Defending Liberty
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May 27, 2009

Mr. Robert R. Di Trolio
Clerk of the Court
United States Tax Court
400 2nd Street, N.W., Room 111
Washington, DC 20217

Re: Proposed Amendments to the Rules of the United States Tax Court

Dear Mr. Di Trolio:

On behalf of the Section of Taxation ("Section") of the American Bar Association, the following comments are provided in response to the invitation for public comments issued by the United States Tax Court (the "Court") with respect to proposed amendments to the Court's Rules of Practice and Procedure announced on March 29, 2009.[1] The proposed amendments to the Court's Rules of Practice and Procedure concern service of papers, interrogatories, depositions, electronically stored information, contemporaneous transmission of testimony, and payment by credit cards. These comments have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, they should not be construed as representing the position of the American Bar Association.

Discussion

The Section commends the Court on the proposed amendments to its Rules[2] and endorses the Court's efforts to more closely align the Rules to certain Federal Rules of Civil Procedure ("Federal Rules").[3] As part of the slate of amendments proposed on March 27, 2009, the Court indicated that it intends to modify several of its discovery

[1] Principal responsibility for drafting these comments was exercised by Christopher S. Rizek, Vice Chair of the Section's Committee on Court Procedure and Practice (the "Committee"). Substantive contributions were made by Mark D. Allison, David Blair, Cathy Fung, Joseph Helm, Michelle Henkel, Dianne C. Mehany, Peter A. Lowy, David Reid, Christopher Swiecicki, and Zhanna A. Ziering, of the Committee. These comments were also reviewed by Mary A. McNulty on behalf of the Section of Taxation's Committee on Government Submissions and by Emily A. Parker, the Section's Council Director for the Committee.

[2] All Rule references herein are to the Court's Rules of Practice and Procedure.

[3] *See* March 27, 2009 Tax Court Press Release announcing the proposed amendments, *available at:* http://www.ustaxcourt.gov/press/032709.pdf.

rules, including the rules regarding contemporaneous transmission of testimony, and address "electronically stored information" ("ESI"). We believe that these proposed amendments appropriately balance the advantageous and efficient characteristics of the Court with both informal and formal discovery procedures that take into account the varying nature of the taxpayers that appear before the Court and the types and sizes of cases that the Court hears. The following comments summarily reflect the Section's understanding of how the new provisions work, why they are necessary, and/or the problems they seek to address, as well as issues and suggestions that may assist the Court in refining the proposed amendments.

Service of Papers

Proposed Rule 21

The Section commends the Court for clarifying some of the issues raised in connection with electronic service and generally agrees with the Court's effort to shift the burden of service to the serving party in conformance with Fed. R. Civ. P. 5(d). While Proposed Rule 21(b)(1) requires the parties to serve papers with an attached certificate of service, it preserves the Court's discretion to authorize service by the Clerk. Recognizing that the business of the Court has increased significantly, we agree that it is not practical or necessary for the Court to assume the burden of service of papers for routine matters. All parties should be expected to assume responsibility for service of papers on the opposing party, and the certificate of service reflecting service on the opposing party or counsel is sufficient proof of service. This has been the practice of both federal and state courts for many years.

The Section also commends the Court for allowing service of papers via electronic transmission with consent of the opposing party or counsel. As noted in the Notes of Advisory Committee to Fed. R. Civ. P. 5(e), electronic technology is advancing with great speed. We hope that in the future the Court will take additional steps to encourage parties and counsel to accept service of papers by electronic transmission. In the local rules of most, if not all United States District Courts ("District Courts"), an attorney's registration for electronic case filing constitutes written consent to accept service of papers by electronic service. Furthermore, the District Courts are placing the burden on attorneys to accept service of papers via electronic transmission by exempting attorneys from electronic transmission only upon a showing of good cause.

