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FROM THE CHAIR

Moving Forward

By Thomas J. Callahan, Thompson Hine LLP, Cleveland, OH

It has been an honor and a privilege to serve as Chair of the Section for 2019-2020. This year has flown by quickly, and I am amazed at the level of dedication that our staff and members have to the Section. This is especially significant in light of the many challenges that the Section has faced due to the COVID-19 pandemic. Despite these challenges, the members and staff were able to complete a substantial number of projects over the past year. Here is a sample:

- Two highly successful in-person meetings—Fall and Midyear—with high attendance and world-class CLE;
- On short notice, moving the May meeting into a virtual format with 21 separate webinars presented from early June through the end of July, providing over 50 hours of CLE;
- Completion of 30 webinars covering both COVID-19 and non-COVID-19 topics;
- Submission of 26 comment letters, including 7 dealing with COVID-19 and 19 covering other topics;
- Implementation of the COVID-19 Tax News and Information webpage to provide members with the latest resources related to the pandemic;
- Coordination with the pro-bono community, the ABA and the IRS to distribute information regarding economic impact payments to vulnerable populations;
- Creation of the Diversity & Inclusion Scholarship to cover registration fees, hotel expenses and air travel for two successful applicants at each of our in-person meetings;
- Successful meetings with officials from Treasury and IRS to discuss tax issues of mutual interest; and
- Surveys of our committees and members regarding changes to the scheduling and format of our in-person meetings.

I want to thank all of the members and staff who worked so hard this year to achieve these milestones.
Pro Bono and Public Service

The Section’s commitment to Pro Bono is remarkable. The Section supports the Adopt-A-Base and VITA programs wherein training and assistance are provided in connection with tax return preparation for low-income individuals and members of the military. As a participant in the Adopt-A-Base program over the years, I can attest to the personal satisfaction that comes from participating in this program. The Section also supports the Tax Court Calendar Call program, wherein attorneys assist pro se individuals in navigating the Tax Court process, and the Partnering for Pro Bono program, wherein members work with LITCs to represent low-income taxpayers across the country. I invite you to volunteer for one of these pro bono opportunities.

Thanks to a Terrific Team

I want to take this opportunity to thank the skilled and energetic team of members and staff that made my job possible this year.

First, members should know how outstanding our Section Officers have been in this year of rapid changes in our procedures due to COVID-19. Larry Campagna (Administration) has done a superb job in handling the Section’s finances, and I am particularly grateful to him for his help with a presentation on the Section’s finances to the ABA in February. Megan Brackney (Committee Operations) has done a wonderful job of guiding our committees and helping the Section pivot to a virtual format for the May Meeting. Fred Murray (CLE) spent countless hours over the past three years working to develop an alternative meeting format that will be useful in future discussions regarding the structure of in-person meetings. Eric Sloan (Government Relations) tirelessly reviewed and revised the Section’s comment letters and helped me to understand a number of complex tax issues described in those letters. Sheri Dillon (Pro Bono and Outreach) energetically led the Section’s pro bono response to COVID-19 and continues to effectively lead the Section’s numerous pro bono programs. Keith Fogg (Publication) has been a steady hand continuing to cement our relationship with Northwestern University Pritzker School of Law in connection with publication of The Tax Lawyer. Robb Longman (Secretary) and Christine Speidel (Assistant Secretary) have been invaluable in their contributions to the Section.

Second, I want to thank our outgoing Council Members—Gregg Barton, Catherine Engell, Cathy Fung, Peter Lowry and David Wheat—for their hard work and guidance of the Section and its committees. The Section looks forward to their continuing involvement in Section leadership in the future. I also want to thank our continuing Council Members for their dedication to the Section.

Third, the Section’s delegates to the ABA House of Delegates—Dick Lipton and Armando Gomez—have contributed significantly to our work throughout the year. Dick and Armando have substantial institutional knowledge regarding the Section, and they have vast experience in dealing with the larger ABA. The Section is fortunate to have the benefit of their insight.

As Chair, I have had the unique opportunity to witness the incredible work done by Section members and staff under very challenging circumstances. For that, I am truly grateful.
Fourth, a special “thank you” is due our Immediate Past Chair, Eric Solomon, for his wisdom, humor and insights regarding Section matters. As you can appreciate, this has been a challenging year for the Section and its leadership. Eric always has a positive attitude, and I am grateful for his wise counsel.

Fifth, I want to acknowledge the work of our current Chair-Elect, Julie Divola. Julie was instrumental in helping to lead the Section’s response to COVID-19.

Sixth, thanks, as always, are due to the Section staff for their hard work and dedication to the Section. John Thorner (Director) has effectively led his team throughout this most challenging year. John has had to manage the shift from in-person to virtual meetings, and he has done a fine job of coordinating with the ABA. Ty Hansen (Associate Director) keeps the Section’s finances in order, and he has done a great job of working to address technical issues with the ABA.

There are so many others worthy of recognition. Haydee Moore, Director of Meetings, did a wonderful job of managing our two in-person meetings, and led the team that was responsible for avoiding costly fees to the Section upon cancellation of numerous hotel contracts due to COVID-19. Meg Newman, Chief Counsel, undertakes the day-to-day work of reviewing and revising comment letters and was deeply involved in the Section’s responses to COVID-19. Chris Tank, Director of CLE, provided substantial support to Fred Murray in connection with the alternative meeting format project and managed the increased webinar workload that resulted from COVID-19. Todd Reitzel, Director of Publishing, handles the day-to-day work on the Section’s marquee publications such as *The Tax Lawyer* and *ABA Tax Times*. In addition to the Section staff members noted above, I wish to thank all other members of the Section staff for their outstanding efforts to serve the Section and its members.

Last, I want to recognize Joan Arnold’s role as Chair-Elect during this past year. Joan has brought incredible energy to leadership this year. She has been a driving force behind the creation of the Women in Tax Forum, and I look forward to the fresh ideas and innovations that Joan will bring to the Section as our next Chair. The Section will surely be in good hands.

I will end as I began. It has been a singular honor for me to be Chair of the Section during the past year. As Chair, I have had the unique opportunity to witness the incredible work done by Section members and staff under very challenging circumstances. For that, I am truly grateful. ■
FROM THE CHAIR-ELECT

Leading in Changed Times

By Joan C. Arnold, Troutman Pepper, Philadelphia, PA

As is tradition, I am writing my first column as the incoming Chair of the Tax Section, moving from the Chair-Elect position this month. It is with a bit of envy that I reviewed the incoming statements of the last three Chairs of the Tax Section. They each had goals that they wanted to accomplish, and the Section had to deal with the 2017 Tax Act and the rather dramatic upheaval in the tax law as we knew it. But the basic framework of how the Section works remained a constant.

As I write this, I, too, have goals that have developed over the years that I have been privileged to be involved in Section leadership. Nonetheless, we are now challenged in ways we could never have anticipated in determining how to deliver services and member benefits. The bedrock of our offerings—large in-person conferences—cracked back in March when we started to cancel conferences, first in Munich for the U.S. and Europe Tax Practice Trends conference, then in New Orleans for the ABA/IPT Advanced Tax Seminars, then our premier Washington D.C. May Tax Meeting, then our U.S. and Latin America Tax Practice Trends Conference in Miami. Now, as described more fully below, the Fall Tax Meeting that was to have been held in New York City will also be held virtually, as will the Philadelphia Tax Conference that is now scheduled for November 10-12.

To add to the mix, Congress passed the CARES Act, and there was a need on behalf of our members, the public, and the government to understand its impact. The Section, under the direction of Julie Divola and with direct cooperation with the IRS and Treasury, made a massive contribution to that understanding. The Tax Implications of COVID-19 webinar series includes 12 webinars that have enjoyed a total of 8,122 registrations. At the same time, through the efforts of Vice Chair of CLE Fred Murray and incoming Vice Chair of CLE Tom Greenaway, the Section developed 21 webinars for our members on substantive topics that would have been presented at our May Tax Meeting and 7 webinars that would have been presented at the European conference.

Virtual Meetings

The confluence of the timing of the cancellation of the May Meeting and the passage of the CARES Act made for hectic planning for the virtual May Meeting sessions. With more time for preparation, we have been able to develop an even better plan for the Fall Tax Meeting. The Virtual 2020 Fall Tax Meeting will take place over four days: Tuesday, September 29 through Friday, October 2. The prospect of spending four afternoons locked into a computer likely sounds daunting. We have developed a program, however, that takes that into account. As for our in-person meetings, members will register for the overall program, and
then come and go as they wish. We can’t offer pastries and coffee during the breaks, but we can make it a flexible and enjoyable experience. The meeting will start with a plenary session that should be of great interest, move through various CLE presentations and roundtables presented by various committees, host a Section Reception with networking opportunities, and close with a plenary session being developed in coordination with the IRS. The committee business meetings will be held separately to avoid any conflicts with the other programming.

At the risk of sounding like a Pollyanna, conducting meetings virtually may have an added benefit for our members who do not ordinarily come to the in-person meetings because of the time commitment, cost, or other practicalities: they may have greater access to the superlative educational experience the Section offers. This arrangement also will offer an enhanced opportunity to participate in a committee, because members do not need to be physically present at the conference to attend the business meetings. I do hope members will appreciate this opportunity and consider becoming more involved in committee work.

Goals

Back to goals. I’ve been active in the Section for more than 25 years and have reaped incredible rewards from that involvement, both professionally and personally. I have to admit, though, that becoming involved and advancing in leadership required a far greater degree of persistence and investigative skills than I had expected. At the beginning, it wasn’t apparent to me how the Section leadership worked, or what the benefits would be from participating. As I talk with newer members these days, I realize that we still have a lot of work to do in communicating these opportunities and challenges. Karen Hawkins was invested in creating greater transparency, and I expect to continue moving that effort forward. We need to be absolutely straightforward in how we work with individuals and committees to develop leaders, and we need procedures that are easy to understand and apply.

The Section also needs to continue to reach out to members to clarify their expectations from membership in the Section and use that to guide us in making changes. Last year we looked hard at whether we should move the in-person meetings from a Thursday-Saturday schedule to a Wednesday-Friday schedule. We decided to stay with what we have, but now we need to tackle issues of location and cost. That is intertwined with the needs and wants of our committees, as the current space usage at meetings is a significant constraint on the venues we can consider. Our staff does an incredible job of planning and implementing the meetings, but they need to know what the pressure points are for attendees.

One goal has already been launched: we started the Women in Tax Forum as a subcommittee of the Diversity Committee in fall 2019. Chaired by Heather Fincher and cochaired by Lauren Azebu, the forum had a “soft” launch at the Midyear Tax Meeting with more than 100 attendees. They gave us great ideas of what they need from the Section for support and advancement, including being part of a community. The Women in Tax Forum now holds Zoom teas on the first Friday of each month at 4:30pm ET to provide opportunities for the attendees to find that community. In response to the Black Lives Matter movement, the forum hosted a panel on allyship chaired by Loren Pond of Miller and Chevalier, which also sponsored the panel.

