I. Introduction

A. The Need to Assist Self-Represented Taxpayers

Approximately 70% of all petitions filed with the United States Tax Court (“Tax Court”) are brought by self-represented taxpayers. In addition, roughly 62% of the taxpayers who appeared pro se before the Tax Court, the United States Court of Federal Claims, and the district courts in 2014 litigated one of the top ten most litigated issues in tax proceedings. There is no question that self-represented taxpayers are especially disadvantaged from a tax controversy and tax litigation perspective because they are often unfamiliar with the Tax Court Rules of Practice and Procedure, the Federal Rules of Evidence, and the internal protocols of the Internal Revenue Service (“Service”). It is not surprising that many self-represented taxpayers appear pro se because the cost of representation would otherwise subsume any tax savings their counsel might achieve by litigating in Tax Court. These self-represented taxpayers, and the Tax Court as an institution, need the private tax bar’s help to resolve many of these cases.

Congress’ recent funding cuts to the Service’s budget also increase the need for volunteerism. According to the National Taxpayer Advocate’s 2014 Annual Report to Congress, the Service’s budget has been reduced by 10% since fiscal year 2010. The report goes on to detail that since fiscal year 2010, inflation has risen by approximately 7.5%, which has further eroded the Service’s resources by about 17% overall. As a result of the budget cuts, the Service’s workforce has been decreased by approximately 12.3% since 2010 and the Service’s training budget has been eviscerated from approximately $168 million in fiscal year to 2010 to a regrettable $28 million in fiscal year 2014 (an astounding 83% reduction). Moreover, the effect of these budget cuts on the taxpayer-assistance services, including low income taxpayer clinics, has been equally alarming. The Service has discontinued tax preparation services at all of its

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3 Id. at 7.
4 Id. at 14-16.
taxpayer assistance centers, the effect of which will lead to increase in self-prepared returns and ensuing litigation. As the only nonprepayment forum, the Tax Court will hear the large majority of these cases.

The Tax Court hears trials in 74 cities nationwide. Fortunately, taxpayer clinics, which are usually staffed with professors and student volunteers, service all of these cities. State and local bar associations, which are typically staffed with practicing attorney-volunteers, work with taxpayer clinics in around 15 of these cities. Taxpayers would truly benefit from State and local bar associations working alongside taxpayer clinics in the remaining 60 or so cities which are not currently serviced by a State and local bar association. It is important that leaders within the private tax bar, such as yourselves, assume the responsibility to extend the Tax Court Pro Bono Calendar Call to all cities at which the Tax Court hears trials. Doing so is beneficial for the nation’s low income taxpayers, the Tax Court Judges who are asked to resolve approximately 30,000 cases per year, the Internal Revenue Service (“Service”), and the private tax bar as a whole. Especially in the light of recent funding cuts to the Service’s budget, you are also an important part of ensuring that the tax system functions as intended.

B. Long-Term Trends and Benefits Associated With Pro Bono Work:

1. The Trend Towards Mandatory Pro Bono Services

   a. The Model Rules’ View on Pro Bono Work: Rule 6.1 of the Model Rules of Professional Conduct states that “a lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year.” That Rule further encourages lawyers to provide a substantial majority of those hours without fee or expectation of fee to persons of limited means or charitable, religious, civic, community, governmental, educational organizations in matters that are designed primarily to address the needs of persons of limited means. Courts and the ABA have recently taken steps to move Rule 6.1 from the aspirational (“should”) to the mandatory (“shall”).

   b. The Long-Term Trend Towards a Mandatory Pro Bono Requirement: The long-term trend may require attorneys to undertake pro bono assistance. According to the ABA, as of December 23, 2014, at least 8 States required annual reporting of lawyers’ pro bono hours and at least 13 States allowed for attorneys to voluntarily self-report pro bono hours. Other States, including California, Mississippi, New Jersey, and New York, are debating whether an aspiring lawyer’s admission to the bar should be conditioned on him or her first providing fifty hours

\[\text{5 The cities at which pro bono programs are currently in effect include: Los Angeles, CA; San Diego, CA; Denver, CO; Miami, FL; Tampa, FL; Baltimore, MD; New York, NY; New York, NY (Newark, NJ); New York, NY (Westbury, NY); Philadelphia, PA; Dallas, TX; El Paso, TX; Houston, TX; Lubbock, TX; and San Antonio, TX.}\]

\[\text{6 The number of petitions filed with the Tax Court during 2014 is estimated to total approximately 30,400.}\]

\[\text{7 Model R. Prof’l Conduct 6.1.}\]

of qualifying pro bono work.\footnote{See Posting of Pro Bono Regulations to Take Effect in New York to Penn Program on Regulation Reg Blog, http://www.regblog.org/2013/10/22/22-logan-pro-bono/ (Oct. 22, 2013) see also Daniel Grunfeld, et al., \textit{Mandatory Pro Bono is Not the Answer for Practitioners}, (Apr. 22, 2014) available at http://www.law360.com/articles/530036/mandatory-pro-bono-is-not-the-answer-for-practitioners.} The debate over whether pro bono volunteerism should be mandatory is not new, but is alive and well. It is not unreasonable to expect that other States may follow the lead of California, Mississippi, New Jersey, and New York by making pro bono mandatory. The United States Tax Court Calendar Call Pro Bono Program is a worthy recipient of such mandatory pro bono hours and the nation’s taxpayers are in need of such assistance.

