

CC-2017-006

April 18, 2017

Subject: Communication with Limited Scope
Representatives in Docketed Tax Court
Cases

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Purpose

This Notice provides updated guidance regarding communications with pro se petitioners who are represented by counsel in some but not all aspects of a docketed Tax Court case. This Notice supplements Chief Counsel Notice CC-2014-003, Communications With Pro Se Petitioners and Form 2848 Representatives in Tax Court Litigation (May 15, 2014).

Background and Discussion

On November 30, 2015, the American Bar Association (ABA) Committee on Ethics and Professional Responsibility issued Formal Opinion 472, which provides guidance about communicating with persons who are receiving limited scope legal services. Questions have arisen as to whether this opinion necessitates any changes to Chief Counsel's policies regarding communication with pro se taxpayers in docketed Tax Court cases.

The Tax Court Rules of Practice and Procedure require that all practitioners before the court, including Chief Counsel attorneys, carry on their practice in accordance with the letter and the spirit of the ABA Model Rules of Professional Conduct. T.C. Rule 201(a). ABA Model Rule 4.2 provides that, "in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." ABA Model Rules of Professional Conduct 4.2. The prohibition in Rule 4.2 does not apply to communications about matters that are outside the scope of the representation. ABA Model Rules of Professional Conduct 4.2 comment [4]. Furthermore, the prohibition "only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed." ABA Model Rules of Professional Conduct 4.2 comment [8]. Communications with persons who are unrepresented in a matter are governed by ABA Model Rule 4.3.

ABA Formal Opinion 472 provides guidance on the application of Rule 4.2 in situations where a person is represented by an attorney in some, but not all, aspects of a matter. The opinion concludes that an attorney *must* comply with Rule 4.2 and communicate with a person's attorney when the communication concerns "an issue, decision, or action" for which that person is represented. ABA Comm. on Ethics & Professional Responsibility, Formal Op. 472 (2015) (Formal Opinion 472). When the communication concerns an aspect of the matter for which the

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person is not represented or with respect to which representation has been completed, the attorney should abide by Model Rule 4.3.¹ *Id.* If the scope of the limited representation is not clear, an attorney should contact the limited-scope representative to identify the issues or aspects of the matter with respect to which the person is represented. *Id.*

Formal Opinion 472 provides that when an attorney has *reason to know* that a person may be represented with respect to some portion of a matter, he or she should inquire about whether the person is receiving limited scope legal services. ABA Model Rule 4.2's prohibition on communicating with a represented person applies where an attorney *knows* that the person is represented in the matter. However, as discussed in both Formal Opinion 472 and Comment 8 to Rule 4.2, knowledge that a person is represented can be inferred from circumstances and an attorney cannot evade the requirements of Rule 4.2 by "closing eyes to the obvious." See ABA Model Rules of Professional Conduct 4.2 comment [8]; Formal Opinion 472. If circumstances – for example, a pleading filed by a pro se litigant that appears to have been prepared by an attorney – indicate that a person is receiving limited scope legal services, the opinion recommends asking whether the person is represented by counsel with respect to any portion of the matter.

Tax Court Rule of Practice and Procedure 24(b) defines when a person is represented in a matter in litigation before the Tax Court, stating that "[i]n the absence of an appearance by counsel, a party will be deemed to appear on the party's own behalf." A petitioner is, therefore, only considered by the Tax Court to be represented by counsel in a docketed case if that petitioner's representative has entered a formal appearance. Thus a representative who has not entered an appearance does not have the authority, for example, to bind the petitioner to a stipulation of facts or stipulated decision, or to communicate with the court on the petitioner's behalf.

Nevertheless, in light of Formal Opinion 472, Chief Counsel attorneys should communicate with a representative providing limited scope legal services when the communication concerns an issue, decision, or action that is within the scope of the limited representation. This advice applies even where the representative has not entered an appearance in the Tax Court. Where circumstances indicate that a pro se petitioner may be receiving assistance from an attorney who has not entered an appearance, Chief Counsel attorneys should ask the petitioner if he or she is represented in some or all aspects of the Tax Court case. If the petitioner states that he or she has limited representation, but the scope of the limited representation cannot be determined from the information provided by the petitioner, contact the limited scope representative for clarification.

If you have any questions about whether the circumstances of the case indicate that a petitioner is receiving limited scope legal services; about how to determine the scope of an attorney's limited representation; or about communicating with a pro se petitioner receiving limited scope legal services or an attorney providing limited scope legal services, please contact Branch 1 or 2 of Procedure and Administration. For example, please call if you are unsure whether a pleading filed in your case indicates that a petitioner is receiving limited scope legal services or

¹ Rule 4.3 provides that, in dealing with an unrepresented person, an attorney should not state or imply that he or she is a disinterested party and that, if he or she knows or reasonably should know that the unrepresented person misunderstands the attorney's role in the matter, the attorney should take steps to correct the misunderstanding. An attorney should also refrain from providing legal advice to the unrepresented person if the attorney knows or reasonably should know that the unrepresented person's interests are adverse to the interests of the attorney's client.

if a petitioner does not respond to inquiries about whether he or she is receiving limited scope legal services and you are unsure of how to proceed.

Chief Counsel attorneys are reminded that, before communicating with a petitioner's representative who has not entered an appearance, they must obtain from either the petitioner or the representative a valid Form 2848 or other valid disclosure authorization covering the tax years and tax types at issue in the docketed case. In addition, in order to provide effective service, pleadings and other documents *must* be served on the pro se petitioner, in addition to any copies that are provided to the limited scope representative. See T.C. Rule 21(a).

Please contact Branch 1 or 2 of Procedure and Administration at (202) 317-6485 and (202) 317-6844, respectively if you have any questions about dealing with a limited scope representative in a Tax Court case or about this Notice generally.

/s/

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