THE SUPREME COURT OF FLORIDA



IN RE

ADVISORY OPINION OF THE GOVERNOR
REQUEST OF MAY 12, 1987

CASE NO. 70,533

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# REPLY BRIEF OF THE FLORIDA BAR, JOSEPH J. REITER, RENEE HIGGINS, VICTOR WADE HOWELL, AND BRENDA L. SMITH

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## TABLE OF CONTENTS

## TABLE OF CITATIONS

PAGE

**CASES**



**MISCELLANEOUS**

I & II

## TAX ON LEGAL SERVICES; DUE PROCESS AND EQUAL PROTECTION

The Florida Bar has asserted the position that the right to legal counsel in both civil and criminal proceedings is a fundamental right guaranteed by the Due Process and Equal Protection clauses of both the Florida and Federal constitutions and that the imposition of Florida's sales and use tax upon such right is subject to strict judicial scrutiny and requires a showing by the state of a compelling necessity.[1]

Neither the Governor nor the Legislature disputes the fact that the right to legal counsel is a fundamental constitutional right. However, both Respondents argue that the tax will not result in a denial of legal services. In addition, the Legislature argues that the sales tax has always been indirectly paid by legal fees since it has been imposed upon general office overhead and presumably passed on by lawyers in their fees. These arguments miss the point. The United States Supreme Court has long held that a direct tax or other state imposition on the exercise of a fundamental constitutional right requires strict judicial scrutiny and the showing of a compelling state interest. The issue in such cases has been the fundamental nature of the right burdened, not the extent of the burden. Thus, in Crandall v. State of Nevada, 73 U.S. 35, 18 L.Ed. 745 (1867), the Court struck down a tax of one dollar levied on each passenger carried out of state, holding that it was an unconstitutional burden on the right to travel from state to state.

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[1] This issue is responded to in Point III B beginning on page 53 of the brief of the Legislature and Point Three beginning on page 40 of the brief of the Governor.

After a discussion of the landmark case of McCulloch v. Maryland, 17 US 316 (1819) the Court stated:

> It will be observed that it was not the extent of the tax in that case which was complained of, but the right to levy any tax of that character. So in the case before us it may be said that a tax of one dollar for passing through the State of Nevada, by stagecoach or by railroad, cannot sensibly affect any function of the government, or deprive a citizen of any valuable right. But if the State can tax a railroad passenger one dollar, it can tax them one thousand dollars.

Id. at U.S. 46. The argument of Respondents suggests that a tax on a constitutional right never raises constitutional questions unless the tax is high enough to deprive a person of the ability to exercise the right. Respondents recite no authority for such a proposition and it would be an entirely unworkable criterion. Would a tax be constitutional as to one person and unconstitutional as to another depending upon their ability to pay the tax? Or would the tax become unconstitutional at some arbitrary point determined to be the point at which the majority of citizens would be substantially affected? Would a tax alternate between constitutionality and unconstitutionality from year to year depending upon economic conditions? The simple fact is that the constitutionality of a tax has never depended upon the amount of the tax or its impact upon a particular taxpayer. Indeed, in most of the landmark cases cited on this issue in the initial brief of this Petitioner, the amounts involved were nominal.

The Governor argues that the decisions of the Supreme Court in Minneapolis Star and Tribune v. Minn. Com'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed. 2d 295 (1983) and Arkansas Writers' Project, Inc. v. Ragland, 107 S.Ct. 1722, 55 USLW 4522 (1987), do not require the application of the compelling state interest test unless a particular group is "singled out" for taxation. There was no such holding in either the Minneapolis Star or Arkansas Writers' Project opinions. In both cases the Court, engaging in a First

Amendment analysis, applied the compelling interest test and struck down statutes imposing taxes upon the press, citing among its grounds discriminatory treatment of the press. The Governor reads these cases to mean that the compelling interest test is only applicable in circumstances in which a plaintiff is singled out for special treatment. However, neither case so holds. While both opinions recognized that the press is not immune from "a genuinely nondiscriminatory tax", neither opinion restricted the use of the compelling interest test to cases in which the complaining party was "singled out" and neither opinion addressed the applicability of the test in Due Process or Equal Protection analysis.

