IN THE SUPREME COURT OF FLORIDA

The Florida Bar
Complainant

Case No. SC07-661
[TFB No.s. 2005 – 30,980 (07B);
2005 – 30,684 (07B)]

Vs.

Charles Behm
Respondent
_____/

INITIAL BRIEF

Charles Behm
POB 10 Pomona Park, FL 32181
(386) 546-2275
FL. Bar # 0171972

ORIGINAL

TABLE OF CONTENTS

TABLE OF CITATIONS **Page No.**

U.S Supreme Court Cases

Florida Supreme Court Cases

Lower Court Cases

Rules Regulating The Florida Bar

PRELIMINARY STATEMENT

The Respondent, Charles Behm, is seeking review of a Report of Referee that recommended 91-day sanction and 2 years probation regarding Count II of the Complaint.

Charles Behm, Respondent, will be referred to as Respondent, or as Mr. Behm throughout this brief. Complainant will be referred to as The Florida Bar, or as the Bar. References to the Revised Report of Referee Pursuant to Order of Supreme Court Dated October 30th 2008 will be referenced by the entire title or by (RR). followed by the appropriate paragraph or page numbers. References to a transcript will be preceded by "T" then the date of the hearing transcribed, the page, and line numbers referenced.

STATEMENT OF THE CASE AND OF THE FACTS

This disciplinary action arises out of a complaint initiated by the Bar against Respondent, Charles Behm, who has been engaged in law practice in Florida since his admission to the Florida Bar in 1999.

The Respondent, who maintains an abiding, ardent and educated belief that there is no law or U.S. Code provision that plainly and clearly lays a tax liability upon him for a federal income tax, has refused to file an income tax return since 1999. (RR at 12).

Mr. Behm has never been charged, indicted, tried, or convicted of any crime in any state or federal court. (RR at 29). This is significant because Florida Bar Counsel initiated the Instant Case. There are 23 other cases brought by the Bar against attorneys within the State of Florida which relate to attorneys having not paid federal income taxes or filed income tax returns. In all previous cases the attorneys were subjected to Bar discipline only after the involved attorney was – in some manner – adjudicated guilty for a crime. This fact is apparent in the cases that the Referee considered (RR , P.9 Par. 1-3).

As to Count II, an agreed settlement intended to result in a global solution for all pending cases was submitted to the Florida Supreme Court. This

Court disapproved the stipulated disposition and remanded the matter for hearing by the Referee.

On February 24th, 2009, the Referee conducted an evidentiary hearing wherein Clark Pearson, a Certified Public Accountant, testified on behalf of the Florida Bar and Respondent Charles Behm testified on his own behalf. Following the evidentiary hearing, the Referee found against Mr. Behm on the issues as they related to violations of Rule 3-4.3 for the commission by a lawyer of any act that is unlawful or contrary to honesty and justice. The Referee also found the Respondent guilty of 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The Referee found that the Respondent was not guilty of committing any criminal act (4-8.4 (b)). (T. 24 Feb 09 at P. 154, L.4 155, L 9).

ORAL ARGUMENTS ARE REQUESTED BEFORE THIS COURT.

SUMMARY OF ARGUMENT

I The Referee's finding that the Respondent had failed to perform a lawful duty is inaccurate regarding Count II of the Complaint. The Findings were based upon "credibility of the witness", Certified Public Accountant Clark Pearson, in spite of the facts that :

i. Pearson testified that only those who are liable are required to file 1040, but he could not cite any statute or Supreme Court case making the Respondent liable;

ii. Pearson testified that the Respondent had "income", but:

1. Could not clearly define income, as it would apply to the Internal Revenue Code;
2. He had considered no U.S. Supreme Court cases in defining income as it would apply to the Respondent, or as to Respondent filing a 1040 to be compliant with the Internal Revenue Code such as Doyle v. Mitchell Brothers Co., 247 U.S. 179 (1918) or Eisner v. Macomber, 252 U.S. 189 (1920), both still valid law;
3. He applied a "zero basis" to the Respondent's revenues even though Respondent's revenues were received in exchange for Respondent's time, expertise, and labor, and despite U.S. Supreme Court cases ; Doyle and Eisner.
4. Pearson could cite no legal grounds for applying a "zero basis" to the Respondent's time and labor.

Whether Respondent is under lawful duty to file is not a question of fact, but rather a question of law and, therefore, the credibility

of an opinion witness is not a factor, nor is the finding of law by the referee entitled to any presumption of correctness, the standard of review in issues of law being merely whether the Referee's finding of law is legally correct.

II. Tax laws must be construed strictly because :
    a. Liability must be plainly and clearly laid upon the Respondent.
    b. [I]n statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. United States v. Merriam, 263 U.S. 179 (1923) citing Gould v. Gould, 245 U.S. 151,153.
    c. Taxing statutes are not to be extended by implication beyond the clear import of the language used; and doubt as to the meaning of their words must be resolved against the Government and in favor of the taxpayer. Id. at P. 187.
    d. If the law is not plainly and clearly laid, then the Respondent is not liable even if liability was intended. Id.
    e. Neither [Supreme Court Justices] nor the Commissioner may rewrite the [tax]statute simply because [they] may feel that the scheme it creates could be improved upon. United States v. Calamaro, *354 U.S. 351* (1957) (There is no such thing as implied or extended liability).