2. **Benefits of Pro Bono Work:** Simply put, practitioners should be involved with a pro bono program because it’s the right thing to do. If that’s not enough, there are many benefits and goals to becoming involved with a pro bono program, including:

   a. To provide competent legal assistance to those who otherwise could not afford to receive it;

   b. To provide competent legal assistance to organizations that otherwise could not afford to receive it for the purpose of furthering that organization’s goal;

   c. To further the Tax Court’s goal to secure the “just, speedy, and inexpensive determination of every case”;

   d. To provide a forum for attorneys to gain hands-on experience on a variety of significant legal matters;

   e. To provide a cost-effective and efficient way to develop younger attorneys in a way that most firms cannot provide through conventional training (e.g., allowing attorneys to interview clients, make oral arguments, question witnesses, write briefs, and file appeals);

   f. To provide a forum for veteran tax litigators and younger attorneys to interact, the effect of which is to foster mentorship, career development, and develop leaders within the tax controversy community; and

   g. To improve attorneys’ career satisfaction and the firm’s morale, reputation, and ability to attract and effectively serve paying clients.\footnote{For an excellent discussion on the benefits of pro bono assistance generally, see Stacy DeBroff, \textit{Pro Bono Guide: An Introduction to Pro Bono Opportunities in the Law Firm Setting}, available at http://law.harvard.edu/current/careers/opia/toolkit/guides/documents/guide-pro-bono.pdf.}
C. **Available Resources:** The thought of starting a calendar call pro bono program in a city near you may seem daunting. There are many resources available to those who want to start or volunteer at a pro bono calendar call program. In addition to the attached materials, the following may be helpful:

1. **The American Bar Association:** The American Bar Association (“ABA”) has videos of a simulated calendar call, which can be found at: http://www.americanbar.org/groups/taxation/tax_pro_bono/pro_bono_resources.html.

2. **Materials Included in the Appendix:** Included in the appendix of these materials are the following documents to assist with the formation and implementation of a pro bono program at a calendar call near you:
   a. Appendix A: First Sample Letter to Tax Court Judge Re: Pro Bono Participation
   b. Appendix B: Sample Letter to Tax Court Judge Re: Lunch Invitation at Calendar Call
   c. Appendix C: Sample Retainer Agreement for Pro Bono Client
   d. Appendix D: Sample Disengagement Letter to Pro Bono Client

3. **Specific Training Materials:** The New York County Lawyer’s Association offers pro bono training on a range of tax topics, including:
   a. Substantiating deductions;
   b. Tax issues affecting the family, including filing status, dependency exemption deductions, credits, joint returns, and innocent spouse relief under I.R.C. § 6015(b), (c), and (f);
   c. Collection due process;
   d. Penalties and miscellaneous income;
   e. Tax Court Practice and Procedure;
   f. Ethics, both on the part of the Government and the taxpayer; and
   g. Valuation.

Materials distributed in connection with seminars on most of the above topics can be found at the following website: https://sites.google.com/site/seminarmaterials/Home/Seminar-Archive.
II. Coordinating Pro Bono Assistance With the Presiding Judge and Respondent’s Counsel

A. Overview: The success of any pro bono program depends in large part upon the support and willing participation of the presiding Judge and the Service’s counsel. This section discusses strategies to gain the presiding Judge’s permission and the Service’s participation to offer pro bono services during a calendar call.

B. Coordinating Pro Bono Assistance With the Presiding Judge:

1. The Need to Contact the Presiding Judge: Pro bono representation should not be offered at a calendar call without the express permission of the presiding Judge.

2. When to Contact the Presiding Judge: Tax Court cases are generally set for trial between five and six months before the start of the calendar call. Therefore, it is usually advisable to contact the presiding Judge, in writing, approximately two months before the start of the calendar call to advise him or her of the availability of pro bono counsel to assist self-represented taxpayers. To the extent the Judge does not respond in writing or with a telephone call, it is appropriate to follow-up with the Judge roughly six weeks before the calendar call.

3. What to Expect: Judges vary in their willingness to have pro bono counsel present at the calendar call, and the particular Judge’s wishes should at all times be respected. In practice, most Judges appreciate the presence of pro bono counsel and agree to have pro bono counsel present.

4. Sample Letters: Attached as Appendix A is a sample letter that can be sent to the presiding Judge to request that he or she allow pro bono counsel to offer services at the referenced calendar call. As noted below, many pro bono programs also host a luncheon for the Judge, volunteers, and Respondent’s counsel. Attached as Appendix B is a sample letter that can be sent to the presiding Judge to invite him or her to that luncheon.

C. Coordinating Pro Bono Assistance With Respondent’s Counsel:

1. Advising Respondent’s Counsel of the Pro Bono Counsel is Good Form: It is also recommended that the director of the pro bono program advise Respondent’s Area Counsel that pro bono representation will be offered at the calendar call. Such advance notice furthers two goals. First, it is basic professional courtesy. Second, Respondent’s counsel may refer potential pro bono clients to the program director ahead of the calendar call; thereby allowing for advance preparation of a case and the issues presented.

2. When to Contact Respondent’s Counsel: It is obviously advisable to keep constant contact with Respondent’s Area Counsel who is handling the
calendar call. At a minimum, it is advisable to contact Respondent’s Area Counsel the Wednesday before the calendar call to understand the number and types of cases for which pro bono representation may be needed.

3. **What Information You Can Expect to Not Receive:** Respondent’s counsel will not provide the pro bono program director with specific taxpayer information because doing so would be a violation of I.R.C. § 6103. For those unfamiliar with I.R.C. § 6103:
   a. **Willful Disclosure Violations:** To the extent the disclosure was willful, such a violation is punishable as a felony and dismissal from Federal service.
   b. **Negligent Disclosure Violations:** To the extent the disclosure was negligent, the United States would be subject to a suit for damages.

4. **What Information You Can Expect to Receive:** Respondent’s counsel will, however, usually speak of the calendar call in general terms (i.e., the number of definite trials and the issues presented (e.g., a substantiation case, a tax protester case, an innocent spouse case, or a collection case)).

5. **Use the Information to Properly Staff the Calendar Call With Attorneys, Enrolled Agents, and Accountants:** The director of the pro bono program, in turn, should staff the calendar call with a sufficient number of attorneys and support personnel (e.g., enrolled agents and accountants) to handle the cases presented.

