

**STATE BAR OF CALIFORNIA
TAXATION SECTION**

PRACTITIONERS' VIEWS OF THE TAX COURT

**PRO BONO LEGAL SERVICES PROVIDED IN CALIFORNIA TO
TAXPAYERS WITH DOCKETED CASES BEFORE THE UNITED
STATES TAX COURT**

TAX COURT'S ELECTRONIC COURTROOM

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¹ The comments contained in this paper are the individual views of the authors who prepared them, and do not represent the position of the State Bar of California. Although the participants on this project might have clients affected by the rules applicable to the subject matter of this paper and have advised such clients on applicable law, no such participant has been specifically engaged by a client to participate on this project.

PRACTITIONERS' VIEWS OF THE TAX COURT

This year, California practitioners expressed overall satisfaction with Tax Court procedures and operations. Most of the suggestions and comments were about the Court's e-filing system. There were also several suggestions for amendments to the Court's procedural rules. Finally, it is suggested that the Tax Court hold trial calendars in Santa Ana, California.

I. E-FILING COMMENTS AND SUGGESTIONS

1. E-filing Petition. It was suggested that practitioners be allowed to initiate a proceeding in Tax Court by e-filing the petition and paying the fee by credit card. Since the Court, rather than the petitioner, serves the Commissioner, several practitioners felt that this was a sensible way to institute proceedings, would eliminate both the risk of a petition being lost in the mail and any question of whether a petition was filed with the Court in a timely manner.

2. Notification of Opinion. There was a suggestion that the Court notify counsel in a case the evening before an opinion is released. Some cases involve well-known taxpayers, publicly-traded corporate clients or closely watched issues. A practitioner commented that she was aware of situations where the media had contacted the client before the attorney had finished reading the Court's opinion.

3. Additional Content in E-mail Notifications. The e-mail notifications of filing sent by the Court just state that there has been a filing in a case that is only identified by docket number. One practitioner requested that the notifications also give the case name and the identity of the document that has been filed, which is what e-mail notifications on the PACER system contain.

4. Direct Link to Document. In the PACER system, the e-mail notification to counsel contains a direct link to the document. The Tax Court notification system requires counsel to log on the Tax Court website in order to obtain a copy of the document that has been e-filed. Several practitioners would like Tax Court notices to contain a direct link to the document.

5. Joint Filing. Where a joint document is filed, notice is not given to the parties that the document has been e-filed. Only the party that has initiated the e-filing knows of the date of e-filing. Several practitioners suggested that the Court send e-file notification to all parties when a joint document is filed.

6. Timing of Notification. There is a perception among some practitioners that notification of e-filing is often sent to Commissioner's counsel before it is sent to petitioner's counsel.

7. Longer Calendars. Frequently, there are several one-week calendars in Los Angeles. This June, there will be four one-week calendars in a row. Several practitioners suggested that there be longer calendars rather than several consecutive one-week calendars.

8. Access to Case Documents. A practitioner who logs on to the Tax Court's website only has three opportunities to view a specific document. Since documents can only be viewed by counsel in a case by using his or her secure password and id, it has been suggested that counsel be allowed unlimited website access to documents in a case.

II. TAX COURT RULES – SUGGESTIONS AND COMMENTS

1. Administrative Record. In collection due process cases, it was suggested that the Court adopt a rule making it mandatory for Respondent's

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counsel to provide the petitioner with a complete copy of the Appeals Office's files in the case. In many CDP cases the taxpayers appear pro se. Since CDP cases are based on the Appeals Office records, such a rule would level the playing field for taxpayers.

2. Remand Orders. It was also suggested that, in CDP cases, that the Court's remand orders specify the issues to be considered by the Appeals Office on remand.