Further, the Section welcomes the Court's efforts to address certain issues associated with electronic service. While the ability to serve court papers electronically is a laudable addition to the rules, the proposed shift of the burden of service raises several concerns. Proposed Rule 21(b) states that where the parties do not consent to electronic service or where electronic transmission fails, the serving party maintains the burden of serving the papers by conventional methods or by additional electronic service, as the case may be. The Section agrees, absent actual notification of a failed transmission, that the proper standard for the determination of the timeliness of service is the act of transmission of the service of papers. Such standard is consistent with Fed. R. Civ. P. 5(b)(2)(E), which states that electronic service is complete upon transmission. If the sender of the electronic transmission receives notification of a failed transmission and the sender cures the failed transmission within a reasonable period of

time or a prescribed safe harbor, we recommend that the papers be deemed served at the time of the original transmission.

The Section further suggests that the Court encourage practitioners to designate co-counsel for the purpose of receiving electronic service. The Section believes that such designation would minimize the number of transmission failures and the need for re-service and would promote efficiency in connection with electronic service. Alternatively, the Court may suggest that, where possible, practitioners within one organization or a firm establish a central system to manage electronic service. Implementation of such a system would allow the designated person or persons to receive and acknowledge the served document on behalf of the organization and to ensure that the received documents are delivered to the assigned practitioners. In fact, many law firms and the Department of Justice have already implemented such systems to manage electronic service.

The Section is also concerned that shifting the burden of service to the parties may be burdensome and confusing for *pro se* taxpayers. The Court remains the preferred forum for *pro se* taxpayers, and the procedures set forth in Fed. R. Civ. P. 5(c) may be too stringent. The Section proposes that the Court maintain the burden of service by the Clerk in cases involving *pro se* taxpayers, while offering *pro se* taxpayers the option to affirmatively assume the responsibility for service of papers. If the *pro se* taxpayer elects to assume such responsibility, the Section recommends that the Court send the taxpayer a form letter explaining the implications of such burden and Court-accepted methods of service, including electronic service. In addition, if the *pro se* taxpayer consents to receiving electronic service, the Section suggests that the taxpayer be required to provide a valid e-mail address and that the Court send a confirmation e-mail to the designated e-mail address. After confirming that the *pro se* taxpayer has a working and accessible e-mail address, the Court may acknowledge the taxpayer's consent to receive electronic service.

Proposed Rules 37, 50, 76, 81, 91, 151, 155, 215

The Court also proposes to make conforming changes to Rules 37, 50, 76, 81, 91, 151, 155, and 215 in conjunction with the Proposed Rule 21(b). The Section does not have any specific comments with respect to these proposed rules, other than the general comments as expressed above.

Limitation on Number of Interrogatories

Proposed Rule 71

We agree with the Court's proposal to provide an initial limit of 25 interrogatories by conforming its Rule 71 to Fed. R. Civ. P. 33(a), which itself was amended in 1993 to reduce the frequency, and to increase the efficiency, of interrogatory practice. According to the Advisory Committee Notes, concern was expressed with respect to District Court practice that interrogatories could be costly and serve as a means of harassment, which problems could be mitigated by court involvement before a larger number of interrogatories were served. These Notes further state that the new presumptive limit on the number of interrogatories is not intended to prevent needed discovery but to require the agreement of the parties or judicial

scrutiny to exceed such limit. Under the Court's proposal, a party's motion for leave to serve additional interrogatories would be reviewed under the standards set forth in Rule 70(b)(2).

The Section agrees with the proposed presumptive limit, the requirement for consultation or judicial review before exceeding the limit, and incorporation of the Rule 70(b)(2) standard. Importantly, the proposed amendment would limit the costs and time of responding to discovery, which would be especially valuable to individual taxpayers. While the Section endorses the proposed amendment, we offer the following recommendations for the Court's consideration:

1. The Court's Explanation touches on the interaction of Rule 71(a) with the requirements to engage in informal discovery.[4] The Explanation discusses that the interrogatory limitation was added because Fed. R. Civ. P. 26 was amended to require voluntary disclosure of certain information without formal request, such as:

   > (a) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
   >
   > (b) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; and
   >
   > (c) the identity of any witness a party may use at trial.

