

Thomas N. Thompson
Attorney at Law
312 South 500 East, Suite 4
Salt Lake City, Utah 84102
Tel. No. (435) 714-9406
tomtrilobite@live.com

October 5, 2015

Chief Judge Michael J. Thornton
United States Tax Court
400 Second Street, N.W.
Washington, D. C. 20217

re: Comment on the Court's Rule of Practice and Procedure

Dear Chief Judge Thornton:

I appreciate the Court's solicitation of comments regarding the Court's Rules of Practice and Procedure.

While the Court's Rules have generally served the Court, practitioners, and those who appear before it very well, I have some concern about Rule 24(b) relating to personal representation without counsel. There, it is stated, in pertinent part, that "[a] corporation or an unincorporated association may be represented by an authorized officer of the corporation or by an authorized member of the association." While it seems to me that an unincorporated association may legitimately be represented by an authorized member of the association, as set forth in the Rule, I am troubled by the provision which allows a *corporation* to be represented by an "authorized officer" because this contravenes the common law rule uniformly applied (so far as I am aware) in every other federal court except the Tax Court.

As one writer has pointed out,

In *MacNeil v. Hearst Corp.* the corporate plaintiff attempted to prosecute a civil action by its corporate officers alone. The federal court did not allow the action, following the rationale that corporations can act only through agents and that such agents must be attorneys at law. In dismissing the action the court introduced a new approach. It mentioned the necessity of a court having control over those representing a corporation in court. If non-lawyer agents were allowed to represent their corporations, what control would the court have over them? These agents could appear freely and without any qualifications as to character and background. That this activity would result in the

"unauthorized practice of law" was brought out in a South Carolina case. The court stated that a corporation cannot appear in *propria persona* because courts cannot permit a representative or employee of a corporation to engage in the unauthorized practice of law based on the theory that the corporation is thus acting for itself. The corporation in this instance is presupposing itself to have the rights of a natural person.

Cotner, Timothy G., *May a Corporation Act as It's Own Attorney?*, 16 Clev.-Marshall L. Rev. 173, 175 (1967) (citations omitted).

In a cursory review of relevant Tax Court cases, I have not discovered any case wherein the Court permitted a non-attorney officer or agent to represent a corporation. Thus, if the Rule is intended to require that any agent representing a corporation must also be a licensed attorney, or a non-attorney who has otherwise appropriately applied for admission to practice (*see* Rule 200) then there is no problem. However, a literal and liberal reading of Rule 24 suggests that any authorized agent – whether admitted to practice law, admitted pursuant to Rule 200, or not – could in fact represent a corporation before the Court and thus raise all of the troubling issues outlined by Mr. Cotner above.

Of particular concern where persons representing corporations are not members of any state bar association, and have not otherwise complied with the Tax Court's Rule 200, is that such persons may well expose themselves to sanctions for the unauthorized practice of law. As the Court is no doubt aware, each state defines the practice of law somewhat differently. A relatively current compilation of the pertinent state statutes by the American Bar Association can be found here: http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf. One thing most state laws have in common, however, is that they define "the practice of law," at least in part, as encompassing appearances in a court of law on behalf of clients.

In light of the above, I recommend that Rule 24 be amended to make clear that only persons who are (a) active members of a state bar association; or (b) others who have complied with Rule 200, are authorized to make appearances before the Court.

A related issue is whether the Court's rules require that only attorneys who have an *active* state bar license may practice before the Court. Presently, a literal reading of Rule 200 would suggest that attorneys having only an inactive license may nevertheless represent clients before the Court. What this means, however, is that attorneys with an inactive license are typically not required to perform *any* continuing legal education to retain their inactive status but they are also not permitted to practice law. In Utah, for example, an attorney on inactive status "may be considered to be in good standing but may not practice law in the state of Utah and is not required to meet continuing legal education requirements." *See* <http://www.utahbar.org/bar-operations/summary-of-utah-attorney-licensing/>.

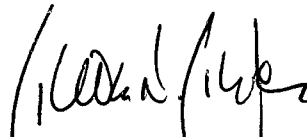
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To my personal knowledge, a number of attorneys presently or formerly employed by the Office of Chief Counsel have elected "inactive" status with their Bar Associations, presumably because that limits their financial exposure in the form of Bar fees. While this may be understandable, I also believe it is beyond any reasonable dispute that, when those attorneys are appearing before the Court, they are indeed engaging in the practice of law, and that any such practice is "unauthorized" by their local Bar Associations. Not only are these attorneys, in my view, engaging in the unauthorized practice of law, but by avoiding any continuing legal education requirements, they are also failing to keep themselves up-to-date on current developments in the law, except to whatever extent they are attending the ad-hoc continuing legal education programs created from time to time by the Office of Chief Counsel.

Consequently, I recommend that Rule 200 of the Court's rules be clarified to make clear that licensed attorneys must be required to be on "active" status with their local Bar Associations.

Thank you for allowing practitioners to contact you regarding recommended changes and clarifications to the Court's rules. Should you or anyone affiliated with the Court require additional information from me, please contact me and I will provide it immediately.

Sincerely yours,



Thomas N. Thompson
T. C. Bar No. TT0076