III. Only those liable are required to file an income tax return or pay tax.

    a. In the Privacy Act notice in the instructions for filing the 1040, the IRS admits that only those liable are required to file or pay the income tax.

b. Examination of Internal Revenue Code §§ 6001, 6011 confirms that filing requirement are limited to those liable or made liable, yet the Respondent has not been shown to be liable or to have been made liable.
c. Internal Revenue Code § 6012 excludes those having taxable income less than the standard exemption from being required to file, yet the Respondent has not been shown to have taxable income at all, let alone to have taxable income in excess of the threshold triggering a return.

IV. There is no statute which plainly and clearly lays liability for the tax on Respondent.

a. A search of the Internal Revenue Code reveals no liability statute other than § 1461, but;

i. § 1461 makes only the withholding agents for nonresident aliens and foreign corporations liable for the tax.

b. Pearson could not cite any liability statute making the Respondent liable for the income tax, ERGO:
1. The Respondent is not liable for the tax;
2. The Respondent is not among those require to file a return;
3. The Respondent cannot have acted unlawfully by failing to file a return when the law imposed no duty upon him to file.

ARGUMENT

Issue I

THE REFEREE ERRED BY RELYING UPON THE BAR'S EXPERT WITNESS WHO PROVIDED NO COMPETENT OR CREDIBLE EVIDENCE AS TO AN UNDERSTANDING OF THE TAX CODE, OR SUPREME COURT CASES NECCESARY TO ESTABLISH THAT THE RESPONDENT WAS LIABLE TO FILE A RETURN, HAD ANY TAXABLE INCOME, OR HAD TAXABLE INCOME SUFFICIENT TO REQUIRE FILING OR PAYING A FEDERAL INCOME TAX BETWEEN 1999 AND 2006**.**

The Florida Bar proffered a Certified Public Accountant as an expert witness on tax preparation. (T. 24 Feb 09 at P. 29, L.1). The Referee cited in his findings that he "had the benefit of the testimony of Clark Pearson, an expert whose testimony this referee finds credible and whose opinions this referee accepts" (RR, Par. 28). The Referee's findings were based upon the "credibility of the witness" (T. 24 Feb 09 at P. 156, L.25 – P. 157, L. 2), The findings of the Referee were that the Respondent had violated Rule 3-4.3 for commission of any act that is unlawful or contrary to honesty and justice), and Rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation (RR at P. 6-7).

The only witnesses to testify were the Florida Bar's "expert", Mr. Pearson, and the Respondent, Charles Behm. The Referee acknowledged in his findings that the Respondent was not charged or convicted of any crime. (RR, Par 29). The Referee made findings that Mr. Behm's "failure to file

either personal or business federal income tax returns from 1999 to 2006 is (sic) unlawful" (RR, P. 6). The Referee also found that the Respondent's failure to pay federal income tax from 1999 to 2006 either personal or business, was unlawful. Id.

The Referee's findings are in spite of the reality that, Mr. Pearson made frequent improper statements as to definitions and demonstrated an unreliable grasp of the tax code, or its application, and admitted to having no knowledge of Supreme Court cases critical to the interpretation of the tax laws as they applied to the Instant Case, and equally critical regarding any reliance on Mr. Pearson's opinion by the Referee.

During cross examination, Mr. Pearson admitted that only those liable are required to file a return, but he could not cite any statute making Respondent liable; (T. 24 Feb 09 at P. 60, L.4 – P.72 L.3). The Bar's witness was also unsure of what he would identify as exempt income (the exemption being from federal taxation) (T. 24 Feb 09 at P. 66, L.4). The Bar's expert witness on tax preparation, apparently had no idea what "Constitutional exemptions" would be, and admitted as much (T. 24 Feb 09 at P. 67. L.1). Mr. Pearson testified that it was his understanding that Internal Revenue Code sections 6001, 6011, and 6012 only required the

filing of a tax return regarding any tax for which one was liable. (T. 24 Feb 09 at P. 67; L.20). When asked "...what section imposes liability, and defines exactly who is liable for the income tax?" Mr. Pearson replied "Section 6151 requires the payment for the taxes by the person liable, -- required to file." (T. 24 Feb 09 at P. 70; L.9). That answer was not responsive and only partially correct. Section 6151 actually refers to the time and place for paying taxes shown on returns and states in pertinent part:

"… when a return of tax is required under this title or regulations, the person required to make such return shall , without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed… "

Nowhere in this section does it state <u>who</u> is required or liable to make such a return. Nowhere in this section can it be shown that it is the Respondent that "is required under this title and regulations … to pay such tax".

Eventually, Mr. Pearson was asked point blank : "Do you know of any statute, [or] Internal Revenue Code [section], that says that this said person [referring to the Respondent] shall be liable for the payment of the income tax ? (T. 24 Feb 09 at P. 71., L.7). The Florida Bar's expert witness could only continue to state his unsupported opinion that "[f]or the record, I know

that he's liable for filing". By any interpretation, that would register as a "No" to the question asked. Hence, Mr. Pearson clearly could cite no such statute, or section of the Internal Revenue Code, making the Respondent liable for the federal income tax, and the Bar offered no other evidence of such a statute or applicable section of the I.R.C. (T. 24 Feb 09 at P. 71 L.1 – P. 72, L. 3). Absent the Florida Bar demonstrating such a law making the Respondent liable for the tax, the Respondent has done nothing unlawful and can not be held in violation of the Bar Rules 4-8.4(c) and Rule 3-4.3 by not filing a 1040 tax return.