III. **Pre-Calendar Call Settlement Day**

   A. **Overview:** A limited number of cities offer a “Settlement Day” a few days before the calendar call, during which the taxpayer, a pro bono volunteer, and an Appeals officers can discuss the merits of a taxpayer’s case. The goal is to allow for informed settlement discussions before the calendar call and, if the case is meritorious, to have the case assigned to pro bono counsel for preparation ahead of the calendar call.

   1. **The Reason Settlement Days Are Held a Few Days Before Trial:** As a practical matter, the reason that Settlement Days are held only a few days before the calendar call is that many cases, and especially small tax cases, are worked by Appeals until two weeks before trial. Some Service counsel have expressed the view that these cases should not be the subject of settlement discussions with Respondent’s counsel until Appeals has finished its task.

   2. **Many of the Service’s Counsel Are Reluctant to Hold Settlement Days at All:** Additionally, some of the Service’s counsel are reluctant to hold
settlement days at all. This is unfortunate and it may be helpful for the Tax Court to include as part of its standing pretrial Order or standing pretrial notice an instruction that the parties shall use all available tools to settle a case, including but not limited to the holding of a Settlement Day at Respondent’s counsel’s offices 30 days before trial.

B. The Need for Settlement Days Further Out From Trial: The Settlement Day is an excellent opportunity to allow for full and frank discussions about the merits of a case before trial. It is also an excellent opportunity for pro bono counsel to learn about the merits of a case. However, the current practice of delaying Settlement Days until a few days before trial (if at all) is inadequate.

1. Effect on the Tax Court: The current practice of delaying Settlement Days until a few days before trial does not assist the Tax Court to ready cases for trial. Recall that taxpayers’ pretrial memorandums, which are purposed to apprise the Tax Court of the key issues in dispute and the status of the case, are typically due 14 days before trial. By holding a Settlement Day only a few days before trial, self-represented taxpayers are not given enough time to prepare a pretrial memorandum with the assistance of counsel. In this regard, the Tax Court is disserviced and the case is prejudiced if the Tax Court only knows Respondent’s views on the case. The panelists are mindful that the Tax Court orders self-represented taxpayers to file a pretrial memorandum and any prejudice that occurs as a result of a failure to do so can be fairly placed on the taxpayer. Still, by involving pro bono counsel earlier in the process, the Tax Court’s standing pretrial Order or standing pretrial notice can be complied with and the case fairly presented by both parties’ counsel.

2. Effect on Pro Bono Counsel: The current practice of delaying Settlement Days until a few days before trial also places pro bono counsel at a significant disadvantage. As discussed below, representation that occurs for the first time at the calendar call requires the counsel to quickly familiarize himself or herself with the client, the issues presented, and limits the documentary evidence potentially available for the taxpayer to prevail.

3. Proposal for Change: The panelists believe that the Service should be encouraged to offer a Settlement Day at least 30 days before trial. Ideally, the Settlement Day would be held at a local bar association’s office during non-working hours (i.e., after 5:00 p.m. or during the weekend). The individuals who should be present include, but are not limited to: an Appeals officer or settlement officer; Respondent’s counsel; and one or more pro bono volunteers. Modifying the existing practice allows the

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11 Respondent’s counsel may, as some have done, decline to hold a Settlement Day during non-working hours due to union or labor concerns. However, Government attorneys may also have a pro bono requirement and most would agree that such efforts count towards the Government-attorney’s pro bono requirement.
presiding Judge to be better-informed about the cases he or she will hear, allows self-represented taxpayers to retain counsel earlier in the process, and allows pro bono counsel to adequately prepare for trial. Finally, it is worth noting, these changes should increase the likelihood of settlement in most cases, an obvious benefit for the Tax Court and the Service.

IV. Assisting the Self-Represented Taxpayer During the Calendar Call

A. Overview: Calendar calls tend to be hectic and, for many pro se litigants, can be daunting. For those unfamiliar with the calendar call process, a typical calendar call consists of the assigned Judge calling every case set for trial during the week of the calendar call and hearing administrative matters, such as whether a trial is needed, the status of the stipulation process, and oral argument with respect to any pending motions and matters.

Note: Many pro bono programs, including the New York County Lawyers’ Association’s Tax Court Pro Bono Calendar Call Program and the Rutgers Federal Tax Law Clinic, offer to provide lunch to the volunteers, the presiding Judge, and Respondent’s counsel. The goal of this lunch is to allow the volunteers, many of whom are students or novice attorneys, to build relationships with established members of the tax bar and obtain advice about careers in tax, with the judiciary, with the Service, or with private law firms. The lunch also builds comradery within the tax community on both sides of the aisle. Attached as Appendix B is a sample letter that can be sent to the presiding Judge to invite him or her to that luncheon.

B. Checklist for the Director of the Program Before the Start of the Calendar Call:

1. Arrive early (at least one hour before the start of the calendar call);

2. Set-up in Petitioners’ counsels’ room a laptop computer with internet access and a printer that may be used throughout the course of the day;

3. Check-in with the Trial Clerk, introduce yourself as the director of the pro bono calendar call program, and ask if the Judge is willing to speak with you and Respondent’s counsel in chambers about how (if at all) he or she would like to make pro bono services available to the taxpayer-litigants;

4. Obtain and review copies of the trial calendar (usually made available by the Tax Court on Petitioners’ counsels’ table) and look for cases in which taxpayers are not represented as well as any identifying information about the case (e.g., a collection case (denoted by “L” at the end of the docket number), “Section 6015 Relief”, “TEFRA Partnership Case”, or “Section 6166 Relief”);

5. Wear identifying insignia, like a large button that says “Pro Bono Volunteer”, so that taxpayers are able to identify you as a volunteer; and
6. Motivate the volunteers with a brief overview of what to expect during the calendar call and throughout the day.

