everybody writes down -- the time they talk to me about something, it happens in the branch.

Q That was my next question.

If a Tax Specialist talks to you about a case or an issue involved in a case, is that conversation memorialized and placed in the administrative file?

A I would suspect not.

Q In your personal experience, what circumstances would lead the Director of the Exempt Organizations' Technical Division to review a church exemption application from your branch?

A The Division Director?

Q Yeah.

A I would say that most of the time he would not be involved. We might brief him on what we're doing because he might have need to know.

Q Is he ever involved with the determination issued in a favorable ruling letter?

A Yes, if it's a technical issue that warrants his consideration?

Q And how often does that happen?

A I have no idea in terms of -- it does happen on occasion.

Q With respect to your branch and your personal experience, once a year? Five times a year?

A It's hard to quantitate it. Sometimes you have several issues in a row that you bring up to his attention, and then you go through another period where you might not have anything that you bring to his attention.

Q Is the Assistant Commissioner ever involved with the decision to issue a favorable determination letter to a church -- favorable ruling letter?

A You changed your question. Which question would you like me to answer?

Q Well, favorable ruling letter.

A Yes, I'm sure there are times. For example, there are issues that would warrant his attention because of the nature of the issue.

Q So he has final authority to make the determination whether a favorable ruling letter would be issued or not?

A (Pause.) I don't know what you mean by "final authority." Any of us have authority to issue a ruling.

Q Are you aware of circumstances in which a case was brought to the Assistant Commissioner's attention, where he determined that a favorable ruling letter would be issued?

A Yes, I'm sure there have been occasions.

Q Any that you recall, specifically?

A (Pause.) He has -- for example, he has the right to accept or not accept GCMs, and so, he would be making the decision as to whether or not we were adopting or not adopting some technical position, and then we would determine processing the cases based on final decision on technical matters.

Q If the Assistant Commissioner made the determination that a favorable ruling letter would be issued, would a notation of that decision be contained in the administrative file?

A The technical basis for the decision would be noted. I don't know that who made that technical decision would be noted.

Q Okay.

When a conference is held with the chief counsel's office, how is that initiated?

A Uhm, I would -- and, again, I can -- speaking from my own personal -- if I had something that I thought would eventually be involved with chief counsel, I'd pick up the phone and I'd talk to one of the people I know who might handle that matter and talk to them, informally.

Q So, there's no form which is required to be filed or submitted?

A If we want formal consideration of an issue, then we transmit that issue to them, formally.

Q In a transmittal letter or memoranda?

A Generally, yes.

Q Does that have a form number that you're aware of?

A No.

Q And would that document be contained in an administrative file?

A Yes.

Q Now you stated earlier that the National Office duplicates its administrative files on disk and sends the originals back to the key District Office. Is that correct?

A Yes, that's my understanding of how the process works now.

Q It is your understanding, then, there are two complete sets of files? Or is only part of the administrative file duplicated here in the National Office?

A The administrative file is duplicated.

Q To your understanding, in its entirety?

A For everything that's on the administrative record. Now, I don't know if all the miscellaneous forms and things are duplicated.

Q Okay.

Are you aware that documents created during the National Office's review of an exemption application, which is approved, may be subject to public disclosure?

A Yes.

Q Has this concern about public disclosure ever affect your handling of the case?

A It affects what my instructions are to my Tax Law Specialists. I say, "Our documents are public and so call them the way you see them, and support them." You know, "It's there, make sure your files are documented."

Q Does this concern about public disclosure -- because of the concern about public disclosure, do you ever not create certain documents or memorialize certain conversations?



A Not to my knowledge.

Q Besides your direction to the Tax Law Specialists to document and support their decisions, do you ever discuss public disclosure with them?

A We have training, periodically, on what is or is not disclosable.

Q And, at these training seminars, do they give you handouts or other materials outlining what is and what is not disclosable?

A They call attention to the Manual provisions.

Q Who conducts these training seminars?

A Sometimes we have disclosure people in to do them. Sometimes we use people who handle disclosure matters, internally.

Q Are disclosure requests submitted to you, directly? Do you handle disclosure requests?

A No, anything that came to me requesting disclosure of documents, I would refer to the disclosure people.

Q So, perhaps, the training then, which is given to you and your Tax Law Specialists regarding disclosure, would that influence what is purged from an administrative file?

A No.

Q If you and your Tax Law Specialists are not required, or do not handle a disclosure requests, I'm just wondering why you attend these training seminars regarding the issue of disclosure. Do you know?

A We get public contacts asking us for information about our files. We want our people to know what they can -- what is part of the public record, what they can tell the public and what they can't. Also, we want them to have an understanding of what they have to do to make something part of the administrative record, and to protect that administrative record.

Q So then, at least telephonically, your Tax Law Specialists respond to disclosure requests or information requests?

A What do you mean by disclosure requests and information requests?

Q Well, in response to a prior question you said that if you received a disclosure request, it would be sent to the disclosure office. And then you said, but sometimes calls come in or inquiries come in and a Tax Law Specialist needs to know how to respond to those inquiries.

A If you called and asked about an application for exemption, my Tax Law Specialist would want to know, who you are, whether you represent the organization, whether you had a power of attorney before they would discuss any matter concerning the organization with you.

Q If I called regarding a ruling letter -- favorable ruling letter which had been issued, and wanted information from the administrative file, how would that be handled?

A That would be referred to disclosure.

Q Okay.

To your knowledge, is there a stamp or form used in the National Office to mark papers which are not subject to public disclosure?

A Not to my knowledge.

Q Do documents contained in an administrative file, would all those documents be subject to public disclosure?

A No.

Q What type of documents contained in an administrative file would not be subject to public disclosure?

A I guess I should ask you what kinds of public disclosure?

Q In response to a Freedom of Information Act request?

A I have very little background as to what is or is not available under the Freedom of Information and I --

Q Sure.

A I defer to the Freedom of Information people.

Q You previously stated that not all documents subject -- contained in an administrative file are subject to public disclosure. What type of documents, in your opinion, are not subject to public disclosure which are contained in such files.

MR. JACKEL: I object. You can ask her if the Service has a policy or procedure for eliminating such documents from the public record, or for withholding those documents, but don't ask her opinion.

MR. STERN: Well, she just stated -- she stated in previous testimony that the administrative file contains documents which are not subject to public disclosure.

MR. JACKEL: Well, you can ask her what documents are not subject to public disclosure, but don't ask her about what her opinion is regarding whether -- what should and should not be disclosed.

MR. STERN: Okay.

BY MR. STERN:

Q What documents are not subject to public disclosure?

A Well, as I indicated before, I don't know which those documents would be FOIA, because I've not researched that law with respect to whether an application is -- when somebody requests to see an application for exemption, which is available to the public.

I do know that we have in the Manual criteria for separating those documents that are available, and those are what is -- I think mostly constitutes the administrative record. It does not include the initial things like memorandums for file and all our internal forms, that type of thing.

Q And who separates these documents out?

A Tax Law Specialist.

Q Prior to closing the file and sending it on to records?

A I think -- to the best of my recollection, we have a procedure that tells them how to assemble the file when it's closed.

Q Is this a written procedure?

A I believe so.

Q Contained in the Internal Revenue Manual, or --

A In division procedures.

Q Have you ever been told or directed by your superior to remove information from an administrative file, which might otherwise be subject to public disclosure?

A No.

Q Have you ever told an employee working under you to remove files from an administrative file -- remove information from an administrative file -- which might otherwise be subject to public disclosure?

A No.

MR. STERN: Could we go off the record for a minute?

(Whereupon, counsel engaged in off-the-record discussion.)

MR. STERN: Back on the record.

BY MR. STERN:

Q Ms. Gessay, do you know a Tax Law Specialist by the name of Wayne Hardesty?

