

PRO BONO MATTERS

A Calendar Call Staffing Success Story

By T. Keith Fogg*

As Chair of the Pro Bono and Tax Clinics Committee (2012-13), one of my goals was to work with low income taxpayer clinics (LITCs) and with bar groups to obtain full coverage of all places where the Tax Court sits through stuffer agreements at the outset of cases and calendar call programs as the cases went to trial. In that effort, I ran into a dead end with respect to certain cities which just did not have the infrastructure to support one or both of these programs. With stuffer notices, I was able to convince some fellow academic clinicians to agree to be on stuffer notices for remote cities and to convince the Tax Court to allow modification of the stuffer notice to explain to the taxpayers why services were being offered in remote locations. Assisting taxpayers even within the same state of a clinic often involves long distances and a minimal amount of face-to-face contact. It is possible to provide effective assistance long distance, and we set up a program to cover the cities where no local LITC existed.

Calendar call programs require a separate challenge. It is not yet possible to handle a calendar call remotely. To participate in a calendar call, someone knowledgeable about the Tax Court and basic tax issues needs to actually appear in the Tax Court at the time of the calendar call. Getting to the cities without a calendar call program required not only expertise and a willingness to commit the time but also the ability to fund the travel.

To get past what looked like an impossible situation, certain white

knights appeared. The biggest white knight of all was Andy Roberson with McDermott Will & Emery LLP (McDermott). Judge Panuthos knew what I was trying to do and suggested that I speak with Andy. I contacted Andy and told him what I was trying to accomplish. Andy and Latonia Haney Keith, Firm-Wide Pro Bono Counsel at McDermott, discussed the challenges facing *pro se* taxpayers without access to legal representation and committed to accepting responsibility to provide attorneys at the calendar call for the cities in which I could not find an LITC or local bar group to accept responsibility for the calendar call program. We entered into this arrangement with the hope that it might be a short term thing in some of the cities and that through continued outreach and training efforts we might fill the gaps in those cities.

Surprisingly, one of the cities that needed both a stuffer notice and calendar call program was Honolulu. An LITC exists in Honolulu in the local legal services organization. Previously, this LITC had agreed to the stuffer notice and had covered calendar calls. The attorney who directed the LITC had recently left the office and the LITC in Honolulu did not want to take on the responsibility of representing Tax Court petitioners at the outset or at calendar call. The University of Washington Law School agreed to have its name placed in the stuffer notice but did not have the funding to travel to calendar call. Andy and McDermott agreed to take Honolulu as one of the cities where they would cover calendar call. We all hoped that by working with the University of Washington and with Andy, the new

director of the LITC in Honolulu would become comfortable with taking on these cases himself.

On June 10, 2013, the Tax Court held a calendar call in Honolulu. Andy and an associate at McDermott traveled to Honolulu to cover the calendar call. I will end my introductory remarks here so that Andy can tell the story of that visit. Before doing so, I want to personally thank him and McDermott for taking on this project and allowing taxpayers in the most difficult cities to cover to receive great representation when they arrived at calendar call unrepresented.

The Calendar Call

By Andrew R. Roberson**

When I first joined McDermott in the summer of 2012, I approached Latonia at McDermott about my prior involvement in the Tax Court calendar call program and representing low-income individuals in Tax Court through referrals from the Center for Economic Progress, and inquired whether this was something that McDermott would support. Not only did Latonia agree, she asked me to look for other ways to expand pro bono tax efforts to other geographic locations where taxpayers did not have access to legal representation. Keith, Latonia, and I talked and McDermott initially planned to send a tax partner and/or an associate to each of the five identified locations without coverage to provide pro bono assistance, with the idea that we were a temporary stopgap until local assistance could be put in place. However, several individuals and organizations assumed responsibility for most of the locations, leaving only the Honolulu calendar call without representation.

Mentioning Hawaii generally brings to mind images of sun, beaches, and paradise. However, the number of

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people in Hawaii living in poverty has soared in recent years to one of the highest in the country, and Honolulu struggles with a large homeless population. A substantial number of families participate in federal aid programs and survive paycheck to paycheck. Given that the Tax Court usually travels to Honolulu only once a year, we anticipated being able to assist several people. This turned out to be the case.

Prior to traveling to the calendar call, I reached out to Judge Panuthos to ensure that we abided by the requirements for the Tax Court's calendar call program. The Center for Economic Progress agreed to sponsor McDermott attorneys at the calendar call and filed a letter with the Court explaining the situation. We were now off and running.

About three weeks before the calendar call, I contacted Scott Schumacher at the University of Washington, and he referred a case on the calendar to us for a taxpayer that had suffered a traumatic brain injury and had not filed a tax return for the year at issue. With the assistance of Kristina Gordon, a tax associate at McDermott, I was able to work with the Service and establish that our client was not liable for the asserted deficiency and penalty and, based on his situation, was in fact entitled to a refund. Our work was paying off already and we had not booked our flights yet.

On the morning of the calendar call, Kristina and I met with Nathan Gooding, the attorney at the Legal Aid Society of Hawaii who had recently been tasked with handling tax matters. Nathan and I had previously talked on the phone about what we were doing, and I had provided him with some materials on the calendar call program and representing taxpayers before the Tax Court. After going through additional materials, the three of us set off for the Tax Court session. My impression was that if all went smoothly, *pro se* taxpayers would be in good hands with Nathan for future calendar calls and that he and his organization could take the reins.