Mr. Pearson also testified that Respondent had "income", but could not clearly define income through the use of a law, any court case, or section of the Internal Revenue Code. Additionally, at no time did Mr. Pearson differentiate between what was taxable income and what was exempt income as related to the income of the Respondent, even though he testified that "gross income" was defined as "all income you receive in the form of money, goods, property, and services, **that is not exempt from tax** (emphasis added) (T. 24 Feb 09 at P. 49 L.14). For his definition, Mr. Pearson resorted to documents such as "instruction manuals" that lacked the weight of law instead of cases or statutes. (See Instruction Manual 501,

p. 2, entered as Bar Exhibit 19) (T. 24 Feb 09 at P. 49 L.14). The witness then incorrectly stated before the Court that gross income was "all income" even though he had just previously read that it did not include income that was exempt from tax (T. 24 Feb 09 at P. 49 L.14).

Mr. Pearson refused to dispute that the position of the United States Government and the Internal Revenue Service is that Supreme Court Cases and only Supreme Court cases have the force of law and that all inferior courts are only binding relative to the parties to the case and the years in question. (T. 24 Feb 09 at P. 54 L.22 – P.55, L. 5) (See also Respondent's Exhibit 1). This is relevant because the Respondent's position is secured upon U.S. Supreme Court cases. However, at no time did Mr. Pearson cite a U.S. Supreme Court Case to define income.

Mr. Pearson was queried specifically as to whether he had considered any U.S. Supreme Court cases defining income. (T. 24 Feb 09 at P. 58 L.23). He broadly and openly admitted before the Court, that he had not read any cases for the specific purpose of determining what a definition of income. (T. 24 Feb 09 at P. 59 L.2).

Further Mr. Pearson admitted having no idea about the case McCulloch v. Maryland, *17 U.S. 316* (1819), in which Chief Justice John Marshal

delineated what is exempt and what is taxable by a sovereign. (T. 24 Feb 09 at P. 67; L.4-10). McCulloch not only delineated and defined the area or scope over which a sovereignty may exercise its power to tax, but also defined those areas over which a sovereign may NOT exercise its power to tax – i.e. those issues falling under another sovereign jurisdiction. Justice Marshall was very clear when he wrote:

> It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true, But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. **All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.**
>
> The sovereignty of a state extends to everything which exists by its own **authority**, or is introduced by its **permission**;

Marshall at 431 wrote:

> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; **that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control**, are propositions not to be denied. McCulloch v. Maryland, *17 U.S. 316* (1819) (emphasis added)

In Farrington v. Tennessee, 95 U.S. 679 (1877)[1], the U.S. Supreme Court recognized that in the areas within State jurisdiction, State law is supreme to that of the federal government. Farrington at 685:

> "In cases involving Federal questions affecting a State, the State cannot be regarded as standing alone. It belongs to a union consisting of itself and all its sister States. The Constitution of that union, and "the laws made in pursuance thereof, are the supreme law of the land, . . . any thing in the Constitution or laws of any State to the contrary notwithstanding;" and that law is as much a part of the law of every State as its own local laws and Constitution. Farmers' & Mechanics' Bank v. Deering, 91 U.S. 29.
>
> "**Yet every State has a sphere of action where the authority of the national government may not intrude. Within that domain the State is as if the union were not. Such are the checks and balances in our complicated but wise system of State and national polity**."
>
> (emphasis added)

Thus, just as the State's power of taxation may not be exercised over those items within its borders where federal jurisdiction is supreme, the federal government's authority to tax may not be exercised over those items or activities over which the jurisdiction of the State government is supreme.

This principle would clearly apply in the Instant Case where the Respondent derives his only income through a license to practice law, issued by the State

[1] Nor is *Farrington* a relic of bygone days, it is still controlling Constitutional law, having been cited and followed over one hundred thirty times and as recently as 2005, See *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, (N.D.Ill. 01 C 9389, 7/28/2005)

of Florida. The federal government neither created nor can destroy the license issued by the State of Florida to practice law. Neither has the State of Florida abdicated its authority by granting any federal jurisdiction over that state license. Consequently, the federal government has no authority to tax the income from a state issued license to practice law per McCullough.

The principles of limited jurisdiction in McCullough and Farrington are further reinforced by the Supreme Court in Bailey v. Drexel Furniture Company (Child Labor Case), 259 U.S. 20, 42 S.Ct. 449 (1922)[2], in which the Supreme Court struck down a federal tax on the employment of children, because it unconstitutionally breached state sovereignty. Chief Justice Taft, writing at p. 37:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the States. **We can not avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards**. In the maintenance of local self government, on the one hand, and the national power, on the

[2] *Bailey v. Drexel Furniture Co.* is still controlling Constitutional law, having been cited and followed as controlling nearly 200 times and as recently as 2005, see *Simpson v. U.S.*, 877 A.2d 1045 (D.C. 2005)

other, our country has been able to endure and prosper for near a century and a half.

"Out of a proper respect for the acts of a coordinate branch of the Government, **this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject**. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. **Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it**. **To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."**(emphasis added).