I am more than happy to discuss these goals with members. Please feel free to send me an e-mail or give me a call. Your input is always welcome.
The Leadership Team

The Section has an outstanding incoming leadership team for 2020-21. Julie Divola is our Chair-Elect, and her dedication and experience will benefit us greatly.

We have several excellent continuing vice-chairs. Larry Campagna (Vice-Chair, Administration) and Keith Fogg (Vice-Chair, Publications) both begin their third year of service in two key areas for our Section. Larry has led the effort to manage our finances responsibly, and Keith has led the effort to expand our portfolio of publications. I look forward to their continued leadership.

Sheri Dillon (Vice-Chair, Pro Bono and Outreach) enters her second year of service in a signature area for our Section, leading a variety of pro bono activities. It's wonderful to have Sheri's continued leadership in this area.

The Section welcomes three new vice-chairs this year. Tom Greenaway will be our Vice-Chair, CLE, and his leadership will be especially important for the Section as we deal with the pandemic circumstances. Kurt Lawson will be our Vice-Chair, Government Relations, and Kurt will guide our efforts to stay engaged with the Service and the Department of Treasury during these challenging times for the tax system. Melissa Wiley will be our Vice-Chair, Committee Operations. This position will also be especially important during the pandemic, and I look forward to Melissa's leadership.

Our Section's committees do so much important work, and we are fortunate to have Council directors whom we rely on to coordinate that work. The 2020-21 Council directors will be Jennifer Alexander, Jennifer E. Breen, Jaye A. Calhoun, James Creech, Katherine E. David, Diana L. Erbsen, Mary B. Foster, Cathy Fung, George A. Hani, Anthony C. Infanti, Summer LePree, Eileen C. Marshall, Julie C. Sassenrath, J. Robert Turnipseed, and Lisa M. Zarlenga. I look forward to their important work, as well as that of all the chairs and officers of our many committees.

Robb Longman will continue as Secretary and Christine Speidel, as Assistant Secretary. The Section will also continue to benefit from the contributions of Dick Lipton and Armando Gomez, our Section Delegates to the ABA House of Delegates.

As we move forward, I'm so grateful for Tom Callahan's leadership as Chair during the past unusual and challenging year. We also benefited from the leadership of outgoing vice-chairs Megan L. Brackney (Committee Operations), Fred Murray (CLE), and Eric Sloan (Government Relations), as well as outgoing Council directors Gregg D. Barton, Catherine Engell, Peter Lowy, and David Wheat. Many thanks to them all. I look forward to building on their achievements to strengthen the Section's value to its members and the tax community in these changed times.

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PEOPLE IN TAX

Interview with Ellen P. Aprill

By Jeremiah Coder, Washington, DC

Editor’s Note: ABA Tax Times interviewer Jeremiah Coder recently spoke with Ellen P. Aprill, John E. Anderson Chair in Tax Law, Loyola Law School, about her diverse career in government, private practice and as a professor.

ATT: Hi Ellen! You’ve had a very diverse career—employment in all three branches of the federal government (judicial clerkship, working on Capitol Hill, and time at Treasury), private practice, and a long academic career. Can you tell us what got you interested in tax in the first place?

EA: You’re right! Moreover, before going to law school, I worked for a Congressional agency, the Office of Technology Assessment, where my job was to “translate” scientific work into easier-to-understand English for members of Congress and their staffs. (My years of teaching Freshman Composition while in grad school helped me a lot in doing that work!) My OTA experience convinced me that I would enjoy law and law school. Like a number of English majors, I had already taken the LSAT.

In common with others in my Baby Boomer cohort, especially women, I went to law school a bit later in life, after a number of years doing graduate work in Renaissance literature and the year working on the Hill. When I started at Georgetown, a friend from my University of Michigan undergraduate days told me another U. of M. grad was teaching there—Patricia White, now the former dean of the University of Miami Law School—and I should go say hello. I hadn’t known her when I was at U. of M. but we had many friends in common. When we first spoke, she asked if I liked sets of interlocking rules and thinking about characterization questions. I said I did. She said tax law would be a good match for me, and she was right. I often say that reading cases is like reading a novel—extracting from the specific—while reading statutes is like reading poetry—asking why each word is where it is, why it was chosen, what repetition of a word (or lack thereof) means, deciding what weight to give to an author’s intent or place in history. Literature, it turns out, was good preparation for tax law.

ATT: Early in your career, you clerked for Supreme Court Justice Byron White. Having seen nearly four decades of Supreme Court jurisprudence on tax issues, do you think the Court’s approach to tax has changed at all in that timeframe, or has it been fairly consistent?

EA: Justice White felt strongly about granting certiorari for circuit splits, whatever the area of law. I don’t know whether that fact is important to the current justices. I think in recent years application of administrative law doctrines to tax is the most important change.
ATT: What, if anything, surprises you most about the practice of tax law/tax profession? Are there any significant changes in the profession that you have observed?

EA: When I started practicing, now decades ago, I was surprised at how much of the work took place on the telephone. Today, I think about how specialized tax law has become—but have no answers about ameliorating that.

The second part of that question is important. I have seen some positive changes regarding treatment of women during my professional life. If I had gone straight through to law school after undergraduate school, I would have finished before Justice White had begun to hire women. I have always assumed (but never was brave enough to ask him—I was always a bit intimidated by him) that he came to a realization, as his daughter grew older, that he needed to treat other men’s daughters the way he wanted other men to treat his daughter. I think the profession has continued to make strides in recognizing women’s contributions since then.

ATT: You have been both a vice chair and council director in the Tax Section. How did you first get involved?

EA: As I recall, I started in order to keep in touch with people who had been in Treasury’s Office of Tax Policy. I continued because of the quality of the programs, the ability it gave me to keep in touch with practitioners, and the fact that so many tax professors are involved as well. Because tax profs are able to see so many other professors quite often at the meetings, I think we are closer than law profs in other fields.

ATT: Any significant mentors/influences in the profession?

EA: Well, I met my husband, now retired, through the Tax Section of the County Bar. One of my stepsons is a tax partner in a large NY firm. There were lots of tax jokes at our wedding. So you never know just what benefits you will reap from involvement in professional activities!

ATT: With various aspects of education upended by the COVID-19 pandemic, do you, as a law professor, foresee any significant impacts to legal education?

EA: I think having a significant amount of teaching online is here to stay, even if/when we go back to the classroom (which, of course, I miss). I am working hard right now to follow best online practices. That means having available a lot of asynchronous material such as recording short, narrated PowerPoints for students to watch prior to class; writing self-assessment quizzes; finding helpful videos that students might enjoy; etc. Class time can then be used to dig into problems, what some describe as a flipped classroom. I didn’t teach last spring, so I will have to see how teaching online and having Zoom for class goes.

ATT: You’ve had significant influence on the development of non-profit taxation, which has been a large focus of your academic writings. What excites/concerns you most about the next few years of developments in this area?

EA: We, including the nonprofit sector, all need to pay attention to equity and inclusion issues—far more than, to our shame, we have up to now. For charitable-giving issues, use of non-c(3) vehicles—such as LLCs; c(4)s; crowdfunding for causes without forming a (c)(3)—are likely to demand attention at both the state and federal levels. The extent to which nonprofits are permitted to engage in political activity—both lobbying and campaign intervention—will, I think, continue to be an issue.
TT: When you’re not busy thinking about tax, what do you do to unwind? How important is it to maintain balance for mental health?

EA: Well, theater and the symphony used to play a big part in my life pre-COVID—it is very odd to have a summer without the Hollywood Bowl. Like a number of my fellow tax lawyers (I know because friends I have made at the Tax Section share recommendations), I am a voracious reader of mysteries. I am especially fond of mysteries from a different time or place. For example, I have enjoyed the Anne Cleeves “Shetland” series and Peter Tremayne’s “Sister Fidelma” series where the protagonist is a lawyer in seventh century Ireland.

TT: Do you have a favorite depiction of a lawyer in a movie or book?

EA: I can say that when “LA Law” was big, I received many comments on student evaluation forms saying that I needed to dress the way the women who were lawyers on that show did!
PRACTICE POINT

Employment Classification in an App-Based Nation

By Jennifer D. Thayer, Amye M. Melton, and David R. Grimmett, Austin Peay State University, Clarksville, TN

I. Introduction

The hundred-year-old term ‘gig’ has had a recent resurgence describing a quasi-new economy. The so-called “gig economy” is the aggregate of markets in which workers providing services work on a job-to-job basis: they are not considered an employee of the company that owns the app but are instead classified as independent contractors. The IRS uses the general rule “that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done.” The gig worker must be willing to participate as a temporary, contract or freelance worker. Zero-hour contracts and forced self-employment are other gig-economy characteristics. In a Mavenlink market study of 300 executives, 79% considered the gig worker key to the on-demand workforce used to establish a competitive advantage.

The 2020 COVID-19 economic uncertainty will likely make contract employees even more attractive to owners and managers. Managers constantly seek ways to cut costs and labor is typically on the short list. The flexibility of gig workers makes them especially attractive to multi-state organizations. Contract workers generally cost businesses less in payroll taxes and benefits, since independent contractors obtain none of the labor law benefits and must assume work-related costs as well as insurance, taxes, and retirement. Classification as independent contractors can be beneficial to both workers and businesses, but misclassification can be harmful both to the individual worker and in creating an unfair competitive advantage for the business over competitors that properly classify similar workers as employees. As positions are created or vacated during the pandemic, managers may choose to hire independent contractors at least until markets stabilize.

4 A. Werner & M. Lim, A new living contract: Cases in the implementation of the living wage by British SME retailers, 29 EMPLOYER RELATIONS 850 (2017).
Nonetheless, employment classification is changing, and managers can no longer rely solely on federal labor laws to determine classification. The IRS has moved to a stricter standard, and since 2018 states have begun implementing stricter labor law employment classification standards that are intended to provide better protection to workers and to ensure that companies pay their fair share of payroll taxes. A significant factor in this change is the Uber ruling which set a precedence of state law differing from federal law. The differences can impact multistate organizations and how they classify workers, so both workers and companies need to be aware of the legal ramifications.

II. Worker Classification Tests

Technology advancements have created the opportunities for increasing the number of gig workers. Technology apps allow gig workers to be on the move, no longer relegated to one location or even one employer. App-based employment has thus contributed to the growth of the gig economy. As the use of app-based workers becomes more popular, companies will need to clearly identify the difference between an independent contractor and an employee—i.e., determining what defines someone as an employee or as an independent contractor, freelancer or temporary employee. The IRS, court cases, and state laws have attempted to answer these questions, with sometimes conflicting results.

A. The IRS Three-Pronged Test

In 2020, the IRS added a webpage called the Gig Economy Tax Center to assist gig workers and gig employers to answer these questions. In addition, IRS Publication 15-A is a 2020 supplement to the agency’s “Employer’s Tax Guide” that includes guidance to assist employers in determining the status of their workers. The federal determination is significant, since employers are required to withhold federal income taxes, withhold and pay over Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. In contrast, businesses generally do not have to withhold or pay over any federal taxes on payments to independent contractors. That distinction is one of the reasons that gig employers want to claim that their workers are independent contractors rather than employees—the savings on thousands of workers across the country is a significant addition to the companies’ bottom line (and a cost to the workers).

