

# TAX SECTION

## State Bar of Texas



November 6, 2018

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**Certified Mail Return Receipt Requested**

The Honorable Maurice B. Foley  
Chief Judge, United States Tax Court  
400 2nd Street, N.W.  
Washington, D.C. 20217

Re: Suggested Change to Tax Court's Rules of Practice and Procedure

Dear Chief Judge Foley:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed comments suggesting an amendment to the United States Tax Court's Rules of Practice and Procedure, to provide for entries of limited appearance.

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE TAX SECTION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSIONS OF THE TAX SECTION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE TAX SECTION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE TAX SECTION WHO PREPARED THEM.

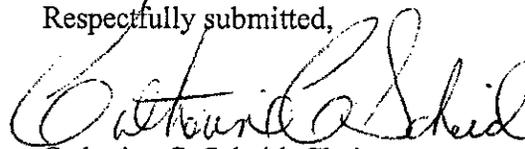
We appreciate the opportunity to provide input on potential improvements to how the Court functions.

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The Hon. Maurice B. Foley  
November 6, 2018  
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Respectfully submitted,



Catherine C. Scheid, Chair  
State Bar of Texas, Tax Section

Enclosure

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## COMMENTS ON SUGGESTED CHANGE TO TAX COURT'S RULES OF PRACTICE AND PROCEDURE

These comments on a suggested change to the Tax Court's Rules of Practice and Procedure are submitted on behalf of the Tax Section of the State Bar of Texas. The principal drafter of these Comments was Robert D. Probasco, member of the Tax Section's Council and former Chair of the Pro Bono Committee. The Committee on Government Submissions (COGS) of the Tax Section of the State Bar of Texas has approved these Comments. Jason B. Freeman, Co-Chair of COGS, reviewed and approved these Comments for COGS. Juan Vasquez, Jr. and Rachael Rubenstein, Co-Chairs of the Pro Bono Committee, and Richard Hunn, Co-Chair of the Tax Controversy Committee, also reviewed the Comments and made substantive suggestions on behalf of COGS.

Although members of the Tax Section who participated in preparing these Comments have clients who would be affected by the principles addressed by these Comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: November 6, 2018

## I. BACKGROUND

As of April 30, 2018, the Tax Court had 21,158 cases pending, of which 7,833 were “small tax cases.” In 68.7% of the total cases, and 91% of the small tax cases, petitioners were self-represented.<sup>1</sup> The Court has long understood the difficulties taxpayers face in prosecuting a case without representation and has taken steps to alleviate those difficulties. The Rules of Practice and Procedure provide an informal process for “small tax cases.”<sup>2</sup> The Court also facilitates a robust program of pro bono assistance for self-represented petitioners. The Court invites both low income taxpayer clinics (LITCs) and Bar-sponsored calendar call programs to provide assistance at calendar calls. Over 100 LITCs and Bar-sponsored programs regularly appear at calendar calls and many also participate in “Pro Bono Days” with IRS Counsel to resolve cases well in advance of the calendar call. Many LITCs are also enrolled in the Tax Court’s clinical program, in which the Court sends “stuffer notices” to self-represented petitioners to make them aware of local LITCs that provide pro bono services.

We commend the Court for its extensive efforts to make the process work better for all parties. We offer the following suggestion in hopes of improving the process even further.

## II. CONCERNS REGARDING ENTRIES OF APPEARANCE

In 2017, LITCs and Bar-sponsored calendar call programs entered appearances in 678 cases and provided advice without entering an appearance in another 1,340 cases.<sup>3</sup> The clinics/programs can and do provide substantial help to self-represented petitioners without entering an appearance, but there are some instances where the assistance could be even more effective if the clinic/program entered an appearance in the case. Yet, these clinics/programs only enter an appearance for approximately one-third of the petitioners they assist at calendar calls. Based on our experience, we believe that one reason for this is a concern about the potential commitment resulting from entering an appearance in the case.