   In support of the proposed amendment, the Court analogizes the *Branerton* process to Fed. R. Civ. P. 26's initial disclosure requirement. However, there are significant differences between the two procedures. Fed. R. Civ. P. 26 is limited to the identification of relevant individuals and the production of basic documents. *Branerton*, on the other hand, is used not only to request information regarding supporting witnesses and documents but also for interrogatories and requests for admission. Historically, unanswered *Branerton* requests are converted into formal discovery requests. The proposal to limit the number of formal interrogatories may raise the question of whether *Branerton* requests are similarly limited to 25 questions. Accordingly, the Section suggests that the Explanation state that the 25 interrogatory limit is not intended to limit the informal discovery process under *Branerton*.

2. As noted in the Advisory Committee Notes to Fed. R. Civ. P. 33, interrogatories (as opposed to depositions) "represent an inexpensive means of securing useful information." If a party is limited to 25 interrogatories, depending on the circumstances that party may be more likely to claim a need to depose witnesses in order to gain all relevant factual information. As a result, this amendment may create a tension with the Court's proposed rule on depositions, which states that taking the deposition of a party is an extraordinary method of discovery and may be used only where other informal and formal discovery,

[4] *See Branerton v. Comm'r*, 61 T.C. 691, 692 (1974); Rule 70(a).

including interrogatories, are insufficient to obtain the requested information. Thus, we recommend that one factor for the Court to consider in determining whether to grant a motion to exceed the 25 interrogatory limit is whether the additional interrogatories will obviate the need for depositions.

3. Unlike private party litigation, tax litigation frequently involves multiple issues and transactions that are factually unrelated, other than being common to the same taxpayer or affiliated group of taxpayers. Unless the *Branerton* process is successful, 25 interrogatories may be insufficient to discover the complete facts in a multi-issue case. Accordingly, another factor that we recommend the Court consider in determining whether to grant a motion to exceed the 25 interrogatory limit is whether the case involves multiple issues.

4. Rule 71(d) allows written interrogatories to inquire into the identification of expert witnesses and the subject matter of their testimony. As currently drafted, the proposed amendment would count expert witness interrogatories as part of the 25 interrogatory limit. Under Fed. R. Civ. P. 26(a)(2), information regarding expert witnesses must be produced voluntarily and, therefore, does not count against the 25 interrogatory limit allowed under Fed. R. Civ. P. 33. The Section suggests clarifying that the 25 interrogatory limit in Proposed Rule 71(a) likewise does not include expert witness interrogatories under Rule 71(d).

Depositions of a Party (Without Consent)

Proposed Rule 75

The Section understands and appreciates the Court's desire to conform its Rule 75 to Fed. R. Civ. P. 30(a)(1) with respect to party depositions. The Tax Court, however, is generally viewed as a cost-efficient forum in which to resolve a tax dispute. Allowing party depositions may significantly increase the cost and duration of the litigation process, which has historically been the reason for precluding the depositions of parties, as stated in the Court's Explanation. Because cost may be a significant issue for any party, but especially *pro se* taxpayers, the Section remains concerned about this increased cost of litigation as well as the need for more extensive trial expertise to handle depositions. We recognize that these concerns may be alleviated by the warning that the deposition of a party as an "extraordinary method of discovery" and by the requirement that a party's motion for leave to take such depositions be reviewed under the standards set forth in Rule 70(b)(2). Nevertheless, we offer the following comments for the Court's consideration:

1. Currently, Rule 75 relates only to depositions of non-party witnesses. By inserting Proposed Rule 75(e) into the existing rule with no other changes, the totality of Rule 75 may be confusing to litigants because Rule 75(a)-(d) will apply only to depositions of non-parties, whereas Rule 75(e) will apply to deposition of parties and Rule 75(f) will apply to depositions of both non-parties and parties. The Section suggests that Rule 75 be restructured as follows:

Rule 75(a) Deposition of a Non-Party.

(a)(1) When Depositions May Be Taken.

(a)(2) Availability.

(a)(3) Notice.

(a)(4) Objections.

Rule 75(b) Deposition of a Party.

(b)(1) When Depositions May Be Taken.

(b)(2) Availability.

(b)(3) Service of Motion and Objections.

Rule 75(c) Other Applicable Rules.

2. The Section suggests that the proposed amendment be modified to require that notice be given to the witness being deposed, if the Court grants the motion for the deposition, and that information be included with that notice regarding the deposition, similar to that required under Rule 75(c).