Section 2 of the publication, titled “Employee or Independent Contractor,” sets out the key differences between those two worker categories and provides illustrative examples from various occupations. The publication sets out three “categories” of facts (sometimes called a ‘three-pronged test”) that provide evidence of the degree of control that the employer has as compared to the independence of the worker. The three categories are behavioral control (“whether the business has a right to direct and control how the worker does the task for which the worker is hired”), financial control (“whether the business has a right to control the business aspects of the worker’s job”) and type of relationship (shown by written contracts, benefits, permanency and whether those worker services are a key aspect...
of the company’s regular business activity). Examples provided cover building and construction, trucking, computer programming, automobile sales and repairs, legal services, taxicab drivers, and salespersons.

**B. The Common Law Test**

Prior to the development of the three-pronged test outlined above, the IRS used a 20-factor test to classify workers as independent contractors or employees. Its switch to the current “three-pronged test” aligned with common law rules. The terms ‘three-pronged test’ and ‘common law test’ are often used interchangeably. This test is applied in 16 states: AL, AZ, DC, FL, IA, KY, MI, MN, MO, MS, NC, ND, NY, SC, SD, TX.

As noted from the IRS publication, behavioral control, financial control, and the relationship between the parties are the three categories examined under the common-law rules. Behavioral control analyzes the level of control the employer has on directing and determining how the worker does the task. Controlling the worker’s performance includes instructions given to the worker; training provided to the worker; direction on when and where to do the work; tools to use; where to purchase supplies or services to complete the work; and the order in which the work must be completed.

Financial control considers the level of control the employer has over the economic aspects of the business by looking at items such as whether the worker has unreimbursed business expenses; if the worker has an investment in the facilities or tools being used; if the worker can pursue and complete other work in the relevant market; and if the worker can realize a profit or loss.

When examining the relationship under the third category, it is less likely an independent contractor relationship exists if the business provides the worker with employee-type benefits, such as paid sick and vacation days, insurance, or a retirement plan.

A recent Tax Court case, **Donald T. and Marlene B. Robinson v. Comm’r** (affirmed in a 2012 non-precedential opinion by the Court of Appeals for the Third Circuit), considered the question of employee or independent contractor in the case of a vocational instructor for Temple University, which treated him as an employee for tax purposes during the years at issue. Donald T. Robinson was employed as a full-time professor at Rowan University, but he also taught classes and created a curriculum for training programs provided at Temple under a contract with the state. Temple managed the enrollment in the classes, provided classroom space, and paid Robinson an hourly rate for teaching and flat rate for development of the curriculum as instructed, so Robinson had no risk of loss or opportunity for a profit in excess of his agreed-upon compensation. Robinson reported his income as an independent contractor. Using the three-pronged test, the IRS concluded Robinson was an adjunct professor and, as such, classified him as an employee as opposed to an independent contractor.

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C. The ABC Test

A slightly different ABC test applies in 27 states: AK, AR, CA, CT, DE, GA, HI, IL, IN, KS, LA, MA, MD, ME, NE, NH, NJ, NM, NV, OH, OR, RI, TN, UT, VT, WA, WV. It places the burden of proof on the employer. Under the ABC test, the default classification of a worker is as an employee. A worker is treated as an independent contractor only if the worker satisfies each of the following factors: (a) the worker has complete control regarding work performance both by contract and in fact; (b) the work is performed outside the usual course of the hiring entity’s business; and (c) the worker has an independent business that customarily conducts the type of work being contracted. The ABC test is thus considered the most stringent of the tests for qualifying a worker as an independent contractor, which may explain why many states have adopted it.

The California Supreme Court provided a landmark decision in the Dynamex case in 2018 when it concluded that the ABC test should be applied when determining whether workers should be classified as employees or independent contractors for purposes of California wage orders that apply obligations relating to minimum wages, maximum hours, and certain limited basic working conditions such as meal and rest breaks for California employees. The case involved delivery drivers who alleged that the national package and document delivery company had inappropriately misclassified its delivery drivers as independent contractors, though it had classified them as employees prior to 2004. The court considered the “suffer or permit to work” definition of employee in the California wage order and applied the ABC test as the standard for distinguishing employees from independent contractors, noting that the worker will be classified as an employee unless the hiring entity can establish each of the three required factors.

This [ABC] standard, whose objective is to create a simpler, clearer test for determining whether the worker is an employee or an independent contractor, presumes a worker hired by an entity is an employee and places the burden on the hirer to establish that the worker is an independent contractor.

Additionally, the court suggested the second and third factors may be examined first, before the “free from control” factor because the “outside the usual course of business” factor and the “engaged in an independently established trade” factor may be easier to determine.

Since the ruling in the Dynamex case, California Assembly Bill 5 was enacted in September 2019 and became effective January 1, 2020. AB5 codified and extended the ABC test to all wage and hour Labor Code violations, unemployment insurance, and workers’ compensation. Its enactment forces app-based companies such as Uber and Lyft to treat workers as employees under California law. The list of exemptions to Assembly Bill 5 make it apparent that the bill was passed with app-based businesses at the forefront of considerations.

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9 Jean Murray, What is the ABA Test? Definition & Examples of the ABA Test (Aug. 2, 2020) (a blog produced by the balance small business.com).
10 Dynamex Operations West, Inc. v. Superior Court of Los Angeles County, 4 Cal. 5th 903 (2018).
11 Id. at 57.
12 See Pub. Util. Comm’n of the State of Cal., Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and new Online-Enabled Transportation Services, Rulemaking 12-12-011 (June 9, 2020); Eric J. Savitz, California Orders Uber and Lyft to Treat Drivers as Employees, BARRON’S.COM (June 11, 2020) (reporting on the California PUC ruling ordering ride-sharing services Uber and Lyft to treat drivers as employees).
With *Dynamex* and the codification (and expansion) of the ABC test for independent contractor status in California, California businesses that treat some workers as independent contractors may need to review their relationship under the ABC test to determine whether there is a need to reclassify those workers as employees. While this only directly affects California businesses, other states may well follow suit, including New Jersey, Oregon, Washington and New York. In late 2019, New Jersey’s Department of Labor and Workforce Development demanded Uber pay back taxes and interest for $649 million on unpaid unemployment and disability insurance from the misclassification of its drivers over a four-year period. The Massachusetts legislature had earlier passed a statute adopting the ABC test to clarify the classification status of employees versus independent contractors.

SB Nation, a sports broadcasting company owned by Vox Media, announced plans to terminate the contracts of its independent contractors with the passage of Assembly Bill 5 and re-staff with full-time employees. Other app-run businesses like Postmates are refusing to comply with the new California law. Part C of the ABC test is the most contentious, since it requires the worker to be engaged in an independently established trade, occupation, or business of the same nature as the work performed for the business at issue. Consider a person who signs up to be an Uber driver who likely did not have an established business as a driver before signing up with Uber. This factor clearly limits the ability of Uber to treat the driver as an independent contractor in California even though they can likely do so in Arizona. Uber, Lyft and other large gig companies are pushing back in these states by working with lawmakers and labor unions with the hope to gain some type of exception or new class of worker. California has a vote coming up in November that would exclude app-based drivers from Assembly Bill 5. The gig companies are also filing lawsuits to challenge these types of state laws in federal court.

**D. The A&C Variant of the ABC Test**

Another 8 states—CO, ID, MT, OK, PA, VA, WI, WY—have chosen to use a modified version of the ABC test. Parts A and C remain the same, but Part B is disregarded. Where the work takes place is no longer a consideration. Multistate organizations may find these states friendlier for their operations. In these states, the worker would be classified as an independent contractor under these terms:

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16 Id.


California Assembly Bill 5 was enacted in September 2019 and became effective January 1, 2020. AB5 codified and extended the ABC test to all wage and hour Labor Code violations, unemployment insurance, and workers’ compensation. Its enactment forces app-based companies such as Uber and Lyft to treat workers as employees under California law.
• the worker has control or could set the direction in connection with the completion of the service, and
• the individual conducts an independent business of similar work.

III. Practice Points for Business Owners

A. For Senior Level Executives

Executives will need to understand the differences in employment classification standards when considering whether to continue or open businesses in various locations. Organizations with business strategies dependent on contract employees may want to avoid states that go beyond the IRS's common law test. On the other hand, it may be preferable to recognize the high cost to Uber in New Jersey: companies may choose to withhold payroll taxes and pay unemployment and disability insurance as they go to avoid paying penalties and taxes later. This choice also may provide a more stable workforce, as employees earn enough to remain in the position.

B. For Management and Human Resources Practitioners

Those responsible for human resource policies will need to pay special attention to state statutes and cases outlining worker classification requirements. State law governs classification more than federal guidelines. If the state allows independent contractor classification for app-based workers, then practitioners should be prepared to issue a 1099-MISC to these workers for amounts of $600 or more paid to them. On the other hand, businesses must ensure that appropriate payroll taxes are remitted to state and federal governments for W-2 workers.

To assist practitioners in appropriately categorizing workers, the following map reflects state use of the ABC or Common Law test.
C. Considerations for Management, Human Resources, and Accounting Practitioners

An organization without a high-risk tolerance for litigation will want to err on the side that benefits the worker. If your organization chooses to continue the practice of hiring independent contractors, it would be prudent to ensure at a minimum that the worker has a business license. The business license will provide some evidence of the existence of an independent established business. Other recommendations include ensuring that such workers have a home office, set their own hours, have some opportunity for earning a profit or incurring losses because of their investment, and maintain the ability to compete.

Two businesses providing the same service can have different tax obligations. For example, a company with more independent contractors will gain a competitive advantage over a similar business that treats its workers as employees because of lower taxes, resulting in a higher bottom line. The higher bottom line is the main reason that managers prefer to use independent contractors. An example of the different tax obligations can be found in Figure 1, which shows a $10,000 difference on $60,000 of compensation. States that are addressing the issue are attempting to even the playing field among businesses, protect workers, and generate state tax revenues.

Figure 1

<table>
<thead>
<tr>
<th>Employer/Employee Scenario</th>
<th>Independent Contractor Scenario</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Owner/Employer</strong></td>
<td><strong>Owner</strong></td>
</tr>
<tr>
<td>Compensation Paid(^1)</td>
<td>$ 60,000</td>
</tr>
<tr>
<td>FICA Taxes(^2)</td>
<td>$ 4,590</td>
</tr>
<tr>
<td>FUTA Tax(^3)</td>
<td>$ 420</td>
</tr>
<tr>
<td>Employer Portion - Avg Health Ins(^4)</td>
<td>$ 5,477</td>
</tr>
<tr>
<td><strong>Cost in Tax &amp; Benefits</strong></td>
<td>$ 10,487</td>
</tr>
<tr>
<td><strong>Total Employer Costs</strong></td>
<td>$ 70,487</td>
</tr>
</tbody>
</table>

In the employer/employee scenario, the total cost of one employee to the employer is $70,487. The employer has total payroll taxes of $5,010. The cost to the employer of additional benefits (health insurance) is $5,477. In the Independent Contractor Scenario, the business owner would not have any tax or benefits costs so the only cost to the business owner would be the $60,000 for the contract.

