

# **Report to the Oregon Tax Court Magistrate Division Workgroup on Representation and Proposal to Adopt Separate, Standalone Representation Statute for Magistrate Division**

## **A. Introduction and history of the project**

The Magistrate Division was created in 1995 with the goal of retaining low-cost and user-friendly aspects of the predecessor Department of Revenue hearing process, while providing additional safeguards of independent judicial review. Since the creation of the Magistrate Division, non-attorney representatives have been permitted to appear without restriction on the scope of representation (*e.g.*, no prohibition on presenting legal arguments). Permitting non-attorney representatives in the Magistrate Division promotes the division's goal of accessibility. Magistrate Division cases vary dramatically in dollar value. Retaining an attorney in a low dollar value case may be cost-prohibitive. Non-attorney representatives often have subject matter expertise in tax. Non-attorney representatives who lack tax expertise may still aid a party by providing another perspective, serving as a sounding board, taking notes, calendaring deadlines, and organizing documents.

Representation in the Magistrate Division is controlled by statute, primarily ORS 305.239 and 305.245, but also ORS 305.242, 305.260, and 305.494. The Tax Court has general rulemaking authority and has promulgated a rule on Magistrate Division representation that incorporates aspects of the statutes and implements the specific rulemaking authority in ORS 305.239(1)(g).<sup>1</sup> The Tax Court has created an Authorization to Represent form that is required of all taxpayer representatives other than Oregon attorneys.<sup>2</sup> Statistics from the Magistrate Division indicate that approximately 30% of parties represent themselves, 33% appear through an 'other' representative (typically a CPA, income or property tax professional, employee, relative, or an attorney not licensed in Oregon), and 37% appear through an Oregon attorney.<sup>3</sup>

Over the years, questions have arisen concerning interpretation of the Magistrate Division representation statutes and rule. The questions have arisen in litigation, in comments on court rules, and in general inquiries to the court concerning representation requirements (*e.g.*, whether the authorization to represent form is required and whether taxpayers must hire an Oregon attorney in addition to their out-of-state attorney). To address those questions and hear other stakeholder concerns, the court convened a workgroup on Magistrate Division representation in fall 2024. The workgroup met several times in late 2024 and early 2025. Workgroup members included Allison Boomer, Presiding Magistrate, Oregon Tax Court; John Adams, Senior Staff Counsel, Oregon Tax Court; Adam Abplanalp, CPA, CFE, CGMA, Cobalt PC; Steve Anderson, licensed real estate broker, registered appraiser; Brian Beebe, Hood River County Assessor and County Clerk; Dan Eller, tax attorney and shareholder, Schwabe, Williamson & Wyatt, PC; Gary

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<sup>1</sup> ORS 305.425(3) (general rulemaking authority); Tax Court Rule-Magistrate Division 1 E (representation rule).

<sup>2</sup> Available at: <https://www.courts.oregon.gov/forms/Documents/TAX-AuthToRepresent.pdf>

<sup>3</sup> Rounded average percentage of caseload by representative type, case filings 2016-2024.

Holcomb, CPA, Ernst & Young; Carol Vogt Lavine, attorney at Carol Vogt Lavine, LLC; Sarah Lora, attorney and Director, Lewis & Clark Law School Low Income Taxpayer Clinic; Avery Pickard, Public Affairs Legislative Attorney, Oregon State Bar (OSB); and Darren Weirnick, Senior Assistant Attorney General, Oregon Department of Justice.<sup>4</sup>

## **B. Statement of the problem**

The Magistrate Division and the Oregon Department of Revenue have shared the same primary representation statute (ORS 305.239) since the Magistrate Division was created in 1995. Despite some amendments, it can be difficult to interpret the same statute consistently for two institutions in different branches of government that are accountable to the public in different ways.

The following questions illustrate problems, sources of confusion, and areas for improvement:

- Is the list of taxpayer representatives in ORS 305.239 meant to be exclusive?
- How broad is the grant of rulemaking authority in ORS 305.239(1)(g) (allowing “any person” authorized by Tax Court rules to represent a taxpayer)?
- Must taxpayers who have an out-of-state attorney also always hire an Oregon attorney under the “*pro hac vice*” rules?<sup>5</sup>
- Are the representation statutes up to date?
- ORS 305.239 begins with a “carve-out” from a statute that generally requires persons to use lawyers to represent them in court: ORS 9.320. Is that carve-out underinclusive? A related statute (ORS 305.245) includes a “carve-out” that cites to additional statutes: ORS 8.690, 9.160, ORS chapter 180, ORS 203.145 or other law, as well as ORS 9.320.
- Is it possible to create a streamlined appearance process for clinical law students doing *pro bono* representation?<sup>6</sup>
- To what extent can issues be addressed by improvements in the court’s representation rule, Tax Court Rule-Magistrate Division 1 E?<sup>7</sup>

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<sup>4</sup> The proposed new representation statute has been circulated for review and comment to the Oregon Department of Revenue; the OSB’s General Counsel and Public Affairs Committee; the City of Portland Revenue Division; Multnomah County; and Metro Regional Government.