A Yes.

Q And, do you know which division or branch Mr. Hardesty works for?

A I think he's in Projects Branch 2.

Q Is that affiliated in the Exempt Organizations' Division?

A Yes.

Q Do you know if Mr. Hardesty has any -- or, one of his duties and responsibilities is to review exemption -- administrative files and purge documents from those files?

Do you want me to repeat that question?

A I think that's a two-pronged question.

Q Sure.

Do you know if Mr. Hardesty is charged with the responsibility of reviewing administrative files?

A He is not a reviewer.

Q After a file is closed, do you know if Mr. Hardesty would review those files?

A I don't know whether he does or doesn't.

Q Do you know if Mr. Hardesty is charged with any responsibility for determining what documents in an administrative file would be subject to public disclosure or not?

A I don't know whether he has -- I do know that he has some disclosure, because he -- responsibilities -- because he collects files for us on favorable rulings and the letter. He collects the letter rulings and sometimes comes back for the file. So, he -- when somebody requests it.

Q Do you know if Mr. Hardesty also has the responsibility to review those files and purge documents from those files?

A I guess I'd like to know what you mean by "purge."

Q Omit, take out, destroy.

A I don't know that he has authority, based on your definition, to purge files. He may have authority to review them.

Q The -- just so I'm clear on this. Your Tax Law Specialists, who work under you, prior to closing a file, will review the administrative file and remove extraneous information. Is that correct?

A That's correct.

Q And they will then forward it down to the records branch? Or, what happens to the file after that?

A It depends on what the need for the file is.

Q Sure.

Let's say you --

A And, if it's a suspense file, it's held in the branch. If it's not, it goes to records.

Q And, if it's a suspend file, after the 90-day period lapses, or whatever time period you're holding it for lapses, you then send it down to records?

A That's correct.

Q I'd like to change topics a little bit.

Did you in any way participate in the issuance of ruling letters, which were issued to the 25 organizations affiliated with the Church of Scientology on October 1, 1993?

A No, I did not.

Q Does your signature appear on those ruling letters?

A I understand it does.

Q But you had no responsibility for their review and took no part in that review process?

A That's correct.

Q Were they assigned to Tax Law Specialists working under you?

A Yes they were.

Q And, how did that assignment occur?

A My understanding -- my recollection is that some of those applications for exemption were already pending in the National Office when we set up the branch and realigned Tax Law Specialists. So, some of them were reassignments from other Tax Law Specialists to members of my staff -- or, to one member of my staff, then additional ones came in and were assigned to members of my staff.

Q And, can you identify the members of your staff who those applications were reviewed by, if you recall?

A One of them was Terry Berkovsky.

Q Can you spell that last name -- his full name for the record, to the best of your knowledge?

A It's Terrell -- I think it's T-E-R-R-E-L-L, Berkovsky, B-E- R-K-O-V-S-K-Y. Then, some of them went to Ted Lieber, that's Theodore Lieber, and that's L-I-E-B-E-R. I think there may have been some people outside my branch, too.

Q Did Mr. Lieber or Mr. Berkovsky ever speak to you regarding these applications?

A I knew they were working on them, yes.

Q Did they ever talk to you about the review procedures to be employed during their consideration and review of these applications?

A I don't recollect, but there may have been informal comments.

Q Nothing stands out in your mind regarding these applications?

A I was not involved in their processing. They were in the inventory. I followed up on the status of them, to see if they were going to be moved anything soon, the kinds of things that

any manager does when somebody -- in terms of administrative management.

Q Were you given any special instructions regarding how these applications were to be handled?

A I was not involved in the process of handling them.

Q Did anybody give you any instructions at all regarding these applications?

A Uhm, we -- I discussed the fact that they were going to be moved, whether or not Terry could move them all, whether we had to reassign part of them to somebody else to consider them; and I think that's when they got somebody else involved beyond my branch. That was about it, that I can recollect.

Q Do you know who the branch reviewer was for these applications?

A There was no branch reviewer.

Q Who gave the authority to issue the ruling letters?

A The procedures give the authority. They were reviewed at the division level, and the division reviewers have authority to issue letters in my name.

Q Why were they reviewed at the division level?

A Because they were cases that had been -- they were cases that were widely considered at the division level, they were difficult cases, they were negotiated cases and so the division usually is responsible for coordinating that kind of matter and for handling it.

Q Was it unusual that the branch reviewer did not review these applications?

A No.

Q Were you aware of any special instructions which were given to your Tax Law Specialist?

A No.



Q Do you know who at the division level was responsible for the issuance of these ruling letters?

A Uhm, could you be more --

Q Sure.

A -- precise, so I can know what you mean by responsible.

Q Do you know who at the division level affixed your signature to these ruling letters?

A I believe it was Jay Rotz.

Q And Mr. Rotz, then, would have made the determination that these ruling letters were to be issued?

A That's correct. He would have reviewed the files.

Q To the best of your recollection, were these favorable ruling letters fully retroactive, or until a date certain?

A I don't recollect.

MR. STERN: Can we go off the record for a second?

(Whereupon, counsel engaged in off-the-record discussion.)

MR. STERN: Back on the record.

BY MR. STERN:

Q Ms. Gessay, I want to hand you a copy of a ruling letter which was issued by the National Office to the Church of Scientology, International -- actually, I'm sorry, it's the Church of Scientology, Western United States.

(Witness perusing document.)

BY MR. STERN:

Q Does your signature -- actually, I can't ask that question, because your signature is not affixed to this document. I'll take that back.

Unfortunately, we have a problem because we don't have the original documents with us, so I can ask you to review your signature on it.

Are you familiar in any way with a negotiations committee, which was established by the IRS to review applications submitted by organizations affiliated with the Church of Scientology, which later received favorable ruling letters.

MR. JACKEL: Hold on a second.

MR. STERN: Sure.

MR. JACKEL: We're treading very closely to 6103 material. How particular taxpayers' cases were handled within the Internal Revenue Service is something that we don't think you should ask. We believe that 6103 prohibits us from providing information about whether a particular taxpayer was subject to an examination; and therefore, describing to you the procedures under which that application was reviewed, or that examination was carried out, would obviously disclose the fact that there was special handling of that taxpayer's case.

So, I'm going to object and instruct the witness not to answer questions about negotiations between Scientology and the Internal Revenue Service.

MR. STERN: We're still off the record, I believe?

REPORTER: No, we're on.

MR. STERN: Okay, I just wanted to make sure we're putting that on the record.

Let me see if I have this straight. It is your contention that return information under 6103 includes the IRS' procedures for considering an exemption application or applications submitted by organizations which later received favorable ruling letters?

MR. JACKEL: No.

MR. STERN: So I can -- you're not directing the witness not to answer about the IRS' procedures regarding how an application or applications were handled?

MR. JACKEL: I am instructing the witness that describing how any particular case was handled is return information.

MR. STERN: Okay.

MR. JACKEL: The IRS' general procedures, which we've examined at length this morning, are a matter of public record and you've done a good job of asking about them already.

MR. LEHRFELD: Could you tell me what return? You said "return information." Would you clarify on the record what return you're talking about?

MR. JACKEL: I beg your pardon, I meant taxpayer information.

MS. STEVENS: Return information -- excuse me, if I could interject, is not just having to do with a return. The definition is far more broadly than that.

MR. LEHRFELD: But is there a return we're talking about?

MS. STEVENS: That, we're not going to reveal to you in the context of any particular taxpayer. That is the very information 6103 protects.

MR. LEHRFELD: It has to protect return information. If there's no return -- you're telling me that there is return information if there is no return?

MS. STEVENS: Yes, that may be so.

