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Before
Sales Tax Exemption Study Commission
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My name is Theodore Klein. I practice law in Miami, Florida. I am the Vice President of the Florida Criminal Defense Attorneys Association. I am appearing here today to discuss the imposition of a sales tax on legal fees involving criminal matters. I am here at the instruction of the Board of Directors of the Florida Criminal Defense Attorneys Association which voted unanimously to oppose imposition of the sales tax on legal fees in criminal matters.

You have already heard extensive testimony and comments from attorneys regarding the imposition of sales taxes generally on legal fees. However, fees in criminal matters stand out uniquely from all other legal services in that there is a constitutional provision that deals directly with a person's right to have counsel. The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed... and to have the assistance of counsel for his defense.

That the framers of the Constitution saw fit to include this provision in the Bill of Rights in 1787, is no mere happenstance. The right to counsel is so deeply ingrained in our philosophical and constitutional way of thinking that it is taken for granted without a second thought. It is ironic that on the two hundredth anniversary of our Constitution the State of Florida now seeks to be the first state to attempt to tax that constitutional right. We believe
that such an attempted tax is not only unconstitutional, but is morally unjustifiable. I can cite you no case law that says that it cannot be done. That is because no one else has ever had the temerity to attempt it. To say to an individual, yes, you have the right to counsel, you can choose who you want, the Constitution guarantees it, but you are going to have to pay a tax to us for the privilege of exercising that right cannot pass constitutional muster.

Throughout the history of our republic, other attempts have been made to tax various fundamental rights which appear in our Constitution. The right to vote, freedom of speech, freedom of religion, freedom of the press, and freedom of assembly have all had their constitutional mettle tested by those who sought to impose a tax on the privilege of exercising those rights. In each instance the courts have struck down such attempts on the basis that imposing a tax on a basic constitutional right violates the Constitution.

The state could not add a sales tax on to a person's church or temple dues, or tax every person who wanted to attend a meeting to discuss their political views, or tax their right to make a speech or write a letter to the editor, or have a collection box at the door of this assembly hall to collect a tax from me and every other person who seeks to exercise our First Amendment right to petition this government for a redress of our grievances.
Nothing could be more fundamental. The state can no less attempt to impose a tax on exercising one's right to a jury trial, or the right to be confronted by witnesses against him, or to subpoena witnesses, or to one's right to the assistance of counsel for his defense.

Aside from the constitutional aspects, other cogent reasons exist for not imposing this tax. A criminal defense lawyer will be required to file a monthly sales tax return and make his professional financial records available for the examination, copying and seizure by state revenue agents. I am sure that you are all aware of the reasons for and the need for the confidentiality of the attorney/client relationship. Such confidentiality is such an integral part of our system as to be practically inviolate. The ability of the state to inquire into and require disclosure of such confidential matters has the potential for destruction of that relationship. If the state is able to look at every attorney's records at will to determine the identity of the client, the nature of the matter, the amount of fees paid, with the ability to thereafter go to such client for further verification, the end of the long cherished notion of confidentiality between attorney and client is on its way to sudden and unceremonious demise. Suppose, for example, that a client consults a lawyer because he fears that he might be investigated for failure to have paid sales tax in his own retail business. The attorney will be obliged to tell the client that by virtue of his having consulted
with the attorney he has just laid himself open to the distinct possibility that he has now inadvertently provided evidence obtainable by that very same revenue department to make him a target of such an investigation.

The possibilities for abuse are endless. Criminal attorneys do not deal just with court cases. Countless individuals seek advice from criminal lawyers for fear that they may become targets, or because they think they may have violated the law, or just to obtain advice to avoid violating the law. Such people run the gamut from ordinary working citizens to government employees and even elected officials. To allow the disclosure of the fact of such consultations to a prying government agency represents a serious, if not devastating incursion into the confidential nature of attorney/client relationships as well as into the right to privacy of such individuals seeking that advice. Citizens should have the right to consult with an attorney without anyone, especially the state, even knowing that they went.

In addition, there is a marginal element of society for whom five percent does mean something. We have seen that already in the great outcry against imposing an additional five percent tax on medical services. Those people have a legitimate objection. They don't go to a doctor because they enjoy it. They go because they have to go. The same is even more true with a criminal lawyer. A person sees a criminal lawyer because he must. For those on the fringes of poverty who are not quite eligible for a public defender, this additional
five percent may well push them over the brink. Not only will they pay five percent on their attorney's fees, they will pay five percent for court reporters, private investigators, expert witnesses such as psychiatrists and psychologists, handwriting experts, ballistics experts, polygraph experts, and so on. For that marginal element who will be driven by higher costs to seek other representation, we have now shifted an even larger burden from the private sector into the public sector. Indeed, those people will now be represented by the public defender, which is funded entirely out of public tax money.

Finally, it is wrong as a matter of social policy to impose a sales tax on those charged with a crime. For those who are acquitted, we must tell them that even though they were wrongfully charged and should never have had to go through the experience in the first place, they are nevertheless going to be taxed for the privilege of having been charged with the crime. We will be the first jurisdiction anywhere to have what will inevitably be labeled, with great derision, an acquittal tax.

I feel confident that this state does not want to be known as the first to ever attempt such an unconscionable act. Criminal lawyers represent the accused and the downtrodden. We are advocates for the constitutional rights of all citizens, even when we represent those who are ultimately found guilty. Without criminal lawyers vigorously defending those who are accused of crimes, the state would be free to pursue
unconstitutional inroads and pathways into the rights of all citizens regardless of whether they are accused or not. To tax those who seek legal help when accused by the state is contrary to the two hundred year tradition of our Constitution. A proper understanding of democracy requires an understanding of the role of all attorneys and criminal lawyers, in particular. Citizens should not be taxed on the exercise of their constitutional rights, and further impediments should not be placed in the paths of those attorneys who champion the rights of the accused.