<sup>5</sup> The Oregon Department of Revenue requires out-of-state attorneys to appear *pro hac vice*, which requires taxpayers to hire an Oregon attorney in addition to the out-of-state attorney. The Magistrate Division permits out-of-state attorneys to appear *pro hac vice* but does not generally require it.

<sup>6</sup> The IRS has a more streamlined, user-friendly process for clinical law students to appear. Through discussion, it was determined that Oregon’s process is governed by the OSB’s Law Student Appearance Program, administered as part of its Rules for Admission of Attorneys in Oregon (rules 13.2 through 13.7), not the representation statutes.

<sup>7</sup> Because the court has rulemaking authority, ideas related to improving the court’s representation rule may be addressed through the court’s annual rule revision process.

The following are latent issues that have not manifested or that appear to be adequately addressed by existing procedural safeguards:

- Concern that non-attorney representatives lack familiarity with—or fail to follow—court rules and procedures. The Magistrate Division seeks to be user-friendly through simplified procedural rules and the provision of resources such as forms, handbooks, how-to videos, and presentations. Cases are heard by a magistrate who has statutory authority to “conduct the hearing in any manner that will achieve substantial justice.” ORS 305.501(4)(a). The magistrate is directed to determine the correct value or amount of tax. *See* ORS 305.412, 305.575. Either party may take a *de novo* appeal to the Regular Division. ORS 305.425. Anecdotally, the court has not observed significant or unique problems with non-attorney representatives failing to follow court rules and procedures (*e.g.*, failing to communicate, missing hearings, etc.).
- Concern that a non-attorney representative lacks relevant subject matter expertise (*e.g.*, a real estate broker or appraiser should only appear in a property tax case). Based on a review of available data and anecdotally, the court has not observed property tax experts appearing in non-property cases, such as income tax cases, or other mismatches.<sup>8</sup>
- Concern that out-of-state attorneys fail to associate with an Oregon attorney (appear *pro hac vice*). In complicated and high dollar value cases, it is preferable for out-of-state attorneys to associate with an Oregon attorney. Anecdotally, association typically occurs in such cases. For cases with modest amounts in controversy, the \$500 *pro hac vice* application fee (which may soon rise to \$750<sup>9</sup>) is an additional barrier for some, typically out-of-state parties, to obtain their desired representation.
- Concern that a disbarred attorney might appear in another capacity. This problem exists under both the current statute and proposed statute. Anecdotally, it is a rare occurrence. The proposed statute makes explicit the court’s authority to revoke an authorization.<sup>10</sup>

### **C. Objectives guiding the proposal**

Statutes, rules, and procedures on representation in the Magistrate Division should:

- Be easy for parties and representatives to understand;
- Be reasonably administrable by the court; and
- Promote fairness and access to justice.

### **D. Review of other tribunals**

The court made an extensive review of other potentially relevant sources of law, including:

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<sup>8</sup> Should this problem manifest, the court may address through its rules and forms.

<sup>9</sup> On February 20, 2025, the OSB Board of Governors approved the submission of a recommendation to the UTCR Committee to raise the cost of the *pro hac vice* registration fee from \$500 to \$750.

<sup>10</sup> Additional safeguards may be implemented through court rules and forms. For instance, the court may add a form question if “discipline ever imposed by a licensing agency” or the representative “resigned in lieu of discipline.”

- Other Oregon statutes with relaxed representation rules:
  - ORS 46.415(4) (small claims): “No attorney at law or person other than the plaintiff and defendant and their witnesses shall appear on behalf of any party in litigation in the small claims department without the consent of the judge of the court.”
  - ORS 52.060 (justice courts): “Any person may act as attorney for another in a justice court, except a person or officer serving any process in the action or proceeding, other than a subpoena.”
  - ORS 183.457 (administrative procedures): allowing non-attorney (or “lay”) representatives to appear in contested cases but not to present legal arguments.
  - ORS 309.100 (property value appeals board): allowing appearance by an attorney, CPA, real estate broker, appraiser, legal guardian or conservator, attorney-in-fact under a POA, or a relative.
  - ORS 419B.646 (tribes in juvenile dependency): “Notwithstanding ORS 9.160 and 9.320, a tribe that is a party to a proceeding under ORS 419B.875(1)(a)(H) may be represented by any individual, regardless of whether the individual is licensed to practice law.”
  - ORS 656.291(5) (workers compensation expedited claims service): “Notwithstanding ORS 9.320 or any provision of this chapter, an individual who is not an attorney may represent oneself or other persons who consent to such representation at any proceeding before the Expedited Claim Service.”
- Federal tax tribunals:
  - US Tax Court: non-attorneys may be admitted to practice before the court if they pass an exam offered every two years. *See* IRC § 7452.
  - IRS: subject to its rules and procedures, practice is permitted by attorneys, CPAs, enrolled agents, enrolled actuaries, registered tax return preparers, and “others.” *See* Treasury Department Circular No. 230.
- Other states:
  - A review of tax tribunals, both administrative and judicial, revealed a wide range of practices with respect to non-attorney representatives.<sup>11</sup> The most permissive tribunals allowed any representative without qualification and the least permissive required attorneys for any party other than a self-represented natural person. Generally, the most permissive tribunals were administrative, less formal, or restricted by the amount in controversy (*e.g.*, small claims).