BY MR. STERN:

Q Ms. Gessay, are you aware if the Exempt Org -- of the fact -- let me strike that question and start again.

Do you know if the Exempt Organizations' Division ever created a negotiations committee to review any exemption application or applications which may have been filed by a taxpayer?

A On advice of counsel, I decline to answer.

Q I don't think your counsel instructed you not to answer that particular question.

A That was my understanding.

MR. JACKEL: No, you can answer the question as to whether it's ever happened. But you can't -  
- I'm instructing you not to answer the question if it's directed to whether it happened with  
respect to a particular taxpayer's application. Do you understand what I mean?

THE WITNESS: Okay. Would you repeat the question, again. I'm sorry.

MR. STERN: Sure.

BY MR. STERN:

Q Are you aware of the fact that the Exempt Organizations' Division created an negotiations  
committee to review an exemption application or applications submitted by a taxpayer.

MR. JACKEL: No, no, wait. You've rephrased the question. Your original question was, has it  
ever happened before.

MR. STERN: Okay.

MR. JACKEL: And now you're saying -- you're assuming that it has.

MR. STERN: I couldn't recall from the top of my head, the exact nature of that question.

MS. STEVENS: Could she repeat back the question.

MR. STERN: That would be great.

(Whereupon, the reporter played back the previous question.)

MR. STERN: Back on the record.

MR. JACKEL: You can answer that question.

THE WITNESS: Yeah, I know, but I --

MS. STEVENS: Do you have the question clear in your mind?

THE WITNESS: Well, I -- I guess there're two prongs to that question. Whether or not there's a negotiating team and what they considered.

MR. JACKEL: Well, if you're confused about the question, why don't you ask Mr. Stern to clarify it for you?

BY MR. STERN:

Q Do you know if the Exempt Organizations' Technical Division ever created a negotiations committee?

A Yes.

Q Do you know why this negotiations committee was created?

A Only generally.

Q And what was your general understanding of why the negotiations committee was created?

MR. JACKEL: Okay, I'm going to instruct the witness that -- you should answer the question in a way that does not disclose the identity of any taxpayer, or that discloses any return information of a taxpayer. Do you understand that?

THE WITNESS: Uhm hum.

MR. JACKEL: Okay, with that proviso, you can answer the question.

THE WITNESS: I know --

MR. JACKEL: Just a minute.

(Whereupon, counsel engaged in off-the-record discussion.)

MR. JACKEL: Let's go back on the record.

BY MR. STERN:

Q Do you know why these negotiations -- this negotiations committee was created?

MR. JACKEL: Wait, wait, wait. This? I mean --

MR. STERN: Well, I mean -- I heard the witness testify or state to you off the record, or in counsel -- or, in conference, that more than one committee had been formulated, so I was trying to restrict my question to what it was before.

MR. JACKEL: Well, you ask whether such a committee had ever been --

MR. STERN: And she said, yes.

MR. JACKEL: -- established. And she said yes.

Now, she didn't ask -- you didn't ask her how many. You didn't ask her whether there was more than one.

MR. STERN: I think there was a question --

MR. JACKEL: And now you're assuming in your question that there was only one. Uhm -- and, I just don't think that's accurate. You're assuming a fact not in evidence.

BY MR. STERN:

Q Ms. Gessay, do you know -- to your knowledge, how many times has the IRS created a negotiations committee?

A I have no idea of how many times.

Q To your knowledge, has it been more than five?

A I wouldn't try to guess.

Q Within the past five years, how many times has the IRS created a negotiations committee?

A I don't know, and I guess my question is, what do you mean by "committee?"

Q Sure.

A You mean a group of people who are negotiating something?

Q Have you ever heard in the Exempt Organizations' Technical Division the term "negotiations committee," used to describe an organization or group of people reviewing an exemption application or applications submitted by a taxpayer or taxpayers?

A I have heard that term used. I do not know what the subject of the discussions were in those committees.

Q Do you know whether or not the IRS created a negotiations committee to review the exemption applications filed by the Church of Scientology or its affiliates?

MR. JACKEL: Objection. I'm going to instruct the witness not to answer. That's clearly 6103.

MR. STERN: In your opinion, it's 6103. We'll put the question and the response in the record.

BY MR. STERN:

Q Do you know whether the IRS adopted a special procedure to review the exemption applications filed by the Church of Scientology or its affiliates?

MR. JACKEL: Could we go off the record for a second?

MR. STERN: Sure.

(Whereupon, counsel engaged in off-the-record discussion.)

MR. STERN: We're back on the record. Could we have the last question.

(Whereupon, the reporter played back the previous question.)

THE WITNESS: No. Well, let me ask you this, what do you mean by special procedures?

MR. STERN: By the term "special procedure," I mean a procedure which is different from that normally employed by the Exempt Organizations' Division to review an exemption application filed by a taxpayer.

THE WITNESS: No. I do not think the procedures were special.

MR. STERN: Thank you.

BY MR. STERN:

Q Do you know how the Church of Scientology's applications were handled by the IRS?

A Generally, yes.

Q Can you describe that procedure for us?

MR. JACKEL: Uh, hold on a second.

(Whereupon, counsel engaged in off-the-record discussion.)

MR. JACKEL: Back on the record. You can answer that question.

THE WITNESS: The applications for exemption, some of them were transferred into my branch. They had already been in the branch. Some of them were new applications that came in after my branch was formed. I assigned them to a Tax Law Specialist, to one Tax Law Specialist, as we do when we have multiple cases with the same issues.

The issues were being considered, as far as I knew, at the division level, long before they came in to my branch. When those issues were resolved, I was consulted as to how and who was going to process them. We decided that Terry needed assistance, that there was no way she was going to be able to process all the applications. So, some of them we assigned to another Tax Law Specialist in my branch to assist her. I think there may have been somebody beyond the branch, also, who considered them.

They prepared ruling letters. They were submitted to the division for review, and that's not unusual in the sense that, if things are being considered at the division level, they go back to the division for review and signature. That's what happened.

BY MR. STERN:

Q Do you know how the applications were handled or processed, prior to the point they were transferred to your division?

A No, I do not.

Q So you're not familiar with any handling prior to that point?



A No.

Q When these new applications were received by you -- and by new applications, I mean those which were recently filed with the IRS -- did they include any special instructions or directions with them?

A That I do not know. I mean, when the applications came in, I assigned them --

Q When --

A -- from the field.

Q So, the applications came in from the field?

A There were some that came in from the field, yes.

Q And how did you get them?

A Through the assignment office.

Q And you do not recall receiving any special instructions regarding the handling of these applications?

A At that time they were all suspended when they came, because issues were under consideration at the division level.

Q Did you receive any instructions or directions regarding the handling of these applications at any time?

A No, except that we discussed that they would be assigned to one person. That when the matters that were under discussion with the Church of Scientology were settled, we would then process the application in the normal course of business.

Q So, you were directed to consider the applications in a standard or typical manner after the Church of Scientology matter was settled?

A I did not -- the -- I did not receive instructions on the processing and because we set up the task -- the group that were to process them. They received their feedback from division, which

I've indicated is normal when the case is at the division level.

Q Who did -- you said that "we decided to assign them to one particular individual." Who made this decision with you, if anybody?

A I think we probably -- I probably -- I don't remember who I specifically discussed it with. The -- at the time, the person who was handling them, it was a single individual, and he moved into a management capacity. So, we identified somebody to take over those cases and that person was in my branch.

But it's usual -- as we discussed before, it's usual, if we have a number of interrelated issues, that those cases end up with one individual.

Q Do you recall when these new applications were received by your branch?

A No I don't.

Q You also stated that a number of the applications were transferred to your branch. Do you know where they were transferred from?

A Uhm, I don't know whether -- it was probably on the reorganization or shortly after that. But, I think it may have been Branch 1.

