

## Tax Court Considering Allowing Limited Appearances

by Nathan J. Richman

The Tax Court is weighing proposals that would make it easier for tax practitioners to help unrepresented taxpayers by allowing limited-scope court appearances.

At a March 27 District of Columbia Bar Taxation Community luncheon in Washington, Special Trial Judge Diana Leyden said, "One of the things that the court is now considering, and I am hoping that we'll have some kind of determination shortly . . . is whether to join other jurisdictions that have limited entry of appearance rules."

In late 2018 the American Bar Association Section of Taxation and the State Bar of Texas Tax Section sent the Tax Court comment letters suggesting that the court allow practitioners to enter limited-scope appearances.

Leyden said the Tax Court has frequently heard from pro bono organizations that volunteer attorneys may be willing to represent a pro se petitioner for a motion or settlement talks but that they are unable to take on full trial responsibilities. She noted that a normal court appearance would make an attorney or Tax Court practitioner responsible for the case through trial and post-trial briefing.

*The Tax Court has frequently heard from pro bono organizations that volunteer attorneys may be willing to represent a pro se petitioner for a motion or settlement talks but that they are unable to take on full trial responsibilities, Leyden said.*

The ABA sent its letter in October 2018, and a few days later Tax Court Chief Judge Maurice Foley called it an "intriguing proposal" and noted his interest in finding ways to make the court's system work better for pro se petitioners. A large majority of Tax Court petitioners are unrepresented.

The Texas State Bar letter came a month later.

## Suggestion Details

Both the ABA and Texas State Bar letters contemplate both broadly applicable and pro-bono-specific limited-representation rules, although they focus explicitly on the use of those rules for volunteer attorneys. Both also suggest that a representative entering a limited appearance obtain explicit consent from the petitioner, and they provide forms for doing so.

The ABA letter suggests the Tax Court adopt a limited-representation rule modeled on those used by District of Columbia superior courts. The ABA proposal includes the possibility of limited appearances based on both time and subject matter.

The Texas State Bar letter acknowledges the possibility of subject matter limitations, but because "we believe the need for these will be relatively rare," it focuses instead on duration limitations.

The main difference between the two letters may lie with which problem facing pro bono attorneys they emphasize. The ABA discusses providing volunteers the flexibility to help unrepresented taxpayers without running conflict-of-interest checks against their firms' existing clients. This is a pressing concern at calendar calls simply because of time constraints.

The Texas State Bar letter focuses more on the entire life of a Tax Court case. A limited-representation rule could help young attorneys who want to help but are uncomfortable with the heavier pressure of trial or post-trial briefing.

The Texas State Bar letter notes that volunteers might only be available for a limited period such as calendar call day or a specific trial session. That concern is exacerbated by the need to travel to one of the five cities in Texas where the Tax Court sits.

Both letters note that alleviating these concerns will help more tax practitioners choose to volunteer.

## Hear, Hear

Jennifer Breen of Morgan, Lewis & Bockius LLP, one of the ABA letter's contributors, told *Tax Notes* that pro bono attorneys meeting with pro se petitioners during calendar call often try to coach those petitioners on what to say to the court to

either present their case or ask for procedural relief such as a continuance.

“It would always be more helpful if we were able to get up and help the taxpayer, either by speaking for the taxpayer or by talking with the court about the case, but we can’t because we have not done anything with respect to the due diligence that we need to do vis-à-vis the taxpayer and also run conflict checks,” Breen said.

Breen, a director of the Washington DC Center for Public Interest Tax Law, noted that not only do volunteers in private practice need to run conflict checks, but that some assistance is contingent on a taxpayer’s income level, which must be verified. At calendar call, a pro bono attorney might have 30 minutes with the taxpayer, and there is no chance to fit those procedures into that time frame while also actually talking to the petitioner about his or her problem, doing any needed legal research, and preparing whatever needs to be said to the court, according to Breen. “It was frustrating everyone because the court would like to hear from the possible representative, and I would have things I’d like to say, but I can’t enter an appearance,” she said.

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A limited-representation rule would allow volunteers to actually speak on the record rather than just giving petitioners a little bit of guidance in a courthouse hallway, Breen said. She described the same sort of limited availability concern raised by the Texas State Bar letter, giving the example of an attorney available to conduct a trial session but not for the later briefing.

“We are always looking for ways to help facilitate the representation of taxpayers who need help, and I think that this could be something that would help that,” Breen said.

Travis W. Thompson of Sideman & Bancroft LLP said the large number of pro se Tax Court petitioners stems not only from taxpayers being unable to afford help but also from tax disputes being too small to justify hiring a competent attorney. Whatever the reason, petitioners face the

same difficulties in understanding both the tax law and Tax Court procedures, he noted.

Thompson said the limited-representation proposals would help not only petitioners and potential volunteers, but also the Tax Court itself. He noted that allowing pro bono attorneys to directly address the court using limited appearances will clarify the attorneys’ obligations for all three parties.

“The ultimate conclusion is that taxpayers receive greater access to the proper use of the law, and the Tax Court runs more smoothly, which serves the interests of justice,” Thompson said. ■