3. The Ping Pong Effect – Multiple Remands in CDP Cases. In collection due process cases, a case can be remanded to IRS Office of Appeals more than once until, from the petitioner's point of view, IRS Office of Appeals finally gets it right. This Ping-Pong effect of repeated remands substantially increases attorney fees in the case and can actually prevent taxpayers with limited means to obtain effective representation. Practitioners would benefit from remand orders that narrowly tailor the issues to be considered on remand so that new issues are not raised late in the process. Practitioners also would like the court to be sensitive to an appropriate award of attorney fees in these repeated remand CDP cases to act as a deterrent to stop this perceived abuse of the system.

4. Depositions of Non-Party Witnesses. The Tax Court's rules governing depositions provide that a party or a nonparty witness can object to a deposition by serving the objections within 15 days after service of the notice of deposition. *See, e.g.,* Tax Court Rules 74(c)(2)(B), 147(d)(1). Unlike the Federal Rules of Civil Procedure, *see* Fed. Rul. Civ. Proc. 45(c)(2)(B), (c)(3), the Tax Court lacks any rules governing objections to trial subpoenas or motions to quash or modify subpoenas issued for trial. Because the Tax Court has nation-wide jurisdiction, a party can issue a subpoena to a non-party witness to appear at a trial in another state a short time before trial. If the witness wants to challenge the subpoena, often the witness has to appear at the trial calendar, absent filing a motion for leave to file a response to the subpoena.

It is proposed that the rules be amended to add a provision to Rule 147 to provide that service of a trial subpoena directed to a witness who resides or is found more than 200 miles from the place of trial is to be made at least 15 days prior to the date set for trial and that any objection to the subpoena be filed with the Court and served on the parties at least 7 days prior to the date set for trial. This would allow the Court to rule on any objections to subpoenas in advance of trial.

The Federal Rules of Civil Procedure provide for using depositions in court proceedings in the event that a witness is unavailable. *See e.g.*, Fed. R. Civ. Proc. 32(a)(4) (unavailable witness). There appears to be is no corollary rule in the Tax Court Rules. If it is inconvenient for the witness to travel out-of-state to testify in Tax Court, there should be a mechanism by which deposition testimony is used in lieu of trial testimony. The witness should not be compelled to travel out-of-state to testify after having his or her deposition taken by both parties. In short, it is proposed that the Tax Court rules be amended in a manner consistent with Fed. R. Civ. Proc. 32(a)(4).

III. MISCELLANEOUS SUGGESTIONS

1. The New Tax Court Discovery Rules. Practitioners generally expressed satisfaction with discovery under the Court's revised discovery rules. Those practitioners who discussed discovery felt that the limitation on interrogatories have forced respondent's counsel to be more focused in their questions. In several instances where respondent has taken the deposition of a petitioner and credibility was a key issue, petitioner's counsel believed that the deposition led to a better settlement than might have occurred.

2. Santa Ana Trial Calendar. Orange County is the sixth most populous county in the United States, with over 3 million inhabitants. It has the second largest private tax bars in California and a sizeable Area Counsel office. Tom Travers, Special Counsel, SB/SE, has suggested that the Court hold trial calendars in Santa Ana, California. This would relieve the

congestion of Los Angeles trial calendars and benefit taxpayers, their representatives and respondent. Several practitioners also feel that having a trial calendar in Santa Ana would be beneficial to clients and counsel for both petitioners and respondent.

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PRO BONO LEGAL SERVICES PROVIDED IN CALIFORNIA TO TAXPAYERS WITH DOCKETED CASES BEFORE THE UNITED STATES TAX COURT

The following paragraphs provide suggestions and comments with respect to possible ways to improve the rendering of pro bono legal services to taxpayers in California with docketed cases before the United States Tax Court.

I. SUGGESTION 1: MODIFIED LANGUAGE IN THE STUFFER NOTICE TO ENCOURAGE PRO SE PETITIONERS TO CONTACT CLINICS EARLY IN THE PROCESS

The issue is whether the stuffer notice language could be improved so as to encourage pro se petitioners to contact the clinics early in the Tax Court proceedings.

