Ethics

Ethical Considerations in Pro Bono Representation

Saturday, February 1, 2020| 9:30-10:20 AM EST

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The Panel

Panelists:
The Honorable Peter J. Panuthos, Chief Special Trial Judge
US Tax Court, Washington, DC

Jennifer Breen, Partner
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Moderator:
Shanthy Balachanthiran, LITC Director, Florida Rural Legal Services, Inc., Ft. Myers, FL
Objectives

By the conclusion of this presentation:

- When contemplating representation of a pro bono client, you will be able to identify when a conflict of interest may exist per Circular 230 §10.29 and ABA Model Rule 1.7.
- When faced with an ethical dilemma of taking on a new case adverse to a former client’s, you will be able to identify whether it is “substantially related” enough to disqualify you from the case in accordance with MRPC 1.9.
- When participating in Calendar Call or Settlement Day engagements, you will be able to distinguish between permissible and impressible conduct as practitioners in conformity with US Tax Court Rule 24(g).
Conflicts of Interest & Special Considerations in Tax Litigation

- Circular 230 §10.29: Conflict of Interest – applies same rules as ABA Model Rule 1.7.
- “A conflict of interest exists when the representation of one client will be adverse to another client or if there is a significant risk that representation of one client will be materially limited by the practitioner’s responsibilities to another client, former client, third person, or his or her personal interest.”
- Pro bono attorneys must be cognizant of divergent interests of family members/divorced spouses/business partners who are represented by the same firm/clinic.
US Tax Court Rule 24(g)

- Lists 3 circumstances where an attorney cannot appear due to a conflict:
  - (1): Was involved in planning a transaction or operating an entity connected with issue in the case.
  - (2): Represents multiple parties with divergent interests with respect to any issue in a case.
  - (3): Is a potential witness in a case (waivable by client’s informed consent).
- U.S. Tax Court Rule 200: Incorporates the ABA Model Rules by reference.
When taking on a new case adverse to a former client’s, you must identify whether it is ‘substantially related’ enough to disqualify you from the case in accordance with MRPC 1.9.

A lawyer is disqualified from taking on a new case adverse to a former client’s in such instances as:

- Same client and matters are relatively interconnected
- Lawyer interviewed a witness key in both cases
- Lawyer’s knowledge of former client’s negotiation strategies relevant
- Commonality of witnesses, legal theories and significance of business practices of client and location of client
- Common subject matter, issues and causes of action
- Information existed on former client’s ability to satisfy debts and possible defense and negotiation strategies
Conflicts for Legal Services/Aid Clients

• Should conflicts really be considered for indigent clients, especially in the tax context?
  • Primary adversary in tax dispute is the IRS.
  • Goal is to help as many indigent citizens access legal services as possible
  • But what about positional conflicts or personal conflicts?
• No clear answer but must weigh utilitarian concerns vs. ethical rules.
Representing Clients in Tax Court

• Calendar Calls:
  • Tax Court created a program that allows volunteers to appear on behalf of pro se litigants at Calendar Calls.

• Settlements:
  • Have to keep client interests paramount.
  • Person conflicts likely to arise here.

• Most Common Ethics Concerns in Tax Court:
  • Conflict of Interest.
    • Duty to tax system, duty to client, duty to remain an upright and ethical attorney.
  • Client provides inaccurate information
  • Client plans on committing fraud
Court Regulation of Clinics

• Tax Court Imposes General Program Requirements:
  • Each such program shall have a program director who shall be responsible for overseeing program operations and serve as a point of contact for communications with the Court.
  • Establish guidelines for assisting self-represented petitioners, including objectives of public service and judicial and administrative economy
  • Provide a letter each year which states the mission of the program, areas served, services provided, copy of program guidelines.
    • Must inform Chief Judge of any material changes to program
Court Regulation of Pro Bono Tax Attorneys at Calendar Call

- Must be a member of the bar of the court.
- Arrive an hour early and inform clerk of availability to assist self-represented petitioners.
- Cannot solicit or receive any fee from a petitioner while volunteering self-represented petitioners.
- Services that can be provided:
  - providing procedural advice to petitioners who decide to proceed to trial
  - consulting with petitioners regarding the merits of their cases and evaluating any settlement proposals from the IRS
  - acting as a communicator between the parties in an effort to assist in resolving the case, and/or
  - entering an appearance with the Court on the petitioner’s behalf.
- Must abide by all applicable rules of professional conduct
- Court in its discretion can terminate the ability of a program/practitioner to appear at calendar calls.
Notice of Limited Appearance

UNITED STATES TAX COURT

Petitioner,

V.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No.

ENTRY OF APPEARANCE

The undersigned, being duly admitted to practice before the United States Tax Court, hereby enters an appearance for the petitioner in the above-entitled case.

Dated:

(Regulate)

(Office address)

(City, State, ZIP code)

(Telephone no. (Include area code))

(Area Code) (Number)

A SEPARATE ENTRY OF APPEARANCE MUST BE FILED IN DUPLICATE FOR EACH DOCKET NUMBER.

FORM 3
Tax Court: IRS Perspectives

• Requires an attorney to make an appearance or a petitioner will be deemed appearing on their own behalf.
  • This is so even if the pro se petitioner has an attorney representative pursuant to Form 2848, or other POA.
• However IRS makes a point of encouraging Counsel attorneys to work with representative even if no formal entry of appearance has been made before the Court.
  • Encouraged to interact with Form 2848 representatives to resolve the case.
• Service of court documents must go to pro se petitioner, copies may be provided to the 2848 representative.
Hypothetical 1:

- You prepared a joint tax return claiming a deduction for husband and wife several years.
- Deductions disallowed and return is audited. Deficiency notice issued to Husband and Wife.
- Husband asks you to represent him in Tax Court.
- Can you represent Husband by himself?
Hypothetical 2:

• You are part of Tax Court volunteer Calendar Call Program.
• You meet with taxpayer and he tells you that he has been receiving under the table payments from his boss. He failed to include a significant portion of his income on the taxable year in question.
• Chief Counsel for the IRS offers you a Settlement Offer before trial that would constitute a windfall for the taxpayer.
• What duty do you owe to the taxpayer?
Hypothetical 3:

- You operate a Low Income Taxpayer Clinic.
- You are contacted by Roy who owes the IRS $50,000 in back taxes.
- After consulting with you, Roy wins the lottery and flees the country with his winnings.
- His wife, Carol, comes into your office regarding the same tax liability.
- Can you represent Carol in her tax matter?
Hypothetical 4:

- Taxpayer Husband and Wife meet with you prior to a calendar call at Tax Court.
- After discussing their tax matter, you agree to represent the wife on a *pro bono* basis.
- The case is called and the Husband concedes to all adjustments and penalties.
- You Motion to Continue for an opportunity to amend the Petition so the Wife can raise the Innocent Spouse defense.
- Husband then withdraws earlier concessions.
- Can you continue with the wife’s representation?
As the second part of a two-part presentation, today we continued our discussion from yesterday on the dilemmas pro bono attorneys may face when representing tax clients at settlement days, calendar calls, and via direct representation outside of the courtroom. Discussions included limited scope and limited time representation and panelists provided advice on how to avoid the perils related to pro bono representation of taxpayer clients.
Questions?

All attendees can submit questions via the Q&A feature on the webinar interface.