In Hill v. Wallace, 259 U.S. 44, 42 S.Ct. 453 (1922), the Court struck down a federal tax on grain contracts. Chief Justice Taft, again, at p. 67:

"Our decision, just announced, in the *Child Labor Tax Case*, *ante*, 20, involving the constitutional validity of the Child Labor Tax Law, completely covers this case. We there distinguish between cases like Veazie Bank v. Fenno, 8 Wall. 533, and McCray v. United States, 195 U.S. 27, in which it was held that **this court could not limit the discretion of Congress in the exercise of its constitutional powers to levy excise taxes because the court might deem the incidence of the tax oppressive or even destructive**. It was pointed out that in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law, detailed **regulation of a concern or business wholly within the police power of the State**, with a heavy exaction to promote the efficacy of such regulation."(emphasis added)

Without any consideration for limits upon sovereignty and federal taxing authority, per McCullough and Farrington (supra)), Mr. Pearson opined on direct, that Mr. Behm was required to file tax returns. (T. 24 Feb 09 at P. 45 L.19). Mr. Pearson speculated, without differentiating between taxable and exempt income, that Mr. Behm would have had at least some income tax or self-employment tax due for each of the years he did not file (T. 24 Feb 09 at P. 45 L.19).

However, without being familiar with McCullough, and Farrington, (supra), and others like them, Mr. Pearson could have no idea about the direct impact that the U.S. Supreme Court cases would have on determining whether the Respondent might have taxable income. Being unfamiliar with the applicable Supreme Court cases, he could not know whether Respondent's income was of a source that could be taxed by the federal government or lie beyond the reach of federal taxing authority and thereby be exempt from the federal income tax.

Mr. Pearson's testimony for the Bar did not demonstrate a law applying liability to the Respondent, or taxable income from a taxable (not exempt) source attributable to the Respondent, sufficient to trigger the threshold for filing a tax return. Absent proof of both such a law and taxable income, the

Respondent, as a matter of law, would have no liability to a federal income tax, or to file a 1040 tax return.

IN OPINING WHETHER THE RESPONDENT HAD TAXABLE INCOME, THE BAR'S EXPERT WITNESS PLACED NO VALUE OR "BASIS" ON THE TIME / LIFE CAPITAL INVESTED BY THE RESPONDENT YET COULD NOT JUSTIFY THAT POSITION WITH ANY STATUTE OR CASE LAW

On cross examination, in an extended effort to ascertain whether the Respondent had any "income", Mr. Pearson was asked the definition of "Basis" as used for tax purposes. Mr. Pearson stated that " [b]asis is [] what a taxpayer has paid out in order to acquire [] an asset. (T. 24 Feb 09 at P. 59 L.16).

Mr. Pearson was subsequently asked what "basis" should be applied to the Respondent's compensation for fees / services rendered by Mr. Behm. (T. 24 Feb 09 at P. 60 L.21). Mr. Pearson admitted applying a "zero basis" to the Respondent's revenues even though compensation was received in exchange for, and at the expense of, Respondent's finite time, expertise and labor; (T. 24 Feb 09 at P. 61 L.3).

Mr. Pearson stated that he based his answers regarding tax "basis" only on his "experience and training" yet cited no legal authority for applying a "zero basis" to the Respondent's revenues. (T. 24 Feb 09 at P. 60 L.25).

The Bar's expert witness was also not familiar with Doyle v. Mitchell Brothers Co., 247 U.S. 179 (1918), (relative to the restoration of capital in order to determine income). (T. 24 Feb 09 at P. 59 L.23).

In Doyle the Supreme Court defined income and explained what income was not:

"Income may be defined as the gain derived from capital, from labor, or from both combined." (Citing Stratton's Independence v. Howbert, 231 U.S. 399,415

Understanding the term in this natural and obvious sense**, it cannot be said that a conversion of capital assets invariably** produces income". …"In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." Id. (emphasis added).

Mr. Pearson denied any knowledge of Eisner v. Macomber, 252 U.S. 189 (1920) and apparently had absolutely no knowledge of the application or import of the case to the Respondent's position regarding a tax basis applied to the Respondent's labor. (T. 24 Feb 09 at P. 60 L.19). In Eisner, the U.S. Supreme Court expounded on Doyle:

> **"Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case.** (Citing Stratton's

> Independence v. Howbert, 231 U.S.399,415; Doyle v. Mitchell Bros. Co., 247 U.S. 179,185).
>
> **The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. "*Derived — from —capital;*" — "the *gain — derived — from — capital,*" etc. Here we have the essential matter: *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but again, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being *"derived,"* that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal; — *that* is income derived from property. Nothing else answers the description.**

In an interesting acknowledgment, the Bar's expert, Mr. Pearson, agreed that objecting to a zero basis being applied to personal earnings was not considered a frivolous argument on the Internal Revenue Service website (T. 24 Feb 09 at P. 61, L.12). This is significant because of the Respondent's belief that time has value and time expended is capital that is not recoverable, (T. 24 Feb 09 at P. 109, L.18). The market value exchanged for that time will be the basis of that amount of time. Therefore if Mr. Pearson's definition of basis holds true, (" [b]asis is [] what a taxpayer has paid out in order to acquire [] an asset. (T. 24 Feb 09 at P. 59 L.16)), then the billable time of the Respondent (which has value), has been paid out in order to acquire money (for legal fees) which is an asset.

The fair market value of the Respondent's time becomes the basis for that time and no gain can be derived from the capital for the Respondent's separate use, benefit and disposal. Hence there is no taxable income from that source per definitions in Eisner (supra) and applying a "zero basis" would be incorrect.