3. Unlike private party litigation, there is an administrative phase of a dispute (*i.e.*, IRS Examination and IRS Appeals) before litigation in the Court. During the administrative phase, the Commissioner may summons a taxpayer under I.R.C. § 7602 to appear and give testimony under oath. The summons procedures available to the Commissioner under I.R.C. § 7602 may be invoked in anticipation of the inability to take depositions under the existing Rules. Where a party has appeared and given testimony during the administrative phase of a case, it would often be unduly burdensome, cumulative and duplicative to allow the Commissioner to require the witness to appear a second time to give testimony on the same subject matter in a deposition under Proposed Rule 75(e). In this regard, the Section believes that the cross-reference to Rule 70(b)(2) is useful, but is concerned that the existing reference in Rule 70(b)(2)(B) to "ample opportunity by discovery in the action to obtain the information sought" may cause confusion regarding the relevance of testimony obtained in the administrative process. The Section notes that this language tracks the language of Fed. R. Civ. P. 26(b)(2)(C) and was not drafted to take into account the unique circumstances of a tax case that has been fully developed through a preliminary administrative process where testimony can be compelled under I.R.C. § 7602. Accordingly, the Section recommends that the Court's Explanation clarify that the deposition of a party who already provided testimony during the administrative process, whether voluntarily or by summons, may be unduly burdensome, cumulative, and duplicative within the meaning of Rule 70(b)(2).

4. Depositions require extensive knowledge of trial strategy and the Federal Rules of Evidence, which as noted above will be particularly burdensome and potentially confusing for *pro se* taxpayers. For example, although examination and cross-examination generally proceed as they would at trial, there is no judge present to resolve disputes over objections. Accordingly, all objections must be stated in the record to be

preserved for trial. The Court's Explanation states that granting the deposition of a party is a matter solely within the discretion of the Judge or Special Trial Judge, and we anticipate that the Court may exercise its discretion to deny depositions in most *pro se* cases. The proposed Rule, itself, cross references the standards in Rule 70(b)(2), which include undue burden and expense, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. We also would anticipate that, under this standard, the Court would typically deny respondent's motion to take the deposition of a *pro se* taxpayer, a taxpayer of limited resources, or to take a deposition in a case with relatively low amount at issue. We would further anticipate that the Court would use its discretion in limiting the number of party depositions in the context of a corporate taxpayer under Rule 81(c), where testimony could be elicited from potentially countless representatives. The Section suggests that further clarification on these issues may be helpful..

5. As noted in the Section's comments to Proposed Rule 71, if a party is limited to 25 interrogatories, that party is more likely to claim a need to depose witnesses to gain all relevant factual information. Unlike private party litigation, most factual information in a tax case can be obtained through documentary evidence or interrogatories. But if the number of interrogatories is limited to 25, the parties may quickly exhaust that discovery alternative and seek depositions as a further means to obtain information. As a result, we wish to draw the Court's attention to the tension between Proposed Rule 71(a) and this proposed amendment. We again recommend, when determining whether to grant a motion to exceed the 25 interrogatory limit, the Court consider whether the additional interrogatories will obviate the need for depositions.

Electronically Stored Information

Proposed Rule 70

The proposed amendments seek to conform the Court's Rules more closely with certain rules within the Federal Rules of Civil Procedure, particularly the 2006 amendments dealing with ESI.[5] The proposed amendments add a reference to ESI as a separately recognized category of information that may be obtained pursuant to a request under Proposed Rule 72 (Production of Documents, Electronically Stored Information, and Things) or in other ways (*e.g.*, produced in lieu of derived responses to interrogatories under Proposed Rule 71). The proposed amendments also add a new subparagraph (b)(3) setting forth limitations on the discovery of ESI. The Section understands that the specified categories of discoverable items were expanded to include ESI because many forms of information may be discoverable or admissible, but do not fall squarely within the traditional notion of a "document." As noted in the Court's Explanation to the proposed amendments, the term "electronically stored information" is to be interpreted expansively, consistent with the approach adopted by the Federal Rules.[6] The Section generally

[5] *See* March 27, 2009 Tax Court Press Release announcing the proposed amendments.