1. November 2017 average weekly salary for Professional and Business Services is $1,150.51. Based on a 52 work-week year, this rounds to an annual salary of $60,000.
2. FICA taxes are 7.65% for both the employee and employer. This includes a 6.2% Social Security tax and a 1.45% Medicare tax.
3. FUTA tax is the employer responsibility on the first $7,000 of each employees' wages.
4. Average health insurance is based on information provided by the Department of Health and Human Services.

A multi-state corporation will need to consider how its workers will be treated in each state. If the company is in California and Arizona, it would use two different rules to assign employment classification status since California uses the strict ABC test and Arizona uses the Common Law test.

IV. Conclusion

Research is replete with information about changing workplaces and the unclear lines separating employment classifications. So long as the states and the federal government lack a universal standard...
for worker classification, uncertainty will persist. The likely push to hire more contractors when businesses rehire following the pandemic may cause a resurgence of the gig economy and the independent contractor classification of its workers, with lasting effects on the labor market, workers, competition, and the overall economy. The classification controversy at this point is focused primarily on app-based businesses. Because of the workers’ interests and states’ need for increased revenues following the revenue losses during the pandemic, it is possible that states will generally decide to expand the use of the ABC test to treat more workers as employees. ■
**PRACTICE POINT**

**May Tax Evasion Be Charged as a Money Laundering Offense? The Times Are A-Changing**

By **Ian M. Comisky**, Chair of International Compliance, Fox Rothschild LLP, Philadelphia, PA

Tax evasion has never been a predicate offense for a money laundering charge in the United States. The government, however, has employed mail and wire fraud offenses to charge money laundering arising out of a tax crime. This article reviews the basics of U.S. money laundering laws, the use of mail and wire fraud crimes to transform tax offenses into money laundering, and recent developments worthy of discussion.

The basic U.S. money laundering laws are contained in Title 18 of the U.S. Code: section 1956 (laundering of monetary instruments, referred to herein as the primary money laundering statute) and section 1957 (engaging in monetary transactions in property derived from specified unlawful activity). The primary money laundering statute involves one who engages in a financial transaction knowing that the property represents the proceeds of some form of unlawful activity, which, in turn, involves the proceeds of a specified unlawful activity (SUA) with certain types of knowledge or intent. There is a tax intent money laundering provision contained within the primary money laundering statute, but the defendant must engage in a transaction with SUA proceeds (taxes are not an SUA), and then engage in conduct that violates one of the two primary U.S. criminal tax provisions. Historically, the government would encounter a defendant who engaged in a different type of illegal activity (e.g., securities fraud, which is an SUA) and then later transferred the proceeds from that activity in a way that evaded taxes with those proceeds. In those circumstances, a tax intent money laundering offense could be charged.

There are two other provisions of the primary money laundering statute where money is represented to be from illegal activity: one involving what is known as international money laundering and a “sting provision.” Noteworthy, the international money laundering provision does not require the use of proceeds from a prior offense but only the transfer of funds with an intent to promote an SUA. A violation of the money laundering

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1 Ian Comisky is co-author of Tax Fraud and Evasion (WGL 2020 Supp.) and an adjunct professor teaching money laundering at the University of Pennsylvania Carey Law School. This article reflects his views and is not attributable to his firm.
4 See, e.g., United States v. Zanghi, 189 F.3d 71 (1st Cir. 1999) (money purported to be “loan repayments” were not reported on a tax return).
statute is a twenty-year felony and permits forfeiture of property involved in or representing the proceeds of the offense.\(^7\)

For purposes of this discussion, the statute references SUAs that are defined by way of a combination of predicate offenses listed in the money laundering statute itself and offenses listed in the Racketeering Influenced and Corrupt Organizations Act (RICO).\(^8\) Despite there being well over two hundred and fifty SUAs,\(^9\) what is notable is what is absent: any violation of the Internal Revenue laws dealing with tax offenses. Although a tax offense is not a direct predicate for money laundering, both mail fraud and wire fraud are listed as SUAs.\(^10\) Because the use of the mails or the use of the wires is likely to occur in connection with the filing of a tax return, tax evasion could, in theory, create a mail or wire fraud violation that is itself a predicate for a violation of the money laundering laws.

There are two federal appellate cases, one in the Eleventh Circuit and one from the Third Circuit, that arrived at different results on this issue. The Eleventh Circuit \textit{Maali/Khanani} case arose out of the employment of undocumented aliens at retail stores in Florida.\(^11\) The government charged the defendants with participating in a conspiracy to violate the money laundering laws based on a theory that the defendants engaged in mail and wire fraud, and the harboring of illegal aliens, all of which were SUAs. The government contended that the tax savings of paying illegal aliens “off the books” constituted the proceeds of the offense and that the use of the proceeds served to conceal and promote the illegal employment scheme.

The district court in \textit{Maali} defined “proceeds” as “the amount of money received from a sale” or “the sum, amount, or value of property sold or converted into money or into other property”—i.e., as “something which is obtained in exchange for the sale of something else as in, most typically, when one sells a good in exchange for money.” The court thus rejected the government’s cost-savings theory, holding that the term “proceeds” did not contemplate profits or revenue indirectly derived from the use of labor or from the failure to remit taxes.\(^12\)

The Eleventh Circuit affirmed the dismissal, quoting the district court opinion to hold that one could not equate retail sales revenue with “proceeds” under the theory that the revenues were illegally obtained by using illegal workers and filing false employment tax returns as follows:

\[
\text{It is clear that the term \text{[proceeds]} does not contemplate profits or revenue indirectly derived from labor or the failure to remit taxes. While it is natural and clearly correct to say that Defendants received \text{“proceeds”} from the sale of jeans, it is, by contrast both causally tenuous and decidedly unnatural to say that the moneys one has received from the sale of a good are not the \text{“proceeds”} from the sale of a good, but \text{“proceeds”} of the labor used to produce the good.}\]

The Third Circuit reached a different conclusion in the *Yusuf* case.\(^{14}\) The principals of a Virgin Islands supermarket chain were charged with mail fraud as the predicate activity to support international money laundering charges. The trial court followed *Maali/Khanani* in holding that there were no proceeds. The circuit court disagreed, relying in significant part on its prior *Morelli* decision in which it held that the money wired in a daisy chain excise tax fraud scheme constituted proceeds for wire fraud purposes based upon the ongoing nature of the entire scheme.\(^{15}\) Drawing on the Supreme Court decision in *Santos*, its own decision in *Morelli*, and two other precedents, the *Yusuf* court held that unpaid taxes, “which are unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail, constitute ‘proceeds’ of mail fraud for purposes of supporting a charge of federal money laundering.”\(^{16}\) The court, therefore, reversed the district court’s dismissal of the money laundering charges.

It is but a small step from permitting a charge based upon territorial taxes to permitting a charge based on domestic income taxes, with the mail fraud or wire fraud statute as a basis to support a money laundering offense. Nonetheless, there was very little development in this area for a number of years.

In 2004, however, the Justice Department Tax Division became concerned about the use of tax offenses as a predicate for money laundering, resulting in a series of directives, beginning with Directive No. 128.\(^{17}\) This Directive noted that Tax Division approval was required prior to prosecution if the conduct arose under the Internal Revenue laws, regardless of the statute used. While not providing any binding rights to a defendant, it provided guidance on charging mail fraud, wire fraud, or bank fraud, alone or as a predicate for a RICO or money laundering charge. The Tax Division would approve mail fraud, wire fraud, or bank fraud charges if there was a “large loss or substantial pattern of conduct and there is significant benefit to bringing charges instead of or in addition to Title 26 violations” or “if there is a significant benefit at the charging stage ... at trial ... or at sentencing.”\(^{18}\) An example noted that a mail fraud or wire fraud charge could be appropriate if there are multiple fraudulent returns or if the target promoted a fraudulent tax shelter. The Directive specifically stated that these types of charges cannot be used “to convert routine tax prosecutions into RICO or money laundering cases” and that approval of the Tax Division and, if necessary, the Criminal Division's Asset Forfeiture and Money Laundering Section would be required.\(^{19}\)

This policy was further highlighted by Directive No. 145, effective January 30, 2014, which restated the Tax Division’s supervisory authority over criminal proceedings arising under the Internal Revenue laws and all related civil forfeiture actions.\(^{20}\) Although reaffirming that the Tax Division policy does not provide substantive rights, the Directive contains an explicit statement in a footnote limiting the use of these provisions for routine tax cases:

> The forfeiture laws should not be used to seize and forfeit personal property such as wages, salaries and compensation for services rendered that is lawfully earned and whose only relationship to criminal conduct is the unpaid tax due and owing on the income. Title 18 fraud statutes such as wire fraud and mail fraud cannot be used to convert a traditional Title

\(^{14}\) *United States v. Yusuf*, 536 F.3d 178 (3d Cir. 2008).

\(^{15}\) *United States v. Morelli*, 169 F.3d 798, 806- 807 (3d Cir. 1999).

\(^{16}\) *United States v. Yusuf*, 536 F.3d, at 189.


\(^{18}\) Id.

\(^{19}\) Id.

\(^{20}\) Tax Division Directive No. 145.
26 legal-source income case into a fraud case even if the IRS is deemed to be a victim of the tax fraud.\footnote{Id. at 3, n.4.}

The Justice Department’s Manual contains a similar provision.\footnote{Justice Manual Title 6-4.210.}

As noted, there had been few cases that considered the use of mail or wire fraud to charge tax violations in a criminal case. At the end of 2019, however, the government brought an indictment where the lead defendant, Ramses Owens, worked at the Mossack Fonseca law firm that created foundations and trusts at the center of the so-called Panama Papers.\footnote{United States v. Ramses Owens, 1:18-cr-00693-rmb (S.D.N.Y.)} The indictment alleged that Ramses Owens assisted clients, including U.S. taxpayers, in setting up sham foundations and bank accounts in countries with strict secrecy laws and assisted in the repatriation of funds to keep undeclared bank accounts concealed. The indictment and a superseding indictment charged the principals not only with a conspiracy to commit tax evasion, but also wire fraud that permitted one of the named defendants to conceal his assets and income generated by assets and investments from the IRS. The superseding indictment then charged a money laundering conspiracy alleging, in part, that a U.S. accountant, along with the taxpayer, attempted to transport and transfer monetary instruments out of the U.S. to or through a place in the U.S. and to a place in the U.S. through a place outside of the U.S. with intent to promote the carrying on of specified unlawful activity alleged as the wire fraud in Count 3 of the superseding indictment.\footnote{United States v. Richard Gaffey, 1:18-cr-00693-rmb (superseding indictment) (December 5, 2019).} An additional superseding indictment was eventually brought against the accountant that also contained wire fraud and money laundering conspiracy charges.\footnote{United States v. Richard Gaffey, 1:18-cr-00693-rmb (second superseding indictment) (February 11, 2020).}

On February 18, 2020, the taxpayer/defendant pleaded guilty to conspiracy to commit tax evasion, wire fraud and the international money laundering charge as well as a charge involving the failure to file foreign bank account reports (FBARs). On February 28, 2020, the accountant pleaded guilty to the tax conspiracy, wire fraud, the money laundering conspiracy, a failure to file FBARs, as well as aggravated identity theft.