The Respondent testified that based upon his research and U.S. Supreme Court cases, including Doyle and Eisner, that he believed that he had no gain to be taxed as income, per definitions by the Supreme Court (T. 24 Feb 09 at P. 108 L.9). Testimony from the Respondent established his belief that there is no way to separate out the value of the depletion of Respondent's finite time and the exertion and depletion of Respondent's "most sacred and inviolable"[3] property, his labor, which is itself capital, per Eisner. Consequently, there is no way to determine what is capital and anything that might be considered gain (T. 24 Feb 09 at P. 109, L.18). The Bar offered no rebuttal, even though Mr. Pearson was present throughout the Respondent's testimony.

Overall, the Bar's "expert witness," was ill equipped to determine what Respondent's proper basis should be for the time the Respondent put into

[3] See Butcher's Union v. Crescent City Co. *111 U.S. 746* (1884).Yick Wo v. Hopkins, *118 U.S. 356* (1886)both holding that a man's labor is his property.

providing legal services and similarly ill equipped to offer competent opinion as to the following parameters:

> Whether the federal government has any jurisdiction to tax an attorney whose income is created by a license issued by the State sovereign, and;
>
> Whether the Respondent had any "income" as defined by U.S. Supreme Court cases Doyle and Eisner and;
>
> If the Respondent had any "income " whether the Respondent had income that was taxable, or exempt and;
>
> If there was any taxable income was it in excess of the threshold that would require a tax return to be filed in the event that the Respondent was liable for such a tax.

The Bar's expert witness offered no competent evidence at all that would establish any necessary legal parameters or answers to any of these questions.

Mr. Pearson's opinion was stated in admitted ignorance of the U.S. Supreme Court cases which made findings to the contrary of his opinion, and prove that as a matter of law, the Respondent has acted lawfully. Therefore, the Florida Bar's expert witness could not render an intelligent, informed, and competent opinion on which the Referee could correctly rely when making his findings. For the Referee to rely upon such an opinion would constitute reversible error.

Issue II

WHETHER THE RESPONDENT IS UNDER LAWFUL DUTY TO FILE IS NOT A QUESTION OF FACT, BUT RATHER ONE OF LAW AND TAX LAWS MUST BE CONSTRUED STRICTLY, LIABILITY MUST BE PLAINLY AND CLEARLY LAID, AND ANY AMBIGUITY MUST BE RESOLVED AGAINST THE GOVERNMENT

Whether Respondent is under lawful duty to file is not a question of fact, but rather a question of law and, therefore, the credibility of an opinion witness is not a factor, nor is the finding of law by the referee entitled to any presumption of correctness, the standard of review in issues of law being merely whether the Referee's finding of law is legally correct.

Taxing statutes are not to be extended by implication beyond the clear import of the language used; and doubt as to the meaning of their words must be resolved against the Government and in favor of the taxpayer. United States v. Merriam, 263 U.S. 179 (1923).

The Court in Merriam went further establishing that if liability is not clearly and plainly laid, then the Respondent is not liable, EVEN if liability was intended:

> **On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer.** Gould v. Gould, 245 U.S. 151,153. (emphasis added).

> **The rule is stated by Lord Cairns in Partington v. Attorney-General, L.R. 4 H.L. 100, 122:**
>
> "I am not at all sure that, in a case of this kind — a fiscal case — form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: **If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."** And see Eidman v. Martinez, 184 U.S.578, 583

Likewise, in United States v. Calamaro, *354 U.S. 351* (1957), a case involving the imposition of tax liability upon employees of a gambling operation, the Supreme Court determined that the taxing statute was not imposed upon everyone, and specifically could not be rewritten:

> "Congress did not choose to subject all employees of gambling enterprises to the tax and reporting requirements, but was content to impose them on persons actually "engaged in receiving wagers." Neither [Supreme Court Justices] nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates could be improved upon. (Calamaro at 358).

Nor can a taxing statute be expanded :

> **"Finally, the Government points to the fact that the Treasury Regulations relating to the statute purport to include the pick-up man among those subject to the § 3290 tax**, [fn11] and argues (a) that this constitutes an administrative interpretation to which we should give weight in construing the statute, …" "…[W]e cannot but

> regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there [fn12]. As such the regulation can furnish no sustenance to the statute. Calamaro citing Koshland v.Helvering, 298 U.S.441,446-447. (emphasis added).

Whether the Respondent is under lawful duty to file is not a question of fact, but rather one of law. The Bar has yet to demonstrate that such a law exists that "plainly and clearly" lays liability upon the Respondent. Absent such a law, and as a matter of law, the Respondent cannot be shown to have done anything unlawful and can not be convicted of violating Rules 3-4.3 and 4-8.4(c).

ONLY THOSE WHO ARE LIABLE FOR THE FILING OF RETURNS AND THE PAYING OF FEDERAL INCOME TAXES ARE REQUIRED TO DO SO

The instructions promulgated by the Internal Revenue Service are not laws, nor do they have the weight of law, but they can constitute an admission against interests. The Disclosure, Privacy Act, and Paperwork Reduction Act Notice in the instructions for the filing of a tax return (1040), claims that the authority of the Internal Revenue Service to request information is through Internal Revenue Codes sections 6001,6011, and 6012. Notwithstanding, the instructions cite those sections and say that "you must file a return or statement with us for any tax you are liable for" (2008 filing

instruction for the 1040 at p.88 http://www.irs.gov/pub/irs-pdf/i1040.pdf). Stated another way, whoever is required to file must first be liable for the tax or is simply not required to file.