This year, two clinics, Santa Clara University School of Law Low Income Taxpayer Clinic (“Santa Clara Law Tax Clinic”) and The Bar Association of San Francisco, Justice and Diversity Center, Low Income Taxpayer Clinic, suggest that the Tax Court modify the language contained in the stuffer notices so that the clinics can better assist pro se taxpayers.

To provide some background, the clinics have found that pro se petitioners often do not realize that there are clinics and volunteers waiting to assist the petitioners with their cases several months prior to the calendar call. It is not unusual for the petitioners to wait to contact the clinics until shortly before the calendar call or the day of the calendar call. This places the clinics and volunteers in a scrambling mode, rushing to meet with the pro se petitioner(s), understand the facts of the case, obtain copies of the petition and notice of deficiency, and meet and confer with Chief Counsel and/or IRS Office of Appeals. The system could run more smoothly from the clinics point of view, if the petitioners were told to contact the clinics sooner.

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Another misconception that the clinics have found is that the petitioners do not understand that they bear the burden of proof in Tax Court. It is not unusual for petitioners to have the mistaken belief that the Internal Revenue Service, as opposed to the petitioner, has the burden of proof.

An example of how improved language in the stuffer notice would benefit the legal community is Santa Clara Law Tax Clinic. A relatively new clinic in Silicon Valley, it offers free legal tax representation to low-income taxpayers located in Santa Clara County and the surrounding counties. The clinic handles all aspects of controversy with the IRS, including assisting clients with audit representation, appeals, collection issues, innocent spouse relief, and offers in compromise. In addition, the clinic's student attorneys represent taxpayers in cases before the United States Tax Court. The clinic is run by Caroline Chen, who worked for the Office of Chief Counsel for over 13 years.

Unlike some clinics, the Santa Clara Law Tax Clinic actually has students on site to assist taxpayers with their cases. The clinic is most interested in having pro se petitioners contact the clinic early in the Tax Court proceedings so that students can gain valuable experience and at the same time assist low-income taxpayers.

In short, both Santa Clara Law Tax Clinic and San Francisco clinic suggest that the stuffer notice header be modified to explicitly state, "Do you need help with your Tax Court case?" and for the notice to contain the following modified language:

If you intend to contact one of the clinics and inquire about possible representation in your case, you should do so as soon as possible after receiving this notice. Time sensitive actions will be required in your matter before the U.S. Tax Court and generally, the burden of proof is placed on you. Clinics may not have sufficient time to assist you if you delay. Below is the contact information for each clinic.

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A sample stuffer notice is attached for the Tax Court's review and consideration.

II. SUGGESTION 2: ENCOURAGING CONSULTATION WITH VOLUNTEER ATTORNEY

At the calendar calls where volunteer attorneys are present, it would be most helpful if each pro se petitioner is provided with an opportunity to consult with a volunteer attorney associated with a clinic prior to meeting with either the Chief Counsel attorney assigned to the case or an IRS Appeals Officer. The judicial system benefits with each of the parties to a case are represented by counsel. Toward this end, it would be helpful if the Tax Court asked the volunteer attorneys to stand and identify themselves and to inform the petitioners that it is acceptable to meet with the volunteer attorneys outside the courtroom.

Pro se petitioners can be unfamiliar with the courtroom setting and do not realize that they can walk outside the courtroom and meet with the volunteer attorney, while the Tax Court Judge is presiding on the bench.

III. SUGGESTION 3: ENCOURAGING IRS COUNSEL TO BRING EXTRA COPIES OF PLEADINGS

Often times at the calendar call, the pro se petitioner lacks a copy of the relevant pleadings such as the petition or even the notice of deficiency, and this makes it more difficult for the volunteer attorney to efficiency review and understand the petitioner's case. Toward this end, it would be helpful if Chief Counsel prepared an extra copy of at least the petition, answer, notice of deficiency and pre-trial memorandum, and any proposed stipulation of facts for each pro se petitioner whose case is not settled prior to the calendar call. This would allow the pro se petitioner to provide copies

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of these material pleadings to the volunteer attorney to better assist the petitioner with his/her case.