[6] "Rule 34(a)(1) [and ESI are] intended to be broad enough to cover all current types of computer-based information and flexible enough to encompass future changes and developments." Adv. Comm. Notes to Fed. R. Civ. P. 34.

endorses the expansion of the discovery rules to address ESI as a separate category of information with unique characteristics that may require special consideration.[7]

The Section also endorses the addition of subparagraph (b)(3) as consistent with the proportionality concept embodied in Rule 70(b)(2) and the Court's mission of providing an efficient and cost-effective forum for taxpayers to litigate disputes with the IRS. Subparagraph (b)(3) provides that a party need not produce ESI that it identifies as not reasonably accessible because of undue burden or cost. The Section agrees that it is important to place limits on the ability of a party to compel another to produce information that is not readily accessible in a cost-effective manner, relative to the amounts at stake and the potential relevance of the information to resolve the dispute. We urge the Court to take special note of the Advisory Committee Notes to Fed R. Civ. P. 26 on this point:

> The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

Given the foregoing considerations, it may be prudent to presumptively disallow the discovery of ESI in matters properly designated as S-cases. Furthermore, consistent with the power of the Court to impose conditions on the compulsory production of ESI that is not reasonably accessible, the Section urges the Court to consider the option of shifting the costs of production to the requesting party in appropriate cases.[8]

The Section notes that, although the Court's Explanation of the proposed amendments to Rule 70 acknowledges the potential problems associated with the assertion of privilege and inadvertent waiver with respect to ESI, there does not appear to be an amendment that specifically addresses these issues. Given the volume of ESI often involved in modern-day discovery, the risk of inadvertent disclosure can drive discovery costs to unworkable levels. Accordingly, the Section believes that some provision should be made to balance the competing goals of cost-effectiveness and the protection of privileged information. The Section recommends that the Court adopt an additional amendment consistent with the provisions of Fed.

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[7] "Electronically stored information can pose unique discovery problems due to the volume of such information, the lack of accessibility to such information, the format in which it is stored and/or produced, the potential for destruction or loss of such information, and difficulties related to assertion of a privilege and/or inadvertent waiver of a privilege." Explanation of proposed amendment of Rule 70.

[8] *See, e.g., Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 573 (N.D. Ill. 2004) (shifting 75% of costs to plaintiff); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (applying a seven-factor test for whether cost-shifting was appropriate); *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 431 (S.D.N.Y. 2002) (applying balancing test and shifting costs of production of emails from backup tapes).

R. Civ. P. 26(b)(5)(B), which was promulgated in response to the special risks of inadvertent waiver associated with ESI:

> *Information Produced*. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

The Section believes that such a rule strikes an appropriate balance between the need for cost-effective discovery and the preservation of privilege and is consistent with the policy embodied in Fed. R. Evid. 502(b) (inadvertent disclosure does not operate as a waiver of privilege where privilege holder took reasonable steps to prevent disclosure and promptly took steps under Fed. R. Civ. P. 26(b)(5)(B) to rectify the error).

Proposed Rule 72

The proposed amendments to Rule 72 include a specific reference to ESI in subparagraph (a)(1) and add subparagraphs (b)(3)(B) and (C). As noted above, the Section generally endorses the inclusion of ESI as a separate category of discoverable information. The Section also endorses the addition of subparagraph (b)(3)(B), which sets forth default procedures for the production of ESI, requiring the producing party to produce the information in the form or forms in which it is maintained in the ordinary course or in a reasonably usable form, unless the requesting party requests it in a different form. The Section recommends, however, that Rule 72 be modified so as not to give the requesting party unfettered discretion to determine the form of production where the requested form may require costly and/or unnecessary translation of the information from the form in which it is maintained in the ordinary course.

The Section also urges the Court to follow the general trend of Federal courts away from routinely requiring the production of metadata (i.e., data about the history and circumstances of an electronic document that is often stored along with the document). Although Fed. R. Civ. P. 34 is agnostic as to metadata, courts have recognized that it may be imprudent to require the production of metadata generally.[9] Where metadata may be of little or no relevance to a dispute, the added burden of reviewing the data for privilege and other issues will almost certainly add unnecessary cost and delay to the production of the ESI.