Bar-sponsored calendar call programs such as that of the Tax Section<sup>4</sup> as well as some LITCs solicit volunteers from private practice. In our program, we have found that the most experienced tax attorneys usually have relatively little time to spare from their busy practices and find it difficult to commit, if at all, to more time than the day of the calendar call. Because of this, young attorneys make up a significant portion of our volunteer pool. These young attorneys, however, not only face pressure for billable hours but also often have relatively limited experience. They may feel comfortable with, for example, presenting the status of the case and arguing motions at the calendar call. But they may feel less comfortable that they can provide other services, such as conducting a trial or filing post-trial briefs, in a competent manner.

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<sup>1</sup> “Update from the Tax Court,” ABA Section of Taxation Pro Bono and Tax Clinics Committee meeting, May 12, 2018.

<sup>2</sup> U.S. Tax Court Rules of Practice & Procedure, Rules 170-174; I.R.C. § 7463.

<sup>3</sup> “Update from the Tax Court,” *supra* note 1.

<sup>4</sup> The State Bar of Texas Tax Section’s calendar call program was established in 2008, and serves petitioners in all five Texas cities where the Tax Court holds trial sessions.

LITC attorneys admitted to practice before the Court may not maintain a private practice and therefore may have more time to dedicate to pro bono services. However, they also may find it difficult to commit to more time than the day of the calendar call. In Texas, there are four academic LITCs, at which the attorneys often have obligations at their law school, such as teaching classes and around which they must schedule client services. There may also be workload constraints. Many LITCs, both academic and non-academic, receive more requests for assistance than they can accept and must either turn down prospective clients or place them on a waitlist. Limiting the services provided to one taxpayer at the calendar call may allow flexibility to help other clients whom the LITC otherwise would have to turn away.

Travel is also an important consideration in states such as Texas for both LITCs and the Tax Section's calendar call program. The Court conducts trial sessions in five different cities in the state. Due to limited numbers of tax controversy attorneys in some locations, the Tax Section frequently arranges for volunteers from other cities to travel to the trial session. Similarly, some Texas LITCs participate at calendar calls in cities other than where the LITC is based. Pro bono volunteers typically make travel arrangements assuming that there will be no need for their services beyond the first day of the trial session. Entering an appearance in a case might, depending on circumstances, require last-minute changes in those travel arrangements as well as rescheduling other commitments.

We believe that pro bono volunteers would be more likely to consider entering an appearance at calendar calls if their appearance could be limited to avoid the concerns described above. While individual judges have at times allowed our volunteers to enter limited appearances, providing for such limited appearances in the Court's Rules of Practice and Procedure would standardize the process and make it more effective.

### **III. SUGGESTED CHANGE TO RULE 24**

We recognize that the Court may wish to implement a broad rule that would be available for anyone entering an appearance, not just pro bono volunteers, and would provide maximum flexibility and coverage. We have no serious objections to such a broad rule. However, we suggest that the Court also consider an alternative that is limited to pro bono volunteers, covers the most common situations faced by volunteers, and is both easy for volunteers and petitioners to understand and easy to administer. We believe such a process may be more effective than a more comprehensive approach.

In our experience, private practitioners engaged for a fee usually are not affected by the problems described above to the same extent as LITCs and Bar-sponsored calendar call programs. Normally, they enter an appearance long before the case is even set for trial, rather than meeting the petitioner for the first time at the calendar call or a Pro Bono Day. As a result, they can and do enter their appearances without limitations and rely on the ability to withdraw as counsel, if necessary, pursuant to the Court's Rule 24(c). Therefore, we believe that a new rule for entries of limited appearance could be restricted to services provided on a pro bono basis and still address the vast majority of situations in which a petitioner's representative would want to enter a limited appearance.

