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May 25, 2023

Via e-mail Only:
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Ms. Harriet Miers
Chair, Texas Access to Justice Commission
Locke Lord LLP
Texas Access to Justice Commission
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RE: *Comments on Texas Access to Justice*

Ladies and Gentlemen:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed response to the October 24, 2022, request of The Supreme Court of Texas (the "Court") to the Texas Access to Justice Commission ("Commission") for comments on modifications to existing rules that would allow qualified non-attorney professionals to provide limited legal services directly to low-income Texans and also to allow non-attorneys to have economic interests in entities that provide legal services to low-income Texans. These comments address these proposals within the context of the area of tax law and tax legal representation and relate to the recommendations of the Texas Commission to Expand Civil Legal Services in its December 2016 report.

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF

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DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE TAX SECTION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSIONS OF THE TAX SECTION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE TAX SECTION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE TAX SECTION WHO PREPARED THEM.

We commend the Court for extending the opportunity to participate in this process.

Respectfully submitted,

A handwritten signature in blue ink that reads "Henry Talavera". The signature is written in a cursive style with a small flourish above the 'y' in "Talavera".

Henry Talavera, Chair
State Bar of Texas, Tax Section

Enclosure

COMMENTS ON ACCESS TO JUSTICE

These comments on Access to Justice (the “Comments”) are submitted on behalf of the Tax Section of the State Bar of Texas. Christi Mondrik, Chair of the Committee on Government Submissions and former Chair of the Tax Section, primarily drafted these Comments. Robert Probasco and Lee Meyercord, Vice-Chair of the Committee on Government Submissions, and Sara Giddings, Chair of the Solo and Small Firm Committee, reviewed these Comments and provided substantive comments. Henry Talavera, Chair of the Tax Section, reviewed the Comments and also provided substantive Comments.

Although members of the Tax Section who participated in preparing these Comments have clients who would be affected by the principles addressed by these Comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make this government submission. These are our initial comments and may be expanded by the Tax Section before the deadline in the fall of 2023. If the Court has specific questions or wants more detail, please let us know and we would be glad to address further through the Commission or through the Court as may be requested, but we felt it was important to provide a timely response to give the Court ample time to consider before finalizing any potential expansion in the area of tax. We would be glad to also dialogue further on this matter as the Court and the Commission determine is appropriate.

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BACKGROUND

These Comments are provided in response to the Court's letter dated October 24, 2022, which requested input from the Texas State Bar on modifications to existing rules proposing modifications that the Commission should consider in the following areas:

- Modifications that would allow qualified non-attorney paraprofessionals to provide limited legal services directly to low-income Texans. Among other things, the Court recommended that the Commission consider: qualifications, licensing, practice areas, and oversight of providers; eligibility criteria for clients; and whether compensation for providers should be limited to certain sources, such as government and non-profit funds.
- Modifications that would allow non-attorneys to have economic interests in entities that provide legal services to low-income Texans while preserving professional independence. The Commission should consider whether to recommend that these modifications be studied through a pilot program or regulatory sandbox and whether modifications should focus on services for which there is a particular need.

Improving access to legal services is a laudable and important goal, but there are already many non-attorneys who provide tax assistance to low-income individuals. Further, the services provided by unscrupulous tax return preparers discussed below highlight the dangers of expanding the categories of non-lawyers providing tax advice without proper regulation and oversight. If such representation is expanded, significant additional oversight and regulation by the Court would be necessary. In our experience, because of the abuses in this area who already exist, we would strongly recommend against any expansion by the Court or the Commission in the area of tax.

We are particularly concerned about expanding the potential for exploitation if non-attorneys are able to take an economic interest in entities providing services to low-income taxpayers. Providing those services for a profit and a financial return for investors increases the chances of predatory or exploitative practices. In addition, existing resources are available to help low-income taxpayers, including programs provided by the Tax Section. Therefore, allocating resources to those existing programs may be a more effective use of available funds.