[9] *See, e.g., Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005) (with regard to metadata, courts look to Principle 12 and Comment 12.a. to the *Sedona Principles for Electronic Document Production*, which suggest an emerging general presumption against production of metadata, but provide a clear caveat when the producing party is aware or should be reasonably aware that particular metadata is relevant to the dispute).

Proposed Rule 104

The proposed amendments to Rule 104 provide that sanctions may not be imposed on a party for failing to produce ESI that was lost due to the routine, good-faith operation of an electronic information system. This proposed amendment conforms to the protections afforded litigants under Fed. R. Civ. P. 37(e). The Section endorses this measure as an appropriate way to balance concerns over spoliation of relevant evidence with the reality that ESI can be lost or destroyed inadvertently through the normal operation of the systems in which it is stored. However, the Section recommends that the Court clarify whether the failure to produce ESI will give rise to any adverse inference unless the good-faith standard is met. Further, the Section recommends that the Court's Explanation clarify whether the parties should request that documents not be destroyed while litigation is pending to prevent further destruction of potentially relevant evidence.

Proposed Rules 71, 73, 75, 76, 80, 81, 82, 100, 103, 147, and 181

The Section generally endorses the inclusion of ESI in these proposed amendments in order to clarify the general applicability of the pertinent provisions to ESI.

Contemporaneous Transmission of Testimony From Different Location

Proposed Rule 143

We agree with the Court's proposed addition of Proposed Rule 143(b). The admission of testimony in open court by contemporaneous transmission from a different location provides significant benefit and safeguards to the parties involved and to the Court. The Court's subpoena power reaches nationwide, and this new provision may provide significant cost reduction to the parties involved. Additionally, Proposed Rule 143(b) ensures that an unforeseen circumstance affecting one witness cannot derail or unnecessarily postpone the entire trial.

As discussed in the Court's Explanation, the Federal Rules provide a similar provision in Fed. R. Civ. P. 43(a). This rule was enacted in 1996 with language restricting its use to "compelling circumstances." The Advisory Committee Notes underlying Fed. R. Civ. P. 43(a) convey a general preference for video depositions as a "superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena." Although the Court has not expressed a similar preference, Rule 81(i) and (j) already permit the introduction of video-recorded depositions into evidence under specific circumstances that do not rise to the level of the "compelling circumstances" standard incorporated in Proposed Rule 143(b).

The Court enjoys national jurisdiction; therefore, we suggest that the Court examine whether parties could employ contemporaneous testimony transmitted in open court on a less restrictive basis than that permitted by the Federal Rules. For instance, Rule 81(i) permits a party to introduce a deposition (video or otherwise) into evidence when, among other reasons, (1) "the witness is at such a distance from the place of trial that it is not practicable for the witness to attend . . .";[10] or (2) the witness is unable to attend or testify because of age, illness,

[10] Rule 81(i)(3)(B).

infirmity, or imprisonment."[11] We recommend that the Court consider including similar provisions in Proposed Rule 143(b).

Such an expansion would, in theory, broaden the scope of Proposed Rule 143(b) beyond that of its counterpart in the Federal Rules; however, certain precautions could be enacted to safeguard the integrity of the proceedings. For instance, requiring a party to transmit contemporaneous testimony by video-feed rather than telephonically[12] (absent the good faith showing of compelling circumstances now contemplated), would eliminate the concern expressed by one District Court that the fact finder be able to "judge the demeanor of a witness face-to-face."[13] Additionally, because the Judge always serves as the ultimate finder-of-fact, the Court does not face the same concerns that a District Court may encounter.[14]

In light of the unique nature of the Court and the administration by District Courts of a similar provision contained in the Federal Rules, we suggest that the following language be added after the last sentence of Proposed Rule 143(b):

> Absent compelling circumstances, the Court may permit testimony in open court by live video-feed if the Court finds that:
>
> > the witness is at such distance from the place of trial that it is not practicable for the witness to attend;
> >
> > the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or
> >
> > the party seeking the introduction of the testimony has been unable to obtain the attendance of the witness at the trial, so as to make it desirable in the interests of justice, to allow the use of off-site contemporaneous testimony.