IV. SUGGESTION 4: COORDINATION WITH LOCAL CPA SOCIETY

It would be helpful to pair a volunteer certified public accountant with a volunteer attorney associated with a pro bono clinic to help analyze the pro se petitioner's case and to assist in attempting to reach a basis of settlement or other resolution of their case. The pro bono clinics may find it helpful to reach out to the California Society of Certified Public Accountants to better assist pro se taxpayers. The Tax Court may want to assist and/or encourage the clinics to associate with the local CPA society because this would help foster early resolution of cases.

V. PROGRAMS IN CALIFORNIA

Silicon Valley

Santa Clara University School of Law
Low Income Taxpayer Clinic
Katharine & George Alexander Community Law Center
1030 The Alameda
San Jose, CA 95126

Caroline Tso Chen
Director and Assistant Clinical Professor
Tel: (408) 288-7030
Email: ctchen@scu.edu

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San Francisco

The Bar Association of San Francisco
Volunteer Legal Services Program
Low Income Taxpayer Clinic
301 Battery Street, 3rd Floor
San Francisco, CA 94111

Krista Denton
Tel: (415) 782-9000 at 8765
kddenton@sfbar.org

Los Angeles

Chapman University School of Law Tax Law Clinic
One University Drive
Orange, CA 92886

Central California

Craig Houghton
Baker, Manock & Jensen, PC
5260 North Palm, Suite 421
Fresno, California 93704
Tel: (559) 432-5400
Email: choughton@bakermanock.com

San Diego

University of San Diego Legal Tax Clinic
Barcelona Suite 305
5998 Alcalá Park
San Diego, CA 92110

Legal Aid Society of San Diego, Inc.
Office of the Public Attorney
110 South Euclid Avenue
San Diego, CA 9211

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DO YOU NEED HELP WITH YOUR TAX COURT CASE?

Dear Tax Court Petitioner:

The United States Tax Court is forwarding you this notice because you have designated San Francisco, California as the place of trial and are not represented by counsel.

Below are organizations in your area that will represent you free of charge if you meet certain income and other qualifications. If one of the clinics agrees to represent you, it will advise you on the merits of your case and assist you in resolving your case by settlement or trial. These clinics are **not** part of either the Internal Revenue Service or the United States Tax Court. Languages other than English may be offered, however all Tax Court proceedings are conducted in English.

- **The Justice & Diversity Center** provides free tax and/or legal representation to low-income taxpayers through volunteer attorneys.
- **The Santa Clara University School of Law's Low Income Taxpayer Clinic** provides free tax and/or legal representation to low-income taxpayers through an academic clinic.

If you intend to contact one of the clinics and inquire about possible representation in your case, you should do so as soon as possible after receiving this notice. Time sensitive actions will be required in your matter before the U.S. Tax Court and generally, the burden of proof is placed on you. Clinics may not have sufficient time to assist you if you delay. Below is the contact information for each clinic.

This notice is not, and should not be understood to be, a recommendation by the United States Tax Court to retain a clinic to represent you.

USE OF THE TAX COURT'S ELECTRONIC COURTROOM

Last year, Judge Thornton requested input from the Taxation Section of the California State Bar concerning effective use of the Tax Court's electronic courtroom and promoting the availability of the electronic courtroom among practitioners.

Steven L. Walker and Robert Horwitz of the Taxation Section researched the issue and solicited Chief Counsel's views on the remote use of the electronic courtroom from Thomas Kane and Peter Reilly of the Office of Associate Chief Counsel, Procedure & Administration.

Before addressing the potential uses of the electronic courtroom, we wish to draw the Court's attention to the information available about the electronic courtroom on the Court's website. Links to a webpage describing the electronic courtroom and to a document on the use of the electronic courtroom are in the lower right hand corner of the home page. After a petition is filed, no information is provided to either petitioners or their counsel about the availability of the electronic courtroom for either trial or for other proceedings.

