

July 31, 2002

Susan Renfro, Clerk
Board of Tax Appeals
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Ms. Renfro:

BACKGROUND AND ISSUES PRESENTED

The Board of Tax Appeals (Board) asks whether non-attorneys may represent taxpayers who have appeals before the Board. In at least one case, objections were raised by an individual attorney who objected to a county being represented by a deputy assessor, who was not an attorney, rather than a deputy prosecuting attorney. In other instances, questions have been raised about individual "tax agents" from out of state appearing before the Board of Tax Appeals to represent groups of property owners who are appealing their property valuation. It has been the Board's position that non-attorneys are authorized to represent parties by virtue of the Board of Tax Appeals Rule 30, which provides:

APPEARANCE AND PRACTICE BEFORE THE BOARD:

The right to appear and practice before the Board shall be limited to the following classes of persons: (4-5-00)

01. Natural Persons. Parties who are natural persons representing themselves; (4-5-00)

02. Authorized Persons. Duly authorized directors, officers or designated full-time salaried employees of corporations representing the corporation of which they are, respectively, directors, officers or employees; (4-5-00)

03. Authorized Representatives. Duly authorized partners, joint venturers, designated full-time salaried employees, or trustees representing their respective partnerships, joint ventures or trusts; (4-5-00)

04. Authorized Attorneys. Attorneys duly authorized, who are qualified and entitled to practice in the courts of the state of Idaho; (4-5-00)

05. Officers or Employees. Public officer or designated employees when representing the agency of which they are an officer or employee; (7-1-93)

06. Board Approved Power Of Attorney. A party may designate a representative in writing through a Board approved power of attorney; (4-5-00)

07. Intervention. Parties entitled to intervene under Section 085. (4-5-00)

Board of Tax Appeals Rule 030.

Of particular concern is Rule 30.06, which allows a party to designate, in writing, a representative to represent him before the Board. There is no requirement in the rule that this representative be an attorney licensed to practice law in the State of Idaho. In fact, Rule 30.04 read together with Rule 30.06 implies that non-attorneys are authorized to represent taxpayers before the Board including presentation of evidence, examination of witnesses and arguing points of law.

Presently, taxpayers might be represented by an attorney, an accountant, by a relative or friend or anyone of the taxpayers' choosing. In addition, a partnership or joint venture might be represented by one or more of the partners or joint ventures and a corporation might be represented by an officer, director or employee of the corporation. As noted above, counties have appeared through the county's assessor.

The Board's rule on representation of practice has developed over time, partly through recognition of the fact that there is not enough tax money at issue in many cases to justify the hiring of an attorney to represent the taxpayer.

NATURE OF BOARD PROCEEDINGS

Parties appearing before the Board are given an opportunity to present witnesses, to cross-examine witnesses, and to argue the application of the facts of a particular case to the tax statutes in question. Under Idaho Code § 63-3808, the Board and each member has the power to issue subpoenas requiring the attendance of witnesses and to require the production of documentary evidence to the same extent as a court of law. Idaho Code § 63-3809(1) states that a hearing on the case will be conducted and a recommended decision will be rendered by the hearing officer or by one Board member. Idaho Code § 63-3810 allows for rehearing and Idaho Code § 63-3812 provides for an appeal from the Board to the courts.

In Idaho State Bar Assoc. v. Idaho Public Utilities Comm., 102 Idaho 672, 637 P.2d 1168 (1981), the Idaho Supreme Court ruled that proceedings before the Idaho Public Utilities Commission (PUC) are quasi-judicial in nature. The court would undoubtedly rule that proceedings before the Board are likewise quasi judicial.

ANALYSIS

Idaho Code § 3-401 states that the practice of law is a privilege granted by the state and not a right of the individual. This section goes on to say that “the public shall be properly protected against the unprofessional, improper and unauthorized practice of law. . . .” To this end, Idaho Code § 3-420 provides misdemeanor criminal penalties for the unauthorized practice of law.

Just what constitutes the unauthorized practice of law, particularly in tax disputes, is not entirely clear. The area of tax is a field where the professions of law and accounting overlap. In addition, officers of a corporation or the corporation’s directors or the partners in a partnership have often appeared before tribunals to state the case for the entity involved. According to one law review article:

The lack of a clear standard has made it difficult to enforce the unauthorized practice of law rules. The problem is particularly apparent in the field of accounting where “the legal phases and accounting phases are so interrelated, interdependent and overlapping that they are difficult to distinguish.”

Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice, Susan B. Schwab, 21 *Cardoza L. Rev.* 1425, 1430.

The Idaho Supreme Court addressed what constitutes the practice of law in In re Matthews, 58 Idaho 772, 79 P.2d 535 (1938). There, the court stated:

The practice of law as generally understood is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure. But in a larger sense, it includes legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.

.....

Where the rendering of such services involves the use of legal knowledge or skill, or where legal advice is required and is availed of or

rendered in connection with such transactions, this is sufficient to characterize the services as practicing law.

58 Idaho at 776-77 (citations omitted).

The Idaho Supreme Court, in a series of cases in the late 1970s and early 1980s, made it clear that representing individuals in front of administrative tribunals constitutes the practice of law and therefore is generally limited to attorneys. In White v. Idaho Forest Industries, 98 Idaho 784, 572 P.2d 887 (1977), the Idaho Supreme Court noted that the Gibbens Company represented the defendant, Idaho Forest Industries, before the Idaho Industrial Commission (Industrial Commission). The court noted that the Gibbens Company had prepared and signed pleadings, introduced evidence, examined and cross-examined witnesses and in general advised and prosecuted the case for Idaho Forest Industries. The court stated: “the functions engaged in by the Gibbens Company may well be within the exclusive province of licensed attorneys,” and added, “the fact that the practice here is before an administrative rather than a judicial body does not make it any less authorized.” 98 Idaho at 788, 572 P.2d at 891.