An examination of Internal Revenue Codes sections 6001 and 6011 confirms that §§ 6001, 6011 limit filing requirement for any tax imposed by Title 26, including the income tax, to those liable or made liable. Thus, only if one is liable for the tax may one be required to act in accord with these sections of the I.R.C.

Section 6012 of the I.R.C. adds another prerequisite for a filing requirement, excluding those having gross income less than the standard exemption. In its filing instruction, the I.R.S. admits that "Gross income means all income you received in the form of money, goods, property, and services that is not exempt from tax,…" (2008 filing instruction for the 1040 at p.8 http://www.irs.gov/pub/irs-pdf/i1040.pdf). Plainly stated, gross income must be comprised of taxable income not exempt income. Id. As examined supra, there has been no proof offered to indicate that the Respondent has any taxable income at all for the years in question, or that if he had any taxable income, he would have taxable income in excess of the threshold requiring the filing of a return under § 6012. Using that same

logic, § 6012 would obviously cuts both ways and exclude the Respondent from filing for a lack of any taxable gross income exceeding the filing threshold.

THERE IS NO STATUTE WHICH PLAINLY AND CLEARLY LAYS LIABILITY FOR THE TAX ON THE RESPONDENT

Without exception, applicable taxes depicted within the sections of the Internal Revenue Code include:

a. the **nature** of the tax,
b. the **amount** of tax to be paid and;
c. **who is liable** for that tax.

A Search of the entire Internal Revenue Code, including its index, reveals no liability statute with regard to the federal income tax, other than § 1461. Examination of that section reveals that I.R.C. § 1461 makes only withholding agents for nonresident aliens and foreign corporations liable for the taxes which they are required to withhold.

The transcript demonstrates that the Florida Bar simply could not cite any liability statute making Respondent liable for the income tax, ERGO:

a. Respondent is not liable for the tax;
b. Respondent is not among those require to file a return;
c. Respondent cannot have acted unlawfully by failing to file a return when the law imposed no duty upon him to file;

Issue III

THE COURT ERRORED IN GIVING ANY PROBATIVE WEIGHT TO THE RULING OF NORTH CAROLINA CIRCUIT JUDGE WILLIAM SPAINHOUR AND HAS MADE FINDINGS THAT ARE CLEARLY UNSUPPORTABLE BY AN EXAMINATION OF THE HEARING TRANSCRIPT.

Paragraph 18 of the Referee's findings is a misrepresentation of the statements made by the Respondent in an unrelated civil case within the State of North Carolina. That paragraph refers to an Order from a North Carolina Superior (Circuit) civil Court and states :

> In an Order dated November 9, 2005, in Behm v. The Estates of Calvin E. Hutson and Connie M. Hutson, Kelly Norwood, and Diann Elizabeth Norwood, case no. 05-CVS-721, the Honorable Wm. Erwin Spainhour found that the respondent stated that he had been gainfully employed and earned **taxable** income during the period from 1998 through 2004 and that he had (1) not filed any tax returns with any state or federal agency and (2) not paid any income taxes to any state or federal agency during that period." (emphasis added).

This finding is not supported by the record. At trial before the Referee, Counsel for the Respondent raised timely objection to the Referee relying upon the findings of Judge Spainhour and affording finality to his findings of fact, as though they were adjudicated law with regard to finding that the Respondent had any "taxable income" (See Bar Exhibit #22 ; T. 24 Feb 2009 at P. 22, L.22). Respondent's Counsel further objected because Judge

Spainhour's opinion was hearsay, not evidence nor supported by competent evidence.

The findings of Judge Spainhour are patently false as to any income to the Respondent being admitted as taxable. In addition, Judge Spainhour had no jurisdiction to rule on a tax issue when the issue before the Court was a motion for sanctions and motion to dismiss the case on matters of discovery in a civil case (See Bar Exhibit #22 ; T. 17 Oct 2005 at P. 2, L.1). Judge Spainhour, at best states dictim and hearsay which misrepresents any income to the Respondent as "taxable" and the reliance on that order by the Referee is clearly improper and unfounded when one reviews the transcript of the hearing. (See Bar Exhibit #22 ; T. 17 Oct 2005 at P. 17, L.11 – 20, L.12). At no point does the Respondent state during this one hearing before Judge Spainhour, that he has "taxable income". Any such assumption or reliance by the Referee on the unspoken and non-existent term "taxable income" is to create facts not in evidence, not present evidence from which to make competent findings.

THERE IS NO EVIDENCE OR PROOF OFFERED TO INDICATE THAT THE RESPONDENT HAS ENGAGED IN, OR HAS HAD ANY INTENT TO ENGAGE IN ANY ACTION THAT IS UNLAWFUL OR CONTRARY TO HONESTY AND JUSTICE, DISHONEST, NOR LINKED TO, FRAUD, DECEIT, OR MISREPRESENTATION

This Court has previously found that :

"[I]t is a lawyer's duty, when necessary, to challenge the rectitude of official action, (In re Amendments to Rules Regulating the Florida Bar., No. SC04-2246 (Fla. 6/29/2006) (Fla., 2006)).

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should **cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law**, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. Id. (emphasis added).

The Respondent has done nothing less than cultivate knowledge of the law beyond its use for clients, and employ that knowledge in reform of the law by seeking the proper application of the law as it relates to the federal income tax. This is clearly in keeping with the mandate of the Florida Supreme Court's admonitions. Id.