The Tax Court is unique in that, unlike other federal and state courts, it holds trials throughout the United States. The only other courts that do so are the Court of Federal Claims and the United States Court of International Trade. We therefore contacted the information technology departments of both courts.

Chris Warner, head of Information Technology for the Court of Federal Claims, reported that six of the seven courtrooms are electronic courtrooms. The Court of Federal Claims routinely uses videoconferencing for testimony by witnesses who are unable to appear in person and for status conferences and motion hearings. Approximately 85% of videoconferencing is for witness testimony and 15% of the usage is for one or both counsel to appear for status conferences and hearings. No information was available on the breakdown between status conferences and motion hearings. The

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Court's Technology Department could not provide any information on whether witnesses who appeared via videoconferencing were ones whose credibility was not at issue.

Besides this use of the remote use of its electronic courtrooms by the Court of Federal Claims, its Technology Department informed us that in one recent instance, a Special Master of the Court (similar to magistrate judges in district court and special trial judges in Tax Court) held a trial via videoconferencing. In another instance, a judge who was traveling presided by videoconference over a hearing in the Court in D.C.

The Court of Federal Claims feels that its use of videoconferencing for witness testimony and for status conferences and hearings has been successful. Given the current financial situation, the Court anticipates there will be increased use of videoconferencing for conferences, hearings and witness testimony and, possibly, trials.

Bill Burgos, Manager of the Technology, Development and Support Services Department of the U.S. Court of International Trade, informed us that their electronic courtrooms are regularly used for video status conferences and for oral argument. He also reported that witnesses have testified on a number of occasions via videoconferencing. Based on his discussions with the Operations Manager for the Court, both fact and foundational witnesses have testified and no complaints were received from either Court personnel or attorneys concerning this use of the electronic courtroom.

Chief Counsel accepted the view that videoconferencing can be used effectively by the Tax Court for purposes of status conferences and hearings. Given the need for the court to make credibility determinations, however, Chief Counsel does not believe that videoconferencing of witnesses would be advisable, except for witnesses whose credibility is not in issue and who are unable to be present at the trial.

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The Federal Judicial Center has available on-line *Effective Use of Courtroom Technology: A Judge's Pre-Trial and Trial Guide*, [http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/\\$file/CTtech00.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/$file/CTtech00.pdf). This document contains information discussions about videoconferencing for pre-trial matters at pages 129 *et seq.* and videoconferencing of witness testimony at pages 168 *et seq.* It cautions that, absent agreement by the parties, videoconferencing of witness testimony should be used only when a witness is incarcerated, incapacitated or otherwise unable to travel to the courtroom or in the case of "peripheral" witnesses who supply foundation for an exhibit and are located at a significant distance from the courtroom.

Federal Rule of Civil Procedure, R. 43(a), provides that "For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Tax Court Rule 143(b) contains the identical provision, as do the rules of the Court of Federal Claims and the U.S. Court of International Trade. Based on our discussions with representatives of the Court of Federal Claims and the U.S. Court of International Trade, neither Court has had any problems with witnesses testifying via videoconference.

Based on our research and discussions with Chief Counsel we would recommend the following:

1. In order to draw attention to the availability of the electronic courtroom, and the benefits of its use, we believe that the Tax Court, when it sends electronic notice of receipt of a petition, should include links to the electronic courtroom webpage and the document concerning use of the courtroom.
2. The Court should encourage the use of the electronic courtroom for videoconferencing status conferences and oral arguments on motions that in the Court's opinion would benefit from oral argument.

3. Given the justifiable concerns of Chief Counsel as to witness testimony via videoconference, the Court should allow the record to be supplemented by the testimony of witnesses whose credibility is not at issue in those cases where the witness is unavailable at trial and the criteria of Rule 143(b) are met, or where the parties stipulate that a witness can testify via videoconference.
4. The Court on its webpage should promote the various matters for which parties can use the electronic courtroom.