Q And, with respect to these applications, once you received them, and assigned them to the Tax Law Specialist who was responsible for them, did you have any further involvement with the consideration and review of them?

A No, I did not.

Q These applications were reviewed by division, after they were reviewed by your Tax Law Specialist. Is that correct?

A That's correct.

Q And how did they get to division?

A They were submitted directly to division.

Q Was a transmittal memoranda prepared?

A No, we generally do not prepare a transmittal when we're dealing internally.

Q No buck slips or anything like that?

A That I don't know.

Q How did your Tax Law Specialists, who were reviewing these applications, know who in division was responsible for review?

A I think they were told. To my best recollection, I think they were told by division and myself that they -- I don't really have a clear recollection of just how that was communicated to them.

Q So, you don't recall anything in writing saying, "Mr. X will be responsible for the review of this application, the issuance or the ruling letter," or anything like that?

A No, I don't recollect anything like that.

Q Do you recall ever having any discussions with anyone in the division regarding these applications?

A My only recollection is a conversation that they were ready to be processed.

Q When you assigned these applications to your Tax Law Specialists, did you expect them to review the applications for compliance with Section 501(c)(3)?

A Yes.

Q Would you be surprised -- strike that.

Did your Tax Law Specialists ever tell you they did not review the applications for compliance with Section 501(c)(3)?

A No.

Q Would it be unusual, in your opinion, for a Tax Law Specialist not to exam an application for compliance with Section 501(c)(3)?

A I would think that would be unusual, yes.

Q Are you aware of any circumstances in which an application was not reviewed for compliance with Section 501(c)(3)?

A I'm not aware of -- our handling of the application involves a memo for file supporting that application. I assume that was done.

Q Are you aware of any circumstance when this was not done?

A No.

Q And what is put -- can you describe what the Tax Law Specialist is supposed to put in this memorandum to file?

A Consideration of the facts, the law, and how it -- regulations or any precedent, and how it applies, and their conclusion.

Q Are you aware of any situation in which a Tax Law Specialist has been instructed by a superior to recommend that a favorable ruling letter be issued to an applicant?

A We don't always agree as to what the conclusion in the case is, so it's not unusual for a division or even a reviewer at the branch level to indicate to the Tax Law Specialist that they have reached a different result.

Q Are you aware of any situation in which someone in division has instructed a Tax Law Specialist not to review an exemption application for compliance with Section 501(c)(3)?

A Not to my knowledge. I don't recollect ever.

Q Is all the information submitted in support of an exemption application by the applicant itself considered part of the administrative file?

A Yes.

Q Is it the IRS' general practice to maintain all information which is submitted in support of an exemption application by the applicant?

A Yes.

Q And it is our understanding that information submitted in support of an application by the applicant is subject to public disclosure?

A Yes.

Q Are you aware of any situation in which an applicant has been advised that information it may submit in support of its exempt application will not be part of the administrative file, or subject to public disclosure?

A Not to my knowledge.

Q Would it be unusual for the IRS to reach an agreement with an applicant -- strike that question.

Have you ever been advised that the IRS has entered into an agreement with a taxpayer where information submitted in support of its exemption application will not be part of the administrative file, nor subject to public disclosure?

A I have no knowledge.

Q In your opinion, would it be unusual for the IRS to agree not to make information submitted by an applicant in support of its exemption application part of the administrative file, or subject to public disclosure?

MR. JACKEL: Now, she can answer to the extent that she has personal experience. But, with that proviso, you can answer the question.

THE WITNESS: I don't know of any case or been involved -- I've not been involved in any case where the -- we told somebody that we're not going to make their information part of -- now, they can request that it not be part of the file, if it's -- there are all kinds of exceptions for patents and -- I mean -- you know, I guess the word is "proprietary" materials.

MR. STERN: Including trade secrets.

THE WITNESS: Right.

BY MR. STERN:

Q But other than those exceptions?

A That's been my only experience.

MR. STERN: Could we go off the record.

(Whereupon, counsel engaged in off-the-record discussion.)

BY MR. STERN:

Q Ms. Gessay, I want to go back to some of your testimony this morning.

You stated you were familiar with a negotiations committee, which has been established by the IRS with respect to an exemption application. Is that correct?

Well, let me strike that.

You stated you were familiar with the negotiations committee created by the Exempt Organizations' Division. Is that correct?

A (Pause.) The -- I said I was familiar with a negotiations committee -- to be truthful, I don't remember whether you had said created by the Exempt Organizations' Division or not, and I don't know who creates the committees I'm familiar with. You know, whether they're created at the division behest, chief counsels or whoever.

Q Yeah. I don't mean to trick or confuse you in any way. With respect to this committee that you're familiar with, do you know when -- about the time frame it was in existence?

A I was speaking, generally, that I know negotiating committees have been formed. I was not speaking of any specific committee.

Q Do you know if a negotiations committee was created with respect to the Scientology applications?

A I believe there was.

Q Do you know who was on this negotiations committee?

A No, I know none of the details about the committee.

Q Okay, I'd like to change tactics -- topics, not tactics. (Laughter.)

MR. STERN: I think the tactics will remain the same. My wife would call that a Freudian slip.

BY MR. STERN:

Q Are you familiar with the National Office's practices and procedures regarding closing agreements with exempt organizations?

A Yes, only very generally.

Q In your experience, can a closing agreement be a solution for a disagreement between an exempt organization and the IRS?

A In my opinion, I believe it can.

Q Do you know if closing agreements have ever been used between the IRS and an exempt organization to resolve a dispute?

A I believe that's one of their purposes.

Q In your experience, are you familiar -- no, let me strike that.

Do you know if the IRS has ever used a closing agreement to resolve issues which had arisen with respect to an exemption application?

A (Pause.) I believe they have used settlement agreements in connection with applications of exemption.

Q Have you ever received an administrative file regarding an exemption application which has a closing agreement attached to it?

A No.

Q If a closing agreement is entered into between the IRS and an exempt organization, which has applied for recognition as a Section 501(c)(3) organization, would a copy of the closing agreement be placed in the organization's administrative file?

A That I don't know.

Q Have you ever seen a closing agreement in an organization's administrative file?

A Not a file that I've reviewed, no.

Q In your last statement you stated that, you have not seen a closing agreement in a file you have been assigned -- you have reviewed, how about with respect to a file you've been assigned?

A What do you mean by assigned?

Q You do not -- which is assigned to your branch, which you delegate to a Tax Law Specialist.

A No, I have not.

Q Do you know in what situations the IRS will enter into a closing agreement with an exempt organization?

A My understanding is that when there is a dispute in terms of the exempt status, or a tax issue, and then in order to resolve it, we might enter into a closing agreement. I think we're disposed to do that when the organization, perhaps, has done some things inadvertantly, or were in -- we think the issue will be in litigation and perhaps settled out in litigation; so, we administratively consider it earlier.

Or, in some instances you have -- you can get the organization to make changes that you think are necessary.

Q At what stage would a -- or the recommendation for a closing agreement be made?

A In -- all I can speak of is my general understanding, because I have not specifically been involved in a case with a closing agreement. But, usually the Service -- if there is a controversy that's been developed, we've taken a technical position, the organization doesn't agree with it.



It's at some stage in the process and the organization might request us to consider settling it out; or the Service might consider that as an appropriate vehicle for a settlement agreement.

Q Well, can a Tax Law Specialist recommend that a closing agreement be proposed or recommended?

A Can they? They certainly can. I don't know that anybody ever has, but that certainly -- when they're the initiator on the case, they can.

Q Has a Tax Law Specialist working under you ever proposed that a closing agreement be entered into with respect to an exemption application?