C. Checklist for the Pro Bono Participant Before the Start of the Calendar Call:

1. Arrive early (at least one hour before the start of the calendar call);

2. Check-in with the director of the pro bono program and let him or her know that you are ready, willing, and able to volunteer. To the extent the director is unfamiliar with you, provide him or her with some background about you, your practice, and your strengths and weaknesses as they relate to tax litigation;

3. Review copies of the trial calendar and look for cases in which taxpayers are not represented as well as any identifying information about the case (e.g., a collection case (denoted by “L” at the end of the docket number), “Section 6015 Relief”, “TEFRA Partnership Case”, or “Section 6166 Relief”);

4. Seek out taxpayers who appear self-represented, introduce yourself, and, if the taxpayer is interested in speaking with you, advise him or her that you are willing to look at his or her materials to offer advice with respect to his or her case.

D. Checklist for the Various Participants During the Calendar Call:

1. Role of the Judge During the Calendar Call: As noted, the Judge calls every case set for trial during the course of the calendar call. As each case is called, it will become apparent which taxpayers are represented and which taxpayers are not. Typically, once a self-represented taxpayer is identified as such, the Judge will probably ask him or her if he or she would like to speak with a pro bono counsel. Assuming the taxpayer wants to speak with pro bono counsel, the Judge may set the case to be recalled at a later point during the calendar call (allowing time for the taxpayer and the volunteer to speak).

2. Role of the Pro Bono Coordinator During the Calendar Call: Again, assuming that the taxpayer wants to speak with pro bono counsel, the director of the pro bono program should assign volunteers to speak with the taxpayer outside of the courtroom. Ideally, it is best that a more senior volunteer and a more junior volunteer be assigned to work the case together. The purpose, of course, is to make sure that the representation is properly supervised and that the taxpayer receives the level of representation that he or she deserves.
3. **Role of the Pro Bono Volunteer During the Calendar Call:** The pro bono volunteer should introduce himself or herself to the taxpayer and explain his or her preliminary function: to evaluate the strengths and weaknesses of the taxpayer’s case and advise the taxpayer how to proceed. Following that preliminary assessment, the volunteer should proceed as follows:

   a. **Cases Determined to Lack Merit:** If it is determined that the case lacks merit (e.g., a tax protester case) or that the taxpayer will not benefit from assistance (e.g., a case that involves unreported income that the taxpayer does not dispute owing), then the volunteer may decline representation or possibly facilitate a settlement for the full amount. However, the pro bono volunteer should still explain the overall process with special attention on the collection process.

      i. **The Importance of Explaining the Assessment Process and the Collection Process:** Many self-represented taxpayers challenge a tax liability, even if they agree that they owe it, because they want to delay collection. Explaining that the determination of the liability for the tax and the collection of the tax are separate procedures helps the taxpayers understand that, even if they owe the tax, the Service will work with them to agree to a mutually agreeable payment plan that allows the tax to be paid without causing them undue financial hardship. Cases disproportionately settle when taxpayers understand the availability of installment agreements and offers in compromise as viable collection alternative to immediate collection.

      ii. **Protect the Client From Himself or Herself:** The primary goal of pro bono counsel in many cases is to protect a client from himself or herself. This means that the attorney should not allow the client to cause himself or herself harm. For example, if the attorney’s review of documents reveals that the client has unreported income that the Service has not yet identified, it may be advisable to tell the client to concede or settle his or her case on (what the client considers to be) unfavorable terms so as to prevent these items from harming the client.

   b. **Cases Determined to Have Merit:** If it is determined that the case has merit, then the volunteer should:

      i. Obtain a copy of the notice of deficiency, notice of determination, notice of worker classification, or other document conferring jurisdiction upon the Tax Court;
ii. Obtain a copy of Respondent’s pretrial memorandum and, if one was filed, the taxpayer’s pretrial memorandum;

iii. Interview the client to understand the taxpayer, his or her business and family affairs, and his or her tax issues;

iv. Determine whether the volunteer will enter an appearance on behalf of the taxpayer or whether he or she will provide behind-the-scenes advice to the taxpayer with respect to how to proceed;

v. Determine whether the taxpayer would benefit from the assistance of additional pro bono volunteers such as an enrolled agent or accountant;

vi. Conduct research with respect to the key issues necessary to prevail on an issue (this task can be delegated to another volunteer or senior attorney who can list the elements the taxpayer needs to satisfy in order to prevail); and

vii. Coordinate a strategy for how to proceed during the recall (i.e., will the attorney request a trial that day, later during the calendar call, or request a continuance (in the unlikely event one is granted)).

E. Pitfalls in Representation: Attorneys representing a self-represented taxpayer or couple should be aware of a number of issues that may arise during the calendar call and after. Some of the issues more commonly seen are as follows:

1. The Accountant’s or Enrolled Agent’s Unauthorized Practice of Law: The accountant or enrolled agent who prepared the taxpayer’s return at issue often arrives at court on the day of the calendar call to attempt to settle the case or represent the taxpayer before the Tax Court. As detailed below, this representation raises conflict of interest issues. More fundamentally, however, settlement negotiations between the authorized representative and Respondent’s counsel, to the extent they should occur at all, implicate questions about the unauthorized practice of law. Pro bono counsel who is retained must be aware of this issue and advise the taxpayer as to the limits of the accountant’s or enrolled agent’s role. However, at the same time, the taxpayer’s authorized representative can be an excellent resource for understanding the bottom-line impact of proposed adjustments. In sum, it is the role of the pro bono counsel to zealously represent the taxpayer’s interest before the Tax Court and with opposing counsel; it is the job of the authorized representative to facilitate that representation.
2. **Conflict of Interest Issues Between the Taxpayer and the Return Preparer:** Conflict of interest issues may arise when the taxpayer’s return preparer seeks to negotiate the taxpayer’s case with Respondent’s counsel. For example, Respondent’s counsel will routinely offer to settle a case for a proposed deficiency amount and a proposed accuracy-related penalty amount. It is not uncommon for the return preparer, who may face personal liability for the penalty, to provide a counteroffer that increases the amount of the deficiency in exchange for elimination of the penalty. In such a situation, the taxpayer is harmed by paying more than he or she would otherwise be required to pay and the elimination of a potential claim against the return preparer who committed malpractice. Pro bono counsel must vigilantly protect taxpayer-clients against such double-dealing.