Once in the courtroom, we met with Judge Gale and Peter Hochman, Associate Area Counsel—Hawaii, to discuss our role at the call. At the commencement of the calendar call, Judge Gale announced our presence in the courtroom and indicated that we were available at the break to meet with any *pro se* taxpayers wishing assistance. At around 10:30 a.m., the court took a recess and we encountered three individuals who were interested in our assistance. The first admitted she owed the deficiency, but she did not have the means to pay the full amount. We discussed the available collection alternatives with her and, once back in Chicago, we followed up by sending her various materials explaining these alternatives. The second individual exceeded the guidelines for *pro bono* assistance; however, we were able to explain to her the procedural process of conducting a case in Tax Court and what types of documents and testimony she might want to present to prove her position. The last individual had several issues related to the substantiation of items. After talking with him and Service counsel, it was clear that a settlement could not be reached and a trial would be necessary. After confirming that the taxpayer was below the required guidelines for *pro bono* representation and that there were no conflicts of interest, we decided to enter an appearance and try the case. Given that the trial had been scheduled for 2:00 that afternoon, we had to move fast.

Over lunch in the courthouse cafeteria, Kristina, Nathan, and I reviewed the stipulation of facts and attached exhibits that had previously been filed, as well as additional documents that our new client brought with him. It became clear that the case turned on three issues: (1) substantiation of claimed employee business expenses and proof that the taxpayer was not entitled to reimbursement from his employer; (2) substantiation of claimed charitable contributions; and (3) penalties. We also discovered a possible education credit

for the taxpayer's daughter that had not previously been raised. We worked fast to assemble the documents and determine the missing gaps in the lines of proof, including items for which we would need our client's testimony. Also, our client had asked his pastor to testify as a witness with regard to the charitable contributions issue. Unfortunately, the pastor had not yet shown up, and we were unaware of what he might say and whether he would be credible.

At 2:00 p.m., we entered our appearance, and I made an opening statement about the case before proceeding to examine our client. Because the stipulation of facts was mostly a document stipulation regarding the business expenses items, we had to walk through several agreements, invoices, checks, and other materials in an attempt to establish that he was not entitled to reimbursement from his employer for the claimed expenses, that such expenses were ordinary and necessary business expenses, and that we had sufficient substantiation for general items and those requiring heightened substantiation under section 274(d). In addition, testimony was elicited regarding the charitable contributions and payments made for his daughter's education.

At the conclusion of the taxpayer's testimony, the court gave us short break so that we could meet, for the first time, our client's pastor. Pastor Bob (as we came to know him) has been helping the poor in Hawaii for many years and was definitely an advocate for this cause and for our client's situation. Kristina, in her first courtroom experience, took charge of questioning Pastor Bob and eliciting testimony regarding charitable contributions made by our client. The trial concluded around 4:30 p.m., meaning that it took nearly as much time to conduct as we had to prepare.

Briefs have since been filed in the case, and we are awaiting Judge Gale's decision. Ultimately, I believe we met the goal of providing *pro bono* services to taxpayers that could not otherwise

afford legal representation. It was also a great training experience for a young associate, providing Kristina with real-life courtroom experience. Based on Nathan and the Legal Aid Society's involvement, we are hopeful that *pro se*

taxpayers in Hawaii now have local resources to help in future Tax Court calendar calls. Special thanks to Keith and the many others who have dedicated so much time and effort to providing tax assistance to *pro se*

taxpayers. I would also like to thank and acknowledge the Service attorneys and staff we met in Honolulu—they were professional, reasonable, and enjoyable to work with. ■

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DATE	PROGRAM	CONTACT
January 23-25, 2014	2014 Midyear Meeting Arizona Biltmore – Phoenix, AZ	Tax Section www.americanbar.org/tax 202.662.8670
February 12, 2014	Traps and Pitfalls in Drafting Real Estate LLC Agreements CLE Webcast and Teleconference	Tax Section www.americanbar.org/tax 202.662.8670
March 18, 2014	2nd Annual International Tax Enforcement Conference Washington, DC	Tax Section www.americanbar.org/tax 202.662.8670
March 26-28, 2014	Corporate Taxation: Tax Planning for Mergers, Acquisitions, and Other Transactions Washington Plaza Hotel – Washington, DC	ALI CLE www.ali-cle.org/ 800.CLE.NEWS
March 31-April 1, 2014	2014 ABA/IPT Advanced Income Tax Seminar The Ritz-Carlton New Orleans – New Orleans, LA	Tax Section www.americanbar.org/tax 202.662.8670
April 1-2, 2014	2014 ABA/IPT Advanced Sales/Use Tax Seminar The Ritz-Carlton New Orleans – New Orleans, LA	Tax Section www.americanbar.org/tax 202.662.8670
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April 9-11, 2014	14th Annual Tax Planning Strategies – U.S. and Europe CICG – Geneva, Switzerland	Tax Section www.americanbar.org/tax 202.662.8670
May 8-10, 2014	2014 May Meeting Grand Hyatt – Washington, DC	Tax Section www.americanbar.org/tax 202.662.8670
June 4-6, 2014	7th Annual U.S. – Latin America Tax Planning Strategies Mandarin Oriental Hotel – Miami, FL	Tax Section www.americanbar.org/tax 202.662.8670
June 22-24, 2014	Benefits Without Borders: 2014 Global Pension and Employee Benefits Lawyers Conference <i>presented jointly by the CBA, ABA and IPEBLA</i> The Drake Hotel – Chicago, IL	ABA JCEB www.americanbar.org/jceb 202.662.8670
June 2014 (TBA)	ERISA Litigation National Institute Chicago, IL	ABA JCEB www.americanbar.org/jceb 202.662.8670
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