"**Unlawful**" is defined as:

"that which is contrary to, prohibited, or unauthorized by law. That which is not lawful. The acting contrary to, or in defiance of the law; disobeying or disregarding the law; …". Black's Law Dictionary (5th Ed.) P.1377.

"**Unlawful Act**" is defined as:

" Act contrary to law, and presupposes that there must be an existing law. A violation of some prohibitory law…" Black's Law Dictionary (5th Ed.) P.1377.

The Florida Supreme Court has determined that:

"**Fraud**" or "**fraudulent**" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information. (In re Amendments to Rules Regulating the Florida Bar, No. SC04-2246 (Fla. 6/29/2006) (Fla., 2006)).

When used in these rules, the terms “fraud” or “fraudulent" refer to conduct that has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform. In re Amendments to Rules Regulating the Florida Bar, No. SC04-2246 (Fla. 6/29/2006) (Fla., 2006).

In light of these definitions, Supreme Court cases, findings by this Court,

and facts surrounding the Instant Case, the Bar has failed to show the

following:

- What law exists that is clearly and plainly lays liability upon the Respondent as well as an obligation to file a federal tax return or pay federal income tax ?
- How the Respondent has done anything unlawful ?
- What law has the Respondent violated that is in existence and applicable as discussed elsewhere herein?
- How the Respondent has done anything fraudulent or dishonest?
- Against whom the Respondent has acted in a deceitful manner ?
- How the actions or inactions of the Respondent are contrary to honesty and justice when there is no law compelling him to file or pay a federal income tax ?

The Respondent has – on at least two occasions approached the Internal Revenue Service seeking guidance and advice as to the existence of such a law, violations of which would support the Bar's position, but the absence of which would clearly defeat the Bar. (See Bar Exhibits #16 and # 17).

The Respondent has been openly seeking the truth and challenging the lore based upon his study of the Internal Revenue Code and applicable U.S. Supreme Court cases. Therefore, how are any of his actions to be considered mired in dishonesty, fraud, deceit, or misrepresentation ? The actions of the Respondent have been in keeping with the law and the admonishments of this Court to all Florida lawyers, in support, rather than in defiance of a law. In re Amendments to Rules Regulating the Florida Bar, No. SC04-2246 (Fla. 6/29/2006) (Fla., 2006). As discussed throughout, neither the Florida Bar nor their expert witness can point to a law that clearly and plainly places liability on the Respondent for the filing or payment of an income tax; Nor can the Bar show by clear and convincing evidence that the Respondent had income that was taxable according to the Internal Revenue Code or U.S. Supreme Court Cases. Without an existing law, there can logically be no violation of law. How then can the Respondent's actions be unlawful ?

Issue IV

IN THE EVENT THAT A LAW IS IN EXISTENCE THAT WOULD CLEARLY AND PLAINLY IMPOSE LIABILITY ON THE RESPONDENT TO FILE A TAX RETURN AND PAY A FEDERAL INCOME TAX, AND IN THE EVENT THAT THE RESPONDENT COULD BE SHOWN TO HAVE TAXABLE INCOME, AND IN THE EVENT THAT THE RESPONDENT'S PROVEN TAXABLE INCOME WAS IN EXCESS OF THE THRESHHOLD REQUIRING HIM TO FILE A FEDERAL TAX RETURN, THE RESPONDENT HAS OPERATED UNDER A REASONABLE BELIEF THAT NO SUCH OBLIGATION EXISTS.

Rule 4-8.4 commentary states that:

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists (Rules Regulating the Florida Bar Rule 4-8.4 commentary p. 1516).

In the Instant Case, there has yet to be an appropriate law shown by the Florida Bar. The Respondent has acted based upon his research, including a study of the Internal Revenue Code, the appropriate Supreme Court Cases, the research of others, and inquiries to the Internal Revenue Service that have yet to be appropriately answered. (T. 24 Feb 09 at P. 80, L.3). The Respondent concluded that there was no liability imposed upon him to file a return or pay an income tax (T. 24 Feb 09 at P. 94, L.2).

The Respondent testified that it was his belief that he was not violating the laws by not filing an income tax return, or paying a federal income tax. (T. 24 Feb 09 at P. 118, L.10). The Respondent testified to his obligation to

uphold the law, to seek out truth as an attorney, and that his beliefs are based upon the research of the Internal Revenue Code and U.S. Supreme Court cases. (T. 24 Feb 09 at P. 118, L.15).

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable. In re Amendments to Rules Regulating the Florida Bar., No. SC04-2246 (Fla. 6/29/2006) (Fla., 2006).

The Respondent's testimony and the fact that the Referee did not find any criminal wrongdoing by the Respondent clearly show that the Respondent believed himself to be acting lawfully. Indeed, the finding by the referee that Respondent had committed no criminal act was based upon the Referee's finding that Respondent held a good faith belief that he was not required by law to file a federal income tax return or to pay the federal income tax. This begs the question that if the Referee found no intent (which would be necessary for a criminal conviction) where has the Bar shown that there is any intent on the part of the Respondent to violate rules 3-8.4 and 4-8.4(c) ? Wouldn't the same intent be required?