3. **Conflicts of Interest Between Spouses:** Conflict of interest issues may also arise when pro bono counsel is asked to jointly represent a husband and a wife. Rule 1.7 of the Model Rules of Professional Conduct defines a conflict of interest as existing when “the representation of one client will be directly adverse to another client.” While the conflict of interest may be waived with the written informed consent of the husband and wife, as a practical matter, a pro bono attorney retained on the day of a calendar call may not have an opportunity to secure the informed written consent of the husband and wife on that same day. There is no doubt that dual-representation of a husband and a wife may present conflict of interest issues, such as one spouse’s entitlement to innocent spouse relief and the other spouse’s sole liability for the tax owed. To the extent conflict of interest issues arise, it is generally advisable to request a continuance and, if denied, secure the informed written consent of the husband and wife. If such informed consent cannot be secured, either by virtue of the absence of one of the spouses or otherwise, it is usually advisable for the attorney to decline representation.

4. **False Documents:** It is not at all uncommon for pro bono counsel to encounter false documents on the day of trial. Pro bono counsel should check the authenticity of documents and, if determined to be false, counsel the client against trying to have them introduced into evidence. To the extent the client insists that the documents be admitted, pro bono counsel should not enter an appearance in the case.

5. **False Testimony:** It is not at all uncommon for pro bono counsel to expect that the client will give false testimony at trial. The pro bono attorney must counsel that the client testify truthfully. To the extent the client insists on providing false testimony, pro bono counsel should not enter an appearance in the case.
6. **The Inability to Substantiate Deductions With Documentation That We Know Logically Exists:** Pro bono counsel may find it difficult to substantiate deductions with documents that logically must exist. For example, a taxpayer-client may not bring records to substantiate common deductions such as mortgage interest, real property taxes, and charitable contribution deductions. As noted, the program director should make available in the Petitioners’ counsels’ room a laptop computer with internet access and a printer. Pro bono counsel should use the internet, bank and financial institution websites, and third-party programs (e.g., Accurint) to obtain corroborative proof of documents that are logically known to exist.

7. **The Inability to Subpoena Witnesses for the Calendar Call:** Pro bono counsel will often be unable to subpoena necessary witnesses for trial on the day of the calendar call. It is advisable for pro bono counsel to request a date and time certain later during the calendar session, issue a subpoena, and attempt to have the witness available to testify at the date and time certain.

V. **Representing the Self-Represented Taxpayer at Trial**

   A. **Overview:** Representing a self-represented taxpayer during a trial soon after a calendar call can be one of the most challenging and rewarding experiences of a lawyer’s career. Such representation requires the counsel to quickly familiarize himself or herself with the client, the client’s family, the client’s business, and the client’s tax affairs. Such representative also requires the counsel to identify the key issues in the case, analyze voluminous documentary evidence, understand it, and develop questions that can allow the client to put forward his or her strongest case. The strategy for representing any client depends upon the facts of the case, but the following may be a good starting point:

   B. **The Client Interview:** After the issues in the case are identified, pro bono counsel should interview the client to understand the taxpayer, his or her business and family affairs, and his or her tax issues. Questions should be designed to allow pro bono counsel to obtain necessary information about the client.

   C. **Gathering Information to Corroborate the Witness’ Testimony:** Documentary evidence is important to the success of any Tax Court cases, but especially those involving indigent clients. Assuming a laptop computer with internet access and a printer are made available for counsel’s use, counsel should use available search engines, bank and financial institution websites, and third-party programs (e.g., Accurint) to obtain corroborative proof of documents that are logically known to exist. The evidence at a pro bono case tends to be less than ideal, but is often sufficient to corroborate the witness’ statements.
D. **Perform Necessary Research:** Pro bono counsel should research the key facts and elements that must be established to prevail on an issue. As time will be limited, this task can be delegated to another volunteer or a senior attorney who, most likely, can distill the information with greater ease and summarize the key points for the junior “lead” attorney.

E. **Prepare the Witness for Direct and Cross-Examination:** Witness preparation is an important aspect of successful tax litigation. Unfortunately, pro bono counsel will have a very limited amount of time to study the witness, provide feedback about his or her direct testimony, and coach him or her for cross-examination.

1. **Prepare for Direct Examination:** It is important that the client is comfortable having a dialogue. Make sure that the client understands that he or she should *always* tells the truth; arguably, the single most important aspect to being successful in a pro bono case is that the witness present himself or herself as credible, honest, and non-evasive.

2. **Prepare for Cross-Examination:** It is important that the client and the attorney be prepared for cross-examination. Pro bono counsel should anticipate the weaknesses in his or her client’s case and develop ways to minimize those weaknesses.

F. **Direct Examination of the Client:** Much of the assistance that pro bono counsel provides is to facilitate the client’s testimony without the quirkiness of a monologue and to create a record on which a persuasive brief can be written. The following format may help facilitate the dialogue:

1. Provide relevant background about the witness; who is your client, what is his or her education level, what is his or her work experience as it relates to the years at issue;

2. Use the client’s tax return, the notice of deficiency, available pretrial memorandums, and the summary of elements and facts that must be proven as guides to question the witness. Doing so will allow you to focus on the key points that matter most.

3. Do not think about your next question while the witness is answering the current question. Listen to the witness’ answers and ask probing follow-up questions.

4. Pro bono counsel should anticipate and cover the points most likely to be made on cross-examination. Doing so will take any “sting” out of the Service’s case.

5. Be sure that important documentary evidence is offered into evidence, but more importantly, that it is received into evidence.
6. Do not forget about penalties, additions to tax, and additional taxes. Ask questions designed to determine the basis for the witness’ position, its reasonableness, and reasons for any failure to do what was required under the law (e.g., any individuals he or she relied upon in filing the return, taking an early distribution from a retirement plan, or in late-filing a return).