Many find the indictment and pleas here troublesome, especially with respect to the U.S. taxpayer. For the taxpayer, this is simply another foreign tax evasion scheme to hide income using offshore accounts and entities. It is worth noting that the \textit{Maali/Khanani} line of authority that no proceeds are created by way of a tax offense does not specifically help the defendant. The government decided to charge a conspiracy to violate the promotion prong of the international money laundering laws rather than the domestic portion of the statute. The promotion portion of the international money laundering statute, as noted, does not require “proceeds” but simply the transportation of funds with intent to promote an SUA.

It is of concern, nonetheless, that the government has begun charging money laundering for what is nothing more than a traditional tax offense accomplished in part via wire fraud. The government certainly has sufficient statutory tools under the Internal Revenue Code for charging a conspiracy to defraud and failing to file FBARs that do not require the use of the U.S. wire fraud statute. The money laundering charges, as noted, permit the forfeiture of all property involved in or traceable to the offense\footnote{18 U.S.C. § 982.} and the advisory sentencing guidelines are more severe for money laundering than for tax offenses.\footnote{Compare U.S. Sentencing Guidelines Chapter 2, Part T, Section 1.1 (advisory tax evasion guideline) with U.S. Sentencing Guidelines Chapter 2, Part S, Section 1.1 (advisory money laundering guideline).}
When taxes are charged as money laundering, the government can obtain an order of restitution at sentencing for the amount of taxes due, plus an order of forfeiture for the amount of the funds involved in the offense.\textsuperscript{28} The IRS then has the option of seeking civil penalties for fraud of seventy-five percent of the taxes due plus interest.\textsuperscript{29} The combination of a criminal order of restitution for the tax loss with a forfeiture order, along with the possibility of a criminal fine coupled with a possible follow-on civil tax fraud proceeding, vastly increases the ultimate exposure for the offense. If Congress intended to have taxes serve as a predicate for money laundering, it could have stated so clearly in the statute but did not. It remains to be seen whether this Panama Papers case is a one-off, or whether this theory of prosecution will be used more often in the future. ■

\textsuperscript{28} For a recent decision considering the scope of the “involved in” provision, see United States v. Waked Hatum, __F.3d__, 2020 WL 4590542 (11th Cir. Aug. 11, 2020).

\textsuperscript{29} 26 U.S.C. § 6663. With respect to the FBAR violation, the government may seek a willfulness penalty that can be one-half of the balance of the accounts involved for each year involved. See 31 U.S.C. § 5321 (a)(5)(C).
PRO BONO MATTERS

Tax Pro Bono Is Easier Than You Think: Virtual Settlement Days and Tax Court Trial Sessions

By Robert Probasco, Director, Tax Dispute Resolution Clinic, Texas A&M University School of Law, and Co-Chair, Pro Bono Committee, Tax Section of the State Bar of Texas

ABA Model Rule 6.1 recommends that every lawyer provide at least 50 hours of pro bono legal services per year, an aspirational goal enthusiastically supported by most state bars. When I started practice in Dallas in 2001, however, there seemed few good opportunities to do that within tax law. I volunteered at local bar programs to do intake and took some cases, but it wasn’t tax-related. I was involved with problems like name changes or uncontested divorces or landlord-tenant disputes. I volunteered occasionally at VITA sites, but preparing simple returns didn’t take full advantage of my legal education and practical expertise.

Calendar Calls and Settlement Days

I finally found something that was more satisfying when our state bar started a Tax Court calendar call program in 2008. Volunteers show up on Monday morning—normally from state bar programs or low-income taxpayer clinics (LITCs)—for local trial sessions to help any unrepresented taxpayers who appear for trial. The tax process and Tax Court procedures are mystifying to most taxpayers, who often are not able to navigate through that complexity by themselves and can’t afford to pay someone to help them with the problem. (Even if a taxpayer could afford to pay an attorney $8,000, it wouldn’t make sense if the deficiency were only $5,000.)

What is a “calendar call”? At the beginning of the trial session, the clerk calls each case remaining on the docket. When each case is called, the parties come to the podium to inform the judge of the status of the case (whether it is ready for trial, how long a trial will likely take, preferred time, etc.) and discuss any pending motions or issues. The purpose of the calendar call is to help the judge schedule hearings and trials during the rest of the week. Instead of going to trial, the case may be continued if additional time is required for the parties to prepare for trial or to allow the parties additional time to seek settlement. Alternatively, the case might be dismissed if the taxpayer has not responded to the IRS or shown up at court.

The tax process and Tax Court procedures are mystifying to most taxpayers, who often are not able to navigate through that complexity by themselves and can’t afford to pay someone to help them with the problem.
During the calendar call, the judge offers unrepresented taxpayers an opportunity to meet with a pro bono volunteer. If the taxpayer wishes to do that, often the IRS attorney first meets briefly with the taxpayer and the volunteer to present her understanding of the status of the case and the issues involved. Because the volunteer usually has not entered an appearance or obtained a power of attorney from the taxpayer, the IRS cannot directly share information with the volunteer about the case without the taxpayer’s consent. Frequently, the IRS attorneys bring copies of petitions and/or a pretrial memoranda to court and provide copies to the taxpayers, who can in turn give the copies to the volunteers. Of course, taxpayers also often bring documents relevant to their cases to court.

After an initial meeting with the IRS attorney, the taxpayer and the volunteer meet privately. Volunteers can:

- review the notice of deficiency or court documents (including pending motions and pretrial memoranda) and explain them or answer questions;
- get additional information from the taxpayers and evaluate their cases;
- facilitate discussions by the taxpayers with the IRS attorney;
- help the taxpayers evaluate any settlement proposals from the IRS;
- explain the trial process and court procedures; and
- give taxpayers advice on how to prepare for and conduct a trial.

Volunteers can, if they choose, enter an appearance (or limited appearance) in the case in order to discuss the status of the case with the judge, address a pending motion, request a continuance, or undertake other similar duties of a representative. Sometimes they may even continue representing the taxpayer through trial. Volunteers are not required to enter an appearance, however, and they usually do not. Often, the volunteer’s commitment ends when the calendar call ends, before any hearings or trials.

A few years after our calendar call program was instituted in Texas, we also started working with IRS Counsel on “settlement days.” For those not familiar with them, these are a collaborative effort between the IRS, LITCs, and state bar calendar call programs. They replicate the same type of process as at calendar calls but do it a month or more in advance of the trial session and at a location other than the courthouse. In fact, ours in Dallas were held at a local LITC. It’s a more relaxed, leisurely, and convenient way to accomplish the same things. Even if the parties don’t settle that day, it often starts the process and may lead to settlement before the trial session. You can find additional background information on settlement days in Frank DiPietro’s article “Evolution of Settlement Days” in the Winter 2020 issue of Tax Times.

Both of these are great opportunities to help taxpayers. Even though volunteers may be arguing against the IRS position in a case, both the court and the IRS appreciate the volunteer efforts. They want to get to the right result, whether for or against the government, and participation by volunteers helps make that process work better than it would if most taxpayers tried to represent themselves. So, get involved—you’ll be glad you did.

How Are Calendar Calls and Settlement Days Changing?

The COVID-19 pandemic has changed much of our daily lives, and tax resolution is no different. No one is eager to participate in a large in-person gathering if alternatives are available. Both the IRS (for settlement days) and the Tax Court (for trial sessions/calendar calls) are moving to virtual platforms during
the pandemic. Virtual settlement days will be held using either Zoomgov or Cisco WebEx; Tax Court trial sessions/calendar calls will be held using Zoomgov.

The fundamentals of the calendar call or settlement day are still the same—pro bono volunteers assist unrepresented taxpayers in resolving their cases or preparing for trial. The pandemic merely changed the surrounding environment of how, when, and where that takes place. As you might anticipate, these logistical changes can't always overcome the inherent limitations of virtual meetings, but they can provide other advantages. The biggest advantage is probably the flexibility a virtual meeting offers.

Even though volunteers may be arguing against the IRS position in a case, both the court and the IRS appreciate the volunteer efforts. They want to get to the right result, whether for or against the government, and participation by volunteers helps make that process work better.

The biggest limitation is probably the relative difficulty of sharing documents through a virtual platform rather than in person. It's very easy to flip through a physical document that the taxpayer or the IRS attorney has brought to the calendar call or settlement day. It's possible to do that as well through videoconferencing, but it can be somewhat awkward for those unfamiliar with the platform's tools. It may also be difficult to do for some unsophisticated taxpayers or effectively impossible if they only have physical documents rather than electronic versions that can be shared during a video conference. The pandemic and inability to meet in person creates that limitation, and unfortunately the virtual platforms cannot entirely erase it.

Questions or Concerns? Here Are Some Answers.

Doesn't this take a lot of time?

It really doesn't, unless you decide to enter an appearance and represent the taxpayer for the duration of the case. Often, it's just a 2- to 4-hour commitment per trial session or settlement day at which you volunteer. In fact, it can take significantly less time than in-person trial sessions or settlement days. For one thing, there is no travel time to get to the courtroom or the site of the settlement day. You volunteer from your home or office.

The calendar call will take place during the work week. But sometimes settlement days will take place at least partly during the weekend; even if they take place during the work week, you generally can schedule appointments ahead of time and only be there for the specific taxpayer(s) you agree to help. That flexibility makes it easier to limit your time commitment and also to fit it around other work commitments.

How do virtual trial sessions or settlement days work?

The Tax Court has a page on its website about Zoomgov proceedings, with FAQs and illustrative videos. It should give you a good feel for the process before you start. The IRS doesn't have as elaborate a resource yet, but the Office of Chief Counsel is coordinating efforts to ensure a quality program. Those virtual settlement days likely will have a lot of similarities to the Tax Court's explanations of its process.

Within that infrastructure, much has not changed. Counseling a taxpayer is an informal process. There are no set guidelines or requirements concerning how you conduct that discussion.
I would be willing to volunteer but there are no Tax Court trial sessions or settlement days where I live.

This is the most significant advantage of going virtual. Location doesn't matter—it's as close as your computer. Recently in Texas, Houston attorneys assisted taxpayers at a settlement day for Dallas and Dallas attorneys assisted taxpayers at a settlement day for Houston. We even had a volunteer from D.C. who is still a member of the Texas bar! Next month, Texas attorneys will be helping at a Las Vegas settlement day. If you have a computer, camera or webcam, and good Internet connection, you can volunteer anywhere.

But I'm not a tax controversy attorney or am very early in my career. I'm not sure I can advise taxpayers effectively about their Tax Court cases!

That's an understandable concern, but for several reasons it shouldn't keep you from volunteering.

You may not be highly experienced at Tax Court litigation, but you already have many of the skills or the knowledge necessary to help these taxpayers. Consider the list above of what a volunteer does at a calendar call or settlement day. Taxpayers may not be able to interpret IRS correspondence or a notice of deficiency effectively and understand what the IRS is saying. But you're used to reading similar documents and will find it easy to understand and explain. You have experience with interviewing clients to get information and—after understanding what the issues are—will have an idea of what information you need. As a lawyer, one of your foremost skills is communicating effectively with clients and that will enable you to act as a “translator” to help the taxpayer and the IRS attorney discuss the status of the case.

