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Memorandum

To: State Board of Equalization

From: Stephanie Maxwell, General Counsel, Comptroller of the Treasury

Date: December 6, 2016

Subject: **Response to comments regarding Proposed Amendments to rules at Chapter 0600-02 regarding Contested Case Procedures**

Background of the proposed amendments to the rules:

The proposed amendments to the rules arise out of a decision issued by the Assessment Appeals Commission on February 11, 2016 in the matter of *Anderson & Anderson LLC* (Tipton County, Tax Years 2013, 2014 and 2015) (<http://www.comptroller.tn.gov/repository/SB/aac-sb-2006/2016.02.11-Anderson&AndersonLLC.pdf>), in which the AAC allowed and gave weight to the testimony of a witness who was a registered agent employed by the law firm representing the taxpayer in that matter since there was no objection to it.

The decision is clearly in conflict with a long line of decisions and could serve to increase greatly the volume of appeals going forward by lowering the standards of what is required for an appeal (it will be much more cost-effective for a law firm to pursue an appeal if the client doesn't have to hire an appraiser). The decision also appears to be in conflict with several ethical rules applicable to attorneys licensed to practice in Tennessee.

Relevant case law prior to *Anderson*:

Many cases decided prior to the *Anderson* decision recognized the ethical problems for appraisers and practitioners of offering testimony where the result of the case will affect the witness' compensation. See, for example, decisions in the following cases:

- <http://www.comptroller.tn.gov/repository/SB/judgeminsky/2014.10.10-ZambelisAspasia.pdf>
- <http://www.comptroller.tn.gov/repository/SB/judgeminsky/2008.04.29-NashwoodParkLimitedPartnership.pdf>
- <http://www.comptroller.tn.gov/repository/SB/judgeminsky/2014.10.10-SYTrainingCenterInc&California.pdf>

Relevant ethical rules:

Ethical issues are also implicated by a law firm presenting expert testimony by its witness employees without the disclosure of that relationship. See Tenn. Sup. Ct. R. 8, RPC 3.7(a), 5.3, and 5.4(a) at <http://www.tsc.state.tn.us/rules/supreme-court/8>.

Summary of proposed amendments:

Because some language in the *Anderson* decision seemed to indicate that the AAC found it significant that the taxpayer relied on a Member of the Appraisal Institute (MAI) who prepared an appraisal in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP), whereas the assessor's representative was not an appraiser and his appraisal was not in accordance with USPAP, one portion of the proposed amendments attempts to clarify that assessing authorities and agents do not have to be licensed appraisers in order to testify concerning valuation in proceedings before the Board. Additionally, the proposed amendments to the rules clarify that valuation analyses prepared by assessing authorities and agents do not have to conform to USPAP. With respect to individuals appearing at hearings as real estate appraisers, the rules make clear that such witnesses must comply with all provisions of the State Licensing and Certified Real Estate Appraisers Law.

Also as a result of the *Anderson* decision (as discussed above), the proposed rules address the situation when an agent is an employee of a person representing a party to an appeal and the agent serves as a witness for the party. In such situations, the agent must disclose the employment relationship and the disclosure gives rise to a presumption of bias which may be rebutted by a preponderance of the evidence. Note that the proposed amendments do not in any way limit the ability of a registered agent both to appear as an advocate on behalf of a taxpayer and testify as a witness on behalf of a taxpayer. Under current Tennessee law, registered agents are in the unique situation of having the ability to be both advocates and witnesses. The proposed amendments do not alter that in any way. The only situation the proposed amendments address is that situation where an advocate for a taxpayer (attorney or non-attorney) offers its employee up as a witness. In that limited situation, the witness must disclose his employment by the advocate. If the witness is both the advocate and witness, such disclosure is not necessary.

Finally, the rules address the refunding of hearing fees and an additional processing fee of \$10.00 per parcel when an appeal is settled. This change is simply proposed to conform the rules to Public Chapter 938, which was signed into law on April 27, 2016.