NON-LAWYERS ALREADY PROVIDE TAX ASSISTANCE TO LOW-INCOME TAXPAYERS

In the area of tax practice, only lawyers may represent taxpayers before the US Tax Court or the federal district courts. However, tax is unique in that many non-lawyers already provide assistance with tax matters. For example, certified public accountants (CPAs) and enrolled agents (EAs) (either former IRS employees or individuals who have passed a three-part test on individual and business tax returns) may assist taxpayers with the preparation of their tax returns and represent taxpayers before the IRS, including in IRS audits and before the IRS Independent Office of Appeals. Even those who are not CPAs or EAs can prepare tax returns. Neither tax return preparation nor representing taxpayers before the IRS is currently considered unauthorized practice of law under Rules 5.04 and 5.05 of the Texas Disciplinary Rules of Professional Conduct

and sections 81.001 and 83.001 of the Texas Government Code. There are also programs specifically focused on providing tax return preparation assistance to low-income taxpayers, such as the VITA (Volunteer Income Tax Assistance) and Tax Counseling for the Elderly (TCE) programs. There are also low-cost online services (TurboTax and H&R Block) that provide tax-return assistance too as part of the IRS Free-File Alliance and the IRS plans a direct e-file pilot program starting in 2024. The IRS Taxpayer Advocate Service also provides free services for resolving disputes nationwide through Local Taxpayer Advocate offices, including four in Texas (Austin, Dallas, El Paso, and Houston). Therefore, there are a host of non-lawyers in various capacities who already provide free tax assistance to low-income taxpayers.

In addition to the broad spectrum of non-lawyers already assisting taxpayers with tax matters, there are also a variety of programs focused on providing legal advice from a tax lawyer to low-income taxpayers. Notably, the Texas Tax Section of the State Bar of Texas has an active pro bono program that assists unrepresented taxpayers at calendar calls and settlement days before the US Tax Court. In addition, there are many low-income taxpayer clinics offering free tax law representation to low-income taxpayers in US Tax Court cases and IRS administrative proceedings. These include the Texas Taxpayer Assistance Project of Texas RioGrande Legal Aid (covering 68 Southwest Texas counties); the Texas A&M University School of Law, Tax Dispute Resolution Clinic (Fort Worth); the Texas Tech University School of Law LITC (Lubbock); the South Texas College of Law LITC (Houston); the Houston Volunteer Lawyers LITC; the Legal Aid of Northwest Texas LITC (Dallas and Fort Worth); the Lone Star Legal Aid LITC in Bryan, Texas; and the SMU Dedman School of Law Federal Tax Clinic (Dallas). The American Bar Association Section of Taxation also assists low-income taxpayers nationwide, including in Texas.

TAX SERVICES BY NON-LAWYERS RAISE SERIOUS CONCERNS OF EXPLOITATION AND ABUSE

While non-lawyers frequently advise taxpayers on tax matters, our experience highlights the dangers of allowing such advice without significant regulation and oversight. For example, the federal government has enacted many social programs through refundable credits, such as the earned income tax credit and the child tax credit. Unscrupulous tax return preparers (non-lawyers) have taken advantage of low-income taxpayers by providing erroneous advice to obtain one of these refundable credits (frequently for a percentage of the refund) or inflating refunds claimed on the return (whether from inadequate understanding of tax law or deliberately to attract clients) leaving taxpayers to face audit adjustments, plus penalties and interest.

Some tax return preparers offer refund anticipation loans, which are a widespread form of predatory lending with fees and interest rates of several hundred percent. Other potential exploitative schemes include so-called refund anticipation checks or “refund transfers” where the preparer receives the refund and deducts steep tax preparation fees. These tax return preparers sometimes neglect to list themselves as preparers on the tax returns and if they do, they must only obtain a Preparer Tax Identification Number (PTIN). For those tax return preparers who are not lawyers, CPAs, or EAs, the IRS has very limited ability to regulate these tax return preparers.

While there have been efforts to curb these abusive schemes, the National Taxpayer Advocate Erin Collins in her 2022 report to Congress continued to identify return preparer

oversight as one of the most serious problems facing taxpayers.¹ Specifically, “[t]axpayers are harmed by the absence of minimum competency standards for return preparers.”² The Internal Revenue Service’s (“IRS”) dirty dozen list includes perennial warnings about scams and schemes (including unscrupulous tax return preparers), during and after tax season.³ So-called “offer-in-compromise mills” misleadingly suggest that taxpayers may qualify for an offer-in-compromise but may end up costing the taxpayer thousands of dollars. These mills and unscrupulous return preparers target non-English speaking communities who may be unable to evaluate the advice due to the language barrier.