Similarly, in Weston v. Gritman Memorial Hospital, 99 Idaho 717, 587 P.2d 1252 (1978), the court noted that Steve Mallard, the Director of the Idaho Hospital Association, introduced evidence, examined and cross-examined witnesses, interposed objections and in general acted as an attorney in the hearing that was held before the Industrial Commission. In the opinion, the court directed that the officials at the Idaho State Bar conduct an investigation “as may be warranted.”

The third case considered by the Idaho Supreme Court bears directly on the issue now being raised by the Board of Tax Appeals. At issue in Idaho State Bar Assoc. v. Idaho Public Utilities Comm., 102 Idaho 672, 637 P.2d 1168 (1981), was a rule issued by the PUC regarding the representation of parties appearing before it. The rule, PUC Rule 4.3 stated:

Appearances and representation of parties shall be made as follows:
(a) a party who is a natural person shall be entitled to represent himself or herself or be represented by an attorney. (b) Non-profit organizations are entitled to be represented by an officer, other duly authorized representative or by an attorney. (c) Utility and motor carriers with present or anticipated annual gross income less than \$100,000 are entitled to be represented by a partner, officer, duly authorized representative, or by an attorney. (d) All other parties shall appear and be represented by an attorney duly admitted to practice law in good standing in the State of Idaho.

102 Idaho at 673, 637 P.2d at 1169 (emphasis added).

The rule proposed by the PUC authorizing representation is narrower than the Board's Rule 30. For example, the proposed PUC rule stated that a natural person may only be represented by an attorney. The only exceptions were for non-profit corporations and utilities and motor carriers who could be represented by "other duly authorized representative[s]." Board Rule 30.06 states that "a party may designate a representative in writing through a Board approved power of attorney." This would authorize any party with a case before the Board to designate anyone as a representative for purposes of filing an appeal, drafting legal briefs, drafting motions, presenting evidence, calling witnesses, entering objections to the proceedings, or arguing points of law. Thus, the court's ruling in Idaho State Bar Assoc. v. Idaho Public Utilities Comm. is particularly relevant.

Regarding the PUC's rule, the Idaho Supreme Court held:

The Bar specifically notes that rule 4.3(b) and (c) apparently authorize the practice of law by lay persons.

Inasmuch as Rule 4.3(b) and (c) profess to empower third persons unconnected with the entity and acting in a representative capacity in proceedings before the Commission to engage in activities constituting the practice of law, the Commission in adopting these subsections has infringed upon the inherent and singularly judicial power granted by the constitution to this court to define and regulate the practice of law.

....

Yet consistent with the recognition that proceedings before the Commission are quasi-judicial, and often involve matters more administrative than judicial in nature, some relaxation of the traditional rule against the practice of law by lay persons is appropriate. Accordingly, this court has no objection to Rule 4.3(b) and (c) to the extent they allow representation of a sole proprietorship by the owner, or representation of a partnership by the partners or representation of a corporation or non-profit organization by the officers of those entities. However, to the extent Rule 4.3 (b) and (c) authorize representation of an entity by third persons unconnected with the entity, the objection of the Bar is well founded. It is well settled that in proceedings before regulatory bodies such as the Commission, that third persons unconnected with the entity and acting in a representative capacity in such proceedings would necessarily be engaging in activities commonly associated with the practice of law.

102 Idaho at 676, 637 P.2d at 1172 (citations omitted).

The court went on to hold:

Thus, it is the decision of this court that the Commission is without authority to adopt those portions of Rule 4.3(b) and (c) which permit representation of a utility, motor carrier or non-profit organization by a non-attorney unconnected with the entity.

102 Idaho at 677, 637 P.2d at 1173.

Assuming that the Idaho Supreme Court would follow its precedent in Idaho State Bar Assoc. v. Idaho Public Utilities Comm. and apply it when reviewing the Board's Rule 30, it would undoubtedly find Board Rule 30.06 invalid and a violation of Idaho statutes, of court rules and in violation of the separation of powers provisions of the Idaho Constitution.

While a court might be convinced to allow a CPA to play a limited role in explaining a taxpayer's case to the Board, it is unlikely that our court would ever rule that a tax agent, neighbor, cousin or friend could be authorized to routinely represent a taxpayer's interests before the Board. Furthermore, based on precedent, the accountants' role would be limited to explaining the rationale used in preparing tax returns and in claiming certain deductions or exemptions. Based on precedent, I doubt the court would allow a rule to stand which allows accountants or other non-attorneys to argue points of law, to prepare legal briefs or call and examine witnesses.

RECOMMENDATIONS

I recommend that the Board carefully review Rule 30 and consider striking Rule 30.06. Failure to do so could put the Board in the position of being the defendant in a legal action brought by the Idaho State Bar or brought by an opposing party in a contested case. After repealing Rule 30.06, the Board might wish to approach the Idaho State Bar, the Idaho Supreme Court and perhaps the legislature and seek specific authorization to allow licensed professionals, such as accountants to have some limited role in representing taxpayers in proceedings before the Board.

Sincerely,

WILLIAM A. VON TAGEN, Division Chief
Intergovernmental & Fiscal Law
Division