

How Will Tax Shelter Opinions Affect Miers's Nomination?

by Allen Kenney

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Earlier this month, Tax Analysts reported that a Senate investigation into tax shelter promoters found that, working with accounting firm Ernst & Young, Miers's firm, Dallas-based Locke Liddell & Sapp, had provided investors with questionable legal opinions for an abusive tax shelter, known as contingent deferred swap (CDS), on her watch. Under a typical CDS transaction, Locke received a \$50,000 fee, according to the Senate report that resulted from the investigation. The IRS made CDS a listed transaction in 2002. (For prior coverage, see *Doc 2005-20477* [[PDF](#)] or *2005 TNT 194-2* )

Because Miers was not a tax attorney and most of her work focused on corporate litigation, there does not appear to be a direct link between her and the CDS opinion letters. In a statement issued to Tax Analysts, the White House denied Miers's involvement with the transaction or the clients involved. John McElhaney, internal counsel to Locke, told Tax Analysts that Miers "did not have anything to do with any aspect of" the transaction.

"Ms. Miers was obviously not directly involved in the CDS opinions. Most otherwise sophisticated non-tax lawyers inside law firms wouldn't be able to decipher what is or isn't accurate in a lengthy tax opinion," said Chuck Rettig, a tax litigator in the Beverly Hills, Calif., firm of Hochman, Salkin, Rettig, Toscher & Perez. "If [E&Y] approved something like CDS, it was historically unlikely to be significantly questioned by other professionals."

However, members of the Senate Judiciary Committee might be forced to consider whether Locke's involvement with the opinion letters affects Miers's fitness to serve on the country's highest court. President Bush has emphasized her experience managing a major law firm in defending her nomination.

"She had the opportunity to have her ethical antennas tweaked here," said Paul Caron, a tax law professor at the University of Cincinnati and the operator of the popular "TaxProf Blog" Web site. "Those ethical antennas were, perhaps, not as sensitive that they should have been."

One item on the Judiciary Committee's questionnaire for Miers asks her to disclose if her firm has been subject to any investigations: "State whether, to your knowledge, you or any organization of which you were or are an officer, director, or active participant has ever been under federal, state, or local investigation for a possible violation of any civil or criminal statute or administrative agency regulation." Another item asks Miers to provide the committee with any "unfavorable information that may affect your nomination."

Although the report didn't exactly set Capitol Hill ablaze, Sen. Chuck Grassley, R-Iowa, for one, hopes to find out more.

"While it doesn't appear that Harriet Miers was directly involved, Sen. Grassley wants to understand better her work as managing partner as it relates to these tax opinion letters. He also wants to understand better these tax transactions and the role of the law firm in the transactions," a spokeswoman for Grassley, chair of the Senate Finance Committee and a member of Senate Judiciary, told Tax Analysts.

Many observers expressed doubt that Miers could not have known about the deal, given the money that the opinion letters generated for the firm.

"I doubt if she really understood the tax issues involved, but it did happen on her watch. Something that lucrative would have caught her attention," said Joe Kristan, a Des Moines, Iowa, CPA who has closely followed the tax shelter saga that has played out in recent years.

Not so, according to Ted Frank, a lawyer and researcher with the American Enterprise Institute for Public Policy Research. Frank, who studies judicial selection, argued that a managing partner's role in a law firm is not like that of a corporate chief executive officer. Instead, according to Frank, managing partners are responsible for duties like determining the firm's business strategy and divvying up the partnership profits.

"I think anybody who's criticizing Miers over this misunderstands the role of a managing partner," Frank said. "When you are in a partnership, you are there because you trust what the other partners do."

McElhanev said that at Locke, partners in the firm's different groups were responsible for overseeing their division's operations. "It's just not a practical thing for the managing partner to be signing off" on everything that each group at Locke does, according to McElhanev.

In the end, what Miers should or shouldn't have done might not be as important as the simple fact that Locke wrote the opinions, according to Caron. He likened the situation to the "Nannygate" scandal of the first Clinton administration that forced the president's first two nominees for attorney general to withdraw from consideration. Miers has been drawing fire from both conservatives and liberals, and, Caron said, CDS could provide a smokescreen for Miers's detractors.

"I don't think it's a momentous thing in and of itself," Caron said, but "if folks want to oppose her on other sorts of grounds, this provides a convenient cover."

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