



LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
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May 27, 2020

Stephanie A. Servoss
Clerk of the Court
United States Tax Court
400 N. Second Street, N.W., Room 111
Washington, D.C. 20217

Subject: Comments on Changes to Tax Court Rule 24

Dear Ms. Servoss,

In response to the Notice from the Tax Court dated April 21, 2020, inviting comments on the proposed rule changes, the Tax Clinic at the Legal Services Center of Harvard Law School (hereinafter the Clinic) offers the following remarks, requests and suggestions:

Rule 24

(a)(4)(A) – The Clinic applauds the creation of the limited appearance rule. This makes it easier to assist individuals at calendar call where limited information is available to check conflicts and to check facts. Further details on the process would be appreciated. There was a form used for entering a limited appearance which the Clinic utilized in a Boston calendar last fall. The Clinic has some suggestions regarding that form related to the period of the limited appearance. The Clinic suggests making the limitation for the period of the calendar call or the calendar session.

(a)(4)(B) – The Clinic requests the Court provide some examples in the explanation of when a special appearance would be appropriate.

(a)(5) – The Clinic is concerned that the way the rule is written it could be interpreted that the student can only work with the lawyer on drafting when specific permission has been obtained from the Court. This proposed rule does not reflect the reality of mentoring and teaching students in a clinical setting, where student involvement in drafting and revising court pleadings is a central part of

being a student-attorney for clients. It is also inconsistent with the Court's general encouragement of law school clinics in representing low income taxpayers.

It is of course expected and required that students prepare any papers for court filings under the supervision and signature of a licensed and admitted attorney. It is impractical to seek specific leave of the court in each instance where a student may do so. No rule exists concerning others who may assist an attorney in drafting a pleading or a document. Paralegals, secretaries, enrolled agents, CPAs and others who are not admitted to practice before the court may assist an attorney in drafting a document or pleading for filing with the court. None of these individuals receive mention in the rules granting permission to assist with the drafting of documents. Why single out students?

The Clinic suggests that the rule focus on practice in the court and on limiting the signing of pleadings to those fully admitted to practice.

The Clinic also suggests that the Rule make provision for students to enter a student-attorney appearance, with supervising counsel present and with leave of the Court, to present oral arguments and to examine witnesses during tax court proceedings. This is already the practice in the Court but the proposed rule is silent on the point and should clarify that students may participate this way in cases.

The Clinic suggests that the Court consider adding to Rule 24 guidance concerning how students may be listed on a brief and on other documents filed by parties.

The Clinic recommends allowing the listing of students who assist in the drafting of documents. and the questioning of witnesses at trial. The Clinic also recommends acknowledging students in the issuance of opinions and orders in cases in which the student(s) assisted in the drafting of documents and the questioning of witnesses at trial. In the past some judges have acknowledged students in orders and opinions and others have not. We acknowledge that the US Supreme Court does not allow students to be listed on, at least, amicus briefs. Here's from part 3.a. of an October 2019 Memorandum of that court regarding filing of amicus briefs:

The name of counsel of record must be included toward the bottom of the cover, along with counsel's office address, email address, and telephone number. Counsel of record must be a member of this Court's Bar. Rule 34.1(f). The names of other attorneys may be included, but the names of other persons (such as research assistants and law students) may not be

listed. Nor are non-attorneys to be thanked for their assistance or credited with having contributed to the preparation of the brief either in the text, in a footnote, or at the conclusion of the brief. Pro se amicus briefs from individuals who are not members of the Court's Bar are not permitted. Rule 37.1

The Clinic, however, recommends that the Tax Court allow students to be listed at the end of briefs or memoranda of law and that it acknowledge in any opinion that names counsel to the case.

(c) – The Clinic applauds the decision to allow withdrawal without motion even though this change is unlikely to be meaningful to the Clinic. Because the use of a motion requires the presence of remaining counsel on the case, this change will probably not cause the Clinic to enter its appearance earlier in the case than it currently does. In cases in which the petitioner contacts the Clinic after the filing of the petition, the Clinic will continue to rely on a power of attorney to deal with the IRS until a formal entry is necessary because in most cases there will not be a second attorney on the case.

If a party can withdraw by Notice and does so 31 days prior to the calendar, will the filing of the Notice create a certainty that withdrawal has occurred? What type of response, if any, will come from the Court?

(d) – The Clinic suggests allowing substitution of counsel up to the time of trial. Many jurisdictions allow this in recognition of the client's right to control their representation through the end of their case. Should a client develop an irreconcilable conflict with their counsel less than a month before trial, the client should have the ability to hire new counsel and establish a new attorney-client relationship without leave of the court and without having to move the trial date should the client and new counsel believe they are able to proceed. Allowing substitution of counsel in this scenario will also ensure counsel are able to be in compliance with state bar ethics rules, which still govern many aspects of the attorney-client relationship outside of the courtroom and which may require counsel to step back from representation, even shortly before trial.

Moreover, substitution of counsel should remain a remedy in situations where counsel has become unable to proceed to trial for any number of logistical or personal reasons but can, with the full consent and agreement of the client, find other counsel who will be able to move forward without delaying the case. In such

circumstances the client should also retain the ability to decide whether their counsel is still capable of proceeding in their representation and to independently seek other counsel should they feel uncomfortable with their current representation.

Rule 13

Unrelated to the changes proposed for Rule 24 but related to litigation in which the Clinic is occasionally involved regarding jurisdiction of the Court, the Clinic suggests that the Court amend Rule 13(c) to reflect the holding of the D.C. Circuit in *Myers v. Commissioner*, and the Court's *Golsen* decision. In *Myers*, the D.C. Circuit held that timely filing of a petition for a whistleblower award action under section 7623(b)(4) is not a jurisdictional requirement of a Tax Court suit. Currently, Rule 13(c) (as amended on July 15, 2019) states: "(c) Timely Petition Required: In all cases, the jurisdiction of the Court also depends on the timely filing of a petition." It should be modified to read: "(c) Timely Petition Generally Required: Except with respect to whistleblower award actions under section 7623(b)(4), in all cases, the jurisdiction of the Court also depends on the timely filing of a petition."

Conclusion

The Clinic would be happy to respond to any questions or concerns the Court may have regarding these comments. Please contact Keith Fogg at the address listed above, by email at kfogg@law.harvard.edu or by phone at 617-290-2532.

Sincerely,

/s/ T. Keith Fogg

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