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June 1, 2020

The Honorable Maurice Foley
Chief Judge
United States Tax Court
400 Second Street, NW
Washington, DC 20217

Re: Proposed Amendment to Rule 24 of the Tax Court Rules of Practice and Procedure

Dear Chief Judge Foley:

Enclosed please find comments on the proposed amendment to Rule 24 of the Tax Court Rules of Practice and Procedure. These comments are submitted on behalf of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments.

Sincerely,

Tom Callahan
Chair, Section of Taxation

Enclosure

cc: Hon. Charles P. Rettig, Commissioner, Internal Revenue Service
Hon. Michael J. Desmond, Chief Counsel, Internal Revenue Service
Drita Tonuzi, Deputy Chief Counsel (Operations), Internal Revenue Service

**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

**COMMENTS ON PROPOSED AMENDMENTS TO RULE 24 OF
THE TAX COURT RULES OF PRACTICE AND PROCEDURE**

These comments (“**Comments**”) are submitted on behalf of the American Bar Association Section of Taxation (the “**Section**”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Elizabeth K. Blickley and Lawrence A. Sannicandro. Substantive contributions were made by Frank Agostino, Caroline D. Ciraolo, Mitchell I. Horowitz, Sarah Lora, Kelley C. Miller, Alexandra Minkovich, Guinevere Moore, and Caleb B. Smith. These Comments were reviewed by Joseph B. Schimmel of the Section’s Committee on Government Submissions and by Eric B. Sloan, the Section’s Vice Chair for Government Relations.

Although members of the Section may have clients who might be affected by the federal tax principles addressed by these Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

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Date: June 1, 2020

I. Executive Summary

In a press release dated April 21, 2020 (the “**Press Release**”), Chief Judge Foley announced that the United States Tax Court (the “**Court**” or the “**Tax Court**”) had proposed amendments to Rule 24¹ of the Court’s Rules of Practice and Procedure, as well as conforming amendments to several other affected rules. Chief Judge Foley invited public comment on the proposed amendments.

The Section commends the Court for undertaking this effort and concurs with the Court’s overall approach to simplify the language in Rule 24. We appreciate the opportunity to provide our comments on the proposed amendments and respectfully suggests several changes and clarifications. In summary, we recommend the Court:

- Include e-mail addresses for all counsel of record as required in proposed Rule 24(a)(2)(B);
- Clarify the applicable procedures for filing a limited entry of appearance in proposed Rule 24(a)(4)(A);
- Clarify the circumstances in which the Tax Court will exercise its discretion to allow special appearances with the filing of an entry of appearance in proposed Rule 24(a)(4)(B);
- Clarify the language regarding the persons who may represent a party without counsel in proposed Rule 24(b)(1);
- Use different language with respect to the substitution of counsel in proposed Rule 24(d)(2)(A) and (B);
- Adopt a new procedure for having the substituted counsel, as opposed to the withdrawing counsel, file the notice of substitution of counsel in proposed Rule 24(d)(3);
- Consider, as part of Rule 24(g), implementing safeguards to protect attorney client privilege where the Court is required to investigate and determine conflicts of interest involving attorneys who are defending a transaction in which they had significant involvement; and
- Adopt a deadline by which motions to disqualify should be filed.

¹ Unless otherwise indicated all Rule references are to the Tax Court Rules of Practice and Procedure and all references to a “section” are to a section of the Internal Revenue Code of 1986, as amended.

Comments

II. Rule 24(a)(2)(B) - Addition of Email Address

The Court proposes to amend Rule 24 to require counsel desiring to enter an appearance in a case to include, among other things, the counsel's email address (if any). The Section supports the inclusion of a practitioner's email address with the practitioner's entry of appearance. Email is regularly used by the vast majority of counsel who enter an appearance, and the Court itself uses electronic means to effect service on all persons who file documents electronically, including the Commissioner's counsel. Furthermore, since the emergence of the ongoing COVID-19 pandemic, many counsel have shifted to remote work and, as such, may have limited access to office telephones, fax machines, or to mail sent to their office through the U.S. postal system or by private delivery service. We believe requiring all counsel of record to provide their respective email addresses may encourage the Commissioner's counsel to make greater use of email communications with counsel for petitioners, consistent with the obligations of the Commissioner's counsel to maintain the confidentiality of taxpayer information.

III. Rule 24(a)(4)(A) - Limited Appearances

The Court proposes to amend Rule 24 to specifically recognize a practitioner's ability to file a limited entry of appearance. The Section supports the concept that a limited representation before the Court should be formalized in the Court's Rules of Practice and Procedure. However, it is unclear to us whether the Court intends to rely on Administrative Order 2019-01² or some other process to make operative the language in Rule 24(a)(4)(A): "to the extent permitted by the Court." We recommend that the Court clarify what is meant by "to the extent permitted by the Court" so practitioners know the Court's practice for entering a limited appearance at any given time.