A I have one case in my branch now that I don't know if the organization originally suggested it or whether the Tax Law Specialist thought it was a vehicle.

Q The general thrust of my question here is, I'm trying to find out where, generally, the recommendation for the IRS to enter into closing agreement with the exempt organization arises from.

A My --

MR. JACKEL: There's no question pending. You want to ask a question?

BY MR. STERN:

Q Is that determination, or is that proposal generally initiated from a Rulings Branch?

A In my experience, it generally originates with the organization rather than with the Service, and usually at some point where a controversy has developed, in so many instances, that's when the case is -- in my experience, it's when the case is in review at the division level.

Q Has an organization ever proposed to you that a closing agreement would be entered into?

A Yes.

Q And what do you do with that proposal?

A I notify the division.

Q Is that your general practice?

A Yes.

Q And then division will determine whether -- will take, simply, the ball from there?

A Not necessarily. The one that you asked me specifically, we decided it wasn't appropriate at the time. We didn't have an issue before us and so we told the organization we didn't.

Q In your experience, are you aware of any favorable ruling letters which were issued recognizing an organization's status as a 501(c)(3) organization, which were contingent on the subsequent issuance of a closing agreement?

A Whether it were contingent that we would enter into a settlement agreement?

Q Whether a ruling letter recognizing the exempt status of an organization was subject to the organization's entry into a closing agreement with the IRS?

A You're asking me whether or not I know of an organization who we issued a letter to on the condition that subsequent to the issuance of the letter that we would -- they would enter into a closing agreement?

Q That's correct.

A Not to my -- I have no knowledge.

Q Are you aware of any favorable ruling letter which was issued to an exempt organization, recognizing its status as a 501(c)(3) organization, which was predicated upon the organization's prior entry into a closing agreement with the IRS?

A Whether it was issued on the basis of the settlement of issues in a settlement -- I mean, in a closing agreement?

Q That's correct.

A Yes.

Q Does that happen frequently?

A Uhm, I've no -- I have no idea of, one, how many settlement agreements that we've had; and how many of them involved applications for exemption rather than examination issues, and whether or not they're not combined issues.

Q I think you may have just answered this question, but let me make sure it's clear for the record.

Do you know how many closing agreements the IRS has entered into with exempt organizations regarding the organization's application for recognition of exemption?

A No, I do not know.

Q Within the last three years, do you know how many times the IRS has issued a favorable ruling letter to an organization recognizing its status as a 501(c)(3) organization, based upon the organization's entry into a closing agreement?

A No I do not.

Q Are you aware that a closing agreement may apply to a group or a class of taxpayers?

A I guess I need to know what you mean by "a class of taxpayers."

Q I'll rephrase the question for you.

Are you aware that a closing agreement may apply to a group of related organizations, including organizations under a group ruling letter?

A I would think that that's possible.

Q Can a closing agreement cover an organization's future activities?

A (Pause.) What do you mean by "can it cover their future activities?"

Q In prior testimony I believe you said that some of the times -- that some of the times when a closing agreement is executed, it's because that the Service believes that the organization needs to make changes -- that there are changes to be made. This would include future conduct of the organization. Is that correct?

A It would include representations of future conduct.

Q So a closing agreement could prescribe a future conduct of the organization?

A I would assume so. I don't know. I haven't --

Q In entering into a closing agreement with the IRS, a taxpayer must commit to future compliance. Is that correct?

A If that's an issue.

Q Have you been involved in the issuance of a ruling letter recognizing an organization's exempt status under Section 501(c)(3) which was issued on the basis of the organization's entering a closing agreement with the IRS?

A No, I have not, to my knowledge. I don't recollect having been involved.

Q Does the Exempt Organizations Division have seminars, or the materials distributed regarding closing agreements?

A Yes.

Q Do these seminars or materials discuss closing agreements which may be entered into with organizations who have applications pending for recognition of their exempt status?

A My recollection of the material is that it deals with closing agreements, generally.

Q Would you agree that information contained in a closing agreement which involves the future conduct of an exempt organization may also be contained in other writings as submitted by the organization to the National Office as part of its exemption application?

MR. JACKEL: I object to the characterization of the contents of the closing agreement as information. It's an agreement. It's not for the purpose of exchanging information, it's for the purpose of entering into an agreement.

BY MR. STERN:

Q One of the things we talked about earlier was that part of a closing agreement -- a closing agreement may be entered into because there are changes to be made in the organization or its operation. Is that correct?

A Yes.

Q Essentially, the organization is committing to a change, or to abide by certain rules governing its conduct. Is that correct?

A I believe so.

Q Would this agreement to operate in a certain manner, could that be contained -- would that kind of information normally be contained in an organization's exempt application?

A If -- are you asking me whether the agreement would be in the administrative file? Or whether --

Q No. I haven't reached that question yet.

When an organization files an exemption application, it states - - does it state what it's activities are and will continue to be?

A Yes.

Q So, it sets forth for the IRS how it will operate in the future. Is that correct?

A Yes.

Q And the IRS issues a favorable ruling based upon the representations that were made by the organization in its exemption application?

A Yes.

Q Now, closing agreements which provide that an organization will operate in a certain way in the future, that information regarding their future conduct is information normally contained in the exemption application. Is that correct?

A That's correct.

Q Why would the IRS -- strike that.

When a closing agreement contains information regarding the future conduct of an organization, couldn't the IRS require the organization to amend its exemption application to contain that same information?

MR. JACKEL: Again, I'm going to object to your characterization of the contents of a closing agreement as information. There are commitments, there are restrictions, but I don't believe that for the purposes of FOIA that is information.

MR. STERN: I'll --

MR. LEHRFELD: Wait a minute. Are you using that denotatively, or connotatively?

MR. JACKEL: I don't understand your question.

MR. LEHRFELD: Are you recharacterizing the word or redefining the word? Would you use the word information as Webster uses the word, or as you choose to use the word?

MR. JACKEL: My understanding of the word "information" is uhm, data, facts, uhm, things of that nature.

An agreement -- obviously, there are words on the page, you know, that need to be understood by the people who deal with that document, but an agreement, typically, is not an informative document. It's not intended --

MR. LEHRFELD: Does it inform you of the parties?

MR. JACKEL: Uh, I'm not going to get into a debate about what this all means. I'm just pointing out that the document that we're talking about is not the document that contains information.

MR. LEHRFELD: So it doesn't contain the name of the parties?

MR. JACKEL: Of course it contains the names of the parties.

MR. LEHRFELD: Well, is parties information?

MR. JACKEL: As I said, I'm not getting into a debate about whether it's disclosable because there are names of parties in it. The fact of the matter is, there's no information in them in the sense of information that's provided in an application. It's a different vehicle all together.

MR. LEHRFELD: Your client has a statement which you gave to us this morning which says, "The closing agreement consists of five parts: identification to parties, introductory clauses." It says, "the agreed determination." It says, "the ending clause." And it says, "the signatures."

Would you say that none of that information is information?

MR. JACKEL: I would say that none of it is disclosable.

MR. LEHRFELD: Did you say that none of that information is information?

MR. JACKEL: I -- I -- it doesn't matter.

MR. LEHRFELD: Okay.

MR. JACKEL: Uhm, what I'm saying, he has chosen the word information in his question. He's chosen to characterize the contents of a document as containing information. It's our position that it doesn't contain information, it contains the terms of an agreement.

Whether it communicates something to somebody is a different issue. It's not information that was provided the organization in the same way that its application was provided to the Internal Revenue Service.

MR. LEHRFELD: Now your official document contains signatures. Does it not?

MR. JACKEL: This is not my deposition here.

MR. LEHRFELD: Okay.

MS. STEVENS: I'm sorry, could I just hear the question again, so we can make sure we understand what's being asked. Maybe it's just a problem of not hearing it correctly.