7. This is the client’s case and pro bono counsel was most likely added at the last minute. It is therefore important that pro bono counsel give the client an opportunity to answer whether “there is anything else that you want the Court to know about your case”. While this question will undoubtedly face an objection from opposing counsel, latitude should be requested given the fact that the pro bono counsel was only recently added to the case. This question is fundamental to the client believing that he or she had the opportunity to tell the presiding Judge everything he or she wanted to tell the Judge.

8. Rely upon available witnesses to corroborate the witness’ testimony to the greatest extent possible. Typical witnesses in a pro bono case may include the taxpayer’s accountant and spouse.

9. **Practice Tip #1:** Pro bono counsel should listen to the client’s answers and have an open dialogue. The direct examination will be as much about the pro bono counsel learning the facts as it is about the presiding Judge learning the facts. Remember, the goal is to garner sufficient facts in the record to write a persuasive brief, not necessarily to win the case in the courtroom.

10. **Practice Tip #2:** Most questions asked should relate to the tax years at issue. Generally, the only exceptions that will arise in a pro bono case are:

    a. In a collection due process case where a collection alternative is at issue, perhaps the taxpayer’s financial state at the time of the collection due process hearing;

    b. In an equitable innocent spouse case under I.R.C. § 6015(f), the taxpayer’s current economic and marital status at the time of the trial;

    c. Carryover items, net operating losses, and basis; or

    d. Where penalties are at issue, the level of the taxpayer’s compliance or noncompliance with filing obligations in years other than the year(s) at issue.
G. **Cross-Examination of the Service’s Witness:** The Service will sometimes need to call witnesses to satisfy the Government’s burden, most typically where penalties or unreported income is at issue. Pro bono counsel should cross-examine such witnesses to probe weaknesses in the witness’ testimony (e.g., his or her reconstruction of income in an unreported case or financial analysis in a collection due process case).

H. **Pending Motions:** Often, pro bono counsel will be asked to argue a pending motion for leave, motion *in limine*, motion to dismiss, or motion for summary judgment. The foregoing rules apply equally to such motions, especially to the extent the hearing to be held is evidentiary (i.e., one in which evidence can be received to support a position).

VI. **Representing the Self-Represented After Trial**

A. **Overview:** Pro bono counsel often continues to assist a taxpayer after the calendar call, either in connection with the active Tax Court case or with other matters before the Service. The pro bono client should be treated for all purposes as the same as any other client of the firm, except with respect to billing. This means that the following should be performed:

1. **Conflict Check:** Complete a thorough conflict check (e.g., conflict by the parties, issue preclusion, or other reasons for not taking the case);

2. **Intake Sheet:** Complete a thorough intake sheet to obtain all information necessary to the representation (e.g., name, address, telephone number, Social Security number, etc.);

3. **Open the File and Keep Time:** Follow the firm’s procedures for creating a client number, billing code, and time entries;
   a. **The Importance of Keeping Time:** It is important that pro bono programs who affiliate themselves with a low income taxpayer clinic or tax clinic keep accurate hours of all pro bono hours spent on a matter. The clinic will routinely ask pro bono counsel for a summary of their hours because the amount of their funding may be tied to the number of hours spent on pro bono matters.

4. **Initial Interview:** Complete an initial interview to make sure that the client qualifies for pro bono assistance and understands both the attorney-client privilege and his or her responsibility under the engagement letter;

5. **Authorizing Documents:** Have the attorney sign a Form 2848, Power of Attorney and Declaration of Representative, or a Form 8821, Tax Information Authorization, so that the attorney can obtain necessary tax
information from the Service and speak with non-attorney Service personnel;

6. **Copy the Client to All Correspondence:** The client should be copied to all correspondence relative to his or her case.

**B. Engagement Letter**

1. **Overview:** The engagement letter is important because it defines the scope of the representation and the responsibilities of the attorney and the client. Attached as **Appendix C** is a sample retainer agreement that can be used for a pro bono client.

2. **Make Clear Who the Client Is:** The engagement letter should make clear who the client is (e.g., taxpayer-husband, taxpayer-wife, taxpayer-couple, taxpayer-organization, taxpayer-officer, etc.).

3. **Detail the Scope of Representation:** The engagement letter should clearly define the scope of the representation. Specific items to be addressed are: (1) whether the representation covers Federal or State matters; (2) the year(s) covered by the representation;

4. **Costs:** Pro bono clients are generally expected to pay costs associated with a matter, but not attorneys’ fees. For example, pro bono clients may need to pay filing fees, transcript costs, costs of photocopies and mailing, and travel (to the extent required). Of course, a firm may decide to waive such costs.

5. **Specify the Terms Under Which the Representation May Be Terminated:** The engagement letter should also specify the terms under which the representation may be terminated by the attorney, the client, or upon mutual agreement of both.

**C. Make Appropriate Inquiries of the Service:** After being retained, the attorney should perform the following:

1. Request account transcripts, including (i) account, and (ii) wage and income;

2. Submit to the Service Disclosure Office a request under the Freedom of Information Request Act, 5 U.S.C. § 552, et seq. (“FOIA”), with respect to relevant information in the case;

3. Use LexisNexis to conduct an Accurint search, which provides detailed information available on businesses and individuals, as well as their assets (including real estate), relatives, and associates;
4. Use Transunion TLOxp (“TLO”), to search personal information, bankruptcies, foreclosures, liens, judgments, assets, and professional licenses, in addition to other items; and

5. Use Google to understand the taxpayer and obtain any information about him or her disseminated on the Internet.

VII. Protecting Yourself and Your Firm: Pro bono assistance can be risky. Attorneys should be aware of, and limit their exposure to, the following types of risk:

1. Malpractice Insurance Coverage for Pro Bono Matters: Pro bono cases are often covered under a firm’s existing malpractice coverage. Nonetheless, attorneys should contact their malpractice insurance provider to understand their scope of coverage.