IV. Rule 24(a)(4)(B) - Special Appearances

The Court proposes to amend Rule 24 to specially recognize an individual or counsel as a party's representative without the need to file a notice of appearance. The Section agrees that a new provision for "special appearances" should be incorporated into the Court's Rules of Practice and Procedure, but the language in proposed Rule 24(a)(4)(B) leaves it unclear as to when such a special appearance will be approved. We note that proposed Rule 24(a)(3) would allow the Court to recognize an individual who had submitted an application for admission to practice before the Court, but has not yet been admitted, so we presume this is outside the purview of a "special appearance." On the other hand, it is possible that "special appearance" could apply, for example, to an attorney who is providing *pro bono* services during a calendar call and who desires to speak to the Court on behalf of a *pro se* petitioner (and the petitioner desires to have that lawyer speak on his or her behalf), but who is unable to submit a notice of limited appearance. Such a practitioner might also be unable to enter a limited entry of appearance if the policy of the lawyer's law firm requires the lawyer to first ensure that there is no conflict of interest in representing the *pro se* litigant, even in a limited capacity. The Section

² U.S. Tax Court, Admin. Order No. 2019-01 (May 10, 2019), available at https://www.ustaxcourt.gov/rules/limited_eoa/Admin_Order_No_2019-01.pdf.

appreciates that the Court regulates the lawyers who practice before the Court in accordance with Rule 200. It is unclear to us, however, whether “special appearances” are intended to cover any appearance other than those specifically listed in Rule 24(a)(1), (3), (4)(A), and (5), or if it is intended for another purpose. Rule 24(a)(4)(B), as proposed, does not provide any examples of the situations in which a special appearance might be allowed. The Section recommends that the Court clarify the circumstances under which it might utilize a special appearance and the scope of such an appearance.

V. Rule 24(b) - Representation Without Counsel

The Court proposes to amend Rule 24(b), which generally relates to the persons who are authorized to represent a party that is not represented by counsel. The Section believes the Court’s simplification of this paragraph raises some issues that could be clarified. We recommend the Court consider modifying proposed Rule 24(b)(1)(C) to state “an authorized member, *partner or other owner, or trustee, fiduciary, or other authorized representative....*” The term “member” is technical, and its use in the proposed rule may be unnecessarily restrictive and not consistent with the Court’s intention to encapsulate the full range of persons who may bring an action before the Court. For example, the term “member” as used in proposed Rule 24(b)(1)(C) generally refers to the owner of equity interests in a limited liability company, but not in a partnership or other unincorporated entity. Under Title XXIV.A of the Court’s Rules of Practice and Procedure, which apply to partnership actions under section 1101 of the Bipartisan Budget Act of 2015,³ a partnership proceeding is commenced when the “partnership representative” files a petition for readjustment. A partnership representative need not be an equity owner in the partnership,⁴ and Rule 24(b) as proposed might be interpreted to suggest that such a non-owner partnership representative would not be allowed to represent the partnership without counsel. If the Court does not intend this result, then we recommend the language in proposed Rule 24(b)(1)(C) be revised.

VI. Rule 24(d)(2)(A) and (B) - Substitution of Counsel

A. Proposed Language

The Court proposes to amend Rule 24(d) to adopt new procedures applicable to substitution of counsel. Given that the form for substituting counsel is in the nature of a notice, and not a motion, the Section suggests the use of declaratory phrases in both (d)(2)(A) and (B). For example, we suggest that Rule 24(d)(2)(A) and (B), respectively, be revised as follows:

- (2) The substitution of counsel must state that:
 - (A) substituted counsel enters an appearance for the party;
 - (B) current counsel’s appearance is withdrawn for the party;

If, however, the Court would prefer not to use the declarative, then we suggest:

³ Pub. L. 114-75, 129 Stat. 584. *See, e.g.*, Rules 255.1, .2, and .6.

⁴ *See, e.g.* I.R.C. §6223(a).

- (A) substituted counsel seeks to enter an appearance for the party; and
- (B) current counsel seeks to withdraw for the party.