Also, cases brought by unrepresented taxpayers tend not to involve the most complex issues of tax law. If the IRS disallowed itemized deductions or Schedule C business expenses because the taxpayer didn’t substantiate them, or the IRS received W-2s or 1099s that were not included on the return, common sense and a background in tax will give you a good idea of where to start. Legal work often is just general problem-solving, and you already have that skill.

Even for the areas where you feel least comfortable, there are online resources that can provide a quick, basic understanding before you enter the virtual meeting. For example, for Tax Court procedures, many unrepresented taxpayers may not bother looking at the “Guidance for Petitioners” on the Tax Court website or may find it confusing, but you can read it and understand it quickly. You can even browse through the court’s Rules of Practice and Procedure. The vast majority of the court’s rules won’t come up while counseling taxpayers at a trial session or settlement day, so you can focus on a few key questions you might have. The court’s illustrative videos for Zoomgov proceedings are also particularly helpful.

You may also be able to connect with an experienced participant who can be a guide and source of information, both generally and specifically with respect to some of the common issues faced by unrepresented taxpayers—earned income credit, collection due process, innocent spouse, worker classification, cancellation of debt, etc. Check with the tax section of your local bar or state bar, or a local LITC. In my experience, the tax law community is very welcoming. State bar calendar call programs often specifically encourage young attorneys to volunteer and then pair them with more experienced attorneys so that they can observe a session or two to become more comfortable before they take on counseling a taxpayer by themselves.

And if you volunteer, soon you will be one of those experienced attorney volunteers.
What if I work in-house and don’t have malpractice insurance?

I heard a quip several years ago that your chances of being sued for malpractice for pro bono services is roughly the same as your chances of being struck by lightning. That’s probably true, but you still may want the protection of malpractice insurance. It may be a problem, but there may be a solution. For example, for the calendar call program operated by the state bar of Texas, the bar provides malpractice insurance that covers all the volunteers for their participation in the program, even though most of them may already be covered by insurance through their law firm. The cost of the insurance was relatively low; you might be able to persuade your local bar or state bar to cover it in order to meet the needs of their members and promote pro bono.

Be a Volunteer!

I hope I’ve convinced you to volunteer for these pro bono programs. If so, the best place to start is probably to contact the tax section of your local or state bar or a local LITC. They may not have a program, but if not, they likely will be able to point you to someone who does. You can also reach out to someone on the ABA Section of Taxation’s Pro Bono & Tax Clinics Committee.

The Tax Court generally requires participants, through bar-sponsored programs or LITCs, to be admitted to practice before the court. (The court’s requirements for these programs are available on the court’s website.) However, it is relatively simple to apply for admission to the Tax Court bar—see here and here—and while you’re waiting, as noted above, you can probably be involved as an observer. For settlement days, the requirements may be a bit more relaxed.

Good luck! ■
IN REMEMBRANCE

In Memory of Edward D. Kleinbard

By Joseph Bankman, Ralph M. Parsons Professor of Law and Business, Stanford University, and Daniel Shaviro, Wayne Perry Professor of Taxation, New York University

Edward D. Kleinbard, one of America’s greatest lawyers in tax or any other field, died on June 28, 2020. He was 68 years old, and the cause of death was cancer. Ed’s importance to the profession, and the many roles he served with great distinction during his career—first in private practice, then in government, and finally as a law professor—merit our honoring his name here. He belonged to a category that ought to be more celebrated than it is: great lawyers who worked at great firms and also worked to improve law and society.

After graduating from Yale Law School in 1976, Kleinbard spent more than thirty years in private practice, nearly all of it at the New York office of Cleary Gottlieb Steen & Hamilton LLP. He then spent two years as the Chief of Staff at the U.S. Congress’s Joint Committee on Taxation, before moving in 2009 to USC Law School, where he held the Robert C. Packard Trustee Chair in Law.

While at Cleary Gottlieb, Ed helped develop, rationalize and explain a myriad of finance- and financial product-related tax issues. He was known as a fierce advocate for his clients, but also as a principled lawyer. He was someone who played by the rules. Without exception, his positions were upheld when challenged, and they often were incorporated into practice and regulations.

At Cleary Gottlieb, Ed also developed the core of an important comprehensive business tax reform proposal that he called the Dual BEIT—the Dual Business Enterprise Income Tax. This proposal is widely recognized as one of the most serious and promising U.S. business tax reform proposals ever formulated. Several of its main rivals were developed by such major institutions as the ALI and the Treasury Department. The Dual BEIT, by contrast, was the work of a single individual, who was also simultaneously working full-time for his many clients.

In what the New York Times obituary for Mr. Kleinbard rightly called an “unusual move for a senior corporate lawyer,” he then decided to leave private practice first to serve Congress on Capitol
Hill, and then to enter law teaching and scholarship, based on his desire to “use[] his insider’s expertise to show in particular how multinational companies avoid taxes,” and more broadly to show how taxes might be raised “as a means of combating inequality and poverty.”

Once in academia, rather than merely using the expertise that he already had, Kleinbard set out to master relevant portions of public finance and moral philosophy. His learning was informed by a sure-footed sense of how the corporate sector made tax decisions and by strong intuitions as to what was fair.

Perhaps his biggest success as an academic was to explain and document the ways in which U.S. multinationals were able to shift items of income and expense from one jurisdiction to another to reduce taxes. In many cases, income was shifted from a high tax jurisdiction (like the U.S. or Germany) to Ireland (which had a low tax) and then to an even lower tax jurisdiction. Kleinbard called these shifted profits “stateless income,” since they were ultimately attributed to tiny tax haven islands, far from where they were earned and where they would be subject to virtually no tax. The name stuck, as did his analysis of the mechanics of the process.

Kleinbard also spent much of his time as an academic documenting the growing disparity in income and wealth, explaining why he believed it was wrong, and outlining what he saw as better tax and fiscal policies. He used moral theory to inform and buttress his intuitions. He was a fan of private ownership and markets. He felt that people have a right to exploit what he called “constitutive luck”—chiefly, the genetic make-up that is part of our self-identity; but he felt we have no claim to “existential luck”—our wealth at birth, access to education, or the products of an ever-changing economic landscape.

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He was amazingly productive. In addition to his academic papers, Kleinbard wrote roughly one hundred op-eds; gave hundreds of interviews; testified at scores of hearings; and devoted countless hours to explaining the way of the tax world to reporters. All this helped to make him probably the most influential tax academic in the country.

His latest (and, alas, last) book, What’s Luck Got to Do With It?, is scheduled for publication in January 2021. Determined not to let his illness stop him, he gave the publisher a completed final draft the day before he entered the hospital for cancer treatment that proved unable to extend his life for more than a few months.

It is a source of profound sadness for us that his voice is forever stilled.
The Incompetent Authority: Questions and Answers

By Andy Howlett, Miller & Chevalier, Washington, DC; Guinevere Moore, Moore Tax Law Group, LLC, Chicago, IL; and Andrew Strelka, Latham & Watkins LLP, Washington, DC

The Incompetent Authority: Questions and Answers, provides some useful responses to your questions about the mysteries of the tax profession, including tax career, business of tax, tax ethics, and other burning tax questions. If we don’t know the answer, we know who to ask. And we hope to offer the answer with a touch of humor. Of course, the standard disclaimer applies: this column does not dispense individualized tax advice, but merely presents the considered views of the writers about tax topics of general interest to the readers.

Andy Howlett is a member at the law firm of Miller & Chevalier in Washington D.C. He focuses his practice on tax planning and helps his clients understand and plan for the federal tax consequences of a wide range of transaction. He is married with two children, all of which made sense from a tax perspective at the time.

Guinevere Moore is the Managing Member of Moore Tax Law Group, LLC in Chicago. She’s worked at big shops (both accounting and law firms) but has found true tax bliss at her four lawyer firm. She is married with four children, all of whom are still young enough to want to spend time with her. Her favorite section of the Internal Revenue Code is §7430. Obviously.

Andrew Strelka is counsel at Latham & Watkins LLP. He has worked for the IRS, the D.C. U.S. Attorney’s Office, the Department of Justice Tax Division, and the White House Counsel’s Office, and can therefore speak authoritatively on the varying definitions of what constitutes “business casual attire” in D.C.

* * *

Dear Incompetent Authority:

Clients often call asking me “can I do x?” and are anxious to get an answer right then and there. Sometimes I have a pretty good idea whether they can or not, but other times I really don’t know without further research. How do I handle this?

– On the hot seat

Dear hot seat:

There are few bright line rules in tax practice, but one of them is that you should (almost) never give a definitive answer right away. Now, there are some exceptions. If, for example, a client asks you what provision of the Internal Revenue Code contains the income tax rates, you can of course tell him or her it’s section 1 (not legal advice—Code provisions move around sometimes).

But anytime a client—or potential client—is asking you to draw a conclusion about the potential application of the law to facts? Slow your roll. If a client is asking you, it’s because he or she isn’t sure of the answer.
They need you to be, and that's how you earn your bacon. Even if you're 100-percent confident of the answer, there's typically little to be gained by giving an answer on the spot without first taking the time to check to make sure your recollection is correct, the law hasn't changed, you have all the pertinent facts, and so on.

Easier said than done, right? It's no secret that clients now more than ever are expecting rapid turnaround on their legal questions. So, instead of simply saying “I don’t know” or “Let me look into that,” here are some ways to “further the engagement” so you can do the work you need to do to get to “yes” (or “no”, as the case may be).

First, consider walking through the facts to make sure you’re not missing anything. Take notes. And once you have everything, convey that whatever Code provision is at issue is complicated (they all are, of course), and you’ll need some time to be sure how it applies to the client’s facts.

Second, if it’s a provision that you’re familiar with, it’s OK to state things to the client in general terms. “In general, the liquidation of an 80-percent owned corporate subsidiary is tax-free to both the liquidating corporation and the receiving corporation.” That's generally true. But what if the subsidiary is foreign? What if it’s insolvent? Is there a different rule for preferred stock? Consolidated groups? So you say, “Anyway, that’s the general rule. Let me dig into it to make sure that no exception applies to the facts you’ve given me.”

Third, be proactive (but reasonable) about setting a timeline to get back to the client. “I can probably run this down in a day or two” (or maybe a week or two if you’re really busy or you need to catch up on Homeland). Don’t suggest a timeline if you don’t think you can meet it, though. In some cases there are known unknowns: For example, you know there’s not much authority under section 1202, so it shouldn’t take too long. In other cases, there are unknown unknowns: you haven’t done anything with the section 704(b) regulations in a while, but you can remember that they were kind of involved. The client can always push back if the timeline doesn’t work for them. This is also a good time to ask what the client wants in terms of a deliverable: “Would you like a phone call? Short analysis in an email? Full-blown memo?”