The Supreme Court has applied the compelling interest test in two circumstances. First, it has applied it in cases involving members of a "suspect class", a class that has historically been the target of invidious discrimination. The test has also been applied in cases involving rights which are so fundamental that the State should not be permitted to impose a burden upon them in the absence of overriding necessity. The United States Supreme Court has not had occasion to consider the application of the test to the circumstances now before this Court. Nevertheless, recognition of the importance of the right to counsel demands application of the compelling interest test. The alternative rational basis test has been applied so broadly as to allow state legislatures almost unlimited discretion in the imposition of taxes and economic regulations and the establishment of classifications. If fundamental due process rights were to be measured against the rational basis yardstick, as the Respondents apparently call for in this case, the door would be opened to the continuing erosion and eventual emasculation of such rights by state legislatures.

The imposition of a tax on legal fees surely justifies the application of the compelling interest test. The right to assistance of legal counsel is one of our most fundamental due process rights, a right essential to the protection of all other rights. The tax here falls directly upon the person exercising the right and, because of the nature of the right to counsel, it is likely to fall unequally on opposing litigants in many cases. This is not a remote possibility arising out of a few isolated exemptions. The Legislature has created a list of exempt classes which covers a wide range of potential litigants including, among others, all governmental agencies and all companies employing in-house counsel. In addition, as noted in this Petitioner's initial brief, the Legislature has exempted a lengthy list of services having no connection whatever with any fundamental right. This raises serious questions as to the necessity for including legal services among those that must suffer the tax. So substantial an imposition on such a critical fundamental right should not be tested against the relaxed rational basis test. Rather, the importance of the right itself demands that restrictions, particularly discriminatory restrictions, be tested within the framework of the exacting standards of the compelling interest test. Neither the Governor nor the Legislature suggests that the application of CS/SB 777 to legal fees could withstand scrutiny under the compelling interest standard.

## POINT III

## SUPREMACY CLAUSE

The Bar argued that the imposition of CS/SB 777 on legal fees for representation before federal courts and agencies is a violation of the Supremacy Clause of the United States Constitution.[2] The Governor responds by stating that attorneys are referred to as officers of the court only in order to emphasis their ethical obligations, and the reference does not extend to performance of a governmental function through those attorneys. The Governor states that "Counsel do not act at the direction of the United States in serving their clients. It would be unethical to do so." [Governor's Brief at Page 53]. This response ignores a subtle yet important distinction between the ethical aspect of being an officer of the court, and that same officer of the court being admitted to the bar of the federal court, and representing civil parties and criminal defendants before the federal courts.

Admission to the bar of the federal court is separate and distinct from admission to the bar of the Florida state courts, and the federal courts operate independently of the Florida state courts. The judicial branch of the federal government comprises one of the "constituent parts" of the federal government, and the federal courts do not operate in a "vacuum"; a serious impediment to the operation of the federal court system would result without attorneys appearing as advocates and appearing as officers of the court before the federal bar.

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[2] This issue is addressed beginning on page 52 of the Governor's brief.

The Governor refers to United States v. Banmiller, 325 F.2d 514 (3rd Cir. 1963), in support of the contention that reference to attorneys as "officers of the court" is a reference strictly to an aspect of ethics, not to a performance of a governmental function. A close reading of Banmiller, however, shows that the decision is specifically limited to attorneys appearing in criminal matters before state courts. When faced with a defendant's contention that an attorney's misconduct deprived the defendant of due process of law due to the attorney being an agent of the state, the Banmiller court held that the attorney, as an officer of the court, acted in no sense as an officer of the state. An officer appearing in federal court does not become an agent for the federal government. However, he or she does become an indispensable instrumentality of the federal judicial process. See United States v. Boyd, 378 U.S. 39 (1964).