## **E. The proposal: a separate, standalone representation statute**

To best meet the stated objectives, the proposal is to create a separate, standalone statute applicable to representation in the Magistrate Division that is easy to understand, reasonably administrable, and promotes fairness and access to justice. The proposed new representation

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<sup>11</sup> The following states were considered in this review: Arkansas, Arizona, California, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, Washington, and Wisconsin.

statute is not intended to create new jurisdictional requirements.<sup>12</sup> A model statute and related statutory revisions is provided in Attachment A.

### **1. Easy to understand:**

- The Magistrate Division and the Department of Revenue share a representation statute even though they perform different core functions and are housed in different branches of government with separate accountability structures and different expectations of the public. Taxpayers are often confused about whether the Magistrate Division is part of the Department of Revenue, so creating a separate statute for the Magistrate Division would reinforce the distinction.
- Current statutes include provisions that do not make sense for the Magistrate Division, such as the requirement to file a written tax matters partner designation with “the magistrate within 30 days after the notice of deficiency.” ORS 305.242(2).
- The proposed statute makes explicit that using an authorized representative is an alternative to using an Oregon attorney, clarifying that an Oregon attorney need not file an authorization to represent form.

### **2. Reasonably administrable:**

- Who may or must be represented. The proposed statute states that a party who is a natural person may designate an authorized representative, but an entity must designate a representative. The Magistrate Division will dismiss a case when no representative is recognized on behalf of an entity within a reasonable time after filing. The proposed statute allows continuation of existing court practices in this area.<sup>13</sup>
- Who may be recognized as a representative. A representative must be a natural person. The proposed statute reflects the Magistrate Division’s current practice of recognizing

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<sup>12</sup> Questions have arisen concerning whether other filing requirements are jurisdictional. ORS 305.419(1) requires payment of “the tax assessed, and all penalties and interest due \* \* \* on or before filing a complaint with the regular division” of this court. ORS 305.419(3) creates an exception when that payment “would be an undue hardship” and permits a plaintiff to file an affidavit alleging hardship. The Oregon Supreme Court concluded that the requirement to file an affidavit with the complaint was not jurisdictional. *Scott v. Dept. of Rev.*, 358 Or 795, 370 P3d 844 (2016). The Supreme Court approved of the Tax Court’s procedure (specified by Tax Court Rule (TCR) 18 C) for obtaining additional information to evaluate a taxpayer’s assertion of undue hardship. *See id.* at 804. TCR 17 A requires pleadings to be signed by an attorney of record or the party, if unrepresented. TCR 17 B states that an unsigned pleading “will be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.” In *Hartman v. Department of Revenue*, 19 OTR 571 (2009), this court considered whether to dismiss the complaint of a corporation where only the president of the corporation – who was not an attorney licensed in Oregon – had signed the complaint and was therefore unable to represent the corporation in the Regular Division. The court observed that “no statute applicable to this court requires that the Complaint be stricken” and found no “Oregon authority holding that defects in the signature of a complaint are necessarily jurisdictional.” *Id.* at 575. The court applied the process for correction in TCR 17 B. *Id.*

<sup>13</sup> The Magistrate Division currently sends an “information request” form letter when an authorization to represent form is required but has not been filed. The information request gives a 10-day response period. If no response is received, the court generally makes a second request through an order to show cause or similar order.

any taxpayer representative designated in a properly completed filing on the court's "authorization to represent" form.

- Process to recognize a representative. The proposed statute retains and makes explicit existing procedures. For taxpayers, a designation must be made in a writing signed by the taxpayer and the representative and filed with the court. For government parties, the court will recognize as a representative an officer or authorized employee of the party, or of the administrator of the tax, who signs a pleading, motion, or notice on behalf of the party. As to any party, a magistrate retains discretion to recognize a natural person as a representative without such a filing, for example in a case management conference or other court proceeding.

### **3. Promotes fairness and access to justice:**

- The proposed statute allows a taxpayer to select any representative ("including but not limited to") but retains phrasing that signals who is a competent representative with subject matter expertise, such as an attorney, CPA, tax preparer, appraiser, or real estate broker.
- The proposed statute retains the current requirement of notifying taxpayers in writing that they are bound by the actions of any representative they select, and that they may not later claim that the proceeding was legally defective because they were not represented by an Oregon licensed attorney.
- The proposed statute combines provisions applicable to both taxpayers and government parties, signaling that all parties are equal before the court.
- By separating the Magistrate Division representation statute from the Department of Revenue's representation statute, the proposal releases the Department of Revenue from any requirement to recognize, for purposes of an audit or other administrative proceeding, a taxpayer representative whom the Department of Revenue finds unacceptable. At the same time, the proposal allows a broad range of potential representatives in the Magistrate Division, making it unlikely that a taxpayer represented before the Department of Revenue would need to find a new representative to appeal to the Magistrate Division.

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