We further believe that a new rule limited to pro bono volunteers could be significantly simpler than typical rules for limited appearances in non-tax representations. The American Bar Association Standing Committee on the Delivery of Legal Services issued a white paper on limited scope services, “An Analysis of Rules That Enable Lawyers to Service Self-Represented Litigants,” in August, 2014.<sup>5</sup> Many states have successfully implemented rules for limited appearances in their courts, whereby an appearance may be limited based on date, subject matter, time period, or activity.

We believe that the limitation could be expressed, for the vast majority of situations encountered by pro bono volunteers, as lasting until the end of specific categories of hearings or presentations to the Court. Alternatively, if needed, it could be expressed as lasting until a specified date/time. That could improve the understanding, and simplify the administration, of limited appearances, as there would be no uncertainty for the Court, IRS Counsel, or the petitioner regarding when the limited appearance would terminate. Based on our experience providing pro bono services in Tax Court cases, we believe the preferred termination point for limited appearances would most often fall within one of the following categories, which could be listed on the form entry of limited appearance to minimize confusion:

- The conclusion of the calendar call. This would allow volunteers to present petitioners’ position and the status of the case to the Court without committing to argue any pre-trial motions.
- The conclusion of pre-trial activity. This would allow volunteers to provide substantial assistance after discussing the status at the calendar call without committing to conduct the trial.<sup>6</sup>
- The conclusion of trial. This option would allow volunteers to conduct the trial without committing to post-trial activity such as filing briefs.
- A specified date/time. This option would benefit volunteers who are willing to assist with pre-trial activity or even trial but cannot commit to return to court later in the week. For example, the volunteer might enter a limited appearance scheduled to terminate at the end of the first day of the trial session.

We believe that the category for terminating the limited appearance at the conclusion of pre-trial activity might be particularly useful. Prior to entering a limited appearance, the volunteers typically will know whether there will be any pre-trial hearings and the subject of the

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<sup>5</sup> Available at [https://www.americanbar.org/groups/delivery\\_legal\\_services/resources.html](https://www.americanbar.org/groups/delivery_legal_services/resources.html) .

<sup>6</sup> We note that the Court’s procedures already provide substantial assistance to self-represented petitioners during trial. As part of the informal process for “small tax cases,” judges typically facilitate petitioners’ testimony. Most non-testimonial evidence is presented through the stipulation of facts, for which pro bono volunteers can assist petitioners without entering an appearance. Volunteers can also advise petitioners regarding relevant information to be presented through testimony. Thus, terminating a limited appearance at the conclusion of pre-trial activity would not necessarily severely disadvantage petitioners with respect to presenting testimony.

hearing(s). Pre-trial hearings in these types of cases are usually relatively straight-forward issues, such as motions to dismiss for failure to prosecute or motions for continuance. Less experienced volunteers often will be willing to represent the petitioner for such hearings even though they might not be comfortable representing the petitioner during the trial. More complex issues, such as discovery disputes or motions for summary judgment, rarely occur in these types of cases. In the event that they do, and if the volunteer is uncomfortable representing the petitioner for such hearings, the volunteer could enter a limited appearance that terminates at the conclusion of the calendar call.

For simplicity and clarity, we suggest that the first three categories be explicitly restricted to the currently scheduled trial session for the petitioner's case. When the volunteer meets a petitioner at calendar call, the volunteer may be able to anticipate her availability to assist the petitioner during that trial session. But if the case were to be continued, the volunteer may not be able to anticipate her availability to assist at a future trial session. Without certainty, the volunteer might be forced to assume that a motion for continuance would be granted and enter a limited appearance ending on the day of the calendar call, in order to avoid a commitment stretching months into the future. Then, if the case is not continued, the volunteer could enter a second limited appearance to continue assistance during the rest of the trial session.