Payment of Tax Court Fees And Charges by Credit Card

Proposed Rule 11

The Section agrees with the Court's addition to Proposed Rule 11 and commends its continued effort to make the Court as user-friendly as practicable.

Although the Section does not recommend any specific change to Proposed Rule 11, the Section observes that, as proposed, Proposed Rule 11 does not address what consequences, if any, a party will face if a credit card company denies payment or if the payment otherwise fails

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[11] Rule 81(i)(3)(B).

[12] At least one District Court has permitted the introduction of testimony delivered telephonically merely upon a showing that "the witnesses were out of the state and great expense would be incurred if they were required to travel to testify in person." *Mission Capital Works, Inc. v. SC Restaurants, Inc.*, 2008 WL 3850523 (W.D. Wash. Aug. 18, 2008).

[13] *Palmer v. Valdez*, 560 F.3d 965, 969 n.4 (9th Cir. 2009).

[14] *Id.* at 969.

to transmit. Currently, the Court's website (www.ustaxcourt.gov) provides that if a party's payment by check "cannot be completed because of insufficient funds, we may try to make the transfer up to two times." We suggest the Court include a similar statement within Proposed Rule 11 or its Explanation to address failed credit card transfers.

We also note that while the Federal Rules do not contain a similar provision, a party filing a petition electronically (via PACER) with a District Court as of January 1, 2007, must remit the filing fee by credit card. The electronic filing system of the District Courts provides a party no opportunity to cure. Instead, filings will *not* be entered into the court record if the party does not remit payment successfully by credit card at the time of filing. Rather than adopting this standard, we recommend that the Court consider including a "good faith" standard providing the party with an opportunity to cure the failure to remit payment within a specified period of time, similar to the language in I.R.C. § 6657 regarding bad checks. Absent any opportunity to cure, the Section recommends advising the parties of the consequences of any defect in transmission of a credit card payment.

Other

Discovery Plan

The Court handles cases brought by a wide range or petitioners, from individual taxpayers with small dollar cases to so called "jumbo" corporate tax cases. The Court faces a challenge in establishing procedures that respect the limited resources of the many individual and small entity taxpayers that seek redress before the Court and, at the same time, providing appropriate procedures for resolving large cases. Fed. R. Civ. P. 26(f) requires the parties to develop a discovery plan, which the court may use in entering a scheduling order under Fed. R. Civ. P. 16(f). The scheduling order may address various aspects of the discovery process, including invoking the protections against waiver of attorney-client privilege and work-product protections under Fed. R. Evid. 502(d). As described in the Advisory Committee Notes to Fed. R. Evid. 502, these protections can significantly enhance the efficiency of the discovery process in cases where electronically stored information is present. However, Fed. R. Evid. 502(d) and (e) require a court order for certain protections to be effective. The Section suggests that the Court consider adopting analogous procedures for the filing of a discovery plan at the commencement of a case that is consistent with the needs of the case (including, in particular, jumbo corporate tax cases), and, where appropriate, entering a scheduling order to address the discovery needs of such a case. A discovery plan (i) would minimize the use of the Court's resources in addressing separate or multiple motions for additional interrogatories or depositions of parties and (ii) would allow the Court to consider the type of taxpayer, the number of issues in the case, the dollar amount in dispute, and the overall needs of the parties at the commencement of the case. A scheduling order could include invoking the protections against waiver of privilege under Fed. R. Evid. 502(d) and (e) in order to facilitate the efficient completion of the discovery process.

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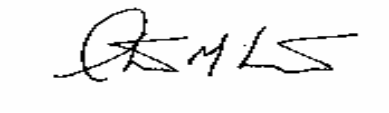
Overall, the Section commends the Court on the proposed amendments to its Rules. The Section believes that the Court's efforts to follow the Federal Rules are laudable and appropriately balance the advantageous and efficient characteristics of the Court with both informal and formal discovery procedures that take into account the varying nature of the taxpayers and the types and sizes of the cases.

Questions regarding these comments may be directed to Christopher S. Rizek at csr@capdale.com or (202) 862-8851. Thank you for your consideration.

Sincerely,



Stuart M. Lewis
Chair-Elect, Section of Taxation