(Whereupon, the reporter played back the previous question.)

BY MR. STERN:

Q I'll ask the question again and modify a word for you.

If we asked you the same question regarding closing agreements and the statements contained therein, couldn't the IRS require the organization to submit an amended exemption application, including similar statements?

A I believe so. That's my opinion. You have to understand, I never negotiated a closing agreement and I've not ever drafted one.

Q So, in your understanding, the promises made by a taxpayer, whether they're contained in a closing agreement or an exemption application, are the same?

A No. They -- I guess when you say promises, I think the issues -- everything is much broader based in a closing agreement, I would think.

Again, you know, you have to accept that I've never -- I've never negotiated one and I've never drafted one, but I think they're generally broader issues. There might be an exemption question involved.

Q In your experience with exemption applications, in what situations would the IRS enter into a closing agreement with a taxpayer?

A Where there's some dispute where the Service thinks that a closing agreement helps to resolve those disputes.

Q And what types of disputes might these be?

A I think that I had indicated earlier that I thought it would be a technical issue, and it might be where, you know, we take a position and the organization disagreed with it and we think we're going to be litigating it, the ongoing controversy.

Q Can you describe these technical issues which might lead to a closing agreement?

A There can be all kinds.

Q Can you give us some examples?



MR. JACKEL: I'm going to advise the witness to be careful not to identify any particular organization in answering this question.

THE WITNESS: It's hard to come up with because it can be any kind of issue in terms of controversy. You know, all over the Code. It can be the exemption issue, it can be unrelated business income, whether that unrelated trade or business is the primary purpose; or, it can be in the case of a private foundation a self-dealing issue. You know --

BY MR. STERN:

Q With respect to an organization applying for recognition under 501(c)(3), I'm sure self-dealing issues arise quite frequently?

A They arise sometimes.

Q Sometimes. Every time one of these issues arises, does the IRS enter into a closing agreement --

A No.

Q -- with the organization?

Does it usually enter into a closing agreement with the organization with respect to issuance of its favorable ruling letter?

A You're asking do organizations generally enter into closing agreements with the Service before we issue a --

Q I'm saying that, when an issue arises, a technical issue as you've described, arises with respect to a Section 501(c)(3) applicant's exemption application, you stated that a closing agreement is an alternative for the IRS. Yes?

A Yes.

Q Is that the usual vehicle used to settle a dispute or an open question?

A No.

Q What is the usual vehicle for resolving these technical issues?

A We generally issue a proposed denial on the case, and the organization has a conference of right and it comes in for that conference, and at that time, the issues are discussed and depending on the issue, we might then issue a favorable ruling. We might issue a final adverse ruling. We might ask the organization to make some changes.

Q And how are these changes agreed to? Does the organization submit documentation regarding the agreed upon changes, or how does that work?

A Yes, the organization would submit a statement so that it becomes part of the administrative record.

Q Now, when the IRS doesn't issue a proposed denial, and instead chooses to enter into a closing agreement with the organization, how does that happen? Is it always the taxpayer who suggests the closing agreement, or are there situations when the IRS will recommend it.

MR. JACKEL: Objection. You've assumed that the -- that going to a closing agreement is mutually exclusive with proposing to issue a denial letter. I don't know for a fact that they are.

MR. STERN: Okay.

BY MR. STERN:

Q When there is a technical issue involving an exemption application for a 501(c)(3) organization, we've discussed two alternatives: a closing agreement may be entered into between the Service and the taxpayer; or the Service may issue a proposed denial letter leading to the Conference of Rights. Are there other alternatives before the Service?

A I guess you're indicating those are our two alternatives. Ordinarily, we would issue the proposed denial and go to conference, and then at that point, I would envision that the question might come up about a closing agreement. Usually, my experience would tell me that it would be a really broad issue related -- in a number of related cases before you, you know, would think about the closing agreement. Ordinarily, you'd just settle in terms of a technical position on the individual case.

Q Why would a closing agreement be entered into as opposed to settling on an individual basis?

A Sometimes there are a number of cases, some of them are in litigation. I would think that there are things that need to be negotiated out by the Service with the organization.

Again, as I said before, that's my best understanding having not, one, negotiated a closing agreement or drafted one.

Q Have you been involved in any cases when a proposed denial letter has been sent out, the conference of right has been held, and the taxpayer at that point -- or the Service at that point -- had suggested that a closing agreement be entered into?

A I personally have not been involved.

Q Would it be correct to say that generally in such circumstances, when ultimately a favorable ruling letter is issued, the taxpayer agrees to submit additional information to the IRS regarding the technical issue?

A Would you repeat that question again?

Q Sure, let me rephrase it a bit for you.

When you're at the conference of right, you've stated earlier that the organization can agree to make certain changes, or agree that its conduct will conform in a certain way. Is that correct?

A Yes.

Q Okay. Generally, to memorialize this agreement, it will submit additional information to the IRS, which will be included in its administrative file?

A Yes.

Q When the IRS enters into a closing agreement with a taxpayer regarding its exempt application, it would have the alternative, instead of entering into the closing agreement to have the taxpayer submit additional information to it regarding the technical issue in dispute?

MR. JACKEL: Again, you've assumed that these are mutually exclusive alternatives.

MR. STERN: Well, I may have been mistaken, I assumed that Ms. Gessay had stated those were the two options. Perhaps she didn't answer that question.

MR. JACKEL: But she didn't say that you would always do one and therefore not do the other. It seems to me -- at least from knowing what closing agreements are -- you could have a closing agreement that requires someone to submit additional information. So, you know -- I think you just assumed a fact that's not in evidence and I'm going to object.

BY MR. STERN:

Q Ms. Gessay, when there's a technical issue regarding an organization's exemption application, we've discussed that the IRS may enter into a closing agreement with the taxpayer and we've discussed that the IRS may require the taxpayer to submit additional information to it, prior to the issuance of its favorable ruling letter.

Are there other avenues available to the IRS which -- are there other procedures the IRS may use prior to issuing a favorable ruling letter to the taxpayer?

A I guess I'm having difficulty in understanding in terms of those being two steps. That might be the case in -- a closing agreement might occur in a variety of ways, only one of which is exemption applications. That doesn't -- that's not -- we don't choose that avenue as opposed to another avenue.

We process the case through the office, and if a question of whether it's an appropriate vehicle for a closing agreement comes up, then we -- then we work on the closing agreement. But that doesn't dispose of the case.

Q When is it appropriate, with respect to exemption applications, to enter into a closing agreement with the taxpayer?

A That depends on the circumstances of the issues I've indicated previously. The issue itself, whether the impact of the issue, whether it's in litigation, whether, you know --

Q Who makes the determination whether the IRS will enter into a closing agreement with the taxpayer regarding an exemption application?

A The final determination would be by the official who signs off on it.

Q Signs off on the ruling letter?

A Signs off -- you asked, not on the ruling letter, but on the closing agreement.

Q Right. So, the final determination -- okay, I -- and who generally signs closing agreements?

A In the National Office?

Q In the National Office regarding exemption applications?

A It's the Assistant Commissioner.

Q So the Assistant Commissioner has final determination and final authority to decide whether a closing agreement would be entered into between a taxpayer and the IRS, with respect to exemption applications?

A Yes.

Q How does the issue get to the Assistant Commissioner's level?

A It's uh -- when it's raised, the division director is briefed on it, and I would assume he briefs and calls it to the attention -- to the Assistant Commissioner's staff and the Assistant Commissioner.

Q And who briefs the division director regarding these issues, generally?

A The person who was -- is involved in handling the case. In most instances, I believe that it probably would be at the division level and it would be the division reviewer.