This proposed amendment to the rule affects a registered agent witness only if he is employed by a law firm and testifying to value. The proposed amendment addresses a legitimate concern as to the reliability of such testimony. It does not presume bias for registered agents generally, only those who are testifying as the employee of a lawyer or other appeals representative. A registered agent who testifies as part of his own representation of a client would not be subject to the presumption. The purpose of the proposed amendments to the rules is to recognize the boundary between advocating for a party to an appeal, and offering impartial expert testimony on behalf of a party. Lawyer and non-lawyer agents are expected to advocate and may be compensated on a contingent basis. Witnesses engaged by those agents as expert appraisers may not receive a contingent fee or, if they do, must disclose it.

Response to written and verbal comments by Evans & Petree:

- *That Proposed Rule 0600-01-.07 is illegal because it is inconsistent with Tenn. Code Ann. § 67-5-1514 and/or the Uniform Administrative Procedures Act, and the UAPA already has rules regarding evidence:*
 - Tenn. Code Ann. § 67-5-1514(f)(2) provides that “[t]he board [of equalization] may adopt additional standards of conduct, if any, regarding all agents when appearing at any conference or hearing pursuant to this section.” The proposed amendments to the rules address the limited situation where the agent is an employee of the person actually representing the assessor or taxpayer. The rule doesn’t prohibit the testimony, but simply creates a presumption of bias when an agent testifies on behalf of a party represented by the agent’s employer.
 - It is appropriate for the SBOE to require registered agents to state whether they are employed by the law firm representing the taxpayer. The rebuttable presumption does add an evidentiary rule not found in the U.A.P.A. or the contested case rules, arguably, but the proposed amendments to the rules do not conflict with either. The rule does not *require* the administrative judge to reject the registered agent’s testimony. The judge still may find the agent to be credible. The rule just requires the judge to take into account the employment relationship between the agent and the law firm that is acting as advocate. (If the agent is the advocate, that will be clear, and it will not be necessary for the agent to make any further disclosure.)
 - In the U.A.P.A., the only substantive provision regarding the rules of evidence is found at Tenn. Code Ann. § 4-5-313, which does not address the same matters as this proposed rule.
- *That this proposed rule imposes limitations on witnesses:*
 - The proposed amendment does not limit or prohibit a party from having its representative call the representative’s employee/agent as a witness. It simply creates a presumption of bias when the witness is employed by the representative.
- *That, by statute, a registered agent is allowed to give testimony:*

- The agent is still allowed to give testimony. The proposed rule simply creates a presumption of bias in the limited instance where the registered agent is simply testifying as a witness and is employed by the law firm who is representing the taxpayer.
- *That it is properly up to the trier of fact to weigh credibility:*
 - Even under the proposed amendment, it is still up to the trier of fact to weigh credibility. The trier of fact ultimately determines whether the presumption has been rebutted.
- *That Proposed Rule 0600-01-.07 is illogical and discriminatory because it establishes “classes” of registered agents and treats them differently:*
 - Under the proposed rule, all registered agents are treated the same. The rule simply addresses the situation where an agent is the employee of the representative and gives testimony.
 - As far as the “equal protection” concern, we need only show a rational basis for treating these registered agents differently from registered agents who are not employed by law firms. The concern we have is that the advocate and the expert witness should not be employed by the same company, which has a financial interest in the outcome of the litigation and may be perceived as influencing the agent’s testimony.
 - A registered company would not be presenting the testimony of its own registered agent; in that situation, the agent would be the advocate.
- *That this proposed rule complicates the appeals process by, for example, requiring the witness to bring in tax returns to prove amounts and sources of his income:*
 - The proposed rule puts the onus on the agent to disclose the relationship, and it assumes the agent will be truthful in doing so. This shouldn’t be a problem – the law firm knows who its employees are.
 - Presumably, the ALJ or AAC would determine the necessary evidence to resolve the issue. That evidence could include tax returns which could be inspected *in camera* or subject to a protective order.
- *That, according to the Tennessee Supreme Court in Petition of Burson, 909 S.W.2d 768 (Tenn. 1995), the services performed by non-attorneys on behalf of either taxpayers or taxing authorities do not constitute the practice of law and B.P.R. Rules regarding testimony of attorneys or their employees do not apply.*
 - The proposed amendments to these rules do not conflict with the Supreme Court’s holding in *Petition of Burson* and do not attempt to classify any services performed by non-attorneys as the practice of law – they simply apply in a situation where a registered agent who is employed by a law firm representing a taxpayer is testifying as a witness (not serving as an advocate himself). The Rules of Professional Conduct do apply to the attorneys representing and advocating for the taxpayer by virtue of the fact that they hold a license to practice law. Attorneys are bound by

those rules whether they are appearing in a formal proceeding or a more informal property tax appeal hearing before an administrative judge and they must comply with RPC 5.3 and 5.4 in particular.