Issue V

THE BAR FAILED TO MEET ITS BURDEN TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE RESPONDENT WAS ETHICALLY OR LEGALLY REQUIRED TO FILE INCOME TAX RETURNS OR PAY A FEDERAL INCOME TAX, OR THAT THE RESPONDENT HAS VIOLATED ANY RULES REGARDING COUNT II

Bar Counsel Francis Brown – Lewis stated in her opening that the Bar's expert witness would provide proof as to the Respondent's "ethical responsibility to file federal tax returns and pay federal taxes from 1999 to 2006" (T. 24 Feb 09 at P. 10, L.13). Bar Counsel further proffered that Mr. Behm had a legal obligation to file 1040 federal tax returns , pay self-employment taxes and was liable for federal income tax (T. 24 Feb 09 at P. 14, L.1). All these were empty promises and false starts. No credible evidence of ethical responsibility or legal obligation has been shown.

In reality, the Bar failed to meet its burden and failed to overcome the overwhelming testimony by the Respondent, supported by references to both the Internal Revenue Code and various U. S. Supreme court cases. Nonetheless, the Referee's basis for finding a lawful duty was testimony of the Bar's expert witness, not the law itself. That testimony was from a layman who couldn't cite any law that made the Respondent liable, nor any

Supreme Court decision that defined income or said the Respondent's exchange of labor for money generated any profit (gain) or taxable income.

Further, the Bar's "expert witness" could not cite any legal authority for assigning a zero basis to the Respondent's lifetime, labor, expertise and energy, such being the Respondent's "most sacred and inviolable" of properties. Butchers' Union Co. v. Crescent City Co., *111 U.S. 746* (1884).

In contrast, the Respondent offered un-rebutted testimony relaying in detail his research and examination of appropriate chapters within the Internal Revenue Code, applicable U.S. Supreme Court cases, and various writings of other researchers to determine that there exists no law imposing liability upon the Respondent. (T. 24 Feb 09 at P. 80 , L.3 – P 94, L.9). Each and every one of the U.S. Supreme Court cases cited by the Respondent is still good law and U.S. Supreme Court decisions are the law of the land. None of these cases have been reversed or modified away from the context and meaning proffered by the Respondent and the Florida Bar has no answer against them.

The Bar's "expert witness", Mr. Pearson, was present in the courtroom throughout the Respondent's testimony. Yet, no further testimony was solicited by Bar Counsel, from Mr. Pearson to rebut the testimony of the Respondent, or the revelations proffered regarding the Respondent's research results.

In the Instant Case, the Bar has demonstrated no clearly and plainly stated law which comports with U.S. Supreme Court cases and imposes liability (ethically or legally) on the Respondent to file a federal tax return or pay federal income taxes. The Bar has not shown that the Respondent has income as defined within either Doyle or Eisner (supra). Nor has the Bar demonstrated that if any income could have been derived from the life capital of the Respondent (gain that is separated, identified and available for use after restoring respondent's life time, energy, labor and finite work life span) it would be income from a privileged activity that is within the federal government's authority to tax as delineated by the U.S. Supreme Court in McCulloch v. Maryland*17 U.S. 316* (1819), and Farrington v. Tennessee, *95 U.S. 679* (1877 supra, and Flint v. Stone Tracy, *220 U.S. 107* (1911). The Bar has not shown that the Respondent's source of income is anything but exempt and outside the taxing authority of the federal government given

cases like McCulloch, and Farrington, Each of the aforementioned cases represent the contemporary law of the land.

On the other hand, un-rebutted testimony by the Respondent indicated that his only source of income was from a license to practice law issued by the State of Florida, an activity subject only to the sovereignty of that State and therefore not within the power of the federal governments jurisdiction as discussed in McCullough and Farrington supra. (T. 24 Feb 09 at P.106,L.8-P.111, L.19).

The testimony of CPA Clark Pearson, tendered by the Bar as "an expert in tax return preparation" (T. 24 Feb 09 at P. 32, L.13), was wholly insufficient to meet the burden of the Bar to show clear and convincing evidence that the Respondent had done anything unlawful or any unlawful act. No competent evidence was proffered by the Florida Bar to support their allegations and the findings of the Referee are repeatedly unsupported and as a matter of law and must be reversed.

CONCLUSION

The existence or non-existence of a legal duty is a question of law, not fact. Tax laws must be strictly construed, any ambiguity being resolved most strongly against the government. The law imposes the duty to file an income tax return only upon those that are both liable and who have income (as defined by the U.S. Supreme Court) in excess of the standard exemption THE ONLY WAY Respondent could be under a duty to file federal income tax returns is to produce a statute plainly and clearly laying liability for the income tax upon the Respondent. There is no statute identifying Respondent as one liable for the income tax. The law – whether statutory or via U.S. Supreme Court interpretations, does not impose upon Respondent any lawful duty to file an income tax return. The Respondent did not act unlawfully in failing to do that which the law does not require of him. Further, the Respondent can not be required to make inquiry into whether he must qualify for the right to exercise a fundamental right.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief regarding Supreme Court Case No. SC07-661, TFB File No. 2005-30980 (07B); 2006-30,684 (07B), has been mailed by certified mail #0300 6000 0005 1506 6026 return receipt requested, to, Francis Brown-Lewis, Esq., Counsel for the Florida Bar, at 1200 Edgewater Drive in Orlando, FL 32804 Complainant, this 23rd day of June, 2008.

_____

Charles Behm
POB 10 Pomona Park, FL 32181
(386) 546-2275
FL. Bar # 0171972

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses.

_____

Charles Behm
POB 10 Pomona Park, FL 32181
(386) 546-2275
FL. Bar # 0171972