Q So, would the division reviewer make the determination, initially, whether a closing agreement would be entered into between the IRS and the taxpayer in -- let me strike that.

Would the division reviewer make the initial determination whether the IRS was going to consider entering into a closing agreement with the taxpayer regarding its exemption application?

A The division reviewer would not make a decision as to whether we were going to do it or not.

Q Okay. He -- if a request comes in to the division reviewer, from the taxpayer requesting the possibility of a closing agreement being entered into, who would he relay that request to?

A He would discuss it with a division director.

Q Directly?

A That employee on the division staff or --

Q Not the Executive Assistant?

A It might be the Executive Assistant, because he has responsibility for tech -- we now have an Executive Assistant for technical matters. We used to just have one.

Q Have guidelines been issued by the division regarding when it is appropriate for the division to enter into a closing agreement with the taxpayer, regarding an exemption application, or any other matter which may be pending before it?

A I'm not aware of any specific division procedures, but we do have some instructions.

Q And what are those instructions?

A We have a CPE article, continuing professional education article.

Q Would that be the article that was provided to us earlier and written by James J. Bloom and Thomas J. Miller?

A Yes.

Q If I'm correct, this appeared in the 1992 edition of the CPE Manual?

A I think so. I'm not going to swear to it.

Q Sure. Okay.

Have you read that article?

A Yes. We all read the continuing professional education text.

Q Okay. Let me just show you a copy of the article.

A Uhm hum.

Q So that article generally governs or provides the guidance?

A It provides a general discussion of how we handle closing agreements.

Q How "we handle" the closing agreements as in the "Exempt Organizations' Division?"

A Yes.

MR. STERN: Could I have this marked as Exhibit C.

(Whereupon, the document previously marked Plaintiff's Exhibit C was entered into the record.)

BY MR. STERN:

Q In your personal experience, do favorable ruling letters recognizing the exempt status of an organization generally contain provisions which state that the organization will be recognized only as exempt so long as there are no material changes in its operations?

A My recollection is that's a standard paragraph.

Q And what would happen if an organization's operations changed materially?

A My recollection is that the letter also asks them to notify the key District Office of any changes in their organization or operation.

Q And the key District Office will then determine whether it affects its 501(c)(3) status?

A Yes, they -- that would go in to them and they would be responsible for reviewing it.

Q I think you may have stated this previously, but, can closing agreements be proposed by either the taxpayer or the Service?

A By either?

Q Yes.

A Yes.

Q Since 1991, do you know if the IRS has entered into a closing agreement with one or more exempt organizations regarding its application for recognition of exemption under Section 501(c)(3)?

A Yes. I believe there have been some closing agreements relating to exemption issues.

Q And since 1991, do you know if the IRS has conditioned its recognition of an organization as exempt under Section 501(c)(3) on the organization's agreement to be bound by the terms of the closing agreement?

A Are you asking me whether that's a condition in the letter?

Q Not necessarily in the letter.

A (Pause.) I have no idea what's been a request or --

Q Are you aware of any ruling letters which have been issued to Section 501(c)(3) organizations which have expressly provided in the ruling letter itself that the organization would comply with the terms of the closing agreement?

A I don't recollect any.

Q Do you know if the IRS within the last three years have resolved any outstanding issues regarding an organization's application for recognition of exemption, including issues regarding inurement, private benefit or commerciality, through the use of a closing agreement?

A Is that a two-section question? One, whether I know of any closing agreements dealing with application of exemption; and then the issues that are involved?



Q Well, I think you previously testified that you know of closing agreements regarding applications for recognition of exemption.

A Yes.

Q So this question is a little more specific. Do you know of closing agreements that deal with applications for recognition of exemption and address the issues of inurement, private benefit, or commerciality?

A I have not read any of the settlement agreements except for the one that's public, so that I do not know what they address, specifically.

Q And I believe you may have testified to this earlier, but I want to be certain.

Do you know how many times the IRS has used a closing agreement to resolve outstanding issues regarding an organization's exemption application?

A I have no idea of what the number is.

Q With respect to the Scientology organizations, do you know if any of the applicants were asked to enter into a closing agreement with the IRS regarding their exemption applications?

MR. JACKEL: Uh, that, I think is 6103 information and I'm going to instruct the witness not to answer that question.

MR. STERN: So the record is clear, could you just describe what the 6103 information you're objecting to is.

MR. JACKEL: Could I hear the question again?

MR. STERN: Sure, let me paraphrase it.

With respect to the Scientology organizations, were any of the applicants asked to enter into a closing agreement as a condition to the issuance of the favorable letter ruling?

MS. STEVENS: To the extent the information is not in the administrative record, that 6104 requires to be made public any information --

MR. STERN: That's not the standard for -- you're stating that it's 6103 information. It's privileged on the basis of 6103.

MS. STEVENS: Uhm hum.

MR. STERN: What information are you contending is privileged?

MR. JACKEL: Any information that's not required to be disclosed under 6104. That information is not required to be disclosed under 6104.

MR. STERN: My understanding was correct. 6103 provides that return information in taxpayer returns are privileged. Is that correct?

MR. JACKEL: It goes way beyond that.

MS. STEVENS: Yes, I mean -- go ahead.

MR. LEHRFELD: Do you have an Internal Revenue Code?

MS. STEVENS: We're not going to sit here and debate what the Code is.

MR. LEHRFELD: No, no.

MR. STERN: No, I just wanted, for the record, to focus the question.

MS. STEVENS: It seems to me that any question that gets into the possible content of any closing agreement with a specific taxpayer, the circumstances under which it would issued, what conditions were made a part of it or not a part of it, is dealing with the process that is 6103.

If it's 6104, which is a carve out and exception, it's there publicly.

MR. LEHRFELD: Okay, let me ask you this. If a document is furnished by the tax exempt organization, or soon-to-be tax exempt organization, during the process in which its exemption application is pending in the National Office -- in other words, it has a document, it puts it in the mail to Ms. Gessay. Ms. Gessay receives it and associates it with the administrative file, is that a document submitted by the exempt organization in connection with its exemption application?

MS. STEVENS: Yes.

MR. LEHRFELD: So that if a document is derived from the Internal Revenue Service, and is sent to the Exempt Organizations for signature, which is thereupon signed by --

MS. STEVENS: I'm sorry, I'm not following what is something that's derived from --

MR. LEHRFELD: Originated. If the Internal Revenue Service has a form, for example 906, that --

MS. STEVENS: Closing agreement form.

MR. LEHRFELD: -- it types out and sends to the taxpayer during a time frame beginning with the date the application is received, and not yet concluded by the date the exemption ruling is issued, and that Form 906 is executed by the applicant and that is sent in to the Internal Revenue Service to be associated with the exemption application file, is that a document submitted by the exempt organization?

MR. JACKEL: No.

MS. STEVENS: Yes. It is submitted by, yes. What has that got to do with whether it's part of the administrative file or --

MR. LEHRFELD: Because 6104 says that a document --

MS. STEVENS: -- the administrative record.

MR. LEHRFELD: 6104 says that a document submitted by the exempt organization in connection with or in support of -- in support of.

MS. STEVENS: Uhm hum, well that may be our legal argument, what is exactly --

MR. LEHRFELD: Oh, okay.

MS. STEVENS: -- considered "in support of."

MR. LEHRFELD: Okay. So a document that emanates from the taxpayer, which supports its exemption application may nonetheless, under your argument, be excluded from disclosure, even though it emanated from --

MS. STEVENS: If this was in the meaning of what 6104's language contemplates, 6104 would require it be disclosed and it would be disclosed. What I'm saying to you is, I'm not going to accept, for this discussion here -- which I think is totally inappropriate in any event -- to battle on the legal issues that are going to rest for the court to decide. I'm not sitting here in the deposition to do it.