For example, one only needs to search Google to find many “Notarios” or “Notaries” offering tax services. This advertising is deliberate because in Latin America “Notarios” are lawyers who have a higher status than just regular lawyers. This common advertising may mislead the public on the services and the quality of the services that can be provided. A notary here in Texas has no exalted status from a tax practice standpoint. One such service touting its tax and notary services “is offering same day advances up to \$9,500. We guarantee your maximum refund!” At the American Bar Association meeting on February 23, 2023, pro bono practitioners drew attention to unscrupulous return preparers all over the country, including in Texas. The panel was moderated by a federal tax litigator at Texas RioGrande Legal Aid and included a panelist from Lone Star Legal Aid.

Given the current exploitation of low-income taxpayers by unscrupulous tax return preparers, we are concerned that increasing the provision of tax services with the imprimatur of legal services may only exacerbate the current situation and increase the exploitation of low-income taxpayers. At a minimum, we suggest that any expansion should be limited to the categories of qualified and regulated individuals who may communicate with the IRS on behalf of a taxpayer: CPAs and EAs duly authorized by the IRS under the requirements of Circular 230. These individuals are subject to specialized training, education, and certification and therefore do not pose the same risk as the unregulated tax return preparers discussed above.

TAX SERVICES BY NON-LAWYERS MAY RESULT IN INCOMPETENT REPRESENTATION

The practice of tax law is nuanced and requires extensive knowledge of the Internal Revenue Code and the Texas Tax Code. The Texas Disciplinary Rules of Professional Conduct Rule 1.01(a) direct that, “[a] lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence.”⁴ Competence is defined as the “possession or the ability to timely acquire legal knowledge, skill, and training

¹ Available online at: <https://www.taxpayeradvocate.irs.gov/reports/2022-annual-report-to-congress/full-report/>

² *Id.*

³ Available online at: <https://www.irs.gov/newsroom/irs-wraps-up-2023-dirty-dozen-list-reminds-taxpayers-and-tax-pros-to-be-wary-of-scams-and-schemes-even-after-tax-season>.

⁴ Tex. Rules Disciplinary P. R. 1.01(a).

reasonably necessary for the representation of the client.⁵” When determining whether a matter “is beyond a lawyer’s competence, relevant factors include the relative complexity and specialized nature of the matter.⁶”

Tax law is specialized and complex and incompetent representation can have severe consequences, including civil and criminal penalties. Advising clients on the tax law requires constantly staying up to date on significant changes to the Internal Revenue Code, like the Inflation Reduction Act of 2022, the Patient Protection and Affordable Care Act, and Secure 2.0 Act of 2022 to name just a few. After statutes are enacted, new regulations are promulgated that tax attorneys must study. Tax attorneys frequently stay current on recent legislation and proposed regulations by reading the legislation, public comments (including by the State Bar of Texas Tax Section), and attending continuing legal education courses.

The Texas Disciplinary Rules require that in order for a lawyer to maintain the “requisite knowledge and skill of a competent practitioner⁷” a lawyer should “engage in continuing study and education.⁸” It does not appear that there would be a similar continuing education or competency requirement for non-lawyers. This lack of oversight may result in non-lawyers giving tax advice in areas in which they are not competent. When considering expanding access to representation and legal services, it is important that this increases access to competent representation. By allowing non-lawyers to practice in a highly complex and technical area like tax law without continuing education or competency requirements, there is an increased likelihood that the client will not receive competent representation.

CONCERNS ABOUT NON-LAWYER OWNERSHIP OF ENTITIES PROVIDING TAX SERVICES

Non-lawyer ownership of entities providing tax-based legal services to low-income taxpayers is fraught for exploitation. The concern is that a profit motive may compromise the quality of the tax advice provided. If expansion of ownership is pursued in Texas, great care should be taken to define what a paraprofessional means in this context, and assure that only licensed regulated professionals are making tax decisions for the clients. Ethical obligations require that professionals in firms providing tax-based legal services be properly trained to provide competent advice. In our opinion, it would be better to boost the grants and resources funding low-income taxpayer clinics and legal aid programs rather than potentially compromising the quality of advice provided to low-income taxpayers by introducing profit motives.

⁵ *Id.* at Terminology.

⁶ *Id.* at P. R. 1.01 Comment 2.

⁷ *Id.* at P. R. 1.01 Comment 8.

⁸ *Id.*