- *That, under Tenn. Code Ann. § 67-5-1514(a), registered agents and attorneys can provide information about property value.*
 - Registered agents and attorneys can still provide information about property value. Under the proposed amendments to the rules, both registered agents can testify as to property value. The proposed rule simply creates a presumption of bias if the agent testifying is an employee of the attorney representing the taxpayer.
- *That the proposed amendments are in direct contravention to Tenn. Code Ann. § 67-5-1514(a) and (b) which provide that, at any hearing, taxpayers may appear by qualified agent and shall be entitled to their assistance.*
 - Even under the proposed rule amendments, taxpayers may still be represented by qualified agent and assisted by them. In the unique situation where the taxpayer is represented by an attorney who puts on testimony of a registered agent (who is his employee) as a witness, there will simply be a presumption of bias in the testimony of the registered agent.
- *That the proposed amendments violate Tenn. Code Ann. § 67-5-1514(d) which provides that these hearings “shall be conducted in an informal manner”.*
 - Nothing in the proposed amendments to the rules changes the informality of these proceedings. The taxpayer will only be required to offer proof rebutting a presumption of bias in a limited situation where he is represented by an attorney who offers up the testimony of a registered agent (who is his employee).

Response to comments by Randy Button, on behalf of the Appraisal Institute and real estate appraisers:

- *That the word “evaluation” in Proposed Rule 0600-01-.07(6)(b) should be replaced by the word “valuation” instead? Button says “evaluation” is defined in appraisal law and has to do with financial institutions.*
 - The proposed amendments use the term “evaluation” because that is the term used in the code section referenced in the rules (T. C. A. § 67-5-1514(c)(5)).
- *That there is already an exclusion in appraisal law for registered agents testifying before the SBOE – and that law states that they don’t have to adhere to USPAP:*
 - The rule isn’t unnecessary just because some provisions of state law already address this. It’s important to clarify the standards that apply to registered agents and to assessor employees, and this rule addresses those standards.
 - T.C.A. § 62-39-104(c) basically means that the State Licensing and Certified Real Estate Appraisers Law [“Appraisers Law”] does not apply to agents handling appeals before boards of equalization and the like. The Appraisers Law doesn’t affirmatively exclude agents from

adhering to USPAP. The requirement doesn't apply to agents because they are not subject to the Appraisers Law.

- *Who will determine in rule 0600-01-.07(6)(a) whether half of the agent's income comes from a certain firm?*
 - The proposed rule puts the onus on the agent to disclose the relationship, and it assumes the agent will be truthful in doing so. This shouldn't be a problem – the law firm knows who its employees are. The trier of fact can then make the ultimate determination.
- *“Bias” is already defined in the uniform standards which are part of state law. What does that mean here?*
 - The definition of “bias” in USPAP on the Appraisal Foundation website isn't relevant to these proposed rules.
 - Black's Law Dictionary defines “presumed bias” as “[b]ias, as of a juror, that the law conclusively presumes because of kinship or some other incurably close relationship; prejudice that is inferred from the experiences or relationships of a judge, juror, witness, or other person.”

Response to written comments by Frank Buettner:

- *That the proposed rules suggest that registered agents are biased or bringing frivolous cases:*
 - The proposed rules make no mention of frivolous cases.
 - With regard to a suggestion of bias, it is appropriate for the SBOE to require registered agent witnesses to state whether they are employed by the law firm representing the taxpayer. The rule does not require the administrative judge to reject the registered agent's testimony. The judge still may find the agent to be credible. The rule just requires the judge to take into account the employment relationship between the agent and the law firm that is acting as advocate. (If the agent is the advocate, that will be clear, and it will not be necessary for the agent to make any further disclosure.)