Fourth, remember you’re in the service industry. Convey that you’re trying to help the client achieve his or her goal. “I’m not sure, to be honest; but if there’s a way to do it, I’ll find it.” Maybe there’s no way to do “it.” In most cases that’s not a call you want to make on the spot, though there are exceptions for clear cut cases. You can tell people Son-of-BOSS transactions aren’t going to work at this point, for example. But don’t tell the client they can’t file that check-the-box election without explaining what makes you sure it’s not allowed.

And of course, sometimes, even after doing all the research, the right answer isn’t clear. Maybe it depends on some fact not yet known. Or maybe the law is simply unclear, and there are arguments on both sides. In these cases, your job as an attorney is to set forth what is known as clearly as possible, and advise the client on the strengths and weaknesses of the potential approaches.

That’s definitely not something you want to be doing on the first phone call.

Want to see your questions about the mysteries of the tax profession, including tax career, business of tax, tax ethics, and other burning tax questions answered by The Incompetent Authority? Readers may submit questions anonymously for a future The Incompetent Authority column through our Submission Portal.
Dear Incompetent Authority,

In my practice, we routinely get cases referred by an accounting firm. Recently I have discovered two mistakes that the accounting firm made for two different clients. The accounting firm is the most important referral source my practice group has. In one case, the client has not asked me about these issues, and it isn’t part of what we have been engaged to handle. In the other, the client hasn’t asked why the tax is so much, but I know it is a matter of time, and the reason the tax will be so high is because the accounting firm recommended the wrong kind of structure for the sale of a business. I don’t want to bite the hand that feeds me. What do I do?

– Not Technically Conflicted

Dear Not Technically Conflicted:

It is true that you don’t have a conflict of interest between two clients, but that doesn’t mean a conflict hasn’t arisen between you and your client. ABA Model Rule 1.7 provides that a lawyer shall not represent a client if “there is a significant risk that the representation … will be materially limited by … a personal interest of the lawyer.”

Would you tell your client the absolute truth about the services performed by the accounting firm if it were not for the prospect of future referrals? ABA Model Rule 1.4 requires you to keep your client reasonably informed about the status of the matter, and to explain matters to the extent necessary to permit your client to make informed decisions regarding the representation. You can’t meet this obligation if you are withholding information that you have, but your client does not, about the quality of the accounting services that the client received.

Keep this in mind: even if your engagement limits the scope of your representation to include only representation before the IRS, if you have information about a potential malpractice claim that could be brought against the accounting firm and don’t tell the client about it, a court may later find that the client reasonably believed you were representing him or her in all tax matters, including potential malpractice against the accounting firm. A limited scope representation must be reasonable, and if you don’t tell the client what his or her rights are, especially if the statute of limitations expires on your watch without ever informing the client of the problem, you may not be successful in limiting the scope.

Taken together, your ethical obligations to tell your client the truth and to cease any representation in which your own interests are in conflict with telling your client the truth compel you to tell your client that you have identified a potential problem with past services, and ask if he or she would like a referral to a malpractice attorney to discuss it. Make sure you document the conversation and expressly state that you are not representing the client in investigating or pursuing a malpractice claim if that is true.

Hard conversations are part of our job as lawyers. The more difficult it may be for you to tell your client that the accounting firm made a mistake, the clearer the indication that you may not be able to continue the representation due to your own self-interest.
PEOPLE IN TAX PODCAST

Omeed Firouzi

In S02E23, James Creech and Omeed Firouzi discuss worker misclassification and the affect it has on both employers and employees. They also delve into what to look at when making a classification challenge, and the intersection of LITC and other areas of legal practice. Listen here.

Tim Todd

In S02E24, James Creech and Tim Todd cover topics in teaching tax taxation, and why tax is a required course for law students. Also discussed, the development of the tax law curriculum and the ever-evolving nature of tax practice. Listen here.

Marsha Dungog and Anshu Khanna

In S02E25, James Creech, Marsha Dungog, and Anshu Khanna discuss getting into international tax law, taxation challenges related to cross-border families, and international responses to the COVID-19 pandemic. Listen here.

Sam Brunson

In S02E26, James Creech and Sam Brunson discuss tax law’s broader social impacts, “God and the IRS”, and teaching tax policy. Listen here.

Jane Zhao

In S02E27, James Creech and Jane Zhao discuss her experiences in low-income tax clinics, including the benefits of the calendar call clinic program, as well as the overlap between low and high-income tax practice, and transitioning between both areas. Listen here.

Bernie Becker

In S02E28, James Creech and Bernie Becker discuss the political side of tax practice, the occasionally odd and tricky aspects of tax policy reporting, and where to find the best snacks on Capitol Hill. Listen here.

Pedro Corona

In S02E29, James Creech and Pedro Corona discuss working in both the U.S. and Mexico, the differences between the two legal systems, and the challenges and opportunities of working in both countries. Listen here.
YOUNG LAWYERS CORNER

Save the Date: 20th Annual Law Student Tax Challenge (2020-2021)

An alternative to traditional moot court competitions, the Law Student Tax Challenge asks two-person teams of students to solve a cutting-edge and complex business problem that might arise in everyday tax practice. Teams are initially evaluated on two criteria: a memorandum to a senior partner and a letter to a client explaining the result. Based on the written work product, six teams from the J.D. Division and four teams from the LL.M. Division are invited to attend the Section of Taxation 2021 Midyear Tax Meeting, where each team will defend its submission before a panel of judges representing the country’s top tax practitioners and government officials, including Tax Court judges.

The competition, sponsored by the Young Lawyers Forum, is a great way for law students to showcase their knowledge in a real-world setting and gain valuable exposure to the tax law community. On average, more than 60 teams compete in the J.D. Division and more than 40 teams compete in the LL.M. Division.

IMPORTANT DATES

Problem Release Date: September 8, 2020, released by 5pm ET

Submission Deadline: November 9, 2020, by or before 5pm ET

Semi-Finalists and Finalist Notified: December 18, 2020

Oral Round Competition & Awards: January 29, 2021

A Note on This Year’s Competition:

The LSTC Administrators are carefully monitoring the ongoing COVID-19 situation. To protect the health and safety of the LSTC participants, the Oral Defense Part of the Competition may be held virtually, via Zoom or a similar virtual platform. Further information will be provided by the LSTC Administrators well in advance of the Midyear Tax Meeting, so that each semi-finalist team can make appropriate arrangements. The LSTC Administrators reserve the right to make any accommodations or adjustments to the Competition, in its sole discretion, that it deems necessary to protect the health and safety of Competition entrants.
TAX Bits

Tax Misbehavin’

By Robert S. Steinberg, Law Offices of Robert S. Steinberg, Palmetto Bay, FL

(To the tune of Ain’t Misbehavin’ by Thomas “Fats” Waller and Andy Razaf (Fats Waller singing and playing, from Stormy Weather film, 1943); Fats Waller (piano only, 1929); Ruth Etting (from 1929 Connie’s Hot Chocolates musical); Louis Armstrong (1929); Sarah Vaughan; Billie Holiday; and many more…)

Won’t show that income
I’ve worked to earn
Honest Abe Lincoln
Would report on his return.
Tax misbehavin’
I’m bettin’ they won’t catch me.

All those instructions
I’ve read with zeal.
For huge deductions
I’ve made up that aren’t real.
Tax misbehavin’
I’m bettin’ they won’t catch me.

Self-assessing
Is a blessing
Claim what I think
Will yield red ink
No tax is what I’m aiming for
When I file.

With audit numbers
Down to the lees
IRS slumbers
And I’m taking liberties.
Tax misbehavin’
I’m bettin’ they won’t catch me.

Reprise
But should perception
Turn out a sham
From self-deception
I’ll be living on-the-lam.
Tax misbehavin’
May seem like it’s only play.
But, I’ll be behavin’
Should they catch and cart me away.
SECTION NEWS & ANNOUNCEMENTS

2020 Fall Tax Meeting Rescheduled as a Virtual Meeting

The Tax Section has rescheduled its Fall Tax Meeting for September 29 – October 2 and reconfigured it as a virtual-only event. The Virtual 2020 Fall Tax Meeting, jointly sponsored with the ABA Real Property, Trust, and Estate (RPTE) Law Section’s Trust and Estate Division, will replace the meeting previously planned to be held several days earlier in New York City.

The virtual meeting will provide in-depth CLE sessions designed to give a comprehensive overview of the latest federal, state, and local tax policies affecting your practice. The preliminary program is now available, and registration is now open.

“The Tax Section is excited to offer our Fall Tax Meeting programming in a virtual format that we expect will be very useful to every member of the tax law community,” noted Section Chair Joan Arnold. “With more than 40 CLE programs, a networking reception, and two plenary sessions, we plan to offer attendees a wealth of information and engagement over four days.”

The Virtual 2020 Fall Tax Meeting will feature a networking reception and two plenary sessions, including the tribute to Martin and Ruth Bader Ginsburg postponed from the 2020 May Tax Meeting. Another plenary session will focus on the changes to the IRS that are the outcome of the Taxpayer First Act, as well as Section awards.

Tax Section committees are also developing networking opportunities surrounding the virtual meeting dates. Details will be announced soon.
SECTION NEWS & ANNOUNCEMENTS

Identifying Future Leaders: A Message from the Chair of the Nominating Committee

By Eric Solomon, Steptoe & Johnson LLP, Washington, DC

There are many tasks which need to occur to keep the Tax Section operating effectively. One of the most important tasks is leadership succession planning by the Section’s Nominating Committee. The purpose of this message is to describe the work of the Nominating Committee and solicit your nominations for leadership positions starting in August 2021 for consideration by the Nominating Committee.

The members of each year’s Nominating Committee identify the future leaders of the Section. About one-third of the committee is selected annually by the Chair-Elect with a view to reflecting the diversity of our Section membership. To further ensure a wide range of perspectives, no more than 20% of the Nominating Committee can be current members of the Section’s leadership Council. The Nominating Committee is chaired by a past chair (me this year) with the last retiring chair serving as vice-chair (Tom Callahan this year). The chair-elect (Julie Divola this year) is the committee’s Council Director.

Each year the Nominating Committee meets at the Fall and Midyear Tax Meetings to select the nominees for five Council Director positions (for three-year terms); six Vice-Chair positions (one-year terms with a maximum of three years in total); the Secretary and Assistant Secretary (one-year terms with a maximum of two years in total); and the next Chair-Elect. Final selection of the individuals for the positions will occur at the annual meeting of the Section in August 2021.

While there are no specific criteria for any of the positions, it is generally understood that a natural progression of Section involvement starting with committee work will provide the leadership training and institutional knowledge necessary to qualify someone for the next step on the leadership ladder. In the past, the Nominating Committee has worked with lists of eligible individuals who have served in various leadership capacities which qualify them for the following step. The Nominating Committee hopes to nominate a group of individuals that reflects the diversity of our membership, including gender, ethnicity, sexual orientation, areas of technical expertise, geography and type or size of firm, all of which contribute to the overall inclusiveness of the Section.