B. Current Confusion Regarding the Commissioner's Designated Counsel

As the Court is aware, in proceedings before it, the Commissioner is always represented by an attorney in the Office of Chief Counsel. Typically, the Commissioner's counsel enters an appearance in a case by filing an answer or a motion related to the pleadings. In some cases, especially those involving relatively small deficiencies, a more senior attorney in the Office of Chief Counsel might sign a pleading even though that attorney will not be primarily responsible for handling that case at trial or in pretrial practice. Once a case is destined for litigation, the more senior attorney might reassign the case to a docket attorney who is not required to (and does not) make it known until the calendar call that the docket attorney is, in fact, the Commissioner's counsel responsible for the case. In these cases, the Court (or a *pro bono* lawyer reviewing a case before the calendar call) may not learn the identity of the Commissioner's counsel until the date of the calendar call (or after calling the designated supervisor). The inability of the Court or a petitioner's counsel to easily identify the Commissioner's counsel can delay the settlement of tax cases by requiring counsel to first contact the senior attorney designated in the first document filed with the Court. We believe requiring the Commissioner's counsel to enter an appearance in the same manner as any private practice attorney is fair and will contribute to the "just, speedy, and inexpensive determination of every case," as required by Rule 1(d). The logical corollary to this rule is also that the Commissioner's counsel would be required to file a notice of substitution of counsel or a notice of withdrawal as counsel if the attorney will no longer represent the Commissioner before a decision is entered. Although we recognize that this would impose an additional burden on the Commissioner's counsel, these are the same rules that apply to attorneys in private practice, and, for the reasons discussed above, we believe would promote a more just and efficient determination of cases before the Court. The Section respectfully recommends that Rule 24 (and more generally, every counsel's obligation to file an entry of appearance), substitution of counsel, or notice of withdrawal be made equally applicable to every counsel who becomes involved in a docketed case for any party.

C. Obligations of Counsel

The Court proposes to revise Rule 24(d)(3) to clarify the obligations of the current counsel and substitute counsel regarding the notice of substitution of counsel. The Section supports the clarification that the substituted counsel is responsible for filing the required notice. This requirement will ensure the substituted counsel has worked with current counsel to obtain the necessary information and documents and is ready to proceed.

VII. Rule 24(g)(1) - Conflicts of Interest

Conflicts of interest, particularly those arising in the context of a counsel of record who was involved in planning or promoting a transaction that is at issue in a Tax Court case, deserve special attention. Rule 24(g), both in its current form and as proposed, requires any counsel of record who was involved in planning or promoting a transaction to secure the client's informed consent, withdraw from the case, or take whatever other steps are necessary to obviate a conflict

of interest or other violation of the Model Rules. The Court proposes to amend Rule 24(g) to require the client's informed consent to be in writing. We support this change.

Counsel who was involved in planning, promoting, or operating an entity is sometimes the same counsel defending that transaction at the Service's examination stage, then at the Service's Independent Office of Appeals ("**Appeals**") stage, and then before the Tax Court. This representation generally creates a conflict of interest between the lawyer and the client, including a possible conflict between the client and the lawyer's own self-interest. The conflict may be waivable with informed consent or it may not be waivable. The current version of Rule 24(g) appropriately grants judges substantial discretion to decide various conflict of interest issues that can arise in a Tax Court case. Under the current version of Rule 24(g), the Court may hold a hearing (and require a petitioner's attendance), order that a copy of the motion to disqualify be served on the petitioner, or take numerous other steps to ensure that the conflict may be waived and that the waiver is knowing and intelligent. The Section recommends that the Court provide safeguards when inquiring as to the circumstances of a waiver of a conflict of interest to ensure that compliance with Rule 24(g) does not come at the expense of either the client's attorney-client privilege protections or the confidentiality of client information. An example of these safeguards, which we expect would occur in practice and not necessarily through a change to the Court's Rules of Practice and Procedure, could include appointing a special trial judge to inquire into the nature of the client's informed consent without risk of waiving the attorney-client privilege or the confidentiality of client information.

VIII. Rule 24(g)(2) – Counsel as Witness

These Comments do not address the Court's proposed changes to the lawyer as witness rule in Rule 24(g). We expect to submit additional comments on that topic and anticipate that others will do the same.

IX. The Court Should Adopt a Deadline by Which Motions to Disqualify Should Be Filed

Regardless of whether the Court maintains the lawyer as witness rule as set forth in Rule 24(g)(1) or Rule 24(g)(2), or modifies Rule 24(g)(2) to more closely conform to Model Rule 3.7(a), motions to disqualify will inevitably occur. Motions to disqualify of any sort are necessarily disruptive to trial and pretrial preparation. And, as such, we believe it is appropriate for the Court's Rules of Practice and Procedure to require parties to bring motions to disqualify to the Court's attention at the earliest possible time.

By the time the Notice of Trial is issued, Counsel should already have spent significant time preparing for trial, and any potential conflicts of interest should be known to the parties. In such instances, it will also serve the Court's purposes to address these potential conflicts of interest issues in sufficient time to avoid delay of trial. Thus, we respectfully recommend that, to prevent delay of trial and surprise to the opposing party, the Court require that any motion to disqualify counsel must be filed within 60 days after the Court issues the Notice of Trial. The Section suggests adding language to the Rule to encourage early filing of any motion to disqualify, but with an exception for situations in which facts later come to light that raise a potential conflict. Specifically, the Section proposes:

Rule 24(g)(3)- Motion to Disqualify-

No motion to disqualify counsel shall be filed, without leave of Court, later than 60 days after the issuance of the Notice of Trial.

* * *