MR. LEHRFELD: Well, I don't know that counsel byplay's ever immaterial for a court's consideration.

MS. STEVENS: Well, that's fine, but it's for District Court.

But, you're using terms like "is it submitted by," I'm using it, as you said before, in Webster's term, yes, it's coming from the taxpayer. Whether it is for 6104 language, I'm going to leave to another day.

MR. LEHRFELD: So you don't want to characterize a document which supports an exempt organization's application as being in support of that application when it is demanded as a condition precedent --

MS. STEVENS: Now you're putting in one more term --

MR. LEHRFELD: No, no, this is all --

MS. STEVENS: I didn't hear that in Bruce's question. I'm sorry.

MR. LEHRFELD: No, I used the words "condition precedent," he used the words "in advance." Maybe I should use that, "in advance of." That was his inquiry.

MS. STEVENS: I would still question the timing issue, which is not quite such a straight line, I suspect.

MR. LEHRFELD: So -- all right. The theory of our case is that a document that is required to be submitted during the application process, and which is required by the National Office in advance of the issuance of a favorable ruling, supports the exemption application and therefore is disclosable under 6104, because the ruling would not have been issued, BUT FOR the filing of that document.

MS. STEVENS: Okay. We'll see how it goes.

MR. JACKEL: Okay. Well, that's a legitimate position. I disagree with it.

MR. LEHRFELD: Oh, that's okay. I mean, I just wanted to articulate what we're trying to do, because these depositions is the beginning of the process to get the boundaries, the time frames and the documents that come in, and how they are treated. We have an administrative record that we under, and now we have an administrative file, and then we have subordinate or auxiliary administrative files from third-party sources.

So, we have at least established that, thus far, in this deposition and that's very helpful.

MR. JACKEL: Well, I'm glad you're pleased.

Back to the question at hand, if the Service has not determined -- and under the procedures of 6104 -- that the document must be placed in a public file, then it is our position that it is 6103 information.

And so, if you want to ask about what's in the public file, you know, you're free to do that. Going beyond that is what we would object to.

MR. STERN: Okay.

BY MR. STERN:

Q In those situations in which the IRS has used a closing agreement in the exemption application process, is the agreement placed in the organization's administrative file?

A I do not know.

Q Do you know what happens to a fully executed closing agreement between the IRS and an exempt organization regarding its exemption application?

A I do not know because as I've indicated before, I've not negotiated one or been involved in drafting one.

Q Okay.

Do you know if a copy is provided to the District Office?

A That I do not know.

Q Do you know if closing agreements with exempt organizations can restrict or otherwise limit who may be paid royalties or employed by the exempt organization?

MR. JACKEL: You're asking her to speculate. I object.

MR. STERN: I was just asking if she knew. I think the question was, do you know whether?

MR. JACKEL: Let me hear the question, again. If you're right, maybe I won't object.

BY MR. STERN:

Q Do you know whether -- now I can't remember the exact words. I can rephrase if you want.

MR. JACKEL: If you rephrase it --

BY MR. STERN:

Q Do you know whether the IRS will enter into a closing agreement with -- do you know whether a closing agreement entered into between the IRS and an exempt organization can restrict or otherwise limit who may be paid royalties or employed by the organization in the future?

MR. JACKEL: I do think your -- I mean, there's a whole universe of things that could be contained in this agreement. I mean, it's one -- you're asking one of those questions where the answer is, "Anything's possible," probably.

So, in that sense, you're asking her to speculate about what -- could it say X, could it say Y. I mean, it could say anything. There's no -- I mean, if you look at the statute, there's no legal restriction on the kind of things that can be agreed to.

BY MR. STERN:

Q To the best of your knowledge, has the IRS ever required an exempt organization to enter into a closing agreement that included provisions or statements regarding whom the

organization could pay royalties or employ in the future?

A I do not know.

Q Okay.

Do you know whether the IRS has ever issued a favorable ruling based upon the fact --

MS. STEVENS: I'm sorry, Bruce. They're talking and I can't hear your question. I'm not trying to listen to what they're saying, but I can't hear what Bruce is asking.

MR. FIELD: It's fine if you listen.

MS. STEVENS: No, I can't do two things at once. I'm just trying to get Bruce's question.

MR. LEHRFELD: Okay.

MS. STEVENS: Sorry, I'm not that skilled.

BY MR. STERN:

Q Do you know whether the IRS has ever premised the issuance of a favorable ruling letter recognizing an organization as exempt under Section 501(c)(3) on the fact that the organization consented to enter into a closing agreement?

A (Pause.) I don't know.

Q Are you familiar with the closing agreement the IRS entered into with Herman Hospital?

A I'm aware of it, yes.

Q Have you read that closing agreement?

A I skimmed it when it appeared in the --

Q Tax Notes?

A Tax Analysts. (Laughter.)

THE WITNESS: I didn't remember whether it was in Tax Notes or in Paul's publication. But, one of the commercial services. (Laughter.)

THE WITNESS: Sorry.

MR. FIELD: You can yank my application.

THE WITNESS: One of the public services.

BY MR. STERN:

Q Were you involved in the preparation or negotiation of that agreement in any capacity?

A No, I was not.

Q Do you know who was?

A No, I don't.

Q Are you aware that a condition of that agreement was that it be made public and distributed to the national tax media?

A Yes, because I read it in the press.

Q Do you know why that provision was insisted upon?

A In that specific case, no.

Q Was there any discussion in the Exempt Organizations' Division regarding that agreement and its public disclosure?

A I was not a party to any discussion.

Q Do you know of any IRS policy or guidelines as to when it will require that a public disclosure statement be contained in a closing agreement entered into with an exempt organization?

A I don't know of any.



Q Do you know who makes the determination as to whether such a provision will be included in a closing agreement?

A I imagine -- I would believe it would be the negotiators.

Q The negotiators being?

A Whoever represents the Service and the other parties.

Q Do you know why the IRS would insist upon a disclosure provision in a closing agreement?

A The --

MR. JACKEL: He asked you, do you know. And, you're asking her to speculate, again, about the Services -- you know, what might possibly happen.

MS. STEVENS: I don't think he's established that the IRS insists -- has insisted on the inclusion of such language in a closing agreement.

BY MR. STERN:

Q Other than the article, which we have included in your deposition as Exhibit C, I believe, regarding the closing agreements, which was produced, is there any other guidance or guidelines provided to EO personnel regarding closing agreements?

A I'm not aware of any guidelines except that article. There was a class in closing agreements.

Q Did you attend that class?

A No, I did not.

MR. STERN: Could we go off the record for a moment?

(Whereupon, counsel engaged in off-the-record discussion.)

MR. STERN: Back on the record.

Ms. Gessay, I just have a few more questions for you.

BY MR. STERN:

Q I believe you testified earlier that you were not sure whether copies of closing agreements were contained in an organization's administrative file. Is that correct?

A That's correct.

Q Do you know who closing agreements between exempt organizations and the IRS are filed with, or who maintains a copy of those agreements?

A No, I do not.

Q Do you know if closing agreements are very circulated within the IRS?

A They have never crossed my desk, and I don't know if they're circulated other places.

Q Do you know of a central depository for closing agreements?

A No, I do not.

Q Do you know if a copy is provided the key District Director for enforcement purposes?

A No, I don't.

MR. STERN: I believe that's all the questions we have for you today. I appreciate your time and your testimony, and your spending the day with us. I apologize for any grief we've put you through.

Thank you.

MR. JACKEL: If I could have a couple minutes to see if I have any questions.

(Whereupon, counsel engaged in off-the-record discussion.)

MR. JACKEL: I don't have any questions.

MR. STERN: Okay.

(Whereupon, at 14:50 p.m., the deposition was concluded.)