The names of the Nominating Committee members can be found on the Section’s website here. The Nominating Committee invites you to contact any member of the Nominating Committee, including me (esolomon@steptoe.com), to identify individuals who you believe have demonstrated their commitment to the Section and its mission, and who are ready to assume greater leadership roles in the Section. If you have a serious interest in a position, please feel free to nominate yourself.

In order to be considered at the Nominating Committee meeting in connection with the virtual Fall Tax Meeting, the Nominating Committee will need to receive your nominations (with a brief statement of support) no later than close of business Tuesday, September 15, 2020. This is your opportunity to participate in determining the future leadership of the Tax Section.
SECTION NEWS & ANNOUNCEMENTS

Ginsburg Tribute Rescheduled for Virtual 2020 Fall Tax Meeting

The Virtual 2020 Fall Tax Meeting's opening plenary session will feature a tribute to former Tax Section member Martin Ginsburg and his wife U.S. Supreme Court Justice Ruth Bader Ginsburg. The tribute was inspired by the 2018 movie On the Basis of Sex, which depicts the Ginsburgs' successful representation of the petitioner in a tax case involving an unmarried man's expenses to care for his dependent mother. See Charles E. Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972) (overturning the Tax Court's decision upholding the statute to find in favor of the petitioner-appellant based on invidious discrimination). Moritz v. Commissioner was the first time any provision in the Internal Revenue Code was overturned as unconstitutional, and it spurred Ruth Bader Ginsburg's career advocating for gender equality.

The tribute was originally scheduled for the 2020 May Tax Meeting in Washington, D.C., which was cancelled due to the COVID-19 pandemic.

Martin Ginsburg was a tax lawyer who was a member of the bar in New York and in the District of Columbia. He worked in multiple law firms and taught law at New York University, Columbia University, and Georgetown University. He was a long-time member of the Tax Section and received its Distinguished Service Award (DSA) in 2006. He was also a fellow of the American College of Tax Counsel and of the American Bar Foundation. Ginsburg died in 2010.

The tribute will include selections from Ginsburg's DSA acceptance remarks, clips from On the Basis of Sex, and a recording of previous remarks from Justice Ginsburg. The Ginsburgs' son James Ginsburg will participate in the tribute.

The opening plenary session will be held Tuesday, September 29, 10:30-11:30am Eastern Time, as part of the Virtual 2020 Fall Tax Meeting. Registration for the meeting is open, at https://www.americanbar.org/events-cle/mtg/web/395461209/.
SECTION NEWS & ANNOUNCEMENTS

Careers in Tax Webinar

The ABA Tax Section hosted a free virtual program for summer associates, law clerks, law students, and young lawyers considering a career in tax law on Friday, July 24, 2020. A diverse group of members of the Tax Section and leaders in various practice areas of tax law discussed their career trajectories, provided advice, and shared their perspectives on the many paths to practice federal tax law. Prasanthi S. Paritala, Associate, Davis & Harman LLP served as the moderator for the panel. The panelists included Judge Maurice B. Foley, Chief Judge, US Tax Court, Michael J. Desmond, Chief Counsel, Internal Revenue Service, Tiffany Smith, Tax Counsel, Senate Finance Committee, Diana L. Erbsen, Partner, DLA Piper, and Alexander Kugelman, Founder, Kugelman Law P.C.

You can view the webinar recording at https://www.americanbar.org/groups/taxation/.
SECTION NEWS & ANNOUNCEMENTS

Government Submissions Boxscore

Government submissions are a key component of the Section’s government relations activities. Since May 13, 2020, the Section has coordinated the following government submissions. The full archive is available to the public on the website: https://www.americanbar.org/groups/taxation/policy/.

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The technical comments and blanket authority submissions listed in this index represent the views of the ABA Section of Taxation. They have not been approved by the ABA Board of Governors or the ABA House of Delegates and should not be construed as representing the policy of the ABA. ■
SECTION NEWS & ANNOUNCEMENTS

Accepting Applications for the 2021-2023 Christine A. Brunswick Public Service Fellowship

The American Bar Association Section of Taxation is pleased to announce that it is now accepting applications for its Christine A. Brunswick Public Service Fellowship program class of 2021-2023. Developed in 2008, the Fellowship program seeks to address the growing need for tax legal assistance and to foster a greater interest in tax-focused public service through funding and other support to young lawyers engaged in tax work for underserved communities.

The deadline for applications is November 2, 2020. Visit the Christine A. Brunswick Public Service Fellowship page for more information about the award criteria and to download the application form.

Available Now: 33rd Edition of Sales & Use Tax Deskbook

Designed for in-house tax professionals, attorneys, and accountants, this multistate resource compiles information about sales and use taxes from every state that imposes them.

Not only does the Sales & Use Deskbook set out the key principles and positions in each state (with citations to pertinent statutes, regulations, and case law), it also contains important interpretive information—gleaned from rulings, bulletins, and other local lore—that is often impossible for out-of-state practitioners to find.

Edited by Robert L. Mahon and Scott E. Sebastian, the Sales & Use Tax Deskbook draws from the long-term contributions and expertise of almost 100 members of the Tax Section's State and Local Taxes Committee.

The volume includes a CD with searchable PDFs. It is available to order in the webstore and is available at a discount for Tax Section members.

Virtual 2020 May Meeting Materials Now Online at TaxIQ

New to TaxIQ! Materials from our Virtual 2020 May Tax Meeting are now available. Materials include cutting-edge committee program materials, and contains analysis of the latest federal tax policy, initiatives, regulations, legislative forecasts, and planning ideas developed by the country’s leading tax attorneys and government officials.
The Tax Lawyer—Summer 2020 Issue Available Now

The Summer 2020 issue of The Tax Lawyer, the nation’s premier, peer-reviewed tax law journal, is available now. The Tax Lawyer is published quarterly as a service to members of the Tax Section.

Summer 2020 Issue (Click here to read or download the complete issue.)

Articles


Bridget J. Crawford and Jonathan G. Blattmachr, Basis and Bargain Sales: Income Tax and Other Concerns

Heather M. Field, Tax MACs: A Study of M&A Termination Rights Triggered by Material Adverse Changes in Tax Law

Steven J. Willis, Naked Stripping for Alimony and Child-Support Tax Benefits

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The Practical Tax Lawyer—Summer 2020 Issue Available Soon

Produced in cooperation with the Tax Section and published by ALI-CLE, The Practical Tax Lawyer offers concise, practice-oriented articles to assist lawyers with all aspects of tax practice. The articles are written by practitioners and are reviewed by an expert board of editorial advisors who are members of the Tax Section and are appointed by the Section. Published four times yearly, each issue of The Practical Tax Lawyer brings you pragmatic, nuts-and-bolts advice on how to solve your clients’ tax problems.

For more information, visit PTL's webpage: https://www.ali-cle.org/legal-periodicals/PTL.

Support the Section’s Public Service Efforts with a Contribution to the TAPS Endowment

Through the Tax Assistance Public Service (TAPS) endowment fund, the Section of Taxation provides stable, long-term funding for its tax-related public service programs. The TAPS endowment fund primarily supports the Christine A. Brunswick Public Service Fellowship program, which provides two-year fellowships for recent law school graduates to work for non-profit organizations offering tax-related legal assistance to underserved communities.

In its four-year existence, the TAPS endowment fund has supported 18 fellows. Not only have the fellows produced impressive results, but many have secured positions in the field of low-income tax assistance and continue to serve low-income communities and train a new generation of law students to provide these services. Other fellows have clerked for judges of the U.S. Tax Court who value their experiences working
with underserved taxpayers and their perspectives gained from their first-hand involvement in low-income tax issues. Fellows who practice tax law in other settings such as major law firms and the government, continue to contribute to the Tax Section by remaining active in pro bono initiatives, speaking on panels, leading committees, drafting comments, and mentoring fellows and other new lawyers. This program has been incredibly successful both in serving taxpayers who otherwise might not have representation, making systemic change in local communities and in providing a springboard to careers in low-income tax services.

Consider giving to the TAPS endowment fund today. Your generous support will help ensure that the Section can continue its mission to provide legal assistance to those in need.

For more information on how to get involved in tax pro bono assistance, please see our website or contact Meg Newman at megan.newman@americanbar.org.

Get Involved in ATT

ABA Tax Times (ATT) is looking for volunteers to join its ranks as associate editors to assist in writing and acquiring articles for publication. This opportunity is open to Section members with significant writing or publication experience, a genuine interest in helping ATT attract great content, and a willingness to commit to at least one article a year. You can find more information about our submission guidelines here. If you are interested in a regular writing and editing opportunity with ATT, contact Linda M. Beale, Supervising Editor, at lbeale@wayne.edu.
SECTION EVENTS & PROMOTIONS

Section Meeting & CLE Calendar

ABA Tax Section meetings and webinars are a great way to get connected, get educated and get the most from your membership! Join us for high-level CLE programming and the latest news and updates from Capitol Hill, the IRS, Treasury and other federal agencies.

https://www.americanbar.org/groups/taxation/events_cle/

ABA Section of Taxation CLE Products

Listen at your convenience to high-quality tax law CLE on a variety of topics. ABA CLE downloads are generally accepted in the following MCLE jurisdictions: AK, AR, CA, CO, GA, HI, IL, MS, MO, MT, NV, NM, NY, NC, ND, OK, OR, SC, TX, UT, VT, WA, WV and WI. Recordings and course materials from the following recent Tax Section webinars and more are available through the ABA Web Store.

Virtual 20th Annual U.S. and Europe Tax Practice Trends Conference

What Private Wealth Professionals Should Know about International Tax Transparency

Dealing with the Good and the Bad in Inbound Investments

DAC 6 - New Transparency Requirements in Europe

Latest Tax Developments Affecting the Structuring of Private Investment Funds

OECD Financial Transactions Report

How to Cope With International Tax Challenges Related to COVID-19

Following the Money (including digital currency) – The Current State of International Criminal Tax Enforcement

Virtual 2020 May Tax Meeting

Tax Bridge to Practice

Corporate Tax and Affiliated & Related Corporations

Tax Accounting

Closely Held Businesses

S Corporations

State & Local Taxes
SECTION EVENTS & PROMOTIONS

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ABA Section of Taxation Meetings are the premier venues for tax practitioners and government guests to connect on the latest developments in tax law and practice. Section Meetings draw up to 2,000 tax practitioners from across the U.S. and internationally. With over 150 panel discussions presented over two days by the country's leading tax attorneys, government officials, and policy makers, Section Meetings are your opportunity to maximize your organization’s visibility and build relationships with key figures in the world of tax law.

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- 1,100 members are in-house counsel
- 32% of meeting attendees represent government
- 25% come from firms of over 100 attorneys
- 23% come from firms of 1-20 attorneys

With most of our 2020 in-person meetings canceled due to COVID-19, we are also offering opportunities to sponsor upcoming webinars. For additional information on webinar sponsorships, or any of our other conferences, please visit https://www.americanbar.org/groups/taxation/sponsorship.html or contact our Sponsorship Team at taxmem@americanbar.org or at 202/662-8670.
Thank You To Our 2020 Virtual Conference Sponsors!

**Virtual 20th Annual U.S. and Europe Tax Practice Trends Conference**

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**Virtual 2020 May Tax Meeting**

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