2. Know When to Withdraw: Pro bono representation imposes upon the attorney and the client certain rights and responsibilities. If a pro bono client fails to meet his or her responsibilities, the attorney should consider withdrawing his or her representation and dedicating his or her resources to another taxpayer who might benefit more greatly. In practice, the following are legitimate reasons to withdraw from representation:
   a. The client misrepresents or improperly conceals any facts in dealings with the pro bono counsel;
   b. The client insists on communicating directly with the Tax Court, the Service, or their representatives;
   c. The client fails to comply with reasonable requests for information and documents; or
   d. The client asks the pro bono attorney to counsel or assist in conduct that the lawyer knows to be illegal, criminal, or fraudulent.

3. Disengagement Letter: Once a matter has ended, either as a result of the natural disposition of the case or as a result of the need for the pro bono counsel to withdraw, counsel should send a disengagement letter to the client making clear that the representation has ended and the reasons therefor. Attached as Appendix D is a sample disengagement letter sent to a pro bono counsel after the natural disposition of a Tax Court case.

VIII. Appendix

Appendix A: First Sample Letter to Tax Court Judge Re: Pro Bono Participation
Appendix B: Sample Letter to Tax Court Judge Re: Lunch Invitation at Calendar Call
Appendix C: Sample Retainer Agreement for Pro Bono Client
Appendix D: Sample Disengagement Letter to Pro Bono Client
[Date]

Via U.S. Mail and Hand Delivery

The Honorable [Judge’s Name]
United States Tax Court
400 Second Street, N.W.
Washington, D.C. 20217

Re: [Location] Tax Court Calendar – [Bar Association] Pro Se/Pro Bono Program

Dear Honorable Judge ________________:

As we have been discussing, I am Chair of the Pro Bono Committee of the Section of Taxation of the [Bar Association] and we have begun a program that makes private bar attorneys available to assist pro se taxpayers during Tax Court calendar calls in [location]. The attorneys would offer assistance to pro se taxpayers on a pro bono basis during the calendar call only, and are not obligated to enter an appearance on behalf of the taxpayer. The primary goal of such a program include educating pro se taxpayers about Tax Court processes and procedures, facilitating communication between the taxpayer and the Counsel Attorney, and assisting in the smooth running of calendar calls. We have discussed with your offices continuing this initiative with your small case calendar in [location] on [date].

**Format.** As we indicated, we would like to make the program available to the Tax Court at the [date] calendar call. We propose the format of the program to be as follows:

1. Area Counsel, Program Chair, ____________ , and the Participating Attorneys will be available to meet with you briefly in your chambers before the calendar call. All Participating Attorneys will arrive no later than thirty minutes before the call of the calendar. Participating Attorneys will check in with the clerk upon arrival.

2. Prior to the call of the calendar, we request that you announce that the attorneys are present and available on a pro bono basis for consultation. You may wish to use the proposed statement on **Attachment 1**, or to create your own. As you introduce the list of Participating Attorneys, included as **Attachment 2**, we will stand to be recognized. We believe that petitioners are more likely to seek our help if we station ourselves in the back of the courtroom.

3. When consulting with a petitioner, the attorney will not distribute business cards or in any way suggest availability for private retention by the taxpayer.

4. The attorney will provide procedural advice to petitioners who decide to go forward with a trial, but the attorney will not enter an appearance on behalf of any petitioner.

5. The attorney will discuss the petitioners’ cases and any settlement proposals from the
Internal Revenue Service with the petitioners to determine whether assistance with Counsel Attorneys or Appeals Officers might help to bring about a resolution.

6. The attorney will not advocate the petitioners’ position to the government but will serve only as communicator and mediator.

7. All discussions with Counsel Attorneys will take place in the petitioners’ presence, and with the petitioners’ permission, to preclude any concerns that the Internal Revenue Service may have regarding disclosure of taxpayer information.

8. The attorney is only available to the petitioners during calendar call. All Participating Attorneys will be licensed to practice before the Tax Court.

**Source of Funding.** The Participating Attorneys will provide their time free of charge.

Of course, we would appreciate any comments or feedback you may wish to give us about the program.

Very truly yours,

_________________________________
I have a special announcement for taxpayers who are not represented this morning by an attorney or other person admitted to practice before the Tax Court. Tax lawyers from the Section of Taxation of the [Bar Association] are available to consult with you informally, to provide procedural advice, and to help you evaluate any settlement possibilities. They are volunteering their time free of charge. They will not appear for you before the Court nor argue your position to the Internal Revenue Service. The lawyers are [see Attachment 2] who are standing at the back of the courtroom. They will be here only during the calendar call this morning. If you want to talk with them, please do so outside the courtroom or let me know when the Clerk calls your case.
ATTACHMENT 2

Volunteer Attorneys for Bar-related Pro Se/Pro Bono Program

[Date]

1. ________________

2. ________________

3. ________________

4. ________________
Appendix B
VIA FIRST CLASS MAIL & FAX/ EMAIL

Honorable James Halpern
United States Tax Court
400 Second Street, NW
Washington, DC 20217

Re: NYCLA U.S. Tax Court Project

Dear Judge Halpern:

Thank you for your past support of New York County Lawyers’ Association (“NYCLA”) U.S. Tax Court Calendar Call Pro Bono Program, an ABA approved private bar project.

As you know, NYCLA’s outreach includes lunches with Respondent’s managers and trial attorneys, and the volunteers after each calendar call. On behalf of NYCLA, I write to invite you again to a simple lunch in the Petitioners’ Counsel Conference Room. The lunch would commence immediately after your September 29, 2014, Westbury, New York calendar so that we do not interfere with the calendar call and the afternoon session.

If you are interested, or you have any questions, please feel free to call me or attorney Erica Son of this office at telephone number (201) 488-5400.

Thank you very much for considering this invitation.