The Bar cited United States v. City of Pittsburg, 589 F.Supp. 179 (W.D. Pa. 1984) which held that federal court reporters function as "instrumentalities" of the United States when they provide verbatim transcripts of proceedings recorded by them in their official capacity. It is true, as the Governor notes, that the case was reversed, but it was reversed on other grounds. The Third Circuit reversed the District Court based upon specific congressional authority authorizing taxation on the compensation of federal employees. The Third Circuit specifically stated that:

> The city, however, contends that even if there were any constitutional infirmity with imposition of its tax, Congress had waived any immunity through the Public Salary Tax Act of 1939. Because we believe that this statutory issue is dispositive, we address that question without deciding whether there would be a constitutional tax immunity absent consent. [Emphasis added.]

United States v. City of Pittsburg, 757 F.2d 43, 46 (3rd Cir. 1985).

Thus, the Third Circuit did not address or overrule the opinion of the District Court that federal court reporters function as instrumentalities of the United States and serve as "arms of the federal judiciary" for purposes of immunity from state taxation.

Finally, the Governor cites the recent opinion in Rockford Life Insurance Company v. Illinois Department of Revenue, ___ U.S. ___ (Slip Op. June 8, 1987), where the court held that Illinois did not violate the supremacy clause by levying a property tax on net assets of privately owned financial institutions, where those institutions were required to include their portfolios of federally guaranteed mortgage back certificates in their taxable net assets. In Rockford Life, the court stated that the financial institution held the primary obligation for payment, and the secondary obligation of the United States was merely contingent, and that Illinois could properly tax those assets.

Even though the Rockford Life decision is, at best, only remotely applicable to the case at bar, the Supreme Court once again did not regress from its position upholding absolute federal immunity from state taxation provided that the taxed entity is:

> So intimately connected with the exercise of a power or the performance of a duty by the government that taxation of it would be a direct interference with the functions of government itself.

James v. Dravo Contracting Company, 302 U.S. 134 (1937).

Thus, taxation upon legal services in Florida, by necessarily including a tax upon representation before a federal instrumentality, unconstitutionally taxes that federal instrumentality.

## POINT IV

## SALE OF JUSTICE

In its initial brief, this Petitioner argued that CS/SB 777, to the extent that it imposes a sales and use tax on legal services, violates the "sale of justice" clause of Article I, Section 21 of the Florida Constitution. The Governor responds that this Court has limited application of the "sale of justice" provision to the levy of "direct" as opposed to "indirect" charges on use of the judicial system.[3]

None of the Florida cases dealing with this issue has drawn the distinction urged by the Governor between direct and indirect taxes levied upon entry into Court. In Flood v. State, 117 So.385, 387 (Fla. 1928), this Court referred to the challenged tax as "an attempt to levy a tax on those who must bring their causes into court . . . ". That is precisely what CS/SB 777 is. To suggest that Florida's sales and use tax on legal fees is not a tax on the use of Florida's justice system is to ignore the reality of present day litigation as recognized by this Court in Farabee v. Board of Trustees, 254 So.2d 1, 5 (Fla. 1971):

> The proliferation of legislation, court decisions, the increase in litigation in general, and the advancement of revolutionary legal theories in recent decades have all combined to make the study of the law an even more specialized and complex calling.

As noted in this Petitioner's initial brief, it has long been recognized that the right to counsel is an essential element of due process. The importance of that right was noted in Mosley v. St. Louis Southwestern Ry, 634 F.2d 942, 945 (5th Cir. 1981):

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[3] This issue is discussed in Point IV of the Governor's brief. The brief of the Legislature discusses the access provision of Section 21 in Point III A and B of its brief, but does not directly address the arguments advanced by this Petitioner.

> The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process. [Citations omitted.] This right inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights.

This Court has consistently held that any tax upon a person who must use Florida's judicial system can be upheld only if it is earmarked for defraying the costs of that system. When the tax, as here, is for general revenue purposes, it cannot be sustained.

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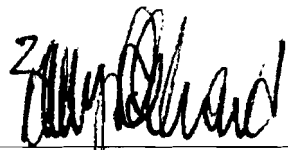

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