By contrast, if the first three categories listed above are explicitly restricted to the currently scheduled trial session, the volunteer could enter a limited appearance for the entire trial session, if she is willing to conduct the trial and her schedule permits. If the case is continued, a second limited appearance might still be necessary but would be months in the future. Even then, a second appearance often will not be necessary to assist the petitioner after the first trial session. Our volunteers have found that they can provide substantial assistance – including informal discovery, facilitating discussions with IRS Counsel, reaching agreement on the stipulation of facts, drafting documents to be submitted to the Court, or reviewing computations under Rule 155 – without an entry of appearance and can potentially resolve the case before a rescheduled trial session.

We believe that a limited appearance, structured as discussed above, would cover the vast majority of situations encountered by pro bono volunteers. The limitation as described above is similar in many respects to the limitations based on date, time period, or activity found in many state court provisions for limited appearances. The approach we suggest does not address limitations based on subject matter. However, we believe the need for these will be relatively rare. When such situations arise, volunteers may be able to resolve them in the same way that private practitioners do.

For example, potential conflicts of interest between two petitioners in the case might be avoided if the volunteer represents only one of the petitioners.<sup>7</sup> If a petitioner wishes to pursue a particular argument but the volunteer believes she cannot advocate for that argument ethically, the volunteer can simply refuse to enter an appearance at all. There may be some circumstances in which, without a limitation based on subject matter, volunteers will not be willing to enter an

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<sup>7</sup> Representatives of more than one clinic/program attend some calendar calls in Texas, so that different volunteers could represent each petitioner.

appearance. However, as noted above, we believe that less than 100% coverage might be justified by a simpler process that is easier to understand and administer.

We further suggest that the petitioner consent to the scope of the limited representation by signing the entry of limited appearance. We believe this, instead of merely serving the represented party, would provide the Court and the volunteer with greater certainty. The Court could, if desired, confirm the petitioner's understanding and consent before accepting the limited appearance. Further, this representation will typically arise when the volunteer first meets the petitioner at the calendar call or an earlier Pro Bono Day; it should be easy to obtain the petitioner's signature. Some states provide for a certificate after the fact if the represented party is unavailable to sign, but we do not foresee that would be necessary.

An amendment to the Court's Rules of Practice and Procedure might take the form of a new Rule 24(a)(6) as follows:

(6) *Limited Appearance*: At the Court's discretion, counsel providing pro bono services, including but not limited to through a low-income taxpayer clinic or Bar-sponsored calendar call program, may file an entry of limited appearance, which shall be subject to all requirements set forth in subparagraph (3) hereof and shall also specify when the representation terminates. The represented party shall sign such entry of limited appearance to confirm consent to the limitation. The entry of limited appearance shall be substantially in the form set forth in Form \_\_\_ in Appendix I. The limited appearance shall automatically expire without leave of Court at the specified time and no notice shall be required by counsel. After the expiration of the specified time period, any service of papers required by Rule 21 shall be made upon the party rather than counsel. Counsel entering a limited appearance shall be subject to all other requirements applicable under these Rules.

A draft version of an Entry of Limited Appearance is attached.

#### IV. CONCLUSION

We appreciate the opportunity to provide suggestions to promote the Court's goal of effective participation by petitioners, aided by pro bono volunteers, in their cases. Thank you for your consideration.

**ENTRY OF LIMITED APPEARANCE**  
(See Rule 24(a)(6))

**UNITED STATES TAX COURT**

Petitioner(s),	§	
v.	§	Docket No. _____
Commissioner of Internal Revenue, Respondent.	§	
	§	
	§	

**ENTRY OF LIMITED APPEARANCE**

The undersigned, being duly admitted to practice before the United States Tax Court, hereby enters an appearance for the petitioner(s) in the above-entitled case, which shall terminate:

- At the conclusion of the calendar call for the current trial session;
- At the conclusion of pre-trial activity during the current trial session;
- At the conclusion of the current trial session; or
- \_\_\_\_\_ [specified date/time].

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed name  
Petitioner(s)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Office Address

\_\_\_\_\_  
City, State, Zip Code

\_\_\_\_\_  
(Area Code) Telephone No.

\_\_\_\_\_  
Tax Court Bar No.