Very truly yours,

Frank Agostino

cc: Stephen C. Lessard, Orrick Herrington & Sutcliff LLP; NYCLA Tax Court Calendar Call Pro Bono Program
   Elizabeth Maresca, Fordham University School of Law LITC
   Mark D. Allison & Peter A. Lowy, Caplin & Drysdale;
   Rachel Son, Queens Legal Services
   Sara Dranoff, Brooklyn Legal Services
   Carroll Lansdell, Associate Area Counsel at IRS, Chief Counsel
   Lydia Branche, Associate Area Counsel at IRS
Appendix C
January 30, 2015

Carolyn Smith
123 Main Street
Hackensack, NJ 07016

Re:  Smith v. Commissioner, Docket No. 1234-15S

Dear Ms. Smith:

This letter-agreement (“Agreement”) confirms that the law firm of Agostino & Associates, A Professional Corporation (“the Firm”) will serve as your counsel in connection with the above-referenced matter. This Agreement also sets forth the terms of our representation, which will be limited to the case listed above, pending in the United States Tax Court. We have not agreed to represent you in any appeal arising out of the above-listed case, nor in any other civil or criminal litigation or other matters as to which you may desire legal counsel. By signing and returning the enclosed extra copy of this Agreement, you are consenting to this limited scope of representation, after consulting with the Firm, in accordance with New Jersey Rule of Professional Conduct 1.2(c), as well as to the terms described below.

YOUR OBLIGATIONS TO THE FIRM

You agree to provide in a timely manner all reasonable information and documents requested by the Firm to assist in representing you. You agree to cooperate fully in the Firm’s representation of you and to make reasonable efforts to work with us on all logistical matters. This includes, but is not limited to, reasonable efforts to appear on time at all scheduled meetings with the Firm or, in case of an unforeseen emergency, reasonable efforts to call or otherwise notify us of a need to reschedule those meetings. Similarly, you agree to make reasonable efforts to appear on time for any depositions, hearings, trials, or other court proceedings at which your presence is required.

You have the right to authorize any final settlement of any action on your behalf. In other words, you have the right, in accordance with Rule of Professional Conduct 1.2, to decide whether to settle the case listed above. You agree, however, to consult with the Firm before accepting or rejecting any settlement offer. You also agree not to communicate directly with any court or administrative tribunal concerning the case listed above, or with the other parties to this case, or their attorneys, without first consulting with the Firm.

You agree not to misrepresent or improperly conceal any facts when communicating with any representative of the Firm. You understand that the Firm cannot counsel or assist you in
conduct that it knows to be illegal, criminal, or fraudulent, pursuant to Rule of Professional Conduct 1.2.

You have the right to terminate our services at any time upon written notice to us. We also have the right to terminate our services to you, upon written notice, if you fail to substantially fulfill the obligations listed above, if you fail to cooperate with a reasonable request from the Firm, or if we determine that continuing services to you would be unethical, impractical, improper or otherwise inappropriate under Rule of Professional Conduct 1.16. If there is a pending proceeding, you understand that the Firm may move for permission to withdraw pursuant to the Rules of Professional Conduct, Tax Court Rule 24(c), or any similar rule in effect at the time.

You agree to notify the Firm, as soon as you are able, of any changes of address or telephone number during the course of our representation. It is important that the Firm be able to keep in regular contact with you concerning developments in your case.

**ATTORNEY’S FEES**

You will not be responsible for paying the Firm any attorneys’ fees in connection with the above-referenced matter.

Although you will not be personally responsible for paying attorneys’ fees to the Firm, we have the right to ask that you pay, or arrange for the payment of, actual costs and expenses necessarily expended in connection with your case, such as filing fees, court costs, transcript fees, printing and photocopying costs, and postage. The Firm will attempt, where possible, to secure waivers of court costs and filing fees, but you will remain responsible for any non-waivable costs and fees. If, on the other hand, the Firm pays or incurs some of these costs and expenses on your behalf, and if you receive an award or a settlement payment, you authorize the Firm to recover the costs it has expended on your behalf from that award or payment.

Please sign and return the enclosed extra copy of this letter to signify your understanding and acceptance of the terms outlined above. We look forward to working with you towards a successful conclusion of this matter.

Very truly yours,

Frank Agostino
I understand that the Firm agrees to represent only me in this matter.

I have read this Agreement carefully, and a representative of the Firm has explained the meaning of this Agreement to me. I understand my rights and obligations under this Agreement. I understand that I have the right to ask the Firm to further explain any part of this Agreement that I do not understand.

This is the entire agreement between Agostino & Associates, PC and me. There are no other agreements or understandings. This Agreement cannot be changed except in writing and signed by a member of the firm of Agostino & Associates, PC.

___________________________
Carolyn Smith

Dated: _____________________

ACCEPTED:
Agostino & Associates, A Professional Corporation

_____________________________
By: Frank Agostino

Dated: _____________________
Appendix D
October 29, 2014

Sent Via Regular Mail and Certified Mail, R.R.R.

Re: Disengagement of Representation

Dear Ms. [Redacted],

As previously discussed, our pro bono representation of you was limited to representing you before the United States Tax Court in connection with your request for relief from joint and several liability for the 2007 and 2008 tax years. An opinion was filed in your case on October 6, 2014, and a decision was entered on October 10, 2014. As Larry Sannicandro explained to you in his emails dated October 7 and 10, 2014, the Court disagreed that you were entitled to relief as an innocent spouse. Although Larry emailed copies of the Court’s opinion and decision for you, because we have not heard back from you, I am again enclosing copies of those documents for your records.

To the extent you disagree with the Court’s decision, you will have 90 days from the date the decision was entered to take an appeal to the appropriate Federal judicial circuit court. We will not be representing you in that appeal and our pro bono representation of you is terminated effective as of today. You should be aware that your time for filing an appeal expires 90 days from the date the decision was entered, or January 8, 2015.

To the extent you continue to need an attorney’s services, we encourage you to retain new counsel. We will, of course, assist in the transition of any matters or files to you or your new counsel, as you may direct. In the absence of any request, we will retain our files in accordance with our firm’s policy. In connection with the termination of our services for you, as a professional courtesy, we have waived any remaining fees and disbursements due and owing on your account.

We wish you every success in your future endeavors.

Very truly yours,

[Signature]

Frank Agostino

FA/ias
Enclosures as stated